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**Report of the Canadian Committee
on Corrections** toward unity:
criminal justice
and corrections



Report of the Canadian Committee on Corrections

Toward Unity:
Criminal Justice and Corrections

March 31, 1969

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Ottawa, March 31, 1969.

The Honourable George J. McIlraith, P.C., Q.C., M.P.,
Solicitor General of Canada,
Sir Wilfrid Laurier Bldg.,
340 Laurier Avenue West,
Ottawa, Ontario.

SIR:

The Canadian Committee on Corrections appointed "to study the broad field of corrections, in its widest sense and to recommend. . . what changes, if any, should be made in the law and practice relating to these matters", has the honour to submit the attached Report of its findings and recommendations.

We would like to take this opportunity to express appreciation to the members of the Panel of Consultants for the invaluable assistance they gave us. Responsibility for the Report rests, of course, only with members of the Committee and not with the members of the Panel of Consultants.

Respectfully yours,

ROGER OUMET, CHAIRMAN

G. ARTHUR MARTIN, VICE-CHAIRMAN

J. R. LEMIEUX, MEMBER

DOROTHY MCARTON, MEMBER

W. T. MCGRATH, MEMBER AND SECRETARY

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PROCEDURES AND BACKGROUND

The Canadian Committee on Corrections was established on June 1, 1965, pursuant to Order-in-Council P.C. 1965-998. The appointment of Committee members was made on the advice of the then Minister of Justice, Hon. Guy Favreau. With the realignment of responsibilities between the Department of Justice and the Department of the Solicitor General on January 1, 1966, the Committee came for administrative purposes under the Department of the Solicitor General.

The Committee's terms of reference are:

To study the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole, including such steps and measures as arrest, summoning, bail, representation in Court, conviction, probation, sentencing, training, medical and psychiatric attention, release, parole, pardon, post-release supervision and guidance and rehabilitation; to recommend as conclusions are reached, what changes, if any, should be made in the law and practice relating to these matters in order better to assure the protection of the individual and, where possible his rehabilitation, having in mind always adequate protection for the community; and to consider and recommend upon any matters necessarily ancillary to the foregoing and such related matters as may later be referred to the Committee; but excluding consideration of specific offences except where such consideration bears directly upon any of the above mentioned matters.

The Committee is made up of five members:

Chairman: HON. MR. JUSTICE ROGER OUMET,
Superior Court and Court of Queen's
Bench, (Criminal Jurisdiction), Montreal,
Quebec.

Vice-Chairman: MR. G. ARTHUR MARTIN, Q.C., LL.D.,
Toronto, Ontario.

Member: MR. J. R. LEMIEUX,
Deputy Commissioner, R.C.M.P.,
(Rtd.), Valleyfield, Quebec.

Member: (MRS. S. P.) DOROTHY MCARTON,
Executive Director,
Family Bureau of Greater Winnipeg,
Winnipeg, Manitoba.

Member and Secretary: MR. W. T. MCGRATH,
Executive Secretary,
Canadian Corrections Association,
Ottawa, Ontario.

The Committee was aided by Professor J. D. MORTON, Q.C., as Research Associate and by Mr. CLAUDE BOUCHARD as Assistant Secretary.

The Committee also had the assistance of a Panel of Consultants consisting of the following men and women from all parts of Canada, representing the many disciplines related to corrections:

MR. GERALD W. ALTON,
Director, Social Services Educational Programs, Centennial College of Applied Arts and Technology, Scarborough, Ontario. (When appointed, Professor, Maritime School of Social Work, Halifax, Nova Scotia.)

MR. JOHN BRAITHWAITE,
Warden, Haney Correctional Institution, Haney, British Columbia.¹

PROF. I. L. CAMPBELL,
Dean of the Faculty of Arts, Bishop's University, Lennoxville, Quebec. (When appointed, Professor, Department of Psychology and Sociology, Mount Allison University, Sackville, New Brunswick.)

JUDGE MARGUERITE CHOQUETTE,
Social Welfare Court, Quebec, Quebec.

MR. W. B. COMMON, Q.C.,
Former Deputy Attorney General for Ontario, Toronto, Ontario.

MR. DANIEL COUGHLAN,
Director of Probation Services for Ontario, Toronto, Ontario.

DR. MAURICE GAUTHIER,
Director of Correctional Services, Department of Justice, Quebec, Quebec.

MR. GILLES GENDREAU,
Director, Boscoville, Montreal, Quebec.

¹ Resigned May 1, 1967, on his appointment as Director of Correctional Planning, Department of the Solicitor General, Ottawa.

- MR. EMMANUEL GRÉGOIRE,
Executive Director, Société d'orientation et de réhabilitation sociale,
Montreal, Quebec.
- MISS PHYLLIS HASLAM,
Executive Director, Elizabeth Fry Society, Toronto, Ontario.
- MR. B. W. HENHEFFER,
Correctional Programs Director, Department of the Attorney
General, Fredericton, New Brunswick.²
- MR. A. M. KIRKPATRICK,
Executive Director, John Howard Society of Ontario, Toronto,
Ontario.
- MR. MARC LÉCAVALIER,
Executive Director, Reception Homes and Training Schools,
Family and Social Welfare Department, Montreal, Quebec.
- JUDGE SIDNEY V. LEGG,
District Court, Edmonton, Alberta. (When appointed, Senior
Magistrate, Edmonton, Alberta.)
- MR. EUGENE A. MACDONALD,
Director of Child Welfare, Charlottetown, Prince Edward Island.
- MR. JOHN A. MACDONALD,
Assistant Professor, School of Social Work, University of British
Columbia, Vancouver, British Columbia.³
- MR. JAMES MACKEY,
Chief, Metropolitan Toronto Police, Toronto, Ontario.
- FATHER NOËL MAILLOUX,
Professor, Department of Psychology, University of Montreal and
Director, Centre for Research in Human Relations, Montreal,
Quebec.
- LT.-COL. FRANK MOULTON,
Director, Correctional Services Department, Salvation Army,
Toronto, Ontario.⁴
- DR. LUCIEN PANACCIO,
Senior Member of the Research Department, St-Jean de Dieu
Hospital, Montreal, Quebec. (When appointed, Medical Super-
intendent, St-Jean de Dieu Hospital, Montreal, Quebec.)
- MR. GEORGE POPE,
Director of Child Welfare and Corrections, Department of Public
Welfare, St. John's, Newfoundland.⁵

² Appointed July 1, 1967

³ Appointed September 7, 1967.

⁴ Resigned October 19, 1966, on his retirement from the Salvation Army.

⁵ Resigned March 15, 1966, on his appointment to Division of Social and Old Age Assistance, Department of Public Welfare, St. John's, Newfoundland.

- DR. C. H. POTTLE,
Director of Mental Health Services, Department of Health, St. John's, Newfoundland.⁶
- MR. FRANK POTTS,
Chairman, Ontario Parole Board, Department of Correctional Services, Toronto, Ontario. (When appointed, Director of Psychology, Department of Correctional Services, Toronto, Ontario.)
- LT.-COL. WILLIAM C. POULTON,
Director, Correctional Services Department, Salvation Army, Toronto, Ontario.⁷
- MR. J. A. ROBERT,
Director, Quebec Provincial Police, Montreal, Quebec.
- DR. G. W. RUSSON, PSYCHIATRIST,
Regina, Saskatchewan. (When appointed, Senior Psychiatrist, Corrections Branch, Department of Welfare, Regina, Saskatchewan.)
- MR. JOHN SCOLLIN,
Barrister, Winnipeg, Manitoba.⁸
- MR. RAY SLOUGH,
Director of Corrections and Inspector of Gaols, Department of the Attorney General, Winnipeg, Manitoba.⁹
- DR. DENIS SZABO,
Director, Department of Criminology, University of Montreal, Montreal, Quebec.
- JUDGE GÉRARD TOURANGEAU,
Municipal Court, Montreal, Quebec.

In discharging its responsibility, the Committee made use of the following procedures:

Committee Meetings

The Committee met a total of sixty-six times during the period of its existence. Most of the meetings were held in Ottawa, although some were held in other parts of Canada and two of the earlier meetings were held in Stockholm at the time of the Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Research Associate and the Assistant Secretary attended most meetings and special consultants were invited to attend as circumstances warranted their presence.

⁶ Appointed June 3, 1966.

⁷ Appointed March 4, 1967.

⁸ Resigned April 20, 1966, on his appointment to Criminal Law Section, Department of Justice, Ottawa.

⁹ Appointed June 3, 1966.

Visits

The Committee, or representatives thereof, visited the capital city of each province, in some instances more than once, and certain other centres where the presence of penal institutions or other factors made a visit desirable. Also, visits were made to a number of foreign countries. A complete list of places visited appears in Appendix A.

Interviews

During the Committee's visits, interviews were held with ministers of government and with representatives of the police, the Bar, the Bench and the correctional services, and with other senior government officials. Prisons and other correctional services were visited. Also, interviews were held with members of university faculties and other individuals with special competence in the matters under study. Similar interviews were held during visits to foreign countries. A number of experts, some from other countries, were invited to Ottawa to meet with the Committee there.

Conferences

The Committee, or representatives thereof, also attended a number of conferences related to the matters under study. A list of conferences attended appears in Appendix B.

Briefs

No public hearings were held by the Committee. This decision was taken because there was insufficient time to follow such a procedure and because it was felt that written briefs would accomplish the desired purpose. When it was considered an oral presentation was needed to supplement the material in a written brief, an interview was arranged. Matters could thus be discussed in private with government officials and others in a way that would have been impossible in a public hearing.

Every effort was made to encourage the submission of written briefs. A bilingual brochure entitled *The Canadian Committee on Corrections Invites Written Briefs from the Canadian Public* was prepared and given wide circulation. The response was indicative of the broad interest in this field. A list of briefs received appears in Appendix C. All briefs were read in full and, in addition, a summary and comparison was prepared for the Committee under the direction of Professor Denis Szabo.

Special Studies

A number of specialists were asked to prepare a work document on specific questions for the Committee's use. In three areas related to the correctional services—Probation, Prisons, and Parole—workgroups were set

up to perform this service. In other instances an individual was asked to take on the assignment. It was originally planned to set up a workgroup to deal with the fourth major correctional service—After-Care—but the difficulty of forming a small group who would be representative of the wide variety of agencies providing after-care service led to a decision to have the study done by an individual.

The Committee also arranged for a special grant to the Canadian Mental Health Association to make it possible for their Committee on Legislation and Psychiatric Disorder to speed up its work and include some additional matters of particular interest to our Committee.

A list of these special studies is set out in Appendix D.

Questionnaire

A questionnaire concerning existing correctional programs in Canada was developed and circulated to all federal and provincial jurisdictions. It was designed to elicit information concerning the major developments in corrections since the time of the Fauteux Report and also to give a more complete overall view of existing correctional programs in Canada than could be obtained by other methods. For example, because of time limitations, the Committee was able to visit only a limited number of provincial correctional institutions.

The questionnaire contained a general section relating to the central planning and administrative organization of each jurisdiction, to staffing, staff development and research, and it invited comment on the most significant correctional developments within the jurisdiction during the past ten years. Other sections requested similar information concerning probation services, parole services, and correctional institutions, a separate return being asked from each institution. The Committee acknowledges with thanks the very considerable work involved from those completing these returns.

Returns from the questionnaire, together with impressions gathered from the committee's visits and information from such other sources as annual reports, provided the material on which Chapter 4 was based.

Panel of Consultants

The advice of the members of the Panel of Consultants was sought continuously throughout the course of the Committee's work. Their advice was sought when the work of the Committee was being planned and, in addition to meetings with individual members of the Panel and consultation through correspondence, group meetings were held in Montreal and Toronto, centres where a number of Panel members are concentrated, and in Halifax at the time of the Canadian Congress of Corrections 1967. Individual consultants were also members of workgroups or assisted in preparing papers for various sections of the report.

The papers prepared by the workgroups were circulated on a confidential basis to the Panel of Consultants for comment before chapters of the report based on these papers were drafted. Drafts of individual chapters of the report were circulated for comment as they were prepared. Finally, the whole Committee report, except Chapters 4 and 22, was circulated in draft for comment and a meeting to which all members of the Panel of Consultants were invited was held in Ottawa on January 20 and 21, 1969, for their final consideration and advice before the report was put in final form.

Special Assignments

The Committee's terms of reference include advising the Government on "such related matters as may be referred to the Committee." The Solicitor General asked for such advice on two matters. The Committee's recommendations to him on the design for maximum security prisons developed by the Canadian Penitentiary Service appear as Appendix E. The Committee's recommendations regarding the recognition of rehabilitation appear as Chapter 23.

The following Chapters were submitted on the dates shown to the Solicitor General in the form of interim reports before the final report of the Committee was ready:

6. Arrest—*March 5, 1968*
7. Bail—*First sections, March 5, 1968*
Remaining sections, August 9, 1968
12. Mentally Disordered Persons under the Criminal Law—
March 4, 1969
16. Probation—*March 4, 1969*
18. Parole and Statutory Conditional Release—*March 4, 1969*
23. Significance of Criminal Records and Recognition of Rehabilitation—
November 14, 1967.

The Committee was also consulted informally on various matters related to proposed legislation the Government was considering.

Historical Perspective

This report contains the findings of the third major study of the adult correctional system in Canada carried out since 1938.

The first of these studies was carried out by the Royal Commission to Investigate the Penal System of Canada under the chairmanship of Hon. Mr. Justice Joseph Archambault. The Royal Commission's report was completed in 1938. The second was carried out by the Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission

Service of the Department of Justice of Canada. This Committee was under the chairmanship of Hon. Mr. Justice Gerald Fauteux and completed its report in 1956.

A comparison of the terms of reference of these three studies is interesting. The terms of reference of the Royal Commission under Mr. Justice Archambault are set out in this way:

The Committee of the Privy Council have had before them a report, dated February 25, 1936, from the Minister of Justice, recommending that the Honourable Joseph Archambault, a Judge of the Superior Court of Quebec, R. W. Craig, Esquire, K.C., Winnipeg, Manitoba, and Harry W. Anderson, Esquire, Journalist, of Toronto, Ontario, be appointed Commissioners under Part I of the Inquiries Act to inquire into and report upon the penal system of Canada, including, but not so as to restrict the generality of the foregoing, the following matters:

1. The treatment of convicted persons in the penitentiaries, covering the investigation and examination of the classification of the institutions;
The classification of offenders;
The construction of penal institutions;
The organization of penal departments;
The appointment of staffs;
The treatment to be accorded to the different classes of offenders, including corporal and other punishment;
The protection of society;
Reformatory and rehabilitative treatment;
Employment of prisoners;
Prison labour;
Remuneration;
The study of international standard minimum rules, and other subjects cognate to the above.
2. The administration, management, discipline and police of penitentiaries.
3. Co-operation between governmental and social agencies in the prevention of crime, including juvenile delinquency, and the furnishing of aid to prisoners upon release from imprisonment.
4. The conditional release of prisoners, including parole or release on probation, conditional release under the Ticket of Leave Act, and remission generally.

The terms of reference of the Committee chaired by Mr. Justice Fauteux are set out in its report by a quote from a letter written to each Committee member by the then Minister of Justice, Hon. Stuart S. Garson:

This will confirm the arrangement under which you have been good enough to undertake to act as a member of an informal committee established to investigate and report upon the principles and procedures followed in the Remission Service of the Department of Justice in connection with the exercise of clemency and to recommend what changes, if any, should be made in those principles and procedures.

As I think you know, I do not propose to place restrictions of any kind upon your field of inquiry. Rather, it is my hope that members of the committee would find it possible to examine the entire field of remission and parole and, after a full inquiry, report to me their findings and recommendations.

The Committee's report contains this comment:

We realized very early that it would not be possible for us to inquire fully into, report upon and make effective recommendations concerning the principles and procedures followed in the Remission Service without examining the field of criminal law in a great many other aspects. Accordingly, we welcomed the opportunity to give to the terms of reference their broadest application. It is for this reason that our report covers a great deal more than the subject of the exercise of clemency. When first you discussed the nature of the inquiry with us, you pointed out that the reorganization that had taken place in the Penitentiaries Service since 1947, and similar developments in some of the provinces, had brought about substantial changes in methods of training and treatment of inmates of penal institutions. You felt that these developments had proceeded to a point where the related problems, specifically, of parole and clemency required examination.

The broad terms of reference given the Canadian Committee on Corrections reflects the growing recognition that the law enforcement, judicial and correctional processes form an inter-related sequence and should not operate in isolation one from the other. This theme is stressed throughout this report.

Acknowledgements

The Chairman and members of the Committee wish to acknowledge and express their thanks for the courtesy extended by all those engaged in the Public Service of Canada with whom they have come in contact. Their gratitude and thanks are extended in a similar manner to public servants in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Ontario, Prince Edward Island, Quebec and Saskatchewan.

As the Committee visited the capital cities of the provinces, it met with representatives of associations and voluntary agencies, courts, correctional institutions, police, law enforcement officers, defence counsel, representatives of university faculties, and related services from whom it has received generous cooperation at all times.

We gratefully acknowledge the assistance extended to the Committee by persons making studies on its behalf and who visited specialized institutions as far as the Northwest Territories.

The Committee is extremely happy about the courtesy and assistance received from members of the judiciary, the Home Office, the ministries of justice, law enforcement and probation officers, representatives and directors of correctional institutions and auxiliary services, researchers and specialists

in the field of corrections in Belgium, Denmark, England, France, the Netherlands, and the United States of America, more particularly in the States of California, Illinois and New York.

We are grateful to the Chairman, members and staff of the President's Commission on Law Enforcement and the Administration of Justice and to the senior officials of the United States Federal Bureau of Prisons who cooperated to the fullest extent.

The Committee wishes to pay special tribute to Professor Leon Radzino-wicz, Wolfson Professor of Criminology at Cambridge University, England, and to Dr. E. K. Nelson, Associate Director of the President's Commission who came to Canada in order to help in the study and solution of some of the more important questions submitted to its consideration.

Finally, we wish to underline the efficiency and usefulness of the work done by Miss Simone Lafrance, on loan from the Translation Bureau of the Solicitor General's Department in revising, correcting and editing the French text of the report.

2

THE BASIC PRINCIPLES AND PURPOSES OF CRIMINAL JUSTICE

The Committee accepts the following propositions as indicating the proper scope and function of the criminal and correctional processes.

1. *The basic purpose of criminal justice is to protect all members of society, including the offender himself, from seriously harmful and dangerous conduct.*

The Committee regards the protection of society not merely as the basic purpose but as the only justifiable purpose of the criminal process in contemporary Canada.

The inclusion of the offender as a member of society entitled to full protection is important. This principle prevents the application of correctional measures against convicted persons too harshly or for too long.

2. *The basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary.*

Society should receive the maximum protection from criminals that is consistent with the freedom of those to be protected, at the same time inflicting no more harm on the offender than is necessary.

To accomplish this, the number of laws must be limited to what is essential, since too many laws invite public rejection and increase the scope of state interference while reducing its effectiveness. Police and court procedures must ensure that the process of enforcement will be carried on effectively but with a minimum of interference with the individual. The suffering caused by the sanctions of the criminal law must also be limited. Unduly harsh sanctions not only create a sense of injustice and impair the treatment potential of correctional measures, but also reduce the impact of law in general. There is also the risk that an increase in the severity of sanctions contributes to an escalation of the war between crime and its control.

As Professor Fitzgerald has put it:

The aim of crime prevention in a free society is part of the larger aim of producing a society in which the citizen can fulfill himself in the pursuit of his individual happiness, free from want, disease, and external interference. The pursuit of this aim naturally entails some measure of state interference with individual liberty. But unless a society is careful to keep a check on the measure of interference, it may end by losing more in the way of liberty than it gains in freedom from want, disease, and crime.¹

3. *Recognition of the innocent must be assured by proper protection at all stages of the criminal process.*

This is taken to be self-evident.

4. *No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means.*

The Committee has not been asked to direct its mind to the question whether specific acts should be designated as crimes. However, there can be no criminals and no one liable to correction under our system unless there be pre-existing legislation, designating such conduct as criminal and imposing upon the actor a liability to legal correction. It would appear to the Committee that there are some matters which are at the moment designated as crimes and yet which are in general agreement not appropriate to be dealt with by the criminal law. To apply the criminal process to such matters is to impose an intolerable burden upon the whole process of correction.

The Committee adopts the following criteria as properly indicating the scope of criminal law:

1. No act should be criminally proscribed unless its incidence, actual or potential, is *substantially damaging to society*.
2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of behaviour. Other kinds of behaviour may be more appropriately dealt with by non-criminal legal processes, e.g. by legislation relating to mental health or social and economic condition.
3. No law should give rise to social or personal damage greater than that it was designed to prevent.

To designate certain conduct as criminal in an attempt to control anti-social behaviour should be a last step. Criminal law traditionally, and

¹ Fitzgerald, P. J. *Criminal Law and Punishment*. Oxford: Clarendon Press, 1962, p. 146.

perhaps inherently, has involved the imposition of a sanction. This sanction, whether in the form of arrest, summons, trial, conviction, punishment or publicity is, in the view of the Committee, to be employed only as an unavoidable necessity. Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense: all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere.

Briefs received from the principal Canadian churches endorse this point of view. Much anti-social behaviour is kept in check by social agencies other than the police and the courts. Fear of discovery with concomitant loss of social and economic status must operate in many cases as effectively as the fear of legal punishment. The family and the general environment must surely more effectively condition the young either for good or evil than do the isolated lessons of the criminal law. As the Wolfenden Committee reported:

Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.²

With that proposition, the Canadian Committee on Corrections is in substantial agreement. The Committee expresses no view on the legislative recommendations of the Wolfenden Committee, most of which have now passed into law in England.

We do, however, desire to emphasize that it is the substantive criminal law including the power of the courts and their sentencing policy which primarily determines the flow of convicted persons to the correctional processes. For example, the extent of the legislative limitations on abortion will determine the extent in terms of liability to correction of those performing abortions in Canada. The existence, extent and function of the correctional services is basically determined by the creation and perpetuation of offences and sentences.

Our terms of reference do not extend to an overall examination of Canadian criminal law. It is, however, our conviction that such a comprehensive examination of the Criminal Code and related Canadian statutes and that body of "quasi-criminal" law enacted by the provinces is a matter of the greatest urgency. The designation of murder, rape, assault and theft as crimes does not require extensive justification: the consequences to the

² Cmnd. 247, 1957, p. 24, para. 61.

victim are obviously grave. In the case of most offences there is objective proof of damage. However, there is a grey or borderline area—if common drunkenness is to continue to be classified as an offence, the correctional process must be prepared to cope with common drunks; if wandering abroad without visible means of support is to be criminal, then the correctional processes must continue to provide for vagrants. If the offering of contraceptives for sale is to be a crime, then the correctional processes must remain charged with responsibility for dealing with such offenders. There are many who see drunkenness as a social deficiency or disease to be dealt with through social, psychological, or medical and legal agencies rather than criminal courts; vagrancy as a social misfortune to be dealt with by welfare and counselling agencies; the sale or use of contraceptives as essentially a matter of morals rather than criminal law. The criminal process is resorted to infrequently with respect to certain kinds of offence created under existing laws. This is true of some sexual offences. There seems to be some justification for a belief that unenforceable legislation is harmful since it teaches disrespect for all law. Only long term research, as yet only of the most meagre proportions in Canada or elsewhere, will provide an adequate factual and philosophical basis for a comprehensive criminal law system. While we are concerned that piece-meal reform will add further confusion, this lack of long term research should not deter us from recommending action where adequate knowledge of glaring deficiencies in the existing system is presently available.

It should here be noted that there is considerable evidence to suggest that in prohibiting certain kinds of conduct and imposing criminal sanctions upon its occurrence, one may be providing the most effective and corrupting publicity for the practice rather than the prohibition. The practices of smoking marijuana and sniffing model glue come immediately to mind as examples of the double and dangerous effect of description and disapproval. Much research is needed into the causative relationship between introduction, description, exploitation, procurement and corruption.

Crime is not a unified activity but consists of a large number of widely differing types of conduct. Crime is made up of a large number of types of conduct, distinct in why they are called crimes, in their history as crimes, in their moral, social and psychological implications, and in the extent to which they are condemned by the public.

The President's Commission on Law Enforcement and Administration of Justice put it this way³:

Many Americans also think of crime as a very narrow range of behaviour. It is not. An enormous variety of acts make up the "crime problem". Crime is not just a tough teenager snatching a lady's purse. It is a professional thief stealing cars "on order". It is a well-heeled loan

³ President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. Washington: United States Government Printing Office, 1967, p. V.

shark taking over a previously legitimate business for organized crime. It is a polite young man who suddenly and inexplicably murders his family. It is a corporation executive conspiring with competitors to keep prices high. No single formula, no single theory, no single generalization can explain the vast range of behaviour called crime.

The terms commonly employed to designate crimes do not adequately describe particular kinds of activity. "Murder" may in practice be applied to such widely diverse activities as killing in the course of armed robbery on the one hand and mercy-killing on the other; "rape" may range from over-aggressive seduction to kidnapping and sexual assault by a gang of ruffians. It may be that the educative function of the criminal process is limited by the extent to which legal terms reflect real-life situations; certainly, effectiveness of any sentencing guides to be included in criminal law presupposes a definition and classification of offences which bears a close relationship to the particular kinds of behaviour dealt with by the courts.

The Committee recommends that the Government of Canada establish in the near future a Committee or Royal Commission to examine the substantive criminal law. The Committee or Royal Commission should also direct its attention to the classification of crimes with a view to developing a system of classification that would distinguish between illegal acts on a more realistic basis.

5. *The criminal justice process can operate to protect society only by way of:*
 - (a) the deterrent effect, both general and particular, of criminal prohibitions and sanctions;
 - (b) correctional measures designed to achieve the social rehabilitation of the individual;
 - (c) control over the offender in varying degrees, including the segregation of the dangerous offender until such time when he can be safely released or, where safe release is impossible, for life.

The Committee believes that the rehabilitation of the individual offender offers the best long-term protection for society, since that ends the risk of a continuing criminal career. However, the offender must be protected against rehabilitative measures that go beyond the bounds of the concept of justice. Some modern correctional methods, such as probation, suspended sentences and medical treatment are part of the arsenal of sanctions but are not conceived as punishments. Their purpose is rehabilitative. Whatever their purpose, however, it cannot be assumed that such treatment methods are necessarily more humane and more effective in practice than moderate penalties. Treatment is not more humane than punishment if it imposes

more pain, restricts freedom for longer periods, or produces no results regarded as desirable by the individual concerned.

It is most difficult to ascertain the extent of the deterrent effect of legal prohibition, arrest, trial, conviction and sentence, and under what condition it operates. It has been suggested that likelihood of detection, arrest and conviction is the best deterrent and that the nature of the sentence that follows conviction is of less importance. For the established member of the community, the risk of public trial is no doubt also a deterrent. However, the Committee is of the opinion that risk of punishment is a deterrent in certain areas of behaviour where the offender is motivated by rational considerations. The Committee is further of the opinion that the removal of profit from crimes that involve financial gain would also serve as a powerful deterrent if made effective in practice. Some persons commit violent crimes for reasons we do not fully understand, and these offenders do not respond to current methods of treatment. Such persons cannot be left at large to repeat their antisocial acts. They must, therefore, have their liberty restricted to ensure the protection of society.

All three techniques are subject to be limited by current ideas of fairness and justice.

6. The law enforcement, judicial and correctional processes should form an inter-related sequence.

There must be consistency in philosophy from the moment the offender has his first contact with the police to the time of his final discharge. In the past, there has been some conflict in aims among the different processes. The aim of corrections has been rehabilitative while the aims claimed for the criminal law have included retribution, deterrence, segregation, denunciation of evil and declaration of moral principles. However, in recent years it is being increasingly recognized that the law enforcement, judicial and correctional processes all share a common over-riding aim: the protection of society from criminal activity. Once this is fully recognized the necessity for the three processes to work in harmony will be accepted.

7. Discretion in the application of the criminal law should be allowed at each step in the process: arrest, prosecution, conviction, sentence and corrections.

To implement the Committee's proposition that the criminal law should be enforced with a minimum of harm to the offender, discretion should be exercised in cases involving individuals who are technically guilty of an offence but where no useful purpose would be served by the laying of a charge. Where a charge is laid, discretion should be exercised as to the manner in which the law is applied.

This means the police should have appropriate discretion whether to lay a charge and, if a charge is laid, whether to release the accused or hold him

in custody. The prosecution should have appropriate discretion to determine whether a charge is to be laid or proceeded with, and whether conviction on a lesser charge would satisfy the requirements of justice. The court should have the power to dispose of a case without conviction and should have a wide range of alternatives open when a sentence must be imposed. The correctional services should have as much discretion as possible in planning and executing a treatment program.

Discretion should, of course, always be exercised with the protection of the community in mind.

8. *The criminal process, including the correctional process, must be such as to command the respect and support of the public according to prevailing concepts of fairness and justice; the process should also as far as possible, be such as to command the respect of the offender.*

The Committee's conclusions as to the steps required to develop a system of justice that will command the respect and support of the public are set out in the appropriate sections of this report. However, it might be helpful to summarize here in brief form some of the problems that require attention in any effort to develop a unified and efficient system of justice.

Investigation of Offences. While there can be no criminals if there be no criminal prohibition, it is also true that there can be no convicted persons to be corrected unless suspected offences are investigated with a view to establishing the nature of the occurrence and the apprehension of the offender, if there be one. Substantive law is only a literary exercise unless there be police to enforce it. Like the substantive criminal law the procedural law governing the investigative process effectively limits the flow of offenders to the correctional process. There are those who maintain that police powers should be greatly extended in Canada in order that offenders should not go uncorrected. There is another school of thought which maintains that police powers must be limited in that too great a police power will give rise to feelings of injustice which will not only gravely affect the community's respect for law in general (a respect upon which law ultimately depends) but also may seriously affect the possibility of the rehabilitation of one who has been apprehended as a result of what he considers an unjust investigation.

Procuring the Attendance of a Suspect in Court. Apart from the civil liberties aspects of the problem of ensuring that a person charged with crime appears to stand his trial, there appears to be little doubt that the treatment of a suspect between his original apprehension and the time of trial has a serious bearing on any corrective measures which are to be applied to him in the event of conviction. The Committee takes the general view that no person should be held in custody before his trial unless there are clear and compelling reasons for so doing. A person held in custody pending trial and who is subsequently acquitted may well be embittered to a dangerous extent; a person held in custody pending trial who is convicted

may be faced with a sentence completely inconsistent with his earlier detention, e.g. the imposition of fine or of a period of probation.

Representation of a Suspect. Once again serious questions of civil liberties and equal justice arise. Legal representation of a suspect is however linked directly with the question of the eventual sentencing of one who is convicted of crime. "Failure to provide an adequate legal aid system thus tends to increase recidivism." (Third United Nation's Congress on the Prevention of Crime and the Treatment of Offenders.) Furthermore, in this area there appears to be a grave risk of a justified lack of respect in both the public and the offender for a system which leaves some persons disadvantaged on the ground of poverty.

The Judicial Function. In keeping with the general philosophy of the report, the Committee has directed its attention to the necessity that justice must be seen to be done. About 95 per cent of all criminal cases in Canada are disposed of by magistrates courts. An enquiry was commissioned into the actual operation of magistrates courts across the country and we have directed our minds to the qualifications and training of those appointed to the Bench.

Conviction. Traditionally it has been regarded as inherent in the criminal process that one who is judged to have committed a crime is to be convicted of crime and thereby made subject to the penological or correctional process. Here again the question of the proper scope and function of the criminal law is raised. Are all of those presently convicted of crime apt subjects for the penological and correctional services? This problem of appropriateness is particularly present with regard to those charged with the commission of a criminal offence but who appear to suffer from a mental deficiency or disorder to which their anti-social conduct can be related.

Sentencing. This report assumes a criminal code which is related to social reality and a criminal process which provides the sentencing authority with the opportunity to make an appropriate disposition of a particular offender. The Committee sees the overall end of the criminal process as the protection of society and believes that this is best achieved by an attempt to rehabilitate offenders in that society is given long term protection at least expense in human values and material resources. The Committee believes that traditionally punishment has been over-stressed as a means of crime prevention yet it does not deny the necessity for punishment as a sanction and it accepts that in some cases the person may be so dangerous as to justify his segregation from the community for periods up to the whole of his life.

Correctional Services. Without adequate correctional services based on a shared general philosophy, the chronologically earlier stages of the criminal process will not ensure the protection which society properly demands from criminal damage.

Present penal and correctional institutions must be reassessed both in the light of the role that they are expected to play and the practicability of their discharging this role. Where punishment is imposed for deterrent reasons, penal facilities must be made available. If correction rather than punishment is to be the goal, then both institutional and community based correctional agencies must be created and maintained.

On these declarations of principle, the Canadian Committee on Corrections rests this report.

3

THE INCIDENCE OF CRIME IN CANADA

Whether serious crime has been increasing in Canada in recent decades is a question that must be examined before changes in the administration of justice can be discussed dispassionately. The belief that violent crime is rampant tends to engender extreme reactions and thus interfere with the consideration of proposals on their merits.

The information that reaches the public through the mass media encourages this belief. Crimes that involve extreme violence or large sums of money receive wide publicity, as do annual reports of increases in the number of crimes known to law enforcement agencies. Canadians' ideas of the prevalence of crime also seem to be influenced by their exposure to news and opinions from the United States where the concern over "crime in the streets" and civil disorder has recently become particularly intense. But is there a significant increase in crime rates? If crime rates are in fact changing, what types of crime are most affected?

Unfortunately the statistical evidence regarding changes in rates of crime is far from conclusive. In Canada as elsewhere the official statistics on crime are an uncertain measure of the actual number of crimes or of the characteristics of offenders. Only a sample of crimes come to the official attention of the police, either because the victims fail to report them or because the evidence necessary to establish the existence of the crimes is not uncovered by the police—as in undetected gambling or traffic offences. Insofar as some offences are more likely than others to be reported or uncovered, the published figures on "crimes known to the police" may give a misleading impression of the relative frequency of various offences. Surveys of households done in the United States for the President's Commission on Law Enforcement and the Administration of Justice, intended to estimate the true incidence of crime through a count of victims, showed that the rate of crime revealed by the victims was several times that reported in police statistics; the number

of crimes uncovered by the research ranged, depending on the offence, up to ten times the official rate.¹

The offences that result in court appearances are also a highly selected sample. Of the Criminal Code offences known to Canadian police in 1967, only 24 per cent were cleared by charges.² Moreover, the probability of being thus cleared differed considerably among offences. For example, in 1967 91 per cent of the known manslaughter offences and 51 per cent of the rapes led to charges, in contrast to 29 per cent of the robberies and 12 per cent of the thefts over \$50. It follows that the persons who appear in court are not representative in the proportional distribution among offences. In addition, we have no way of knowing for any given offence whether the accused who reach court differ in any important respects from the offenders who escape being caught and charged. This is of some importance in assessing the representativeness of figures on the bio-social characteristics (such as age, sex and occupation) of offenders, for information of this order is generally available only after the accused have been charged.

Furthermore, unreliable reporting is not confined to victims but may be found at each official level. Individual police officers and police districts may report inaccurately or incompletely to their headquarters, which may in turn distort the figures through their own reporting practices. Similarly, court officials responsible for recording data and sending in reports may make incomplete or inexact returns to the central body compiling the statistics. The reader of the final published statistics usually has no empirical basis for assessing reliability. He cannot tell, for instance, whether a reported increment results from more actual crime, more efficient law enforcement, more zealous reporting, better record keeping, or some combination of these.³

Despite these strictures we must make use of the official statistics if we are to learn anything of the trends in crime rates on a national scale.⁴ On the principle that a series of criminal statistics in which the reporting procedures have been standardized over a long period is likely to be a more reliable indicator of change than a series of a more recent origin, the court statistics published annually by the Dominion Bureau of Statistics as *Statistics of Criminal and Other Offences* have been employed here. It may be true, as often asserted, that crimes known to the police, being closer to the source, give a more reliable index of the true crime situation than court statistics, but the introduction in 1962 of a new and improved method of reporting police sta-

¹The President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. Washington: U.S. Government Printing Office, 1967, pp. 20-22.

²Dominion Bureau of Statistics. *Crime Statistics, 1967*. Ottawa: Queen's Printer, 1968, p. 13.

³For a classical discussion of the shortcomings of criminal statistic see: Sellin, T. "The Significance of Records of Crime". *Law Quarterly Journal* 27: 489-504, 1951.

⁴These remarks are not meant to discredit the efforts of the Judicial Branch of the Dominion Bureau of Statistics, as will be seen from the discussion in Chapter 25 of the measures taken by this organization to improve the reliability of Canadian criminal statistics.

tistics in Canada means that the statistics since that date are not comparable with those of earlier years.⁵

In view of the inescapable weaknesses of criminal statistics, we will regard as significant only fairly large changes in the official rates. The evidentiary weight of large and persistent changes in official rates is to be seen in the recent admission by United States criminologists, previously highly skeptical of the annual increases reported in the Uniform Crime Reports of the Federal Bureau of Investigation, that the 1967 upsurge in rates for serious crime could not be dismissed as a mere improvement in reporting.⁶

The statistics that follow are derived either from tables prepared by the Judicial Section of The Dominion Bureau of Statistics for this Committee or from the regular publications of the Dominion Bureau of Statistics. More detailed tables and discussion are to be found in Appendix F. It should be emphasized that the court statistics are being used as an indication of the direction and relative magnitude of broad changes in the rates of crime; they do not tell us about the actual amount of crime at any point in time.

An alarming picture of the long run increase in criminality in Canada can be drawn if we do not take account of the types of offences involved. Total convictions for offences of all types rose from 42,148 in 1901 to 4,066,957 in 1965.⁷ Translated into rates per 100,000 population 16 years and older⁸ this means an increase from 1,236 to 32,010, a twenty-five-fold growth. But, as Figure 1 illustrates graphically, the increase in summary offences has accounted for 98 per cent of this total increase. Traffic offences, in turn, have been responsible for 90 per cent of the increase in summary convictions. Indictable convictions have declined from 13.4 per cent of all convictions in 1901 to 1.0 per cent in 1965, as shown in Figure 2. What these overall conviction figures attest to mainly, then, is not an upsurge in violent or predatory crime but a phenomenal growth in the use—and consequently misuse—of motor vehicles.

An increase in the rate of indictable offences over this 66 year period is to be expected, for Canada has undergone fundamental social and economic changes. We have been transformed from a predominantly rural nation dependent on primary production to a predominantly urban and increasingly industrialized one. The growth of the proportion of the population classified in the census as urban from 37.5 per cent in 1901 to 73.6 per cent in 1966 should in itself have made for an increasing rate of serious crime since even today when rural life has attained many urban characteristics the rate of indictable convictions among urbanites remains almost twice that of rural

⁵ The method is described in Dominion Bureau of Statistics, *Crime Statistics, 1962*, pp. 7-11.

⁶ *New York Times*, August 27, 1968.

⁷ Although the 1966 figures are available they are not used because incomplete reporting of summary convictions by a large urban court has resulted in the specious decline shown in Figure 1. See Dominion Bureau of Statistics, *Statistics of Criminal and Other Offences, 1966*, p. 123.

⁸ All the rates that follow are based on the population 16 years and older unless otherwise noted.

FIGURE 1 — GRAPHIQUE 1

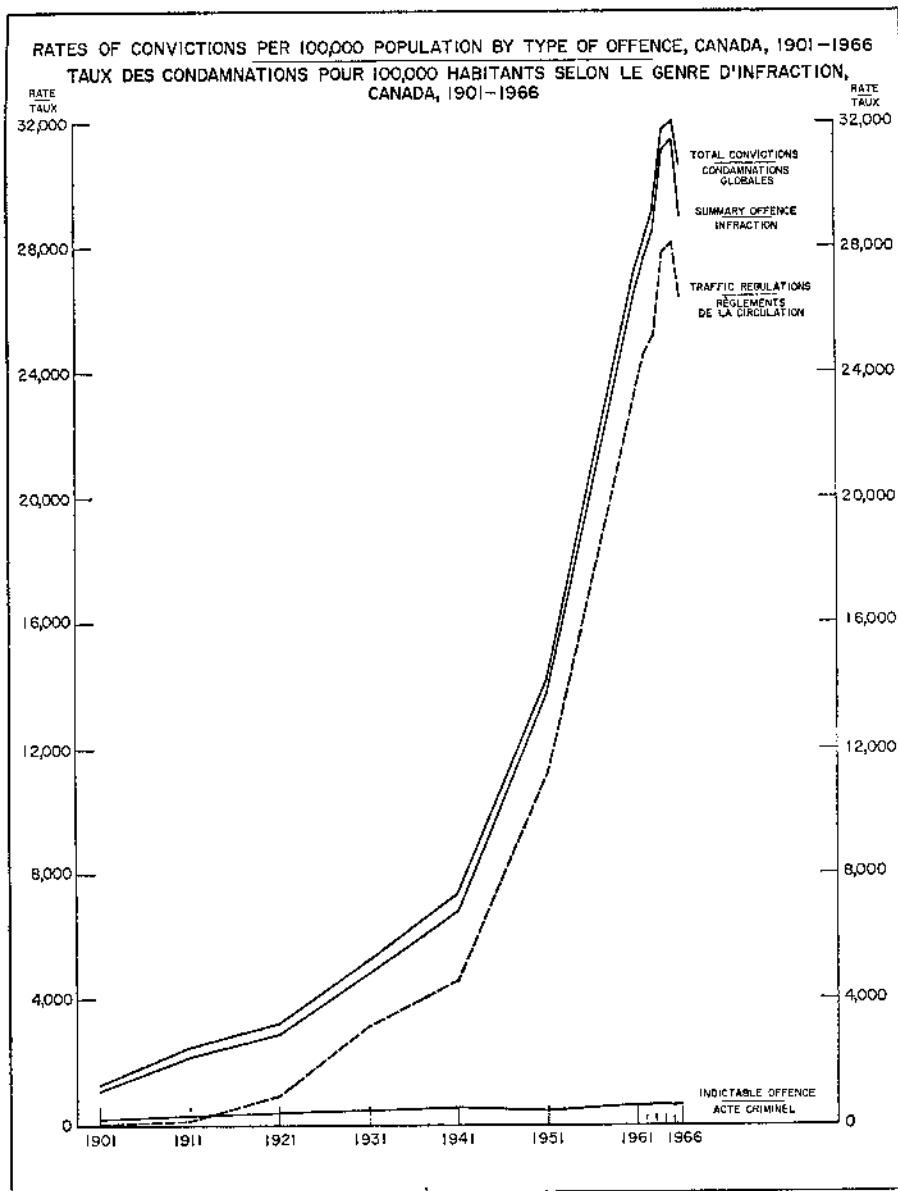
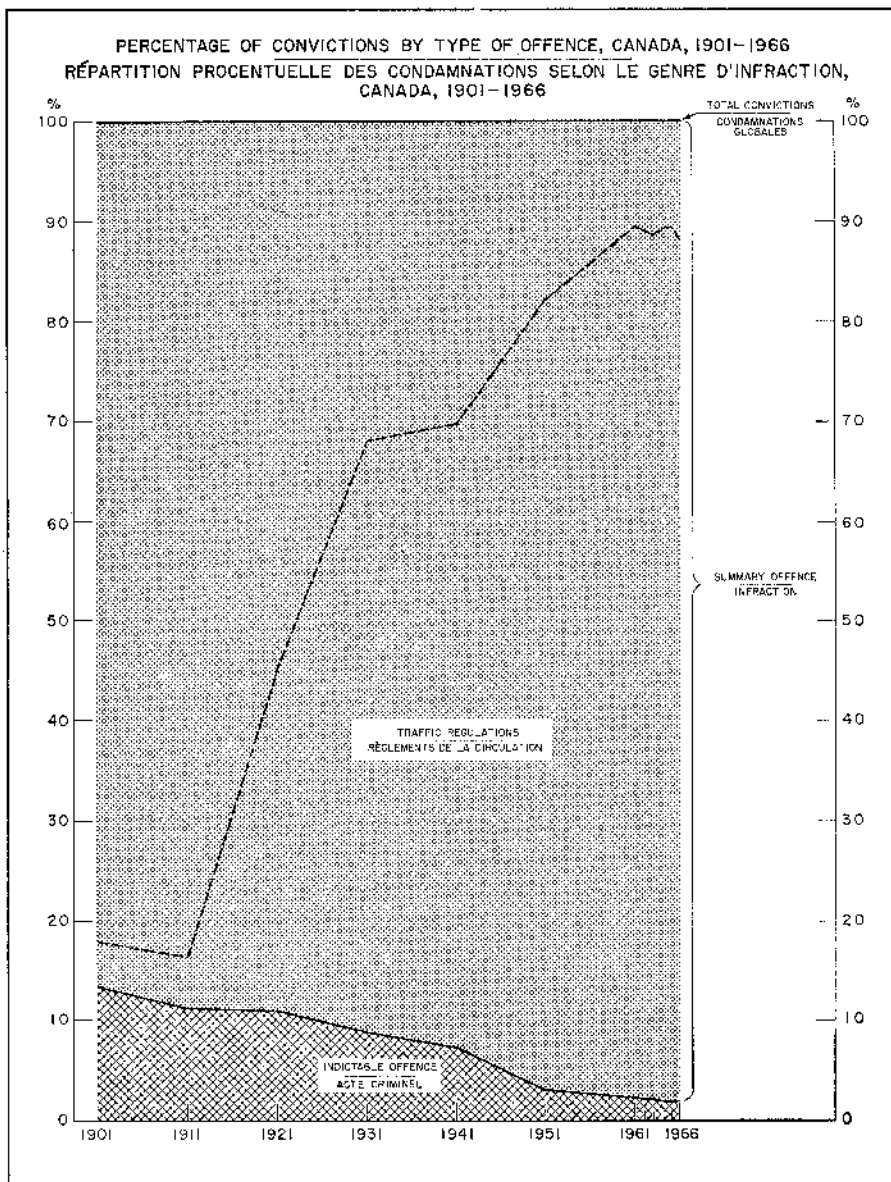


FIGURE 2 — GRAPHIQUE 2



residents.⁹ There has also been a great growth and diversification in the opportunities for crimes of gain, as well as many other changes likely to affect crime rates.¹⁰

We have no way of judging whether the apparent increase in indictable convictions from 165 per 100,000 population in 1901 to 615 in 1966 is more or less than should be expected by reason of these far-reaching social changes. A more useful comparison would be between Canada's current rates and those of other urban industrial nations. Valid comparisons are difficult because of differences in laws and in methods of collecting and categorizing offences. Hence the following comparison of the rates for certain selected offences known to the police in Canada, with the United States rates for the crimes that bear close resemblance, is put forward with reservations.

TABLE 1
Selected Offences Known to the Police in Canada and the United States, 1966
Rates per 100,000 Population

Canada*		United States†	
Rape.....	3.3	Forcible rape.....	12.9
Robbery.....	28.5	Robbery.....	78.3
Breaking and entering.....	510.3	Burglary.....	699.6
Theft (over and under \$50).....	1,330.6	Theft (over and under \$50).....	1,520.4
Theft—motor vehicle.....	198.1	Auto theft.....	284.4

*Based on Dominion Bureau of Statistics. *Crime Statistics, 1966*, p. 16 and Dominion Bureau of Statistics Census Statistics.

†Federal Bureau of Investigation. *Uniform Crime Reports, 1966*. Washington: U.S. Government Printing Office, 1967, pp. 58 and 110.

On the basis of this limited evidence it would appear that United States rates are higher, although the discrepancy is much larger for crimes of violence than for non-violent crimes of gain. This may reflect the fact that breaking and entering, theft, and motor vehicle theft are more broadly defined under Canadian law than are the comparable offences in many United States jurisdictions.

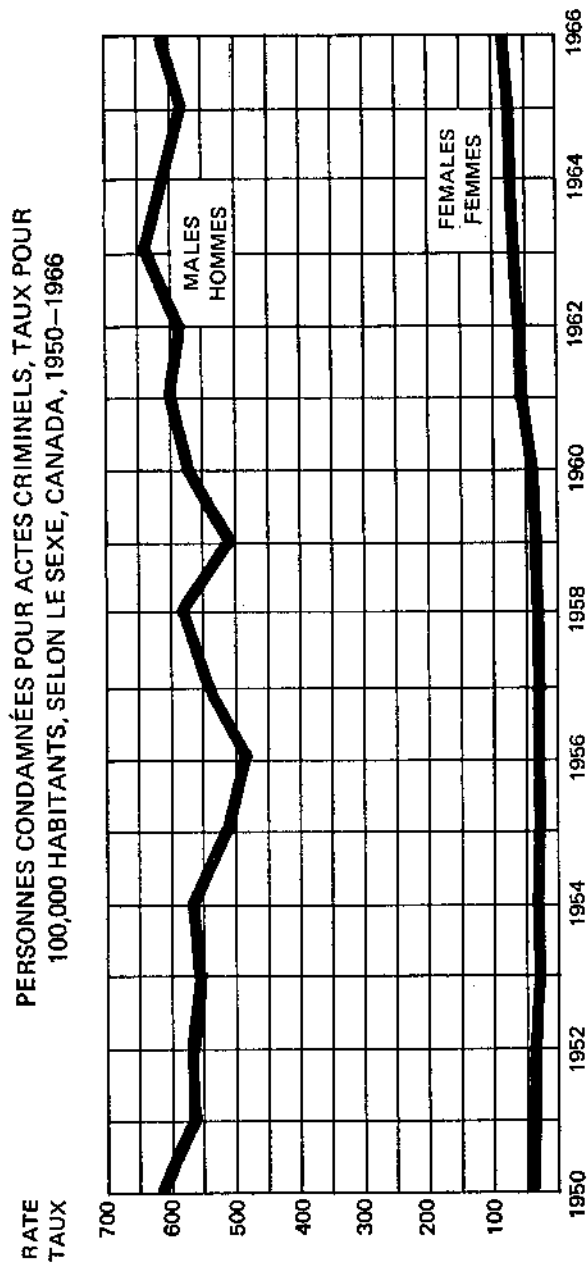
Let us examine in more detail recent changes in rates of serious crime, using as our index the rates of persons convicted of indictable offences from 1950 to 1966.

The period ended with a small increase in total rates from 333 to 351, but as Figure 3 shows, this marks a very significant difference between the sexes. The rate for males fluctuated considerably between 1950 and 1966, ending

⁹Giffen, P. J., "Rates of Crime and Delinquency," in McGrath, W. T. (ed.). *Crime and Its Treatment in Canada*. Toronto: Macmillan of Canada, 1965, pp. 75-76.

¹⁰Including a decline in the proportion of first generation immigrants in the population, since they have had considerably lower crime rates in Canada than the native-born. Giffen, *op. cit.* pp. 83-85.

FIGURE 3 — GRAPHIQUE 3
 PERSONS CONVICTED OF INDICTABLE OFFENCES, RATE PER
 100,000 POPULATION, BY SEX, CANADA, 1950—1966



about 1 per cent less than at the beginning of the period. The female rate began climbing in 1957 and by 1966 was more than twice the 1950 rate. Despite this large increase in their crime rates, women still account for only a minority of serious crimes—they constituted only 6.2 per cent of the persons convicted in 1950 and 12.5 per cent in 1966. Also, they continue to be much less likely than men to commit violent crimes. Their rate for “offences against the person”—violations likely to cause injury to others—was only 1/17 of the male rate in 1966, having declined by 15 per cent since 1950.

By way of contrast, the female rate for ordinary theft was 1/5 of the male rate, having increased by 265 per cent since 1950. In 1966 theft accounted for 67 per cent of the convictions of women compared to 37 per cent of the male convictions.

The contrast between men and women in the probability of being convicted for robbery is instructive because this offence has been considered a key indicator of violent criminality in that it involves a willingness to use violence on strangers. Although robbery plays only a small part in the indictable convictions of men (2.5 per cent in 1966), men nevertheless were thirty times more likely than women to be convicted of this offence in 1966. Without attempting to minimize the harm caused by ordinary theft, it should be emphasized that the marked increase in female crime rates has not, in any significant degree, involved those offences which are thought of as violent and threatening.

These changes in crime rates bring into question the part played by shifts in the age structure of our society. In Canada as in other industrialized nations the crime rate is highest among young persons and decreases markedly with age. In 1966 the rate of indictable offenders was 1,035 among 16 and 17 year olds, but only 90 among those 50-59 years of age. This means that increases in crime rates may be due to increases in the proportion of young people in the population. Alternatively, an increase in the proportion at the high risk ages may cause what would otherwise be a radical decline in rates to become a stable or only slightly diminishing rate. Not only has the proportion of the Canadian population in the high risk ages (16 to 24 years) increased somewhat (about 1.5 per cent) between 1950 and 1966, but to this has been added a significant increase in per capita crime at these ages.

When the changes in crime rates are broken down by age and sex, we find that male rates have increased in the age grades up to 25 years but have declined beyond this age. The rate for males 16-17 years of age increased by 47 per cent between 1950 and 1966, while the rate for males 35-39 years of age declined by 33 per cent. The female rate on the other hand has increased in all age classes, the magnitude of the increase showing no relation to age. The largest increase in rates (175 per cent) appears in the age class 60 years and over and the lowest (48 per cent) in the age class 45-49 years.

The overall influence on indictable offence rates of the higher rate among young males may be seen by estimating what the 1966 rate for both sexes combined would have been if the conviction rate among 16-19 year old males

had remained at the 1950 level. This would have resulted despite the increases in the female rates, in a decline of 3 per cent in the total rate instead of the actual increase of 5 per cent. If the rates of young men persist at the 1966 level, the overall conviction rate for indictable offences may continue to rise somewhat until other changes intervene. However, past experience shows that short-run fluctuations in rates are highly unpredictable. Certainly the common assumption that annual increments in rates are universal and inevitable is not justified by the evidence.

TABLE 2
Persons Convicted of Indictable Offences, Canada, 1950 and 1966
Rate Per 100,000 Population, 16 Years and Older

Name of Offence	1950	1966
Offences against the person.....	62	53
Robbery and extortion.....	7	8
Breaking and entering.....	39	53
Theft.....	106	146
Other non-violent crimes against property.....	38	47
Other Criminal Code.....	75	41
Other federal statutes.....	6	3
Total.....	333	351

Finally, it should be noted that the great majority of indictable convictions at all ages are for non-violent offences and that this proportion has been increasing. The rate for crimes against the person has declined by 15 per cent between 1950 and 1966 among men as well as women, with the result that these convictions made up only 15 per cent of the total in 1966. Robbery convictions increased 14 per cent but nevertheless constituted only 2.3 per cent of the total convictions in 1966, while armed robbery was only 0.4 per cent of the total.

Theft and other non-violent means of acquiring the property of others constitutes the largest problem among the indictable offences. The offences labelled "against property without violence" by the Dominion Bureau of Statistics increased 34 per cent from 1950 to 1966 and in the latter year constituted 55 per cent of the convictions. If breaking and entering is added to this total on the grounds that the damage caused is to property rather than to persons, this grouping of gainful offences made up 73 per cent of the indictable offences in 1966.

Furthermore, there is reason to believe that thefts make up a considerably larger proportion of the offences actually committed than of those that end up in court. The United States surveys of victimization mentioned earlier showed that victims on the whole are less likely to report theft to the police

than incidents in which they have been targets of violence.¹¹ Added to this is the fact that once reported to the police the major crimes against property are less likely to be cleared by charges than offences against the person.¹² In short, theft is a considerably larger portion of hidden and unsolved crime than official statistics would lead us to believe.

The tentative conclusion to be drawn from this brief examination of the evidence is that Canada has not been experiencing a marked increase in serious crime. The dramatic increase in this century in the convictions for all offences taken collectively has been largely an increase in convictions for minor offences related to the growing use of the automobile. A slight increase in the total rate of indictable convictions in the period since 1950 has been the result of an increase in the rates of young men and of women of all ages, which has offset a steady decline in the rates of men beyond their mid-twenties. When the distribution of offenders among various categories of "serious", i.e. indictable, offences was examined it was found that non-violent property offences, as distinct from violent offences directed against persons, continue to predominate.

These findings underline the danger of attaching much significance to reports of annual fluctuations in unfamiliar statistics or of extrapolating to the Canadian situation the much-publicized trends of crime in large United States cities. Many of the circumstances cited as causes of the apparently rising United States crime rates are either absent or much less severe in Canada.

¹¹ President's Commission on Law Enforcement and Administration of Justice, *op. cit.*, p. 22.

¹² Dominion Bureau of Statistics. *Crime Statistics, 1967*, p. 13, and Federal Bureau of Investigation. *Uniform Crime Reports, 1967*, p. 31.

4

TRENDS AND DEVELOPMENTS IN CANADIAN CORRECTIONS

In 1938 the Royal Commission to Investigate the Penal System of Canada (the Archambault Commission) submitted its report. Eighteen years later, in 1956, the Committee to Enquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada (the Fauteux Committee) submitted its report. These two reports contain many recommendations that have a direct bearing on the law enforcement, court and correctional services in Canada.

In addition, suggestions for change have come from many other sources, including several studies at the provincial level such as those undertaken by the McRuer Commission¹, the Prévost Commission² and the Alberta Penology Study.³

Any comprehensive comparison of present conditions in the corrections field with those in 1938 or 1956 is impossible, but important developments have occurred and the opportunity for even more important advances in the immediate future is present.

Public Interest and Participation

Throughout this report we stress the need for public understanding of the issues involved in crime and corrections and for direct citizen participation in the correctional services. Members of the public supply the tax money that supports the correctional services; their direct participation is necessary to a successful correctional program; they are the ones who suffer if efforts

¹ Ontario. Royal Commission Inquiry into Civil Rights. *Report*. (McRuer Report) Toronto: Queen's Printer, 1968.

² Quebec. Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Québec. *Crime, Justice and Society* (Prévost Report). Québec: Québec Official Publisher, 1968.

³ Alberta. Executive Council. *Report of the Alberta Penology Study* (McGrath Report). Edmonton: Queen's Printer, 1968.

to curb the incidence of crime fail; and in the final analysis correctional advances are dependent on public attitudes.

Although no study of the extent of public interest and participation in the corrections field has been undertaken in Canada, the Committee has been impressed by the extent and, in many instances, the quality of press, television and radio coverage of correctional subjects in recent years. This coverage has not been confined to news items but has included thoughtful assessment of problems related to crime and corrections. Several articles on correctional topics have appeared in popular magazines. Many citizen organizations, such as churches, have sponsored study groups and conferences on matters connected with crime and corrections. The interest of church groups has been demonstrated by the number of excellent briefs received from them by the Committee.

However, despite this increased interest on the part of the public, the Committee is not convinced that members of the public are fully aware of the issues involved or fully accept modern concepts and services in law enforcement, sentencing and corrections. This view is supported by recent studies of public attitudes carried out in the United States.⁴

Leadership in Correctional Planning

Advances in correctional planning leadership, stimulated by the coordinating organizations, have been impressive. The Canadian Corrections Association undertakes this coordinating role for Canada as a whole. Four other organizations serve specific regions or provinces. They are: the Atlantic Provinces Corrections Association, the British Columbia Corrections Association, the Ontario Association of Corrections and Criminology and the Quebec Society of Criminology. These organizations stimulate progressive attitudes among correctional staff through study groups and conferences, make information related to correctional research more available, prepare briefs addressed to government suggesting improved procedures and carry out public education.

The Canadian Congress of Corrections, a national forum, is held every two years under the auspices of the Canadian Corrections Association. The British Columbia Corrections Institute is held every two years under the auspices of the British Columbia Corrections Association. The Research Conference on Delinquency and Criminality is held biennially alternately with the Quebec Congress of Corrections under the auspices of the Quebec Society of Criminology. The Atlantic Provinces Corrections Association and the Ontario Society of Corrections and Criminology sponsor conferences which, while not regularly scheduled, provide similar opportunities for the exchange of ideas and information among those involved in corrections in their respective regions.

⁴Harris, Louis. "Changing Public Attitudes toward Crime and Corrections". *Federal Probation*, XXXII, 4, 1968.

Particular groups such as provincial judges and magistrates in many provinces have organized annual conferences. The Committee deals in this report extensively with legal developments relevant to the correctional process such as legal aid and proposals for reform in the bail system. The legal profession has given impetus to progress in these matters. Chiefs of police meet regularly both nationally and provincially. Such groups as staffs of training schools and prison chaplains have formed national associations and meet regularly. Correctional staff within the various services, national and provincial, also hold regular staff meetings.

Technical literature is also more readily available. The document entitled *Correctional Literature Published in Canada*, prepared annually by the Canadian Corrections Association, lists fifteen technical journals published in Canada. Several of these began publication in recent years, among them the *Canadian Journal of Corrections*, *Acta Criminologica*, the *Criminal Law Quarterly*, the *Ontario Magistrates Quarterly*, and the *Revue Canadienne d'Education Spécialisée*. Also listed are eight bulletins, eleven periodicals published by prison inmates, ninety-five books and 204 lesser works currently available.

Developments within the universities provide a source of leadership in correctional research and education. The three major developments, in chronological order of their establishment, are the Department of Criminology at the University of Montreal, the Centre of Criminology at the University of Toronto and the Department of Criminology and Centre of Criminology at the University of Ottawa. A survey of Resources for Education and Research in Criminology and Criminal Justice undertaken on the Committee's behalf by Dr. Denis Szabo indicates that a number of university departments, mainly law and sociology and to a lesser extent social work and psychology, offer criminological courses or have added criminological content to more general courses open to their students. Two developments in forensic psychiatry related to universities deserve special mention: the Forensic Clinic at McGill University and the Clarke Institute of Psychiatry, affiliated with the University of Toronto.

A closer liaison has been established between the corrections field in Canada and similar disciplines in other countries, with a resulting stimulation and exchange of ideas and information, including the results of research. An important step in establishing this relationship was taken when the 5th International Congress of Criminology was held in Montreal in 1965. Canadian attendance at international conferences, including the United Nations Congress on the Prevention of Crime and Treatment of Offenders, is also evident. Canada participates regularly in international studies and inventories.

Inter-Disciplinary Cooperation

A trend towards more effective cooperation among law enforcement agencies, the judiciary and the correction services appears to be developing. All of the developments discussed above—coordinating organizations, univers-

ity departments and centres, conferences, literature and research—are based on a belief in the importance of this cooperation. This development is, in the Committee's opinion, one of the most important of all and our conviction is expressed in the title of this report—*Toward Unity: Criminal Justice and Corrections*.

Research and Statistics

Valuable developments in criminological research and research facilities are evident in recent years. During the past year, the Inventory of Current Research, published in the *Canadian Journal of Corrections*, listed thirty-four projects in progress. Facilities for such research are chiefly located within the universities but the coordinating organizations also offer these facilities. There have been important developments within government related to research. Recently, the Department of the Solicitor General established a Correctional Planning Division. This Division has two sections, Correctional Research and Correctional Consultation. The Department of Correctional Services in Ontario has recently appointed a full-time director of research. Other provinces have also shown an increased interest in research.

Further significant advances have been made in expanding, refining and distributing statistics related to crime and corrections. Increased staff within the Judicial Statistics Section of the Dominion Bureau of Statistics has made possible the following series of annual publications:

- Statistics of Criminal and other Offences (Court)
- Juvenile Delinquents
- Police Administration Statistics
- Crime Statistics (Police)
- Traffic Enforcement Statistics
- Correctional Institution Statistics
- Training Schools

In addition, the Bureau publishes special studies from time to time.

Recent discussions between the Dominion Bureau of Statistics and the provinces of Quebec, Alberta and New Brunswick give hope that a more comprehensive statistical series, bringing together law enforcement, judicial and correctional statistics, will be possible. This will make it possible to follow the individual offender through the process from initial arrest to final discharge from supervision, thus gaining a clearer picture of success or failure.

Correctional Legislation

Desirable developments have occurred in relation to correctional legislation both federally and provincially. At the federal level, a Parole Act, which established the National Parole Board and Service, was passed in 1958 and a new Penitentiary Act, more in accordance with good correctional principle, was passed in 1961. Several of the provinces have introduced relatively

comprehensive corrections acts, Newfoundland (1953), New Brunswick (1964), Manitoba (1966), Saskatchewan (the revised act in 1967) and Ontario (1968). Other provinces, although they have not developed comprehensive corrections acts, have introduced important amendments to correctional legislation in recent years. This new legislation, in several instances, provides for such programs as work release and parole for inmates convicted of offences against provincial legislation.

Staff Development

The development of additional facilities within the universities for educating correctional staff is increasing the flow of qualified recruits into the correctional and police services. Another development related to staff training is taking place within community colleges. In-service training has also improved, with most correctional jurisdictions now having a staff-development officer.

Police

The police approach to enforcing the law, their main responsibility, has endeavoured to keep abreast of change. The police have traditionally accepted responsibilities beyond those of law enforcement and are expected to meet emergency situations of varying degrees and to be of general assistance to the public.

Policing is no longer a local matter; it is national and inter-national. Although crime has no boundaries, the police are bound to observe political jurisdiction, be it municipal, provincial or national. The ease of travel and communications today necessitates closer cooperation between various police bodies throughout the world through such organizations as Interpol and the International Association of Chiefs of Police. These same factors have brought about an exchange of liaison officers among Canadian police forces, national, provincial and municipal. These liaison arrangements have included establishing computer services to provide for faster exchange of information related to criminals. This information can be transmitted to all Canadian police forces and to police forces in the United States and Europe who are linked to the computer system.

Changes in the nature of crime, including geographical aspects, and the increase in the more organized and sophisticated kinds of crime, have forced police forces to place emphasis on specialized police training. The police have had to equip themselves to deal with such frauds as criminal bankruptcy, corporate manipulations and fraudulent income tax evasions. To meet these difficult and highly specialized forms of crime, the police have raised their standards of training.

Individual police officers have been encouraged to undertake university training in such fields as criminology, law, social science, psychology, accounting and business administration.

Provincial police commissions have been established in some provinces to coordinate the organization, administration, development, operation and cooperation between police forces within the province.

The police have had to face growing disrespect for the laws intended to protect the safety of the person and property. Such disrespect has increased with urbanization. The police feel they do not always have the support of the community in enforcing law. However, the police are moving towards a closer relationship with social agencies, the judiciary and the correctional agencies, including the after-care organizations and the forensic clinics.

The Courts

A most important development is the wider availability of legal aid. Ontario, Alberta and Saskatchewan now have legal aid plans financed by government funds and several other provinces have made significant advances in providing legal aid. Growing concern over the number of people held in custody awaiting trial or on remand has led to a re-examination of bail practices. Increased facilities available to the court, notably probation officers who prepare pre-disposition reports, have made it possible for the courts to give more effective recognition to the offender's rehabilitation needs when sentencing.

Probation

The most significant change in dealing with offenders has been the increased use of probation. In 1966, 13,965 adults were placed on probation in Canada, an increase of about one-third in five years.⁵ In several provinces there are more adults on probation at any given time than there are in prison. Public adult probation services now exist in all provinces. This is in contrast to the situation in 1956.⁶

Prisons

In 1956 there were eight federal penitentiaries in Canada.⁷ Today there are thirty-seven. This provides facilities for better classification practices and for reducing the number of inmates held in maximum security. Institutions such as William Head, the camps and the farm annexes provide medium and minimum security settings. The number of inmates held in individual institutions has also been reduced. Plans call for reception centres and medical psychiatric centres in each region.

⁵ See Table 11, Chapter 16.

⁶ Canada. Department of Justice. Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada. *Report* (Fauteux Report). Ottawa: Queen's Printer, 1956, p. 13.

⁷ Fauteux Report, *Ibid.*, p. 39.

New institutions have also been built in several provinces. Detention centres are replacing traditional jails. Forestry camps have reduced the number of inmates held in security. Modern medium security institutions have come into operation.

Parole

One of the most significant developments was the establishment of the national parole system in Canada in 1958, replacing the former limited Remission Service. During 1967, the National Parole Board granted 3,088 paroles.⁸ The trend in recent years has been toward a greater use of parole and a decentralization of the Parole Service administrative duties. The Parole Board has established experimental programs related to particular groups of offenders such as narcotic offenders, Doukhobors, and habitual criminals and has applied different programs such as gradual parole, day parole and minimum parole. The two large provincial parole systems, in British Columbia and Ontario, were in existence before 1956.

After-Care

After-care has also grown in scope and quality. Voluntary agencies are active in all provinces.⁹ Hostel facilities for offenders have increased considerably. Developments in after-care are dealt with more comprehensively in Chapter 20.

Conclusion

This brief survey, supplemented by more detailed examinations of developments in other sections of this report, gives indication of the progress in Canadian corrections since publication of the Archambault and Fauteux reports. Much remains to be done and it is our hope this report sets out attainable goals and realistic ways in which these goals can be reached.

⁸ See Table 14, Chapter 18.

⁹ Compare with Fauteux Report, *Ibid.*, pp. 74 and 75.

5

THE INVESTIGATION OF OFFENCES AND POLICE POWERS

The Committee considers that the scope of its examination of this part of the criminal process is limited by the general framework of the Committee's terms of reference (namely: the broad field of corrections) to an examination of the subject only in relation to its bearing on corrections. We, therefore, do not consider that an examination of such matters as the techniques of investigation, scientific aids to criminal investigation, the structure of the Canadian police system and its internal administration, or procedures for the most effective use of police manpower fall within our terms of reference, except insofar as such matters relate to corrections.

The Role of the Police in a Democratic Society

The primary functions of the police are:

- (a) To prevent crime.
- (b) To detect crime and apprehend offenders. This latter function involves the gathering of evidence sufficient not only to warrant the laying of a charge against a specific individual, but to establish the guilt of that individual in a court of law.
- (c) To maintain order in the community in accordance with the rule of law.
- (d) The control of highway traffic has also become an important police function in modern times.

The Report of the Royal Commission on the Police in England 1962 also pointed out that:

They have by long tradition a duty to befriend anyone who needs their help, and they may at any time be called upon to cope with minor or major emergencies.

Contrary to popular belief, much less time is spent on crime detection and the apprehension of offenders than on other phases of police work. Much work is clerical in nature.

Much police time is spent in what might be described as peace keeping functions such as dispersing crowds which interrupt traffic or which endanger the peace, acting as a peace maker in a family quarrel which seems likely to have a violent outcome, or breaking up a street quarrel which threatens to erupt in violence. These peace keeping functions are related to the police duties to preserve order in the community, to prevent crime and also to the traditional duties referred to by the Royal Commission on the police.

In addition, the police perform "helping" or community service functions which may range from giving first aid to helping a stranger find his way.

In a democratic society the police carry out their functions on behalf of the community and exercise only the powers entrusted to them by the community. As Professor Skolnick has pointed out, it is customary to speak of "law and order" as though they were necessarily two mutually compatible and supportive ideas, whereas order of a very high degree may be achieved by the use of dictatorial and arbitrary power.¹

In a democratic society such as Canada, the police are required to act within the framework of a legal system which recognizes and gives effect to democratic values. They remain accountable to courts of law for their conduct, and in the final analysis to the people through their elected representatives at various levels of government.

Effective law enforcement requires that the police be given adequate powers and be supplied with the necessary resources to efficiently perform the functions which society has delegated to them.

It is equally important that police powers and practices not undermine the societal values which they are established to protect, which include civil liberties as well as security of the person and property. It is necessary, therefore, to strike a delicate balance between those powers of the police which are needed for effective law enforcement and the right of the citizen to be protected from abuse of power. The nature of the resulting compromise is described by the Royal Commission on the police as follows:

The police systems in England, Scotland and Wales are the products of a series of compromises between conflicting principles or ideas. Consequently, in contrast to other public services such as health and education, the rationale of the police service does not rest upon any single and definite concept of the public good. Thus it is to the public good that the police should be strong and effective in preserving law and order and preventing crime; but it is equally to the public good that police power should be controlled and confined so as not to interfere arbitrarily with personal freedom. The result is compromise. The police should be powerful but not oppressive; they should be efficient but not officious; they

¹ Skolnick, J. H. *Justice Without Trial*. New York: John Wiley & Sons, 1966, pp. 7-9.

should form an impartial force in the body politic, and yet be subject to a degree of control by persons who are not required to be impartial and who are themselves liable to police supervision.²

The Police and the Public

There is unanimity of opinion that the police cannot *effectively* carry out their duties with respect to law enforcement unless they have the support and confidence of the public. Not only is the co-operation of the citizen necessary for effective law enforcement, but disrespect for the police creates a climate which is conducive to crime. Concern has been increasingly expressed, by both the police and members of the public, over what appears to be deterioration in the relationship between the police and the public. The Royal Commission on the police in England came to the conclusion that relations between the police and the public were, on the whole, good.³ The report, however, recognized that there were indications of antagonism towards the police among young men and women and motorists. The social survey upon which the Royal Commission based its conclusions also showed that police community relations were better in rural than in urban areas.

In the United States, notwithstanding widely publicized criticisms of the police, a survey conducted for the President's Commission on Law Enforcement and Administration of Justice also indicates that "the overwhelming majority of the public has a high opinion of the work of the police."⁴

The Committee is also satisfied that the majority of Canadians have confidence in the police, although respect for the police is obviously greater in some parts of the country than in others, and not all groups which make up the Canadian public share the same degree of confidence in the police. Complacency is not justified because of the fact that police and public relations, judged on a numerical basis, are satisfactory.

The police feel, and with some justification, that the public fails to realize the difficulties inherent in the duties which they are called upon to perform, and that they are frequently subjected to criticism that is unjust. Apart from the damage to police morale, unwarranted criticism over a long period of time can lead to frustrations on the part of the police. This sometimes results in a police reaction which occasionally causes the police to overstate their role, which in turn sows the seeds of further conflict. Unwarranted criticism, of course, leads to a lessening of public confidence in the police and makes it more difficult for them to perform the important duties which society has entrusted to them.

² Great Britain. *Royal Commission on the Police*. London: Her Majesty's Stationary Office, 1962, Cmnd. 1728, p. 9.

³ The basis upon which the conclusion was reached has not, however, escaped criticism: Skolnick, J. H. *Justice Without Trial*. New York: John Wiley & Sons, 1966, p. 64; Great Britain. *Royal Commission on the Police*. London: Her Majesty's Stationary Office, 1962, Appendix IV to the Evidence, pp. 15-18.

⁴ United States. *Task Force Report: The Police*. The President's Commission On Law Enforcement And Administration of Justice. Washington: U.S. Gov't Printing Office, 1967, p. 145.

Animosity is occasionally directed towards the police because they are sometimes called upon to enforce unpopular laws. Obviously it is unjust to criticize the police for discharging a duty with respect to which they have no choice. The fault lies rather in permitting laws which do not command public support to remain on the statute books. Is there public support for a law which makes it an offence for a citizen, no matter how well behaved, to drink a bottle of beer at a family picnic? Is there public support for a law which makes it an offence to purchase a lottery ticket? These are choices which must be made by the public, not by the police, and they are not to be blamed for enforcing the law as it is.

The Committee is of the view that there are, in addition, other and more subtle factors which have tended to impair the relationship between the police and the public. The vast increase in the number and kind of laws which they are required to enforce and the range of duties which the police are required to perform in present day society, especially in the control of highway traffic, brings the police officer, *in an authoritarian role*, into ever increasing contact with the citizen. Rudeness, impatience or the unnecessary adoption of an authoritarian manner in dealing with the law abiding or essentially law abiding citizen who may have committed a minor infraction, perhaps unwittingly, is likely to create citizen hostility towards the police.

Much criticism has recently been directed against the police for making too frequent use of arrest where a summons would suffice, and for unnecessarily detaining arrested persons when the public interest no longer requires their continued detention. We think that the present law fails to give sufficient guidance to the police in this respect. The Committee later in this report, in the chapter dealing with procuring the attendance of the accused and bail, recommends certain changes in the law in order to bring the law and police practices into greater harmony with the needs of the community.

Police-Community Relations

The Committee considers that police-community relations involve more than public relations in the traditional police context. Public relations' programmes directed toward promoting better feeling and understanding between the various groups which make up the public and the police have usually emphasized communication by the police to the public of their role and their objectives. This is only one part of a community relations programme.

The police must be prepared to receive and discuss communications from the public. Sincere criticism—even when unfounded—must not be confused with an "attack" upon the police or an indication of an anti-police attitude. The police must be prepared to meet and discuss the grievances (real or alleged) of particular hostile groups and even initiate communication with those groups. Many police officers play a highly commendable role in working in off-duty hours with youth groups, boys' clubs and in providing recreation for underprivileged boys. The Committee wishes to acknowledge the

importance of this activity in police-community relations. We believe, however, that police-community relations is also the responsibility of police departments.

Police Training

The nature of police work tends to produce in the police officer a sense of isolation and to set him apart from the community.⁵ Police policy which requires him to be selective in his associations, while necessary, accentuates this isolation. This tendency towards isolation involved in police work must necessarily involve some loss of sensitivity to the psychological processes and the problems of different groups in a society which produces rapidly changing patterns of behaviour. To counteract this tendency towards isolation, we believe that police training programmes should be broadened with a view to developing in police officers a better understanding of their role in relation to total societal goals and a better understanding of the behaviour of particular groups.

We consider that there should be a greater involvement in police training programmes of social and behavioural scientists, judges, magistrates, criminologists, correctional workers and lawyers. The exposure to the thinking of other professional groups and the resulting dialogue will promote effective law enforcement by the utilization of the resources of the behavioural sciences, and by developing a better understanding of the role of the police, the courts and the correctional agencies in the entire criminal process.

The Police and the Offender

From the point of view of the offender, everything that happens to him in connection with the offence (investigation, pre-trial procedures, the trial, and his experiences before and after the imposition of sentence) is part of a continuing process and affects him for better or for worse.⁶

The use of unnecessary force, sarcasm or illegal measures on the part of the police in carrying out their duties, may increase the offender's disrespect for authority and impede his rehabilitation. Fairness may gain his cooperation. Fairness in dealing with the offender is not incompatible with the exercise of necessary authority and firmness.

The first contact the law violator has with civil authority is the police officer. The first impression based on personal experience that he gets of our judicial process results from his first encounter with the police . . .

If a police officer resorts to brutality, if he fails to advise an offender of his legal rights or worse still if he deprives a suspect of what he knows to be his legal rights, he is guilty of grave wrongdoing and helps to thwart the efforts of others in the correction field.⁷

⁵Great Britain, *Royal Commission on the Police*, London: Her Majesty's Stationary Office, 1962, Cmnd. 1728, p. 105; Skolnick, J. H. *Justice Without Trial*, New York: John Wiley & Sons, 1966, pp. 62-65.

⁶See Kirkpatrick A. M. "Prison After-care", 14 *Chitty's Law J.* 91 and 126 (1966).

⁷Maloney, A. M., Q.C. "The Court and the Police Functions in the Developing of Effective Canadian Corrections", 2 *Crim. Law Q.* 164 p. 176 (1959-60).

While the police officer must act with firmness and authority when the necessity arises and is often subjected to extreme provocation, provocative behaviour on his part or the use of undue force by the police may result in the escalation from a minor to a more serious offence with unfortunate results not only from the point of view of the offender, but from the standpoint of the public. We consider that there is a need for the training of police personnel not only to avoid provocative behaviour, but to tolerate behaviour which is provocative but not criminal. The ability to tolerate provocative behaviour is particularly important in dealing with young people, where resentment of authority may be a transient phase of their experience. The Committee has been informed that police officers are increasingly receiving training along these lines. The Committee, in a later part of this report, has stressed the value to society as well as the offender of avoiding wherever possible the initial labelling of an individual as an offender.

Police Discretion Not to Invoke the Criminal Process

The question whether the police have any discretion with respect to invoking the criminal process, and if so the nature and extent of that discretion, has been the subject of very little discussion by the courts in Canada or in the Canadian legal literature.

That the attorney-general and the law officers of the crown have a discretion as to whether a prosecution should be initiated has never been doubted. This discretion must be exercised in a quasi-judicial way in accordance with the requirements of the public interest⁸ and is subject to a measure of scrutiny.

The exercise of discretion on the part of a police officer not to invoke the criminal process is not subject to similar scrutiny, because there may be no person other than the police officer and the person affected who is aware of the incident giving rise to the exercise of the discretion. Different views have been expressed as to whether the police have a discretion not to invoke the criminal process, where there is evidence of the commission of an offence, and whether it is desirable that such a discretion should be recognized.⁹ The exercise of police discretion contains inherent dangers. It may result in inequality of treatment, since not all police officers will act in the same way under similar circumstances. Fairness and the non-discriminatory application of the criminal law requires that similar cases be treated, so far as possible, in the same way.

⁸ Devlin, Lord Patrick. *The Criminal Prosecution in England*. London: Oxford University Press, 1960, pp. 19-20; Williams, Glanville. "Discretion in Prosecuting". [1956] *Crim. Law Rev.* 222.

⁹ LaFave, Wayne R. "The Police and Non-enforcement of the Law". 1962 *Wisconsin Law Rev.* 104 (Part 1) and 179 (Part 2); Kadish, S. H. "Legal Norm and Discretion in the Police and Sentencing Processes". 75 *Harvard Law Rev.* 904 (1962); Goldstein, J. "Police Discretion Not To Invoke the Criminal Process; Law Visibility Decisions in the Administration of Justice". 69 *Yale Law J.* 543 (1960); Williams, G. T. "The Police and Law Enforcement". [1968] *Crim. Law Rev.* 351; Jackson, R. M. *Enforcing The Law*. Toronto: Macmillan & Co., 1967, at pp. 50-54; Barker, B. M. "Police Discretion and the Principle of Legality". 8 *Crim. Law Q.* 400 (1965-66).

As the Committee has pointed out, the police cannot refuse to enforce an unpopular law. This proposition has recently been restated by the Court of Appeal in England.¹⁰ The Commissioner of Police of the Metropolis made a policy decision that observations in registered or licensed clubs were not justified unless there were complaints of cheating or reason to suppose that a particular club had become a haunt for criminals. A private citizen alleged that illegal gaming was taking place in casinos in London. He wrote to the Commissioner and asked for his assistance in enforcing the provisions of the Betting, Gaming and Lotteries Act of 1963. Subsequently he brought an application for an order of mandamus requiring the Commissioner to assist him in the prosecution of gaming clubs in the metropolitan police area which contravened the provision of the Gaming, Betting and Lotteries Act. Lord Denning, in holding that the Commissioner was under a duty to enforce the law, nevertheless recognized that a discretion existed not to invoke the law in a particular case. He said:

Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police of the Metropolis, or the chief constable, as the case may be, to decide in any particular case whether inquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such a matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide. But there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law.*

Salmon L. J. took a similar view and indicated that, in his view, the police have a discretion whether or not to prosecute in a particular case. He also indicated that a discretion not to invoke the criminal process exists in cases which fall within the literal words of the statute defining an offence, but do not constitute the evil which the statute was enacted to suppress. In the view of the Committee, conduct which does not fall within the evil intended to be suppressed by the statute should be removed from the prohibition by the legislature by re-defining the offence in narrower terms.

The Committee is, however, of the view that the element of the exercise of police discretion cannot be separated from law enforcement and that its complete elimination would not advance the ends of justice. We think that a decision not to prosecute and merely to give a warning may

¹⁰ *Reg. v Commissioner Of Police Of The Metropolis, Ex Parte Blackburn*, [1968] 2 W. L. R. 893.

*The emphasis is ours.

best advance the ends of justice in some circumstances. Where the offence is minor or marginal, especially where the offender is young and unsophisticated, or undergoing mental treatment, a warning may be more appropriate than invoking the massive machinery of the criminal law.

Arrest, even when followed by early dismissal of the charge, may ruin an innocent member of the community. Where there is no real likelihood of sufficient evidence being available to substantiate the suspicion that an offence has been committed, an arrest should not be made. We have in the following chapter set out what we consider the considerations which should determine whether the police officer should issue, or cause to be issued, a summons rather than make an arrest. Where a judicial officer or law officer is required to review the evidence before deciding to issue process or initiate a prosecution, an additional safeguard is available to the citizen.

Proper and consistent exercise of discretion in a large organization, like a police department, will not result from the individual judgment of individual police officers in individual cases. Whatever the need for the exercise of judgment by an individual officer may be, certainly the development of overall law enforcement policies must be made at the departmental level and communicated to individual officers. This is necessary if the issues are to be adequately defined and adequately researched and if discretion is to be exercised consistently throughout the department.¹¹

No statistics are kept in Canada on a comprehensive basis as to the number of cases or the circumstances in which a caution is administered as an alternative to invoking the criminal process, but the available figures in Great Britain indicate a substantial exercise of police discretion in this respect.¹²

The Committee is of the opinion that police departments should develop systems for recording the exercise of police discretion where a caution has been administered to a possible offender as an alternative to a prosecution. Moreover, guidelines with respect to the exercise of police discretion should be enunciated by senior officials in the police forces with a view to developing uniform practices. We are further of the view that the subject of police discretion is deserving not only of emphasis in police training programmes, but that further research on this subject is desirable.

The Prevention of Crime

The Committee does not interpret its terms of reference as including the problem of the prevention of crime, but rather as being restricted to the processes brought into motion after an offence has been committed. The Committee, therefore, confines itself to stressing the values to society of crime prevention.

¹¹ United States. *Task Force Report: The Police*. The President's Commission on Law Enforcement and Administration of Justice. Washington: U.S. Gov't Printing Office, 1967, p. 19.

¹² Barker, B. M. "Police Discretion and the Principle of Legality". 8 *Crim. Law Q.* 400 at p. 401 (1965-66).

The primary function of the police is the prevention of crime. A reduction in the opportunities for crime is the most economical mode of "corrections". The Committee feels that insufficient attention is being paid to the problem of crime prevention as distinct from crime detection, and that police forces merit much greater support in this area of their responsibility.

Car theft is one of the rapidly rising crimes in Canada, as it is in the United States. According to United States Federal Bureau of Investigation statistics, the key had been left in the ignition or the ignition had been left unlocked in 42 per cent of all stolen cars.¹³ Merely locking the car would prevent many car thefts by youths in a joy riding mood. Car theft is a crime that has started many youths on criminal careers. The lesson is obvious. Indeed, it seems entirely likely that car theft might be eliminated or drastically reduced by research directed to the development of automatic and improved locking devices for automobiles.

Greater precautions when substantial sums of money are being transported might reduce the incidence of robbery; improved auditing procedures might reduce the incidence of embezzlement; notification by householders to the police that they are going to be absent for an extended period might help to reduce the number of burglaries. Stricter control of firearms would, we feel, help to reduce the incidence of violent crime. Television cameras might be used to keep dangerous areas under general surveillance and some experimentation has already taken place in this direction. Special police units might be trained to keep in touch with and caution those who appear to be contemplating the commission of a crime.

The above are but examples of the sort of development which would, by reducing the opportunities for crime, cut down the flow of offenders to the correctional services. Quite apart from the reduction in human wastage which would result from the reduction in opportunities for crime, there would obviously be a great financial saving to the community in being freed from the cost of crime, apprehending, trying, convicting and subsequently maintaining the offender.

Improved methods of crime prevention are related to the conclusion drawn from correctional work with offenders that many who become offenders are indistinguishable in terms of personality proneness from many who do not become offenders, and what makes some offenders and others not is essentially the presence of opportunity, particularly at a time of temporary instability.

Police Powers and the Investigation of Offences

The Committee considers that its terms of reference require it, for a number of reasons, to make a broad survey of police powers in Canada with a view to determining whether they are unduly restrictive or, on the other hand, too extensive.

¹³ United States. *The Challenge of Crime in a Free Society*. The President's Commission On Law Enforcement And Administration of Justice. Washington: U.S. Gov't Printing Office, 1967, p. VII.

Since the primary purpose of the entire criminal process is to protect society by reducing the volume of crime, the withholding of necessary powers from the police to an extent that the primary purpose of the criminal law is largely negated, would involve a startling inconsistency. Effective police services will reduce the potential load on the correctional services by maximizing the effects of deterrence in preventing crime.

Where the principle of general deterrence has failed to prevent the commission of the offence, effective police services are necessary to ensure that those who commit crimes are detected and apprehended.

On the other hand, police powers which are too extensive, especially when harshly and unnecessarily used, create hostilities against the police which result in public attitudes and loss of community support which increase the difficulty of law enforcement. Police services must be efficient, but they must also be compatible with respect for basic ideas and feelings concerning the fundamental rights of the individual. Moreover, police powers must not be so extensive as to jeopardize the innocent.

The Committee accepts as a fundamental proposition that interference with individual liberty can only be justified where it is clearly necessary in the interest of society as a whole, and that no greater interference with individual liberty than is necessary to protect the interests of society is justifiable.

The Committee also considers that a survey of police powers in Canada is desirable in the interests of clarification. We think there is much misunderstanding on the part of many members of the Canadian public on the question of the sufficiency or otherwise of police powers. Many members of the Canadian public who are exposed to the mass news media emanating from the United States may, not unnaturally, assume that police powers are the same in Canada as in the United States, or are subject to similar restrictions. Since our criminal law, like the law of the United States, is derived from the English law, it is perhaps even more natural to assume that police powers are the same in Canada as in England. In the opinion of the Committee the nature and extent of the police powers which are available to law enforcement officers in Canada are in some respects unique.

We think occasionally the clash of views between law enforcement officers and groups who emphasize civil liberties contributes to the misunderstanding and confusion as to the nature and extent of police powers in Canada. It is sometimes asserted by individual law enforcement officers that the safeguards of the criminal process afford excessive protection to the accused and too little protection to society, and that the administration of justice is being increasingly weighted in favour of the accused. The conviction rate shown by the Dominion Bureau of Statistics would seem to show that the trend has been in the opposite direction. The probability that a charge of an indictable offence would lead to a conviction was 68.0 per cent in 1901 and 89.5 per cent in 1966. Undoubtedly the increase in the conviction rate is, in part, due to an increase in police efficiency.

A different view with respect to police powers is taken by certain other groups and it is sometimes alleged that police powers have increased to a

point where we are in danger of becoming a police state. This view is equally untenable. The Committee points out that in Canada the police are accountable to courts of law for their conduct, and that they have only the powers conferred on them by a democratically elected Parliament and democratically elected provincial legislatures. The Committee is of the view that a brief survey of police powers will indicate that in Canada a reasonable balance has, in general, been kept between the requirements of the general security and the protection of the fundamental rights of the individual.

We wish to emphasize that the vast majority of police officers, both in written briefs, and in oral discussions with the Committee, did not ask for general or overall increases in police powers. Certain specific powers were requested which will be discussed by the Committee later in this chapter.

The majority of police officers, law enforcement officers, judges, magistrates and lawyers expressed the opinion that *in general* the police had sufficient powers.

The Committee also desires to state that, in their discussions with the Committee, and in representations made to the Committee, there was no indication that the police as a whole were seeking an increase of power of a kind which poses a threat to civil liberties.

A Survey of Police Powers in Canada

Police Power to Question

In the investigation of the commission or alleged commission of an offence, a police officer is entitled to question any person, whether or not the person is suspected, in an endeavour to obtain information with respect to the offence. While the police officer may question, he has no power to compel answers. There is no doubt, however, that a police officer by reason of his position and his right to arrest in certain circumstances, has a power (factual but not legal) to exert very great psychological pressure to obtain answers.

The police may engage in interrogation for two reasons, frequently confused:

- (a) To obtain knowledge of facts which may be independently established by further investigation, for example, the whereabouts of the proceeds of a robbery or the identity of a witness.
- (b) To obtain incriminating statements to establish the guilt of the accused at his trial.

Interrogation conducted to obtain information is probably of considerably more importance in the investigation of crime than questioning for the purpose of obtaining confessions or incriminating statements in order to prove the guilt of the accused at his trial.

Interrogation to Obtain Information

The citizen, be he suspected or not, when interrogated by the police with a view to obtaining information, is protected from violence or the threatened application of violence or illegal detention only by the general laws which protect every citizen from illegal assaults, unlawful threats and false imprisonment. In legal theory these are the only limitations upon police questioning. A police officer is in breach of no rule of law who uses trickery, fraud, promises or even an aggressive or intimidating manner in the conduct of interrogation to obtain information—provided his conduct does not constitute an assault or an unlawful threat—and provided that he does not unlawfully deprive the citizen of his liberty. The Committee does not doubt, however, that there are considerations other than legal restraints which tend to keep such interrogation within acceptable limits. Abusive or unacceptable practices would lead to loss of confidence in the police and result in loss of community support.

Admissibility of Confessions Obtained by Police Questioning

Where, however, it is desired to introduce incriminating answers in evidence at the accused's trial, additional considerations arise. A confession, or incriminating statement made to a police officer, is not admissible in evidence against an accused under existing Canadian law, unless it is shown by the prosecution that the statement was made voluntarily in the sense that it was not obtained from him by fear of prejudice or hope of advantage exercised or held out by a person in authority. Proof of voluntariness is required because of the danger that a confession, extorted by threats or promises exercised or held out by a person in authority, may be untrue.

The Canadian courts have traditionally taken a much more liberal attitude with respect to the admissibility of incriminating statements made in answer to police questioning than the courts of some countries—which have similar legal systems. A writer in the *Harvard Law Review* in examining the law in the United States, England and other common law countries with respect to the admissibility of confession and incriminating statements has recently said:

On the whole, there is probably little question that the police in Canada are less restricted than in many other common law countries.¹⁴

The Judges' Rules in England have not the force of law, but are a series of directions issued for the guidance of the police. An incriminating statement obtained in violation of the Judges' Rules *may*, in the discretion of the trial judge, be rejected, although it will not *necessarily* be rejected if it meets the test of voluntariness. The Judges' Rules, if followed literally, would greatly restrict police interrogation. The latest edition of the Judges' Rules states that a police officer may question any person, whether he

¹⁴ "Developments in the Law: Confessions", 79 *Harvard Law Rev.* 935, p. 1106 (1966).

suspects that person or not, from whom he is likely to obtain useful information. Where, however, the officer reaches the point at which he has evidence which would afford reasonable grounds for suspecting that the person being questioned has committed an offence, he is required to caution him that he is not obliged to say anything and that anything he does say may be put in writing and given in evidence, before putting to him any further questions relating to that offence. Where a person is charged or informed that he may be charged with an offence a further caution must be given. Thereafter all questioning must cease except for limited purposes, to clear up an ambiguity, for example.

Under Scots law, a suspect upon arrest must be informed of the nature of the charge and cautioned that any statement he makes can be used in evidence. While the police may question a mere suspect freely, upon arrest all statements made by the accused as a result of police interrogation in relation to the offence for which he was arrested are inadmissible.

Under section 25 of The Indian Evidence Act, all confessions made by a person in the custody of a police officer are inadmissible. No confession made by any person while he is in the custody of a police officer is admissible, unless made in the immediate presence of a magistrate who is required to warn the accused that he is not required to make a statement and to conduct an inquiry to satisfy himself that the statement is voluntary.

The Supreme Court of the United States, in the much discussed case of *Miranda v Arizona*,¹⁵ held that an incriminating statement made by a person in police custody is not admissible in evidence unless the suspect:

1. has been clearly informed that he has a right to remain silent and that anything he says will be used against him in court;
2. has been clearly informed that he has the right to consult a lawyer and to have the lawyer with him during interrogation, and that if he is indigent a lawyer will be provided for him.¹⁶

In contrast to such restrictions, as those above referred to, upon the admissibility of incriminating statements made by persons in custody as a result of police questioning, the attitude of Canadian courts has been that the broad question as to whether a statement has been made voluntarily must be decided by the court unfettered by a set of predetermined rules.

¹⁵ 334 U. S. 436 (1966).

¹⁶ The Congress of the United States by the *Omnibus Crime Control and Safe Streets Act* of 1968, Title II (Public Law 90-351, 90th Congress, H. R. 5037 June 19, 1968) has endeavoured to control the effect of the decision of the Supreme Court in *Miranda v Arizona* in any prosecutions brought by the United States or the District of Columbia by providing that whether the defendant was advised or knew that he was not required to make any statement; whether or not the defendant was advised prior to questioning of his right to the assistance of counsel; and whether or not the defendant was without counsel when questioned are factors to be taken into consideration by the trial judge on the issue of voluntariness but the presence or absence of such factors need not be conclusive on the issue of voluntariness. American lawyers have questioned the power of Congress to overrule the Supreme Court's interpretation of the United States Constitution.

The Canadian courts have held that the giving of a caution or warning is not a condition of the admissibility of an incriminating statement made, as a result of police questioning, by a person who is in custody, or with respect to whom a decision to prefer a charge has been made. Whether or not a warning was given may be a factor and sometimes an important factor in determining whether or not a statement was voluntary, especially if the suspect is young, of low intelligence, or had no previous contact with the criminal law—but it is not decisive. Nor is the presence of counsel when a suspect is questioned by the police a condition of admissibility under Canadian law, unless the suspect has waived his right to counsel. However, since the suspect is under no obligation to answer questions put to him by the police, he may require the presence of counsel as a condition of making a statement. The police will then have to decide whether to accept the condition or forego the making of the statement.

The attitude of Canadian courts is exemplified in two judgments of the Supreme Court of Canada. In *Boudreau v The King*¹⁷ Rand J. said:

The underlying and controlling question then remains; Is the statement freely and voluntarily made? Here the Trial Judge found that it was. It would be a serious error to place the ordinary modes of investigation of crime in a straight-jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad question to the court. Rigid formulas can be both meaningless to the weakling and absurd to the sophisticated or hardened criminal; and to introduce a new rite as an inflexible preliminary condition would serve no genuine interest of the accused and but add an unreal formalism to that vital branch of the administration of justice.

I do not mean to imply any right on the part of officers to interrogate or to give countenance or approval to the practice; I leave it as it is, a circumstance frequently presented to courts which is balanced between a virtually inevitable tendency and the danger of abuse.

In the later case of *The Queen v Fitton*¹⁸ Rand J. said:

Questions without intimidating or suggestive overtones are inescapable from police enquiry; and put as they were here, they cannot by themselves be taken to invalidate the response given.

On the other hand, oppressive or intimidating questioning will result in the rejection by the court of incriminating answers.¹⁹ In addition the court has a broad discretion to reject a statement, which although voluntary in the strict sense, was obtained by methods which make the statement untrustworthy or which offend the conscience of the court.

Suggestions have been made that all incriminating statements should be rejected unless made before a judicial officer.

¹⁷ *Boudreau v The King* (1949), 94 C.C.C. 1, p. 8-9.

¹⁸ [1956] S.C.R. 958, p. 963-4.

¹⁹ *R. v Howlett*, [1950] O.R. 181. Application for leave to appeal to the Supreme Court refused, 96 C.C.C. 190.

We think that *properly conducted* police questioning is a legitimate aid to investigation, and the interests of the administration of justice would not be well served by the rejection of all answers made in response to police questioning. Nor has the Committee any evidence of widespread abuse of police questioning, although we are satisfied that abuses occasionally occur. We are also equally satisfied that if the accused is adequately represented by counsel, such abuses are likely to be disclosed to the court and will lead to the rejection of an incriminating statement which has been improperly obtained.

It has been suggested to the Committee that no incriminating statement should be admitted in evidence, unless the statement and all the circumstances leading up to the making of the statement have been electronically recorded. We think that in some circumstances the protection afforded by this requirement might be more illusory than real as there would be no way of ensuring that all words spoken from the moment of contact between the police and the suspect were in fact recorded. No doubt in some circumstances the electronic recording of an interview in a police station might be helpful in enabling the court to judge the atmosphere in which the statement was made. Nevertheless, the use of such a device masks a concealed danger in the absence of complete assurance that everything leading up to the statement has been faithfully reproduced—which assurance would be difficult to obtain.

If the use of electronic recording devices becomes the normal or usual way of recording conversations in other areas of human activity, the failure of the police to electronically record interviews with a suspect will naturally give rise to justifiable suspicion as to the reason for such failure. We do not, however, consider that at the present time a rigid rule requiring the exclusion of all statements unless electronically recorded would be practical or necessarily in the interest of the accused.

The Committee is of the opinion that the accused is best protected against oppressive treatment at the hands of the police by ensuring that legal advice is available to him at an early stage of the criminal process, and by the vigilance of the courts.

In the chapter dealing with representation of the accused the Committee recommends that the protections guaranteed by the Canadian Bill of Rights be implemented by specific provisions contained in the Criminal Code, to ensure that no statement procured in violation of the suspect's right to legal advice be used against him.

The degree of protection required depends ultimately on the quality and integrity of police forces.

While, subject to the above, the Committee has not seen fit to make any recommendations with respect to the admissibility of incriminating statements, we wish to indicate however, that we think that *undue* reliance upon the obtaining of incriminating statements does not promote effective law enforcement.

Reliance upon a statement which may ultimately be rejected by the court may result in insufficient independent investigation by the police officer who has relied upon the statement in proof of the case. Oppressive or unacceptable conduct on the part of the police in obtaining a statement can result in loss of confidence in the police by the community.

Interrogation before a Judicial Officer

Recently it has been urged that a legal process of compulsory interrogation before a magistrate be created. The privilege of an accused person not to incriminate himself is deeply engrained in Canadian criminal law. Under our system, a person accused of a crime is under no obligation to say anything at any stage of the process.

A Committee of JUSTICE (The British section of The International Commission of Jurists) has proposed that statements made by a suspect (as defined in the report of the Committee) to the police should, with the exception of electronically recorded statements taken prior to arrest or arrival at a police station, not be admissible in evidence—but that a police officer should be empowered to take out a summons for the purpose of enabling him to interrogate the suspect before a magistrate. In the interrogation before the magistrate, the accused would be entitled to be represented by a lawyer, but would be required to answer questions put to him. No penalty is envisaged as being incurred for failure to answer other than that he would be informed by the magistrate that it was his duty to answer, unless the magistrate ruled otherwise, and the entire record of the proceedings including the refusal of the suspect to answer would become a part of the evidence at his trial.

The Committee is not convinced that a system of compulsory interrogation would benefit law enforcement. The necessary delay involved might make such a procedure less effective than the present powers of the police to question. A professional criminal might very well use such a procedure to get a fabricated defence on the record and avoid the rigorous cross-examination of experienced crown counsel at his trial.

The experienced police and law enforcement officers with whom the Committee has consulted have not been prepared to support the proposal of the British section of the International Commission of Jurists referred to above. Moreover, it appears to the Committee that the privilege against self-incrimination is deeply involved in the feeling of justice or fairness with which contemporary Canadian society reacts to our criminal process. *We are of the opinion that such a long respected privilege should not be disturbed except for the clearest and most compelling reasons.*

The Committee has been unable to discover such reasons in the Canadian contemporary context. Therefore, we do not recommend the introduction of a scheme of compulsory examination, especially where satisfactory evidence is lacking that such an innovation is either necessary, desirable or indeed would increase the effectiveness of the present system of investigation.

Power to Arrest

From one point of view arrest may be considered as the culmination of the investigation, rather than as a part of the investigative phase of police procedure where a crime is suspected to have been committed. Arrest may, however, in certain circumstances, properly constitute a part of police investigation. Under s. 435 of the Criminal Code a peace officer may lawfully arrest without warrant a person who has committed no offence at all, if there are reasonable grounds for believing that such person "is about to commit an indictable offence." The arrest which gives rise to the legal right to search may establish that the person arrested has in fact committed an offence, for example, the possession of instruments of house-breaking, or the possession of narcotics.

Even where an arrest is made in respect of a specific offence believed to have been committed, important investigative procedures may follow arrest. While a police officer must act upon reasonable and probable grounds in making an arrest, he is not required to have sufficient evidence to procure a conviction in a court of law or sufficient evidence to constitute what is known in law as a *prima facie* case. Procedures subsequent to arrest such as fingerprinting, identification parades, and questioning may augment the case against the accused or, on the other hand, may exonerate him.

The general power to arrest without warrant contained in s. 435 is very broad and reads as follows:

435. A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence or is about to commit suicide, or
- (b) a person whom he finds committing a criminal offence, 1960-61, c. 43, s. 14.²⁰

We have pointed out that s. 435 empowers a police officer to arrest a person where he has reasonable grounds to believe that such person is *about* to commit an indictable offence although no offence has yet been committed or attempted to be committed.

An attempt to commit an indictable offence is itself an indictable offence, and an attempt to commit an offence punishable on summary conviction is itself an offence punishable on summary conviction. Since a peace officer is empowered by s. 435 to arrest any person whom he finds committing a criminal offence, the power to arrest a person found attempting to commit an offence is conferred by that particular provision, and the power to arrest a person who he believes "is about to commit an indictable offence" would be unnecessary if that power were limited to attempts. The words "about to commit an indictable offence" obviously,

²⁰ In addition to the power conferred by s. 435 there are additional powers conferred by other sections of the Code, e.g. sections 436, 437, and s. 30.

therefore, cover conduct more remote from the actual commission of the offence than an attempt to commit it—and hence not an offence. The arrest may produce evidence of the actual commission of an offence or it may not. If further investigation, including questioning, fails to produce evidence of an offence, the person arrested must be released.

The Committee considers that the power conferred on a peace officer by s. 435 of the Criminal Code to arrest a person where he has reasonable grounds to believe that such person is about to commit an indictable offence, is an important police power in relation to the prevention of crime. The arrest of a *potential* offender, when warranted by the circumstances, may have sufficient therapeutic value to halt an incipient criminal career. The Committee considers that the paramount duty of the police is to prevent crime and normally police intervention should take place as soon as possible in order to prevent the occurrence of unnecessary harm.

Because of the broad power to arrest without warrant contained in s. 435, the vast majority of arrests in Canada are made without a warrant, rather than pursuant to a warrant of arrest signed by a justice of the peace. A warrant of arrest is, however, except in certain exceptional cases later referred to, required in order to authorize the forcible entry of premises in order to effect an arrest.

Section 438 of the Criminal Code requires a peace officer who has arrested a person with or without a warrant to bring that person before a justice of the peace within twenty-four hours after the arrest if a justice is available, and where a justice is not available, as soon as possible. Many police officers consider that s. 438 of the Code requires that an arrested person be taken before a justice of the peace even where police investigation has cleared the person arrested, or has failed to disclose sufficient evidence to support a charge. This is not the Committee's interpretation of s. 438, which was enacted for the protection of the individual by placing limits upon the time the police could detain an arrested person without bringing him before a judicial officer. The police view of the effect of s. 438 results in many persons being detained unnecessarily.

In the view of the Committee, a peace officer may lawfully release a person whom he has arrested without taking him before a justice of the peace if further investigation clears him or fails to reveal evidence of the commission of an offence. Because opinion is not uniform, however, we recommend legislative clarification along the lines of recently proposed legislation.

Detention on Suspicion

Under existing Canadian law, there is no right to detain a person for investigation except insofar as that right is contained in section 435. A police officer may request the citizen to accompany him to the police station to answer questions, but if the citizen does not choose to co-operate the police officer must allow him to go on his way or make an arrest for a specific offence, based on reasonable and probable grounds, or make an arrest

because there are reasonable and probable grounds for believing that the person arrested was about to commit an indictable offence. If the officer decides to make an arrest, he must be prepared to justify his action in a court of law if he is subsequently sued for false arrest.

In some of the states of the United States, statutes have been enacted authorizing a police officer to stop a person in a public place where he reasonably *suspects* that such person is committing, has committed or is about to commit a felony or other designated class of offence, and demand of such person his name and address and an explanation of his conduct. Such statutes commonly provide that when the officer reasonably suspects that he is in danger of physical injury he may search such person for weapons. Such statutes are commonly known as "stop and frisk" statutes.

It would appear that it is the intent of such statutes by the use of the term "reasonably suspects" to substitute a lesser degree of belief than that which is imported by the term "reasonable and probable grounds to believe". Such lesser degree of belief justifies the *limited* police action envisaged in the "stop and frisk" statutes. Where a police officer makes an arrest under s. 435 of the Code he may as an incident of arrest, search the person arrested, not only for weapons but for the purpose of discovering evidence of the crime for which he has been arrested, and may subject the person arrested to the usual procedures following arrest, including fingerprinting, where the person is charged with an indictable offence.

The so called "stop and frisk" statutes are more relevant in the American context than under Canadian law because of the narrower power of arrest in most states, and because of the exclusionary rule which prevails in the United States, whereby evidence obtained by a search as an incident of arrest is suppressed if the court comes to the conclusion that at the moment of arrest, and consequently before the incriminating evidence was found, there was an absence of reasonable and probable cause for the arrest, notwithstanding that for example narcotics, burglars' tools or offensive weapons were found in the possession of the suspect as a result of the search.

The Supreme Court of the United States has recently held that the limited action authorized by a "stop and frisk" statute may be taken where the circumstances do not afford reasonable and probable grounds for believing that an offence has been committed.²¹ We think, however, that it is undesirable, having regard to the already broad powers of arrest in Canada, and the powers incident thereto that additional power should be conferred to interfere with the citizen when no belief based on reasonable and probable grounds exists for so doing. *For the same reason, the Committee does not recommend the enactment of legislation authorizing the police to detain a person on suspicion for interrogation.* Moreover, there is virtual unanimity on the part of law enforcement officers, the police and lawyers, that the powers of arrest in Canada are adequate.²²

²¹ *Terry v Ohio*, 88 s. ct. 1868 (1968).

²² See also *Report of The Proceedings, National Conference on The Prevention of Crime* convened by the Centre of Criminology, University of Toronto, June 1965.

Whether a Person Should Be Required to Identify Himself.

Under existing Canadian law, there is no general duty on the part of a person to identify himself when called upon to do so. It has been suggested that a universal and compulsory fingerprinting system should be established and that all citizens should be required to carry identity cards.

In the view of the Committee, a very strong necessity should be required to be shown before universal fingerprinting and the carrying of an identity card should be made compulsory. We do not consider that the necessity for such measures has been demonstrated. Nor do we recommend that failure on the part of the individual to identify himself should be made a punishable offence, although we consider that there is an obvious *social* duty on the part of the citizen to assist the police in this way when asked to do so—a duty which we think most citizens will discharge if the request is made in polite terms.

We point out that if grounds exist which justify an arrest, the citizen can not complain if he is arrested rather than summoned because such a course is made necessary by his refusal to satisfactorily identify himself. Again, while failure to identify oneself does not justify arrest such a failure, when considered with suspicious circumstances, might lend additional support to a reasonable belief on the part of a police officer, that such person had committed or was about to commit an indictable offence, which a satisfactory explanation might dispel.

It should be noted that police powers are frequently supplemented by provincial legislation. A number of provincial highway traffic acts and motor vehicle acts authorize a peace officer to arrest without warrant for a breach or anticipated breach of their provisions. Some provincial statutes authorize an arrest for a breach of certain provisions only. Section 74 of the Quebec Highway Code authorizes a peace officer to arrest without warrant the driver of a motor vehicle who has committed an offence against that act if;

- (a) he cannot establish his identity
- (b) he has no driving permit
- (c) his behaviour is suspicious.²⁸

Since motor vehicles play an important role in many kinds of criminal activity, such legislation constitutes an important police power.

Universal Fingerprinting.

It is the view of the Committee that if universal fingerprinting is considered necessary or desirable for general social purposes, which would of course include the purposes of criminal law, that a separate government agency be established charged with the responsibility for collecting and maintaining fingerprint records and for making such records available only to police and other appropriate public services.

²⁸ Quebec Highway Code, R.S.Q. 1964, Ch. 231, s. 74.

Entry without Warrant to Prevent Crime or to Effect Arrest

The Committee has not recommended an enlargement of the power to arrest should be codified in view of the fact that there is a degree of uncertainty among police officers as to the existence and extent of such powers.

We think that a police officer presently has the right to enter premises, including a dwelling house, by force if necessary, *without a warrant*, to prevent the commission of an offence which would cause immediate and serious injury to any person, if he believes on reasonable and probable grounds that any such offence is about to be committed. We think also that a police officer has the right to enter premises, including a dwelling house, by force if necessary, *and without a warrant* to effect the arrest of a person who has been found committing a serious crime; and who is being freshly pursued and who seeks refuge in such premises.²⁴

In the view of the Committee the above powers exist under the common law and are preserved by s. 7 of the Criminal Code. Police powers should not, however, require research to ascertain their existence and extent, but should be readily ascertainable and clearly defined.

Use of Firearms in Prevention of Flight to Avoid Arrest

The amount of force which a police officer is entitled to use in effecting the arrest of a person who takes to flight to avoid arrest is governed by s. 25 of the Criminal Code, the relevant parts of which are as follows:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
 - (a) as a private person,
 - (b) as a peace officer or public officer,
 - (c) in aid of a peace officer or public officer, or
 - (d) by virtue of his office,is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose . . .
- (3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.
- (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid

²⁴The *Crimes Act*, Stats. New Zealand 1961, No. 43, s. 317 affords an example of a codification of common law principles with respect to these powers.

arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

In *Priestman v Colangelo et al*, Cartwright J. (as he then was) said:

When subsection (3) and subsection (4) of section 25 are read together the conclusion is inescapable that if all the conditions prescribed in subsection (4) are present the officer is justified in using force that is intended or is likely to cause death or grievous bodily harm to the person in flight.²⁵

Prior to the coming into force of the Criminal Code of 1955, the right of a police officer to arrest without a warrant, in the belief on reasonable and probable grounds that an offence had been committed, was limited to certain specified offences. Under Section 435 of the present Criminal Code this power extends to all indictable offences. In addition, a police officer may arrest without a warrant any person whom *he finds committing* an offence punishable on summary conviction. Some indictable offences are relatively minor, for example, the theft of anything, however trivial, except where otherwise prescribed by law, constitutes an indictable offence.

The Committee is accordingly of the view that the degree of force authorized by s. 25 in order to apprehend a person who takes to flight to avoid arrest is excessive.

The Committee has examined the directives issued by a number of major police forces in Canada to members of those forces with respect to the use of firearms in apprehending a person who takes to flight to avoid arrest. Such directives generally limit the use of firearms to cases where the person sought to be apprehended, and who has taken to flight, has committed or is reasonably believed to have committed a *serious* crime and whose escape cannot be prevented by reasonable means in a less violent manner.

Police policy in some forces, however, restricts the use of firearms to the apprehension of *dangerous* criminals. The Committee agrees with the basic policy of all such directives. There are, however, offences which are considered serious in the hierarchy of offences which do not involve danger to life and limb, for example, forgery.

The Committee considers that firearms should only be used in order to prevent the escape of persons who represent a threat to the physical safety of the public.

The directives issued by the different police forces, while more specific than the provisions of the Criminal Code, and commendable, do not, in the view of the Committee, in all cases, afford sufficient guidance to the police officer.

In the view of the Committee, the use of firearms to prevent the escape of a person who has taken to flight to avoid arrest after having committed a minor offence or even a serious offence which does not represent a threat to personal safety, is not warranted.

²⁵ Per Cartwright J., dissenting, in *Priestman v Colangelo Shynall and Smythson*, [1959] S.C.R. 615, p. 631.

The use of firearms for the purpose of preventing the escape of a person who has committed an offence frequently endangers the lives of innocent citizens as well as the person sought to be apprehended. Such measures are, accordingly, justified only where the harm sought to be prevented is grave.

We think that it is preferable where the escape cannot be prevented without the use of firearms—unless the crime is a serious one involving violence—to temporarily abandon the chase rather than endanger the lives of citizens or risk working summary execution upon the offender for a minor crime or for a non-violent crime. Moreover, we think that legislative direction is desirable not only because it would create a uniform rule applicable throughout the country, but would give greater guidance to the police.

The Committee, therefore, recommends that section 25 of the Criminal Code be amended to prohibit the use of firearms by a peace officer or other person lawfully assisting him in order to prevent the escape of a person who has taken to flight to avoid arrest, notwithstanding the arrest sought to be made is lawful, unless:

- (a) The person who has taken to flight to avoid arrest is believed on reasonable and probable grounds to have committed or attempted to commit a serious offence involving violence.**
- (b) There are reasonable and probable grounds for believing that there is a substantial risk that the person whose escape is sought to be prevented may seriously endanger the public if his escape is not prevented.**
- (c) Such escape cannot be prevented by reasonable means in a less violent manner.**

We point out that such a rule would in no way affect the right of a police officer to use firearms, where their use is reasonable in self-defence under s. 34 of the Criminal Code, or where their use is reasonable to protect the citizen under s. 27 of the Code, or in other circumstances where the use of firearms may reasonably be necessary.

The Power to Search

Power to Search the Person as an Incident of Arrest. After making an arrest, either with or without a warrant, a police officer has the right to search the prisoner in order to discover anything which might afford evidence of the crime for which he has been arrested, or for any weapon or instrument with which he may do violence to effect his escape. The power to search the person is nowhere conferred by the Criminal Code and is derived from the common law, which is preserved in such matters by s. 7 of the Criminal Code.

Apart from special provisions contained in particular statutes, for example, the Narcotic Control Act, the right to search the *person* exists only as an incident of arrest.

In the view of the Committee, however, the right to search the person and clothing of a person under arrest to obtain evidence of the offence does not authorize the withdrawal of blood, the use of stomach pumps or other quasi-surgical measures to obtain evidence.²⁶

Search of Premises as an Incident of Arrest. Apart from special powers conferred by particular statutes, there is no general right to enter and search premises without the authority of a search warrant except as an incident of arrest.

Where a person has been arrested, either with or without a warrant, the right of search extends not only to the person of the accused, but to premises under his control. In modern times the right to search premises, no doubt, also extends to a vehicle or other means of conveyance under the control of the accused.

In the existing state of the law, it is uncertain whether the power to *seize* things uncovered in the course of a search, incidental to an arrest, is limited to things affording evidence of the crime for which the accused has been arrested; or whether articles which afford evidence of another and different offence committed by the accused, or which afford evidence of a crime committed by a third person may be seized. The question is perhaps of little more than academic interest in so far as it relates to the seizure of things which afford evidence of another offence committed by the accused, since the accused could be forthwith arrested for the additional offence which would justify the seizure of the material evidence in question.

There is some authority for holding that an officer, who in the course of a lawful search uncovers evidence of a crime committed by a third person, could justify its seizure as being in the interest of the state, if subsequently sued.²⁷ This judgment has, however, been severely criticized.²⁸

The Committee has already indicated that it considers that police powers should be clearly defined and readily ascertainable. The existing law with respect to the nature and extent of the power to search the person of the accused, the premises where the accused is arrested, and vehicles or chattels under his control, as an incident of arrest, does not meet this test.

The Committee therefore, recommends:

- 1. Codification of police powers relating to the right to search both the person of the accused, the premises where he is arrested and vehicles or other means of transportation under his control as an incident of arrest.**

²⁶ Sowle, C. R. (ed.). "The Privilege of Self-Incrimination (England)". *Police Power and Individual Freedom*. Chicago: Aldine Publishing Co. 1962, p. 258. See also section 224 (4) of the Criminal Code which provides that:

"no person is required to give a sample of blood, urine, breath or other bodily substance for chemical analysis for the purposes of this section"

²⁷ *Elias et al v Pasmore et al*, [1934] 2 K. B. 164.

²⁸ Radzinowicz, L. and J. W. C. Turner (eds.). *The Modern Approach to Criminal Law*. London: Macmillan & Co., 1948, p. 77.

2. That such legislation specifically prohibit the use of quasi-surgical procedures such as blood withdrawal or the use of stomach pumps upon the person of the accused without his consent.

Search of Premises under a Search warrant. As we have pointed out, apart from the power to search premises as an incident of arrest, and apart from special powers contained in particular statutes, there is no power to search premises without a search warrant authorizing the search of particular premises.

At common law the only purpose for which a warrant to search premises could be issued was in cases where it was suspected that stolen goods were concealed on the premises. In England, search warrants are now authorized under a great many statutes for specific purposes. As a result the English law is exceedingly complex and is said to contain many gaps.

In an article on police powers in England by D. A. Thomas, relating to search and seizure, the author says:

Examples of the deficiencies and anomalies in the law are numerous. The police have no power, nor can they obtain warrants to search premises for the body of a murder victim or to seize a murder weapon or vehicle used in connection with a murder (or in fact many other crimes).²⁸

The learned author recommends the enactment of a general statutory provision for search, using as a model the provisions of the Australian Federal Crimes Act, which is substantially similar to the provisions of section 429 of the Canadian Criminal Code, conferring authority on a justice of the peace to issue search warrants.

Section 429 of the Criminal Code which has existed in substantially the same form since the Canadian Criminal Code was enacted in 1892, provides:

- (1) A justice who is satisfied by information upon oath in Form 1, that there is reasonable ground to believe that there is in a building, receptacle or place,
 - (a) anything upon or in respect of which any offence against this Act has been or is suspected to have been committed,
 - (b) anything that there is reasonable ground to believe will afford evidence with respect to the commission of an offence against this Act, or
 - (c) anything that there is reasonable ground to believe is intended to be used for the purpose of committing any offence against the person for which a person may be arrested without warrant, may at any time issue a warrant under his hand authorizing a person named therein or a peace officer to search the building, receptacle or place for any such thing, and to seize and carry it before the justice who issued the warrant or some other justice for the same territorial division to be dealt with by him according to law.

²⁸ [1967] *Crim. Law Rev.* 3; see also Devlin, Lord Patrick. *The Criminal Prosecution in England*. London: Oxford University Press, 1960, p. 53.

In addition to the general provisions of s. 429, there are specific provisions with respect to the issuing of search warrants in other sections of the Code related to particular offences, for example, disorderly houses.

It will be observed that under s. 429 of the Code a warrant may be issued, inter alia, to search any building, receptacle or place if there is reasonable ground to believe that there is in such building, receptacle or place, anything that will afford evidence with respect to the commission of an offence against the Act. The warrant to search may be issued, although no prosecution is pending, in an effort to discover evidence of a crime or after a charge has been laid to discover further evidence. In practice such searches often lead to the discovery of private memoranda and records which frequently constitute the main or at least substantial evidence against an accused at his trial in certain kinds of cases. By way of contrast, in the United States the Supreme Court of the United States held in *Gouled v. U.S.*³⁰ that search warrants may be used only to seize contraband or the fruits or instrumentalities of crime and that search warrants

... may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding. . . .

Evidence which in Canada is subject to search and seizure, and which often constitutes important evidence for the prosecution, has until recently been beyond the reach of law enforcement officials in the United States as a result of the interpretation of the Supreme Court in the *Gouled* case of constitutional limitations upon search and seizure. The Supreme Court of the United States recently in *Warden, Maryland Penitentiary v Hayden*,³¹ held that the 14th Amendment to the Constitution does not prohibit the search of premises for things which were merely evidential. The articles seized in the *Hayden* case, however, were articles of clothing. The court said:

The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction, therefore, did not compel respondent to become a witness against himself in violation of the Fifth Amendment. *Schmerber v California* 384, U.S. 757. This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

The Omnibus Crime Control and Safe Streets Act of 1968 provides that:

A warrant may be issued to search for and seize any property that constitutes evidence of a criminal offence in violation of the laws of the United States.

³⁰ 255 U.S. 298 at p. 309 (1921); referred to in United States. *The Challenge of Crime in a Free Society*. Report of the President's Commission on Law Enforcement and Administration of Justice. Washington: U.S. Gov't Printing Office, 1967, p. 126.

³¹ 387 U.S. 294 (1967).

The learned authors of a recent work on criminal justice in the United States⁸² ask:

Would this statutory provision authorize the seizure of a defendant's diary?
If so, would such a seizure be constitutional under the Hayden case?

Such a document would, unquestionably, be subject to search and seizure under Canadian law.

Extraordinary Powers of Search. While police powers to enter and search premises and to search persons are in general restricted as set out above, there are a number of instances in both federal and provincial legislation where much wider powers are conferred for particular purposes. An example may be found in s. 96 of the Criminal Code conferring the power on a peace officer to search *without warrant any person, vehicle or premises other than a dwelling house* where the officer believes on reasonable grounds that an offence has been committed against the Code relating to offensive weapons or unregistered firearms.

Section 10 (1) of The Narcotic Control Act in part, provides:

A peace officer may at any time;

- (a) without a warrant enter and search any place other than a dwelling house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed;
 - (b) search any person found in such place; and
 - (c) seize and take away any narcotic found in such place, any thing in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence.
- (2) A Magistrate who is satisfied by information upon oath that there are reasonable grounds for believing that there is a narcotic, by means of or in respect of which an offence under this Act has been committed, in any dwelling house may issue a warrant under his hand authorizing a peace officer named therein at any time to enter the dwelling house and search for narcotics.

Writs of Assistance. Provision is made under four federal statutes, namely, *The Customs Act, The Excise Act, The Narcotic Control Act, and The Food and Drugs Act* for the granting of writs of assistance by a Judge of the Exchequer Court of Canada to the persons specified in the different Acts. Under *The Customs Act* and *The Excise Act* the writ of assistance is granted, upon the application of the Attorney-General of Canada, to an "officer," which means a person employed in the administration of those Acts and

⁸² Inbau, Fred E. et al. (eds.). *Cases and Comments on Criminal Justice*. Mineola: The Foundation Press, 1968, 2nd ed., p. 494.

includes a member of the Royal Canadian Mounted Police force. Under *The Narcotic Control Act* and *The Food and Drugs Act* the writ of assistance is granted to the person named therein on the application of the Minister. In practice writs of assistance under these Acts are granted to members of the Royal Canadian Mounted Police force. The granting of the writ, upon proper application being made, is mandatory under *The Excise Act*, *The Narcotic Control Act* and *The Food and Drugs Act*. No meaningful discretion is vested in the court under *The Customs Act* with respect to the granting of the writ where a proper application is made.³³

... the writ of assistance confers authority upon the person named therein to exercise the wide powers of search throughout the whole of his career and without limit as to place. . . .³⁴

The person to whom a writ of assistance has been granted may enter and search any building including a dwelling house, using force if necessary, provided only that he has reasonable grounds for exercising his authority in the particular instance. The writs are in fact general warrants not limited to any particular place or time.

The extent of the power conferred upon a person to whom a writ of assistance has been granted raises serious questions as to whether such powers should be conferred upon any person in a democratic country. The existence of writs of assistance is viewed by historians as one of the precipitating causes of the American Revolutionary War. In *Stanford v Texas*³⁵ Mr. Justice Stewart delivering the judgment of the Supreme Court of the United States said:

It is now settled that the fundamental protections of the Fourth Amendment are guaranteed by the Fourteenth Amendment against invasion by the States. The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing* the place to be searched, and the persons or *things to be seized*."

These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new nation should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British Tax Laws. They were denounced by James Otis as the "worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book", . . .

³³ *In Re Writs of Assistance*, [1965] 2 Ex. C.R. 645; See also Parker, G. E. "The Extraordinary Power To Search and Seize and the Writ of Assistance". 1 *U.B.C. Law Rev.* 688 (1963); Trasewick, E. W. "Search Warrants and Writs of Assistance". 5 *Crim. Law Q.* 341 (1962-63).

³⁴ *In Re Writs of Assistance*, [1965] 2 Ex. C.R. 645, pp. 650-51.

³⁵ 379 U.S. 476, p. 481 (1965).

It does not appear, however, that the broad powers conferred by the granting of these writs has been abused in Canada, and the Committee is informed that a system for recording their use has been developed so that any abuse thereof is more visible, and hence subject to parliamentary scrutiny. Moreover, the writ is granted to a particular person and is not transferable. The number of members of the Royal Canadian Mounted Police to whom the writ is granted is restricted.

It is to be noted also that the principal areas in which they are granted involve matters of vital public interest, namely, the protection of the revenue and the suppression of traffic in narcotic drugs.

After giving careful consideration to the matter, the Committee does not see fit to recommend the abolition of the power to grant writs of assistance in the area of law enforcement where they are authorized by existing legislation.

Indirect Investigation of Offences through Administrative Tribunals

Under Canadian law, as the Committee has pointed out, *the accused* in a criminal prosecution is not obliged to incriminate himself. He is not required to answer questions put to him by the police, and at his trial he cannot be compelled to give evidence at the instance of the prosecution. If, however, he chooses to give evidence on his own behalf at his trial, he may be cross-examined for the purpose of incriminating himself.

Under the common law a *witness* is entitled to refuse to answer any question on the ground that it may tend to incriminate him. In the United States, this privilege is protected by the Vth Amendment to the Constitution, with the consequence that a person summoned as a witness before a tribunal or commission having power to summon witnesses and to compel them to give evidence under oath, may refuse to answer questions on the ground that the answer may incriminate him.

In Canada the privilege of a *witness* in the common law sense was abolished in criminal cases by the Canada Evidence Act in 1893. Section 5 of The Canada Evidence Act provides that no witness shall be excused from answering any question upon the ground that the answer to such question may tend to incriminate him. The section provides, however, that if the witness objects to answer upon the ground that his answer may tend to incriminate him, and if but for the provisions of The Canada Evidence Act or the provisions of an act of any provincial legislature, the witness would, therefore, have been excused from answering such question, then although the witness is by reason of the Canada Evidence Act, or by reason of such provincial act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceedings against him thereafter taking place—other than a prosecution for perjury. The Canada Evidence Act is, of course, applicable only to proceedings over which Parliament has legislative jurisdiction. The provinces have, however, enacted similar legislation applicable to provincial proceedings.

There is no duty upon the court or other tribunal to inform a witness of his right to object, and if he fails to object, his answer is admissible against him in a subsequent criminal prosecution.³⁶

Both federal and provincial statutes have created administrative tribunals with all the powers of a court of law to summon witnesses and to require them to give evidence under oath with respect to the matter which the tribunal is authorized to investigate. Such investigations frequently are the forerunners of criminal prosecutions. Because the person to whom the questions are directed is, in form, a witness, although in fact he may be suspected of a crime, he is subject to compulsory examination.

Even in those cases where the witness is aware of his right to object on the ground that his answer may tend to incriminate him and exercises that right, the effect of the objection is merely to prevent his *answer* being admissible in evidence in a subsequent proceeding. A searching examination may, however, elicit facts or clues which enable the case to be independently proved. *Thus the abolition of the privilege of a witness to refuse to answer on the ground that his answer may tend to incriminate him places an additional and powerful weapon in the hands of law enforcement.*

Perhaps the most famous example of an investigation of this type, which was followed by criminal prosecutions of a number of persons called as witnesses, is the Royal Commission, constituted under the Federal Inquiries Act which sat in 1946 to conduct an investigation into a Russian espionage network which was revealed when Igor Gouzenko defected and left the Russian Embassy removing documents pertaining to the network.

Where death has occurred under suspicious circumstances, it is customary to compulsorily question suspects under provincial coroners' acts.

The Supreme Court of Canada has, however, held that provincial legislation which purported to make a person *charged with murder*, as distinct from a person who is merely under suspicion, a compellable witness at an inquest into the death of the deceased, was *ultra vires* as being legislation in relation to criminal law and hence within the exclusive legislative jurisdiction of Parliament.³⁷

In addition to *The Inquiries Act*, examples of other federal statutes which authorize the compulsory examination of witnesses are *The Excise Act*, *The Income Tax Act*, *The Combines Investigation Act* and *The Bankruptcy Act*.

In the provincial area, securities legislation,³⁸ fire marshalls' acts and fire commissioners' acts, as well as provincial public inquiry legislation, confer similar power.

³⁶ *Tass v The King* (1947) 87 C.C.C. 97, p. 99.

³⁷ *Batary v The Attorney-General for Saskatchewan et al.*, [1965] S.C.R. 465.

³⁸ In *International Claim Brokers Ltd. v. Kinsey et al* (1966), 57 D.L.R. 2d 357, sections 23 and 25 of *The Securities Act*, Stats. B.C. 1962, c. 55 were held to be *intra vires* notwithstanding that s. 23 of the Act empowers the Commission to appoint a person to make an investigation where, from a statement made under oath, it appears probable to the Commission that a person or Company has, *inter alia*, "committed an offence under the Criminal Code in connection with a trade in securities".

The Committee observes that such legislation frequently is operative in areas of activity where sophisticated crime occurs.

Perhaps the most striking example of the use of administrative powers to investigate crime is to be found in the Quebec and Ontario Police Acts. Section 19 of *The Quebec Police Act*³⁹ provides that the Quebec Police Commission shall make an inquiry, whenever so requested by the Lieutenant-Governor in Council, *into any aspect of crime that he indicates*.⁴⁰

Section 21 of the Act provides:

For the purposes of such inquiries the Commission and each of its members and every person authorized by it to make an inquiry shall be vested with the powers and immunities of commissioners appointed under the Public Inquiry Commission Act. (Revised Statutes, 1964, Chapter II)

Section 22 of the Act provides:

Every person who testifies at any such inquiry shall have the same privileges as a witness before the Superior Court and articles 307 to 310 of the Code of Civil Procedure shall apply to such person, *mutatis mutandis*. Such person shall be entitled to the assistance of an advocate.

Section 48 (a) of *The Ontario Police Act*, in part, reads:

48 (1) The Lieutenant Governor in Council may direct the Commission to inquire into and report to him upon any matter relating to,
(a) the extent, investigation or control of crime; or
(b) the enforcement of law,
and he shall define the scope of the inquiry in the direction.⁴¹

The section provides that the Commission has all the powers to enforce the attendance of witnesses, and to compel them to give evidence and produce documents and things as are vested in any court in civil cases. The section further provides that upon the request or with the consent of a witness at an inquiry, his evidence shall be taken in private, and that a witness has the right to retain and instruct counsel.

The Committee has pointed out that there is at the present time no legal duty imposed upon a court or other tribunal to inform a witness with respect to the protection afforded by section 5 of *The Canada Evidence Act*. Sometimes a court or other tribunal will advise a witness with respect to his rights, but generally the witness is not so advised. We think that such advice ought in all cases to be given.

³⁹ Assented to the 21st of June, 1968.

⁴⁰ In *Bedard v Dawson and The Attorney General For Quebec*, 40 C.C.C. 404, Duff J. said, p. 407-8:

"The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the Provinces seem to be free to legislate."

⁴¹ R.S.O. 1960, Ch. 298 (as amended by 1964, c. 92, s. 17).

The Committee recommends that section 5, sub-section (2) of the Canada Evidence Act be amended to provide that no answer made by a witness required to give evidence before a court, administrative tribunal or other body having the power to compel witnesses to attend and give evidence under oath shall be receivable in evidence in any subsequent criminal proceedings against such witness, other than a prosecution for perjury in the giving of such evidence, unless it is established that prior to the making of such answer such court, administrative tribunal or other body advised the witness of the protection afforded by section 5, sub-section (2) of the Canada Evidence Act and the procedure required to be followed to obtain the protection afforded thereby.

Additional Powers

It has been suggested to the Committee in a brief submitted by a committee of the Canadian Bar Association, that there are additional powers available to law enforcement officers which are perhaps not sufficiently used. For example, sections 171, 172 and 174 of the Criminal Code, subject to the conditions prescribed by those sections, authorize the compulsory examination under oath before a justice of the peace persons who appear to be the keepers of common gaming houses or common bawdy houses as well as those found therein.

The power of a justice of the peace who *receives* an information to hear the evidence of witnesses, where he considers it desirable or necessary to do so, has been used as an aid to investigation where the matter under investigation is one that is not easily exposed.⁴² The prosecution is, accordingly, able to *compulsorily* examine witnesses who might otherwise refuse to reveal information.

Admissibility of Evidence Obtained by Illegal Means

The Canadian and English Rule

The rule of evidence which excludes confessions which have been obtained by threats or promises or oppression is, under Canadian law, based upon the fact that a confession or incriminating statement obtained by such methods may be untrustworthy.

It has long been the law that real or physical evidence which is discovered as a result of an inadmissible confession is admissible. Thus, if a suspect, as a result of threats of violence exercised by a person in authority, were to confess that he committed a certain murder and that the rifle with which the murder was committed was hidden in his basement, evidence on the part of the police that a rifle was found in the accused's basement, and evidence of a ballistics expert that the rifle in question was the one which fired the bullet

⁴² *Reg v Ingwer et al.*, [1960] O.R. 60.

which killed the deceased would be clearly admissible under Canadian law. Such evidence would equally be clearly inadmissible under the so called "Exclusionary Rule," in the United States, by virtue of which not only evidence directly obtained by illegality is inadmissible, but also evidence *derived* from such illegally obtained evidence is inadmissible.

It has been held in Canada, that not only is the evidence with respect to the finding of the rifle admissible, but so much of the confession as is confirmed by the finding of the rifle is admissible. Under this doctrine, evidence could be given by the police that the accused showed them where the rifle was or told them where to look for it. That part of the confession in which the accused said that he committed the murder would, however, be inadmissible because that statement is not confirmed by the finding of the rifle. The accused's knowledge of the whereabouts of the rifle does not confirm the truth of the statement that he committed the murder. His knowledge of the whereabouts of the rifle is consistent with the commission of the murder by someone else and the accused merely knowing where that person concealed the rifle.⁴³

The Canadian courts have consistently held that real or physical evidence, which is otherwise relevant and admissible, is not rendered inadmissible by the fact that the evidence, for example a blood sample, was obtained by unlawful force.⁴⁴

The courts have refused to analogize incriminating substances taken from the body of the accused or physical evidence obtained by illegal searches to confessions. The probative value of the real or physical evidence is not diminished by the unlawful means used to obtain it.

The leading English authority in modern times is *Kuruma v The Queen*.⁴⁵ In that case the accused, a native of Kenya, had been sentenced to death for the illegal possession of ammunition. The ammunition had been discovered on the accused's person as a result of an illegal search and seizure. The Judicial Committee of the Privy Council advised Her Majesty to dismiss the appeal from the judgment of the Court of Appeal for Eastern Africa.

Affirming the conviction although "there were matters of fact which caused them some uneasiness," Lord Goddard in delivering the reasons of the Judicial Committee said:

In their Lordships' opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained.

⁴³ *R v St. Lawrence* (1949), 93 C.C.C. 376; *Reg. v Haase* (1965), 45 C.R. 113, aff'd at p. 32.

⁴⁴ *A.G. for Quebec v Begin*, 1955 S.C.R. 593; *R v McNamara* (1951), 99 C.C.C. 107.

⁴⁵ [1955] 2 W.L.R. 223.

Their Lordships did, however, recognize that in a criminal case the judge always has a discretion to disallow evidence if the strict rules of evidence would operate unfairly against an accused.

Lord Goddard said:

If, for instance, some admission of some piece of evidence, e.g., a document, had been obtained from a defendant by a trick, no doubt the Judge might properly rule it out.

As Dr. Glanville Williams has pointed out it seems strange if a judge may, in his discretion, reject evidence which has been obtained by fraud and may not, equally in the exercise of his discretion, reject evidence obtained by illegal force.⁴⁶

American Exclusionary Rule Respecting Evidence Illegally Obtained

In the United States, evidence which has been obtained by illegal search and seizure is inadmissible in a criminal prosecution in both federal and state courts.⁴⁷ The rule has many supporters. It also has many critics.

... the purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way by removing the incentive to disregard it."⁴⁸

The supporters of the rule claim that conventional sanctions such as the right of the citizen to bring an action in tort for damages, to initiate a criminal prosecution for assault, and internal police disciplinary procedures, have not proved effective to control lawlessness in law enforcement.

In the United States, where evidence has been illegally obtained, the evidence is suppressed on a pre-trial motion. The increasing number of such motions would seem to lend support to those who claim that the exclusionary rule has not been effective in deterring illegal searches and seizures.

The rule equally excludes evidence where "the constable has blundered" and where the violation is deliberate. The rule excludes not only the evidence directly obtained by an illegal search and seizure but also evidence, which has itself been lawfully obtained, but which is discovered as a result of leads uncovered by an illegal search and seizure. The application of the rule has led to the exclusion of the testimony of a witness who was discovered in the course of an unlawful search.⁴⁹

⁴⁶ Williams, Glanville, "Evidence Obtained by Illegal Means". [1955] *Crim. Law Rev.* 339, p. 344.

⁴⁷ *Mapp v Ohio*, 367 U.S. 643 (1961).

⁴⁸ *Ibid.* at p. 656.

⁴⁹ Sowle, C. R. (ed.). "The Exclusionary Rule Regarding Illegally Seized Evidence; The Exclusionary Rule in the American Law of Search and Seizure". *Police Power and Individual Freedom* (Part 11). Chicago: Aldine Publishing Co., 1962, p. 77.

Professor Monrad Paulsen, one of the strongest supporters of the Exclusionary Rule, has said:

The case against the rule is an impressive one.⁵⁰

A striking illustration of the working of the rule is found in the recent case of *Sibron v New York*.⁵¹ Sibron was convicted of unlawful possession of heroin. He moved before the trial to suppress the heroin seized from his person by the arresting officer. After the trial court refused his motion he pleaded guilty, preserving his right to appeal the evidentiary ruling.

The arresting officer saw Sibron conversing with a number of known addicts over an eight hour period. He saw Sibron speak to three more known addicts in a restaurant. The officer asked Sibron to come outside and said: "you know what I am after." Sibron put his hand in his pocket and simultaneously the officer thrust his hand in the same pocket and found several envelopes containing heroin. The Supreme Court of the United States held that there was no reasonable and probable cause to arrest Sibron prior to the finding of the heroin, which was consequently obtained by an illegal search, since the search could only be justified as an incident of a lawful arrest. The court held that the evidence with respect to the finding of the heroin should, accordingly, have been suppressed and reversed the conviction.

Scots Law Respecting the Admissibility of Evidence Illegally Obtained

The law of Scotland adopts a flexible rule with respect to the admissibility of evidence which has been illegally obtained. The rule is stated in a leading work on Scottish criminal procedure to be as follows:⁵²

There is no absolute rule governing the matter, the question whether any given irregularity ought or ought not to be excused depending in each case upon the nature of the irregularity and the circumstances in which it was committed, an important consideration always being whether the admission of the evidence will be fair to the accused. . . .

Conclusions and Recommendations Respecting Illegally Obtained Evidence

The problem of unlawful arrests and illegal searches has not been as acute in Canada as in the United States. There are a number of reasons for this. Generally speaking, the wide powers entrusted to the police have been exercised responsibly and with restraint. Since there are no constitutional limitations upon Parliament, police powers can be expanded when such expansion is required to cope with a particularly difficult problem of law enforcement.

⁵⁰ Sowle, C. R. (ed.), "The Exclusionary Rule Regarding Illegally Seized Evidence: The Exclusionary Rule and Misconduct by the Police". *Police Power and Individual Freedom* (Part 11). Chicago: Aldine Publishing Co., 1962, pp. 87 and 89.

⁵¹ 88 S.Ct. 1889 (1968).

⁵² Watt, F. C. (ed.). *Renton and Brown's Criminal Procedure*. 3rd ed. Edinburgh: W. Green & Sons, 1956, p. 429.

In comparison with many other jurisdictions governed by the British legal system, Canada has been very susceptible to demands for placing broad and sweeping powers in the hands of police and other enforcement officers.⁵³

Actions for assault and false arrest and trespass have proved not ineffective as a means of controlling excesses in law enforcement. The trend of recent legislation has been to make the doctrine of *respondeat superior* applicable to actions in tort against police officers,⁵⁴ with the result that the municipality is liable for damages recovered against the police officer. Those who are required to pay the bills incurred as a result of the violation of the citizens' rights are likely to exercise stricter control over the actions of the individual police officer.

The Committee considers that an inflexible rule which requires the rejection of all evidence illegally obtained is neither necessary or desirable.

The Committee is, however, of the view that there may be circumstances under which the court should be empowered to reject evidence which has been illegally obtained.

It is uncertain whether this discretion exists at the present time, although it would seem that it should exist because of the recognized discretion which presently exists to exclude evidence where the strict rules of evidence would operate unfairly against the accused.

The Committee also wishes to emphasize that the use of evidence which has been obtained by a *deliberate* violation of the rights of the suspect may reduce respect for the entire criminal process and diminish the likelihood of the offender's rehabilitation.

The Committee considers that legislative clarification of the law in respect of the admissibility of evidence which has been illegally obtained is desirable.

The Committee, therefore, recommends the enactment of legislation to give effect to the following principles:

- 1. The court may in its discretion reject evidence which has been illegally obtained.**
- 2. The court in exercising its discretion to either reject or admit evidence which has been illegally obtained shall take into consideration the following factors:**
 - (i) Whether the violation of rights was wilful or whether it occurred as a result of inadvertance, mistake, ignorance, or error in judgment.**
 - (ii) Whether there existed a situation of urgency in order to prevent the destruction or loss of evidence, or other circumstances which in the particular case justified the action taken.**

⁵³Parker, G. E. "The Extraordinary Power to Search and Seize and the Writ of Assistance", 1 *U.B.C. Law Rev.* 688 (1963).

⁵⁴*The Ontario Police Act*, R.S.O. 1960, c. 298 (as amended by Stats. Ont. 1965, c. 99, s. 6, and Stats. Ont. 1966, c. 118, ss. 4-5), *The Police Act*, R.S.A. 1955, c. 236 (as amended by Stats. Alta. 1967, c. 61, s. 3).

(iii) Whether the admission of the evidence in question would be unfair to the accused.

- 3. The legislation should provide that the discretion to reject evidence illegally obtained provided for by such legislation does not affect the discretion which a court now has to disallow evidence if the the strict rules of evidence would operate unfairly against an accused.**

Police Intelligence

One of the most important aspects of police work in the field of crime prevention and the detection and apprehension of offenders involves the gathering of information with respect to intended crimes and the organization of criminal groups. Police intelligence may be related to the task of obtaining evidence to sustain a specific prosecution, or it may have longer term objectives related to acquiring knowledge of the existence of criminal organizations; the scope of their operations and their plans and methods of operation in order to be able to effectively combat them.

Informers and Undercover Agents

Traditionally, information as to intended crimes has been obtained from informers and undercover agents. In order to obtain evidence of criminal conspiracies, evidence with respect to trafficking in narcotic drugs and similar crimes, it is sometimes necessary for law enforcement officers to pose as members of a criminal group or to make purchases of narcotic drugs.

In order to ascertain whether the provisions of statutes enacted for the protection of the health and welfare of the community, such as the Food and Drugs Act,⁵⁵ are being complied with, law enforcement officers may make purchases for the purpose of analysis or offer to purchase controlled drugs in order to ascertain whether restrictions imposed by the legislation with respect to their sale are being complied with. Such activities fall within the scope of legitimate law enforcement.

The Committee wishes to emphasize however, that the function of law enforcement officers is to *detect* crime not to *create* or *encourage* crime. It is proper to pretend to be a member of a criminal gang to obtain evidence of their criminal designs. It is legitimate in the investigation of such offences as the sale of narcotic drugs for a law enforcement officer, by posing as a drug addict or a purveyor of narcotics, to afford a specific occasion for the making of a sale, in order to obtain evidence upon which to base a prosecution, to a person who has a pre-existing intention to traffic in narcotic drugs, as evidenced by a continuing course of conduct. Stratagem may be used to catch a criminal.

On the other hand, the use of persuasion or unfair means to induce the commission of an offence by a person who had no pre-existing intention to commit it, and who would not have committed the offence but for the

⁵⁵ *Food and Drugs Act*, R.S.C. 1952, c. 76, s. 11.

instigation of law enforcement officers or an *agent provocateur* employed by them, is in the opinion of the Committee wholly indefensible.

Official Instigation of Crime

The Canadian criminal law has not developed a rule of public policy precluding the conviction of a person who has committed an offence as a result of the instigation of law enforcement officers or agents employed by them. No doubt one of the reasons for the failure of the Canadian law to develop such a policy is that departure from proper practices on the part of law enforcement officers have been infrequent. Despite the infrequency of improper and unfair inducements to commit crime on the part of law enforcement officers or *agents provocateur* employed by them, the Committee is of the view that it is desirable that there should be a clear legislative statement with respect to the unacceptability of official *instigation* of crime. The Canadian courts have on occasions criticized the activities of *agents provocateur*, but have consistently held that if the offence has been committed, the fact that the accused was induced to commit it as a result of official instigation affords no defence.

Sometimes, however, the activities of law enforcement officers have the effect of negating an essential element of the offence with the result that no offence has been committed.

The Committee considers that the dividing line between proper and improper law enforcement is indicated by the court in *Amsden v Rogers*.⁵⁶

The accused was charged with selling liquor contrary to the Saskatchewan Liquor Licence Act on the complaint of one Amsden, a special constable in the employ of the government. The accused was a brakeman and possessed an excellent character. The accused gave evidence and admitted that he procured the liquor and gave it to Amsden, *who represented himself as being too sick to go to the buffet car for it himself*. The accused was acquitted and his acquittal was upheld by Lamont J. on appeal, on the ground that the prosecution had failed to prove that the liquor was sold in Saskatchewan, the accused having sworn that the sale took place in Alberta. In the course of his judgment, Lamont J. indicated his view with respect to such police practices:

I do not say that in their efforts to secure evidence in cases where crimes have been committed the officers of the law are not sometimes entitled to resort to pretense and even false statements. There may be cases where that is necessary in the interests of justice to enable them to secure the evidence, and the fact that an officer has resorted to subterfuge may not cast discredit upon the evidence which he discovers by means thereof. But, in my opinion, it is a different matter where the false statements are made, not for the detection of crime committed but for the purpose of inducing its com-

⁵⁶ (1916), 26 C.C.C. 389.

mission, and inducing its commission in order that the person making these statements may be able to prefer a charge for the offence committed at his solicitation. . . .

A more recent case dealing with *agents provocateur* is *Lemieux v The Queen*.⁵⁷ The accused was solicited by a police informant, one Bard, to participate in a supposed burglary, Bard having informed the police that for a suitable payment he would disclose to the police the members of a ring of burglars. In fact the police, as a result of Bard's communication, had arranged with the owner of the house in question to let them have the key to the house. The police were waiting in the house and made an arrest when the informer and a third accused entered the premises. The conviction of the accused was quashed by the Supreme Court on the ground that no burglary had in fact been committed since the owner had consented to the break-in for the purpose of entrapping the supposed burglars. The whole affair was staged.

The Court said:

The police set the whole scheme in motion through Bard. He was to lead a man who at first had no intention of breaking and entering, who went to the scene of the crime at Bard's instigation and who was led into a trap by Bard.

Nevertheless the court went on to say:

Had Lemieux in fact committed the offence with which he was charged, the circumstance that he had done the forbidden act at the solicitation of an *agent provocateur* would have been irrelevant to the question of his guilt or innocence.

Defence of Entrapment in the United States

The Supreme Court of the United States in the case of *Sorrels v United States*⁵⁸ held that "when the criminal design originates with the officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offence and induce its commission in order that they may prosecute," the defendant is entitled to be acquitted on the ground of entrapment.

In the *Sorrels Case*, the defendant, a man of good character, had been persuaded by a prohibition agent to secure some liquor for him. The defendant at first refused. The agent, however, learned that the defendant had been a member of the American Expeditionary Force during World War I, and that he and the defendant were both members of the same division. After discussing their war experiences, he finally succeeded in persuading the defendant to procure the liquor after two unsuccessful prior requests. As an American author has pointed out the term entrapment is not the appropriate word to describe such improper activity because it is not the entrapment of a

⁵⁷ [1967] S.C.R. 492.

⁵⁸ 287 U.S. 435 (1932).

criminal but the instigation of an innocent person to commit a crime which the law frowns upon.⁵⁹ Neither is the rationale of the defence uniform. The majority of the court in the *Sorrels* case construed the statute as exempting a defendant from liability where the offence was induced by the government. The minority, who concurred in the result, held that it was contrary to public policy to uphold a prosecution in such circumstances.

There is a similar lack of unanimity among the American authorities as to whether the crucial issue is the previous innocent state of mind of the defendant, or the use of unfair methods likely to overcome the will of persons other than those willing to commit the offence.⁶⁰ It seems quite clear, however, that the defence may apply to a person, notwithstanding that he has a prior criminal record for similar offences.

The power of government is abused and directed to an end for which it was not constituted when employed to promote rather than detect crime and to bring about the downfall of those who, left to themselves, might well have obeyed the law. Human nature is weak enough and sufficiently beset by temptations without government adding to them and generating crime.⁶¹

The Committee has already indicated its views as to where the dividing line between proper and improper law enforcement lies. It has also expressed the opinion that Parliament should declare that the policy of the criminal law is opposed to the instigation by public officials of persons, who might otherwise have obeyed the law, to commit offences in order to obtain evidence upon which to base a prosecution.

We consider that it would be beyond the Committee's terms of reference to examine in detail the criminal responsibility of law enforcement officers who incite or participate in the commission of an offence in order to obtain evidence against a person suspected to be engaging in criminal activity. It suffices to say that in many cases where a police officer appears or pretends to be participating in the commission of an offence in order to discover evidence, he commits no offence because he lacks the necessary criminal intent.

A private citizen who incites another to commit a crime is, if the crime is actually committed, a party to and guilty of such crime. If the incitement does not result in the commission of the crime, the person is nevertheless guilty of the crime of incitement.⁶² Whether a police officer, in some circumstances, may be exempt from the general provisions of the criminal law where his conduct amounts to inciting another to commit an offence for the purpose of entrapping a suspected offender is not clear.⁶³

⁵⁹ Perkins, R. M. *Criminal Law*. Brooklyn: The Foundation Press, 1957, p. 921.

⁶⁰ *Sherman v United States*, 356 U.S. 369 (1958); cf. Illinois Criminal Code and Code of Criminal Procedure (Illinois Revised Statutes 1967, ch. 38, Article 7, sec. 12), and the American Law Institute's Model Penal Code—Proposed draft 1962, section 2. 13.

⁶¹ *Sherman v U.S.*, 356 U.S. 369, per Frankfurter, J., p. 384 (1958).

⁶² Criminal Code s. 407.

⁶³ Williams, Glanville. *Criminal Law* (The General Part). 2nd ed. London: Stevens & Sons, 1961, pp. 795-99.

Section 14 (1) of the *Alberta Police Act*⁶⁴ provides:

A member of the force or any person acting under instructions given by the Attorney-General or the Commissioner shall not be convicted of a violation of *The Liquor Control Act* if it is made to appear to the Justice or Magistrate before whom the complaint is heard that the person charged with the offence committed it pursuant to instructions for the purpose of obtaining evidence.

No similar exemption is afforded by the criminal law of Canada in relation to *criminal* offences.

Moreover, it is abundantly clear that there are some offences of such a serious character that an incitement by a police officer to commit an offence of that character—especially if the offence were actually committed—would attract criminal liability, for example, an incitement to inflict bodily harm on another or to burn down a building.

Further discussion of such offences is not justified because it is scarcely possible to imagine a set of circumstances in which a police officer would be tempted to incite another to commit crime of this character in order to entrap him, although perhaps the same assumption could not be made with respect to the activities of informants and *agents provocateur*.

Conversely, there are some crimes the commission of which, because of their serious nature, ought not to be excused by reason of the fact that they were instigated by a law enforcement officer or his agent. Moreover, the criminal liability of the person who solicits the commission of an offence of this character, affords adequate protection against the use of improper methods resulting in the instigation of crime rather than the detection of crime. It should be noted that under s. 17 of the Criminal Code, the commission of an offence under compulsion by reason of threats of immediate death or grievous bodily harm is excused, but the defence does not apply to the commission of the most serious crimes such as murder, arson or causing bodily harm.

For the reasons previously stated, the Committee recommends the enactment of legislation to provide:

- 1. That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer or agent of a law enforcement officer, for the purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.**
- 2. Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.**

⁶⁴ R.S.A. 1955, c. 236.

3. **The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life.**

Wiretapping and Electronic Surveillance

Physical surveillance by locating a person suspected to be engaging in criminal activity; following him, observing his activities, and overhearing his conversations with others, has been an important aspect of police investigation as long as there have been police forces.

Technological advances in surveillance devices have tremendously enlarged the capacity of the police in the area of surveillance. It seems not impossible that in the future it will be possible to keep a person under complete surveillance—visual as well as auditory—for an indefinite period.⁶⁵

The unlimited use of the advances in the sciences of light and sound by government, when directed against individuals, would be destructive of liberty. On the other hand electronic eavesdropping equipment in the hands of the criminally minded poses a serious threat to the security of the community. The subject of wiretapping and electronic eavesdropping, while related to the investigation of offences, also involves issues and considerations entirely outside the subject of corrections and, hence, the Committee does not consider that its detailed examination or the making of specific recommendations fall within the Committee's terms of reference.

We, therefore, confine ourselves to making certain observations, having relevance to the investigation of offences and the criminal process generally. The divergence of opinion as to the use of wiretapping and electronic eavesdropping in law enforcement is illustrated by the lack of unanimity among the members of the President's Commission on Law Enforcement and Administration of Justice:

All members of the Commission believe that if authority to employ these techniques is granted it must be granted only with stringent limitations. One form of detailed regulatory statute that has been suggested to the Commission is outlined in the appendix to the Commission's organized crime task force volume. All private use of electronic surveillance should be placed under rigid control, or it should be outlawed.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *People v Berger*, and, further, that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.

The other members of the Commission have serious doubts about the desirability of such authority and believe that without the kind of searching

⁶⁵ Westwin, Alan F. "Science, Privacy and Freedom; Issues and Proposals for the 1970's". 66 *Columbia Law Rev.* 1003 (1966); *Berger v New York*, 388 U.S. 41 (1967).

inquiry that would result from further congressional consideration of electronic surveillance, particularly of the problems of bugging, there is insufficient basis to strike this balance against the interests of privacy.⁶⁶

The Congress of the United States has, however, in the "Omnibus Crime Control and Safe Street's Act of 1968" sanctioned the use of wiretapping and electronic surveillance in law enforcement for limited purposes and subject to rigid controls.

The term wiretapping is commonly used to describe the listening in on conversations on the telephone through the use of electronic equipment and other devices. Electronic eavesdropping or "bugging" is a term commonly used to describe forms of eavesdropping other than wiretapping.

One of the common forms of eavesdropping involves the placing of a concealed device in a specific location to receive and transmit conversations.⁶⁷ Frequently electronic eavesdropping involves a trespassory invasion, but recent developments permit the acquisition of oral conversations within a building without committing a trespass in conventional terms.

Directional microphones of the 'shot gun mike' and parabolic mike types sold in retail outlets make it possible to listen from distances of several hundred feet to conversations held in rooms with open windows or on porches and balconies; such eavesdropping from building to building is quite simple. The high-frequency sounds produced on the outside of windows and thin walls by speech in the room can be obtained even without contact microphones by means of ultrasonic waves sent onto the surface and reflected back to the sending apparatus, the wave being modulated by the speech vibrations. In addition, windowpanes can be coated with a transparent radar-reflecting coating which allows a sensitive radar equipment to monitor from considerable distances the vibrations caused by conversations. Modern office and Government buildings, with great glass surfaces, make ideal targets for such new sound surveillance technology.⁶⁸

In the investigation of crime, one of the parties to a conversation may, without the knowledge of the other party to the conversation, consent to the conversation being recorded in order to obtain evidence of the commission of an offence; for example a person who is the victim of a blackmail plot. It is not uncommon for one of the parties to a conversation to have it recorded for his own purposes by a mechanical device.

It is not uncommon for a party to a telephone conversation to permit a third person to acquire the contents of the conversation by listening on a telephone extension.

⁶⁶ United States. *The Challenge of Crime in a Free Society*. Report by the President's Commission On Law Enforcement And Administration of Justice. Washington: U.S. Gov't Printing Office, 1967, p. 203.

⁶⁷ *Reg v Steinberg*, [1967] 1 O.R. 733 affords an example of the use of such a device; See also Chorney, N. M. "Wiretapping and Electronic Eavesdropping". 7 *Crim. Law Q.* 434 (1964-65).

⁶⁸ Westin, Alan F. "Science, Privacy and Freedom: Issues and Proposals for the 1970's". 66 *Columbia Law Rev.* 1003, pp. 1007-8 (1966).

We do not consider that the use of electronic or mechanical devices, or ordinary telephone equipment in the circumstances outlined above, constitute the evil which requires legislative control. The use of equipment to amplify conversations taking place in restaurants, on the street and in public places generally for law enforcement purposes, *may* also fall outside the proper scope of legislative control.

The Committee considers that the interest which requires protection is the privacy of conversations taking place under such circumstances as to justify a reasonable belief on the part of both the parties to the conversation that such conversation is not subject to interception—in the sense of the acquisition of that conversation by others through the use of electronic, mechanical or other devices.

Canadian Legislation

There is no adequate Canadian legislation at the present time to deal with the threat to privacy involved in wiretapping and electronic eavesdropping.

Section 25 of the Act incorporating the Bell Telephone Company of Canada, 1880 (Can.) c. 67, provides:

Any person who shall wilfully or maliciously injure, molest or destroy any of the lines, posts or other material or property of the Company, or in any way wilfully obstruct or interfere with the working of the said telephone lines, or intercept any message transmitted thereon shall be guilty of a misdemeanor.

It has been pointed out that the purpose of the statute was primarily to prevent damage to property and interference with service.⁶⁹ It is at least doubtful whether such legislation is applicable to wiretapping by law enforcement officers in the investigation of crime.

Sections 36 and 37 of The Manitoba Telephone Act⁷⁰ and sections 23 and 24 of The Alberta Government Telephone Act prohibit wiretapping of telephones. It would appear that it is doubtful whether provincial legislation could constitutionally control conduct of law enforcement officers in the investigation of criminal offences. Federal legislation is, therefore, desirable.

Use and Control of Wiretapping and Electronic Surveillance by Law Enforcement Officers

Wiretapping is presently used by police forces in the investigation of suspected criminal activities. The extent to which it is used is not known. It is obvious, however, that electronic eavesdropping other than wiretapping is used extensively in the investigation of certain kinds of suspected criminal activity.

⁶⁹ Chorney, N.M. "Wiretapping and Electronic Eavesdropping". 7 *Crim. Law Q.* 434, p. 442 (1964-65).

⁷⁰ R.S.M. 1955, c. 76; Stats. Alta. 1958, c. 85.

The Committee is of the view that federal legislation controlling the use of wiretapping and electronic eavesdropping in law enforcement is required.

The Committee considers that wiretapping and electronic eavesdropping in matters affecting national security is within the sphere of the executive branch of government. The Committee considers that wiretapping and electronic eavesdropping for criminal purposes should be suppressed by criminal legislation.

We consider that the subject of the suppression of wiretapping and electronic eavesdropping unrelated to criminal activities does not properly fall within our terms of reference. The Committee's observations with respect to the control of wiretapping and eavesdropping in law enforcement, however, presupposes the enactment by Parliament of general legislation prohibiting the interception of private conversations.

The Committee is of the view, that subject to the conditions and controls hereinafter discussed, such interception should be permitted for law enforcement purposes as an exception to such legislation.

Judicial or Ministerial Control of Wiretapping and Electronic Surveillance

In England, wiretapping by the police in the investigation of crime must be authorized by the Home Secretary. The right to intercept telephone communications would seem to be related to the Royal prerogative.

Lord Devlin in *The Criminal Prosecution in England* states that the power to intercept telephone communications has been used where the security of the state is involved, and by the customs authorities to detect cases involving custom frauds which would seriously damage the revenue.

Where the police wish to intercept telephone communications to detect ordinary crimes, they are required to apply to the Home Secretary for a warrant which must be signed by the Home Secretary after he has personally considered the application. A warrant to intercept telephone communications is only granted where the application relates to the investigation of very serious offences, and only where normal methods of investigation have failed or must, from the nature of the matter, be unlikely to succeed. A third condition of the granting of a warrant is that there must be good reason to believe that the interception in question would result in a conviction.

It would appear that the authority to intercept telephone communications is used sparingly.⁷¹

In Australia, the Telephonic Communications (Interception Act) 1960, prohibits the interception of a communication passing over the telephone system and provides substantial penalties by way of fine or imprisonment for a breach of the provisions of the Act. The Act, however, contains an exception permitting interception to take place when authorized by a warrant

⁷¹ Devlin, Lord Patrick. *The Criminal Prosecution in England*. London: Oxford University Press, 1960, pp. 54-58.

signed by the Attorney-General where national security is involved. The Act does not permit interception in the investigation of ordinary crime.

The law with respect to wiretapping and electronic eavesdropping in the United States prior to the "Omnibus Crime Control and Safe Streets Act of 1968" was summarized by Mr. Justice Clark, delivering the judgment of the Supreme Court of the United States in *Berger v New York*⁷² as follows:

Federal law, as we have seen, prohibits interception and divulging or publishing of the contents of wiretaps without exception. In sum, it is fair to say that wiretapping on the whole is outlawed, except for permissive use by law enforcement officials in some States: while electronic eavesdropping is—save for seven States—permitted both officially and privately. And, in six of the seven States electronic eavesdropping ("bugging") is permissible on court order.

Under the "Omnibus Crime Control and Safe Streets Act of 1968" the interception by means of any electronic, mechanical or other device of wire communications or oral communications uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation is, subject to the exceptions contained in the Act, made unlawful.

A person violating the provisions of the Act is liable to a fine of not more than \$10,000.00 or to imprisonment for not more than five years, or both.

The Act authorizes a judge, on proper application, to make an order authorizing the interception of wire and oral communications by investigative or law enforcement officers having responsibility for the investigation of the offences as to which the application is made—when such interception may provide evidence of certain enumerated crimes. The conditions upon which the court is authorized to make an order are set out in the Act. The court must be satisfied that:

- (a) There is probable cause for belief that an individual is committing, has committed or is about to commit one of the offences specified in the Act;
- (b) There is probable cause for belief that particular communications concerning that offence will be obtained through such interception;
- (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) There is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offence, or are leased to, listed in the name of, or commonly used by such person.

The order authorizing the interception is required to specify, among other things:

⁷² 388 U.S. 41, p. 48 (1967).

- (a) The identity of the person whose communications are to be intercepted;
- (b) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;
- (c) A particular description of the type of communication sought to be intercepted and a statement of the particular offence to which it relates;
- (d) The period of time during which such interception is authorized.

The statute authorizes the interception of communications without judicial authorization, in emergency circumstances; such interception must be by specially designated law enforcement officers. The interception is limited to conspiracies jeopardizing national security or relating to organized crime. Judicial validation must be obtained within forty-eight hours.

The Act requires that the contents of any communication be recorded on tape or other device, if possible, and be made available to the judge issuing the order and sealed under his directions. The judge making the order is required to give directions with respect to the custody of the recordings.

An annual report containing information as to the orders which have been made authorizing interception, a description of the interceptions made pursuant to the order, and the results of such interceptions is required to be made to Congress.

The Committee has discussed the provisions of the Act in some detail to emphasize some of the safeguards which the Congress of the United States considered necessary to include in legislation authorizing wiretapping and eavesdropping by investigative and law enforcement officers.

Views and Conclusions Respecting Wiretapping and Electronic Surveillance

The Committee is of the view that wiretapping and electronic eavesdropping for law enforcement purposes, under conditions of strict control, should be authorized by legislation. We point out that it is in fact taking place and that at the present time it is not subject to any effective control.

The Committee has already indicated that the interception of conversations with the consent of one of the parties to the conversation, the listening in on conversations by means of telephone extensions, the mechanical recording of telephone conversations by the parties thereto, and the acquisition of the contents of conversations which take place in circumstances which do not justify an expectation of privacy do not require legislative control and, accordingly, do not fall within the controls considered by the Committee to be necessary.

The Committee favours a system of judicial control of wiretapping and of electronic eavesdropping when used to acquire the contents of conversations where none of the parties to a conversation has consented to its interception.

In June, 1965, a National Conference on the Prevention of Crime was convened by the Centre of Criminology, University of Toronto. The

participants in the Conference included members of the judiciary, prosecuting counsel, police chiefs, defence counsel and law professors. The statement made at the conclusion of the conference contains the following:

There was a general feeling that the law should control the use of wiretapping and concern was expressed at the implications which technological advances in electronic eavesdropping may involve so far as the citizen's right to privacy is concerned. A wide measure of support was exhibited among the conference participants for the control by legislation of wiretapping, it being felt that specified procedures should be worked out whereby the courts could govern resort to wiretapping by law enforcement agencies and that this should only be permitted in the detection of certain types of crimes.⁷⁸

The Committee considers that jurisdiction to make an order authorizing wiretapping or electronic eavesdropping for law enforcement purposes should be vested in a superior court judge, with provision being made for specified law enforcement officers to authorize, in emergency situations, the interception of communications upon the condition that an order validating the interception is made within forty-eight hours.

We consider that the application for an order authorizing wiretapping or electronic eavesdropping should justify in detail the circumstances which require the making of the order. Moreover, the order itself should specify in detail the person or persons whose conversations are to be intercepted, the place or places and the facilities in respect of which the order is made, the type of communication sought to be intercepted, the nature of the offence to which the interception relates and the duration of the order.

Where an application is made for an extension of time within which the order is operative, a reasonable case for the extension should be made out.

The power to authorize wiretapping and other prohibited forms of interception should be confined to crimes or suspected crimes of a serious nature which should be specified in the legislation.

In addition to the general disfavour with which a great many people view the acquisition of private conversations because of the threat to privacy which is involved, and which only the most urgent consideration of public interest can justify, there are inherent dangers in wiretapping and electronic surveillance.

There is impressive evidence that tapes can be edited in such a way as to completely distort the meaning of the statements originally recorded. The editings once transferred to new tapes cannot be detected.

Moreover, interception devices sweep up all conversations, those of the innocent as well as the guilty, and record conversations of a private and intimate nature having no connection with illegality. Intercepted conversations may contain poisonous rumour and gossip without foundation in fact.

⁷⁸ *Report of the Proceedings of the National Conference on the Prevention of Crime* convened by the Centre of Criminology, University of Toronto, June 1965, p. 70.

It is, therefore, imperative that any system of control should require that the tapes of conversations obtained pursuant to an order be returned to the judge issuing the order. If the tapes contain no conversations relevant to law enforcement, provision should be made for their destruction. If they do contain relevant material, provision should be made for the sealing of the tapes and for their safe custody pending their use in court proceedings.

The Committee also considers that provision should be made for access by an accused person or his counsel, under appropriate conditions as to security, to tapes intended to be introduced in criminal proceedings in order that their accuracy may be verified or tested.

The Committee is further of the view that any effective system for the control of authorized wiretapping and electronic interception requires that an accounting of the use made of orders authorizing interception, and the results thereof, should be made on a regular basis to the appropriate provincial attorneys-general and the Minister of Justice of Canada.

Admissibility of Conversations Obtained through Wiretapping and Electronic Surveillance

Anything that an accused person has said is admissible in evidence at his trial on a criminal charge—if the conversation is relevant to the charge. Generally speaking, statements made by third persons out of court are not admissible and are excluded as hearsay.

The above principle is subject to the rule that in order for a confession or incriminating statement made to a person in authority to be admissible against an accused at his trial, the prosecution must prove that the confession or incriminating statement was made voluntarily. Subject to the special rule which governs confessions, the Canadian law, as the Committee has previously pointed out, holds that evidence which is otherwise relevant and admissible is not rendered inadmissible by reason of the fact that it was illegally obtained.

It follows that an incriminating conversation intercepted through an unlawful wiretap is nevertheless admissible in evidence against the person who made the statement at his trial on a criminal charge.

The Committee has recommended against a rigid rule excluding illegally obtained evidence in all cases and has recommended that legislation be enacted to empower a court in its discretion, to exclude evidence which has been illegally obtained. We have also suggested certain criteria which a court, in exercising its discretion to admit or reject illegally obtained evidence, should be required to take into account. One of the criteria is whether the illegality was deliberate or inadvertent.

We consider, however, that the admissibility of illegally intercepted conversations should be governed by a separate rule rather than by the general discretionary principle referred to. It is difficult to envisage an illegal wiretap occurring through error or inadvertence.

The Committee is of the view that *illegally* intercepted conversations should not be admissible against an accused at his trial and that this principle of exclusion should apply to evidence derived from such illegal interception.

Suppression of Invasions of Privacy for Criminal Purposes

Strong representations have been made by the police that sophisticated "snooping" devices are being used by criminals to further criminal enterprises. The criminal law frequently prohibits conduct because of the threat to security which it represents. Under s. 295 of the Canadian Criminal Code, the possession of instruments of house-breaking without lawful excuse, the onus of proof of which lies upon the accused, constitutes an offence. An instrument which is capable of being used for house-breaking, such as a screw driver or a crowbar, is an instrument of house-breaking within the meaning of the section, notwithstanding that it is capable of and normally is used for legitimate purposes.⁷⁴

The Committee considers that it is desirable to enact legislation to provide that:

1. The possession of any electronic, mechanical, or other device capable of surreptitiously intercepting telephone or other communications with intent to use the same for a criminal purpose is an offence.
2. That the possession by any person of any such electronic, mechanical or other device without lawful excuse, the proof of which lies upon him, constitutes *prima facie* evidence of the intent to use the same for a criminal purpose.

The Committee also considers that legislation to provide for the imposition of an additional penalty upon conviction for any offence, the commission of which was furthered by the surreptitious interception of conversations by electronic, mechanical or other devices, is desirable.

The Committee also recommends that a study be undertaken as to the feasibility of a system of control based upon the maintenance of records by manufacturers and wholesalers and retailers with respect to the persons to whom certain types of equipment are sold.

General Conclusions with Respect to Police Powers

The Committee has already indicated that, in its view, and subject to the recommendations and views it has expressed with respect to particular powers, police powers in Canada are adequate but not excessive. We consider that increases in the power of any body or agency to interfere with the liberty of the citizen can only be justified by particular and urgent social requirements.

⁷⁴*Tupper v The Queen* (1968) 1 C.C.C. 253.

An assumption that radical changes in criminal procedure would promote more effective investigation of crime remains an assumption which cannot be established. It is well to bear in mind that supposed increases in efficiency may be purchased at too great a price in terms of other values.

We consider that increases in the effectiveness of police services should be sought by providing better pay to attract recruits, and by better working conditions and better training. Police forces should be provided with the most modern equipment and should have available to them scientific, technological, accounting, legal advice and assistance, when such advice and assistance is required.

The Committee considers that the gradual elimination of small police forces by the amalgamation of adjoining police forces, or by small municipalities contracting for police services from provincial police forces or the Royal Canadian Mounted Police, would result in more effective police services.

The pooling of strength which would result from the amalgamation of the smaller police forces would make selected personnel available for training in police work requiring special skills. A central communication system would help to reduce delays.

The President's Commission on Law Enforcement and Administration of Justice found that the reduction in police response time increased the probability of apprehension.

Uniform and better systems for reporting crime would have long range value in the prevention and detection of crime. The costs of police services would be reduced by the elimination of duplicate services. There are many police forces in Canada which have less than ten members and a substantial number have only one, two or three members.⁷⁵

For example, on January 1, 1967, there were 262 municipal police forces in the Province of Ontario employing one or more officers on a full-time basis as well as a number of municipalities which employed only a part-time officer; 43 municipalities employed a one-man police force; 97 municipalities had police forces consisting of from two to five men and 43 municipalities had police forces which employed between six and nine men. During the following twelve month period, the number of police forces was reduced to 225 through arrangements for police services to be provided by the Ontario Provincial Police.

The Committee also considers that technological advances and the ability to computerize information will become increasingly important in the area of law enforcement. The cost of such equipment would of course place it beyond the reach of small police forces.

⁷⁵ According to *D.B.S. Police Administration Statistics, 1967*, there were 446 police forces in Canada having less than 10 members; 85 police forces had only 1 member; 295 police forces had less than 5 members.

The Committee has in the chapter on continuing research recommended that a Canadian Advisory Council on Criminal Justice be established and that one of its functions should be to conduct and encourage research in the area of law enforcement with a view to the development of new methods, or the improvement of existing methods, for the prevention and detection of crime.

6

ARREST

Increased Use of Summons as an Alternative to Arrest without Warrant

The general power of a police officer to arrest without warrant is contained in section 435 of the Criminal Code and is a broad power. The arrest of the suspect has, as one of its primary purposes, securing his attendance at his trial. This, however, is not the only reason why the arrest of the suspect, rather than summoning him, may be justified in the public interest.

It is the view of the Committee that in considering whether an arrest, rather than the use of a summons, is justified, the following considerations of public interest should be controlling:

- (a) The necessity for arrest as a means of establishing the identity of the suspect.
- (b) The necessity to prevent the continuation or repetition of the offence. For example, to prevent the completion of the offence by a person apprehended during an attempted burglary or robbery or attempted murder or to prevent the repetition or continuation of the offence by a person apprehended while committing an assault, or driving his automobile while intoxicated.
- (c) Arrest may be necessary to create a legal basis for search and thereby avoid the destruction of evidence. For example, where a police officer has reasonable and probable grounds for believing that a person is in possession of narcotics or instruments of house-breaking, applying to a justice of the peace for a summons would hardly be realistic police procedure.
- (d) Arrest in some cases may be necessary for the protection of the accused himself, if there is reason to suspect that by reason of emotional or mental disturbance or other cause he is a danger to himself (for example, suicidal).
- (e) The improbability of the accused appearing in answer to a summons.

We wish to emphasize, however, that once an arrest has been made, the continued detention of the person arrested may be unnecessary and that in accordance with the recently proposed amendment to s. 438, a person arrested without a warrant should be released unconditionally if further investigation clears him;¹ or released with the intention of compelling his appearance by way of summons, or as suggested in the following chapter, on giving his undertaking to appear—if further detention is unnecessary in the public interest.

The Committee is satisfied that too many persons are detained in custody by the police when it is no longer necessary to do so in the public interest, even where an arrest may have been initially justified. We think this is due in part to the fact that many police officers believe that once they have made an arrest, either with or without a warrant, they are required to take the arrested person before a justice. We have indicated that this is not our view of the present law,² but have recommended legislative clarification on the same lines as recently proposed legislation.

The Committee is also satisfied that frequently persons are arrested in the first instance when a summons would be effective and no public interest would be thereby prejudiced.

The right of a police officer to arrest without a warrant under s. 435 is not expressly circumscribed by reference to the considerations which make an arrest as distinct from a summons a reasonable exercise of power. It appears to be implicit, however, by reference to general principles that an arrest should not be made unless it is necessary in the public interest.

The Committee therefore recommends that section 435 of the Criminal Code be amended to require not only reasonable grounds to believe that the person arrested has committed or is about to commit an indictable offence but also reasonable grounds to believe that immediate arrest is necessary in the public interest and to provide that a police officer may arrest a person whom he finds committing an offence punishable on summary conviction if he has reasonable grounds for believing that immediate arrest is necessary in the public interest.

Increase Use of Summons as an Alternative to Arrest under Warrant

Under s. 440 of the Criminal Code a justice who receives an information alleging the commission of an indictable offence is required to:

¹An illustration of this power in other jurisdictions is to be found in Art. 107-6 of *The Illinois Code of Criminal Procedure of 1963*, Illinois Revised Statutes 1967 ch. 38 which provides:

"A peace officer who arrests a person without a warrant is authorized to release the person without requiring him to appear before a court when the officer is satisfied that there are no grounds for criminal complaint against the person arrested."

²Sowle, Claude R. (ed.). "Police Detention And Arrest Privileges Under Foreign Law: Canada". *Police Power And Individual Freedom*. Chicago: Aldine, 1966, p. 38. *Mayer v Vaughan* (No. 2) (1903), 6 C. C. C. 68, p. 71.

- (1) (b) issue, where he considers that a case for so doing is made out, a summons or warrant, as the case may be, to compel the accused to attend before him.

The provisions of s. 440 are made applicable to summary conviction offences by virtue of s. 700 of the Criminal Code.

It is the view of the Committee that the justice ought not to issue a warrant to arrest the accused, but should instead issue a summons, where the issuing of a warrant is not necessary in the public interest.

The Committee cannot escape the conclusion that warrants are often issued quite unnecessarily when a summons would suffice. We are of the opinion that this practice results in unnecessary hardship, not only in those cases where the accused is ultimately found not guilty, but also in cases where no real public interest is served by arresting the offender because there is little likelihood that the accused would fail to appear and no other controlling reasons exist for the use of a warrant rather than a summons.

In many cases, even where the offender is ultimately convicted, the consequences of being arrested, including the possible consequence that he may lose his employment, may be out of proportion to the gravity of the offence and the penalty that may be ultimately imposed.

The Committee therefore recommends that section 440 of the Criminal Code be amended to provide that the justice shall issue a summons rather than a warrant unless it is made to appear that the public interest requires the issue of a warrant rather than a summons.

Police Power to Summon

It has been suggested in both oral and written representations made to the Committee that the police should be empowered, without the intervention of a justice, to issue summonses because:

- (a) The police may sometimes arrest without warrant because of the delay, additional trouble and expenditure of time involved in laying an information before a justice (leading to the issue of a summons) and then returning to find the defendant in order to serve the summons upon him.
- (b) A police officer who is justified in making an arrest without warrant initially, for the reasons previously discussed, should be allowed to release the accused from custody for the purpose of issuing and serving upon him a summons, when it is no longer necessary to detain him in the public interest.

While the granting of these powers to the police involves a substantial enlargement of police powers, the enlargement of power is in the interest of the liberty of the citizen. The present law, as we have pointed out, places very wide powers in the hands of the police to arrest without a warrant when it is reasonable to do so. If powers of this wide nature, subject to

proper controls, can be safely entrusted to the police, it follows that they can equally be entrusted with broad powers of a less coercive nature which enable them to enforce the law without causing more hardship than is necessary.

Under the present provisions of the Canadian Criminal Code, a summons is a command signed by a justice of the peace addressed to a defendant named in an information already laid, and directing the defendant to appear at a designated time and place to answer to the charge.

Under the proposed New York Criminal Procedure Law, prepared by the State of New York Temporary Commission on Revision of the Penal Law and Criminal Code, a police officer who arrests a person without a warrant for an offence other than a felony may issue and serve an 'appearance ticket' upon the defendant *in lieu of taking him before a criminal court* (as he would otherwise be required to do) and release him from custody either unconditionally or upon a deposit of cash bail in an amount fixed by the officer; or the police officer may, where he is authorized to arrest a person without a warrant for an offence other than a felony, issue and serve upon such person an 'appearance ticket' *in lieu of arresting him*.³

An 'appearance ticket' is defined as follows:

An appearance ticket is a written notice issued and subscribed by a police officer or other public servant authorized by law to issue the same, directing a designated person to appear in a designated local criminal court at a designated future time in connection with his alleged commission of a designated offence. (Art. 75.10)

The reason for describing the notice to appear as an 'appearance ticket' appears in the staff comment to Article 75.20 as follows:

It is to be noted that use of the contrived term 'appearance ticket' rather than the term 'summons', is designed to avoid a misapprehension which is created by blanketing two very different types of instruments under the one label of 'summons'. In its true and generic meaning, a 'summons' is a process issued by a court commanding a person accused of an offense, by an information previously filed with the court, to appear before such court at a future time to answer the charge. Two features of a 'summons' to be kept in mind are that, like a warrant of arrest, it is issued only by a *court* and only upon the basis of an information or complaint which has been lodged with such court.⁴

Under the existing provisions of the Canadian Criminal Code a summons, as has been pointed out, is issued by a judicial officer, namely a justice of the peace, rather than a court, on an information previously received.

³New York. *Proposed New York Criminal Procedure Law*. Brooklyn: Edward Thompson Co., 1967. Art. 75.20, p. 107.

⁴New York. *Proposed New York Criminal Procedure Law*. Brooklyn: Edward Thompson Co., 1967, p. 108.

In the view of the Committee it is immaterial by what name the notice to appear is called; whether it be a summons, appearance ticket, notice to appear,⁵ special summons, restricted summons or police summons. The Committee favours the use of the term special summons. The Committee sees no inconsistency in expanding by legislation the existing concept of a summons to include a notice to attend issued by a police officer, which has not been preceded by a sworn information.

The purpose of the power is the same—namely to avoid unnecessary arrests and detention.

The Committee agrees with the staff comment to Article 75.20 of the proposed New York Criminal Procedure Law:

From the standpoint of the kind of defendant who would unquestionably honor an appearance ticket, use of the ominous, humiliating and frequently expensive arrest procedure for a relatively minor offence seems both unnecessary and unfair.⁶

The Committee is of the view, however, that since the power of the police to issue a summons under the legislation which the Committee recommends extends to true crimes, rather than merely regulatory offences, a sworn information should be laid prior to the arraignment of the defendant. Furthermore, we believe that the criminal process should not be equated with procedures which are appropriate for traffic violations and offences of a regulatory nature. Since an information may be received by a justice where the informant has reasonable grounds for believing, and does believe, that the offence specified in the information has been committed, the information need not be sworn by the officer issuing the summons. Instead, it could be sworn by another officer or court official on the basis of the report of the officer issuing the summons. Such a procedure would not be productive of the delay and expenditure of time required if the officer who witnessed the offence had to drop his ordinary duties, swear an information, obtain a summons and then return and locate the defendant and serve him with the summons.

The Committee is of the opinion that the power of a police officer to issue a summons in lieu of arrest without a warrant should be restricted to those cases in which the officer *finds a person committing*:

- (a) an offence punishable on summary conviction, or

⁵ Art. 107-12 of the *Illinois Code of Criminal Procedure of 1963* provides:
Notice to Appear.

(a) Whenever a peace officer is authorized to arrest a person without a warrant he may instead issue to such person a notice to appear.

(b) The notice shall:

- (1) Be in writing;
- (2) State the name of the person and his address, if known;
- (3) Set forth the nature of the offense;
- (4) Be signed by the officer issuing the notice; and
- (5) Request the person to appear before a court at a certain time and place.

(c) Upon failure of the person to appear a summons or warrant of arrest may issue.

⁶ New York. *Proposed New York Criminal Procedure Law*. Brooklyn: Edward Thompson Co., 1967, p. 109.

- (b) an indictable offence specified in section 467 of the Criminal Code, (i.e. those less serious indictable offences triable by a magistrate without the consent of the accused).

and that the power to issue and serve a summons upon a person already in custody so that he may be released should be restricted to persons in custody arrested without a warrant for offences falling within that class of offence.

For the purposes of the proposed legislation, an offense which is punishable either on indictment or on summary conviction at the option of the crown should be considered an offense punishable on summary conviction.

The Committee is of the view that it is unnecessary and perhaps inappropriate to extend the power of a police officer to issue summonses to the more serious indictable offences where the intervention of a judicial officer may be desirable. The Committee is, moreover, of the view that it is in relation to the less serious criminal offences, that the lack of power on the part of the police to issue summonses under the present law is likely to result in unnecessary arrests or in unnecessary detention.

The Committee is of the opinion that where a police officer decides to release from custody a person already arrested without a warrant, upon serving him with a summons, the release should be unconditional rather than conditional upon bail being provided. The Committee in the following chapter recommends the enactment of legislation to empower the police to release a prisoner from custody on bail—where such a procedure is more appropriate than release upon serving a summons. The two procedures are intended as alternatives and should be kept distinct. Moreover, the power of a police officer to issue a summons either in lieu of arrest or in order to release a person already arrested is intended to apply only to cases where a warrant has not been issued.

The power to release on bail which the Committee proposes should be conferred on the police, extends to release on bail where the initial arrest was made either with or without a warrant in the class of offence to which the Committee's recommendation extends. Although the Committee is of the view that in this class of offence the justice should normally issue a summons rather than a warrant, there may be exceptional cases where the issue of a warrant would be justified in order to create the right to search as an incident of arrest, for example, where the charge relates to the keeping of a common betting house. After the arrest has been made, however, release on bail should normally follow quickly.

The Committee has seen fit to recommend that the power of a police officer to issue a summons should be confined to those cases in which the officer *finds a person committing* a criminal offence falling within the class of offence specified, or to cases where a person is in custody, having been arrested without a warrant for such an offence. We have made this recommendation because, after giving careful consideration to the matter, we

decided that a police officer ought not to be placed in the position of being required to issue a summons on hearsay evidence.

It is to be noted that under s. 440 of the Criminal Code, a justice who receives an information may, in addition to hearing the allegations of the informant, hear the evidence of witnesses under oath where he considers it desirable or necessary to do so. A justice of the peace who receives an information may not be prepared to act on the allegations of the informant, and may require additional evidence in order to protect the citizen from the issuing of process which may be unjustified. We think that judicial functions of this nature are not an appropriate police function.

The Committee accordingly recommends:

- 1. That the Criminal Code should be amended to empower a police officer, as an alternative to arrest without a warrant, to issue a summons in any case where,**
 - (a) He finds a person committing an offence punishable on summary conviction, or**
 - (b) An indictable offence specified in section 467 of the Code.**
- 2. That the power to issue a summons should extend not only to the issue of a summons in the first instance, but to the issue of a summons following an arrest without a warrant in respect of an offence referred to in paragraph (a) and (b) above, where further detention is not required in the public interest.**
- 3. That such legislation should not detract from the present right to arrest in circumstances where it is reasonable to do so rather than issue a summons, nor should it detract from the present power to lay an information before a justice leading to a summons.**
- 4. (a) Where a summons is issued by a police officer without the intervention of a justice, an information should be required to be laid prior to the arraignment of the accused and legislation should so provide.**
 - (b) Where an information has been so laid before a justice and where the justice would not have issued a summons or warrant, the justice shall set aside the original summons and cause the person summoned to be so notified.**

Penalty for Failure to Obey a Summons

Under s. 444 of the Criminal Code, if the accused, having been served with a summons, fails to appear, or it appears that a summons cannot be served because the accused is evading service, a justice may issue a warrant. While this is the ultimate sanction for failure to obey a summons, the Committee is of the view that if the legislation recommended by the Committee

is enacted, the use of the summons as an alternative to arrest will be greatly increased.

The Committee, therefore, considers that it is desirable to constitute the failure to appear at the time and place specified in the summons without lawful excuse, the onus of proof of which lies on the accused, an offence. Due notice of the serious consequence of failing to obey the summons should be contained therein.

The Identification of Criminals Act

Under the Identification of Criminals Act, a person in custody charged with an indictable offence is required to submit to fingerprinting. As the Committee envisages that there will be fewer persons in custody if its recommendations are implemented, it will be necessary to extend the provisions of the Identification of Criminals Act to require a person, who has been summoned to appear to answer a charge of having committed an indictable offence, to present himself and submit to fingerprinting as directed in the summons. Failure to do so without lawful excuse should result in arrest.

7

BAIL

Pre-trial detention, in the view of the Committee, can only be justified where it is *necessary* in the public interest:

- (i) To ensure the appearance of the accused at his trial.
- (ii) To protect the public pending the trial of the accused.

Pre-trial detention is justified where it is *necessary* to prevent criminal misconduct by the accused pending his trial. The offences sought to be prevented may be offences similar to those in respect of which the accused has been arrested, or may be offences related to his trial such as:

- (a) The destruction of evidence or the tampering with witnesses.
- (b) Otherwise attempting to pervert the course of justice.

It should be observed in this connection, however, that the prosecution has no property in witnesses. Moreover, the accused has the same right to interview potential witnesses as has the prosecution, so long as there is no question of improperly influencing witnesses or tampering with their evidence.¹

Pre-trial detention to obtain pleas of guilty or to inflict punishment on a person whose guilt is not established is indefensible.

It is the view of the Committee, which will be developed more fully later in this chapter, that the onus of justifying pre-trial detention should rest upon the prosecution, rather than upon the accused to justify his release from custody.

In accordance with the views which the Committee has expressed in Chapter 2, society is not warranted in inflicting greater harm on a person—although his guilt is ultimately established—than is absolutely necessary for the protection of society.

¹ *The Law Society's Gazette*, vol. 41-42, p. 8 (January, 1944); *R v Gibbons* (1946), 86 C. C. C. 20, pp. 28-29; see also Devlin, Lord Patrick. *The Criminal Prosecution in England*. London: Oxford University Press, 1960, p. 80.

The Committee agrees with the principle enunciated at *The Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, as follows:

... There was unanimity on the aim of reducing so far as possible the needless arrest and detention of suspected persons, and of detaining them in custody only when such a course was absolutely necessary for the protection of society.³

Use of Bail to Reduce Pre-Trial Detention

The procedure whereby an accused may be released on bail pending his trial developed at a very early stage in the English criminal law. Historically, the theory of bail is that the accused is released from the custody of the law and entrusted instead to the custody of his sureties.³

The sureties in order to fulfill their obligations may seize the accused at any time for the purpose of surrendering him into the custody of the law.⁴

The sureties may also apply to the court to be relieved of their obligations, in which event the court is authorized to issue an order for the committal of the accused to prison.

The term bail is used in several different senses. It is used to describe the contract whereby an accused is delivered to his sureties, who undertake that the accused will appear in court to stand his trial or that they will forfeit a sum of money if he fails to do so. The word is also used to describe the surety or sureties who undertake that the accused will appear. Sometimes the word is used to denote the security which is furnished, or the amount agreed to be forfeited by the surety or sureties if the accused fails to appear. Under the Canadian Criminal Code, it is also used to denote the release of the accused without deposit of money or property on his own recognizance, i.e. without sureties. Later in this chapter the Committee recommends that the concept of release on bail be enlarged to include the release of an accused person upon his solemn undertaking to appear.

The theory of bail in English and Canadian law is that an accused will be deterred from absconding and thus inflicting a loss on his sureties who will normally be friends or relatives. Moreover, the sureties have a motive to keep watch on the accused to see that he does not abscond.

The English and Canadian criminal law place a great stress on the necessity for a surety having a genuine motive to see that the accused attends at

³United Nations. *Report of The Proceedings of The Third United Nations Congress On The Prevention Of Crime And The Treatment of Offenders*. New York: United Nations Publications, 1967, p. 21.

³Devlin, Lord Patrick. *The Criminal Prosecution in England*. London: Oxford University Press, 1960, p. 74.

⁴*R v Lepicki* (1926), 44 C. C. C. 263, at p. 266. The provisions of s. 672 of the Criminal Code which permit the surety to apply to a court, justice or magistrate to be relieved of his obligation and which authorize the court, magistrate or justice on such an application to issue an order for the committal of the accused to prison do not affect the common law rights of the surety over the accused which are preserved by s. 674 of the Criminal Code.

his trial, and for that reason regards the indemnification of the surety by the accused as an act seriously likely to pervert or defeat the course of justice and as such a criminal offence.

In the United States, however, the law and practice with respect to bail developed along lines different from those in Canada. Professional bondsmen or sureties commonly are recognized.⁶ Professional bondsmen not only receive fees but frequently require that security be furnished. The result is that an accused literally buys his freedom pending trial.

Bail, Corrections and Human Rights

It is desirable that every accused awaiting trial be released on bail, unless the desirability of releasing the accused is out-weighed by the public interest. The detention of the accused while awaiting trial may unfairly damage a person who is subsequently acquitted and may unnecessarily damage a person who is subsequently convicted.

Many of the institutions used to house those awaiting trial are old and poorly equipped. Sanitation and living conditions are primitive. Segregation is difficult, and security provisions designed to meet the requirements of the most difficult inmates must apply to all. This means that security in these institutions often exceeds that in institutions housing the convicted. Little is available in the way of program. Problems of segregation and classification make even work or recreational programs difficult to organize. Incarceration under such conditions can lead to confusion and resentment on the part of the accused. Standards for institutions housing those awaiting trial are set out in another section of this report.

Because segregation is difficult, the young and susceptible inmate is thrown into contact with sophisticated and hardened criminals.

The period immediately following his first arrest is a crucial one for the first offender. If he is unwisely dealt with, he may come to see society as an enemy and to assume that his future lies with the criminal element. If he is released while awaiting trial he may continue his positive family and social relationships; if he is held in jail he will more readily identify himself with the criminal element. This negative self-identification is fostered if the jail is old and dilapidated and he is thrown into contact with confirmed criminals, but it can occur even in the most modern building.

While progressive measures are being adopted in some parts of Canada to improve the conditions of pre-trial detention, the present situation in that respect cannot be remedied overnight.

Incarceration prior to trial may cause the accused to lose his job and thus make it impossible for him to fulfill his family and other obliga-

⁶ "In this respect the American situation was quite different from that in England; it was a new land inhabited by many new people with no roots or long-standing relationships with each other. In this one sense the bondman filled a valuable role. For many people without personal friends or relatives to help them secure their freedom through bail, the commercial bondsman was a welcome substitute (if one could afford his aid)." Goldfarb, Ronald. *Ransom*. New York: Harper & Row, 1965, p. 93.

tions. Even if he does not lose his job, the loss of income during the period in jail may have similar effects. This in turn may weaken his family and social relationships. Also, the period in jail may leave a stigma even if he is eventually found innocent. This kind of social dislocation may strengthen his belief that there is no place for him in the normal community.

The Committee considers that it is self-evident from the standpoint of human rights that an accused should not be incarcerated pending trial—unless it is required for the protection of the public.

The release of the accused pending his trial avoids the infliction of punishment on a person not yet proved to be guilty whom under Canadian law is presumed to be innocent.

There is some statistical evidence in support of the conclusion that the fact that a defendant has been held in custody pending trial militates against his chances of acquittal. The release of the accused on bail may enable him to render assistance in locating witnesses and permit greater consultation with his counsel. There is also some statistical evidence that a defendant who has been held in custody is more likely to receive a more severe penalty than one who has been released on bail.⁶

These statistics must, however, be interpreted with caution because such matters as:

- (a) The strength of the case against the accused.
- (b) The accused's criminal record and antecedents; these are factors (although no more than factors) in determining whether the accused should be released at all, as well as in setting the amount of bail where bail is granted.

Nevertheless, an accused who by virtue of release on bail is able to hold his job, may be in a better position to obtain release on probation if convicted. On the other hand, some courts take into consideration the fact that an accused has already spent some time in custody in suspending the passing of sentence. This approach, however, identifies pre-trial detention with punishment and perpetuates the confusion as to the legitimate purpose of pre-trial detention.

The release on bail of those awaiting trial, where continuing detention is not necessary, also means a reduction in the jail population and a resulting saving in cost to the public.

The Present Law and Practice in Canada with Respect to Bail

Power to Admit to Bail

Under the Canadian Criminal Code the power to admit an accused to bail is unlimited, although only a judge of a superior court of criminal jurisdiction

⁶ Friedland, M. L. *Detention Before Trial*. Toronto: University of Toronto Press, 1965, p. 124; Foote, C. "Compelling Appearance in Court: Administration of Bail in Philadelphia". *Studies On Bail*. Philadelphia: International Printing Co., 1966, pp. 23-26.

has the power to admit an accused to bail who is charged with an offence punishable by death (as to which there are now only two, capital murder and certain kinds of treason), non-capital murder or certain offences involving national security.⁷

The power of a judge of a superior court of criminal jurisdiction to grant bail in respect of this class of offences may be exercised either before or after the accused has been committed for trial.

A justice of the peace may admit an accused to bail before he has been committed for trial where he is charged with an offence other than the very limited number of offences enumerated in s. 464 of the Code, with respect to which only a judge of a superior court of criminal jurisdiction has the power to grant bail.

After committal for trial, a county or district court judge or a magistrate, as defined by the Criminal Code, may grant bail to an accused who is charged with an offence other than those as to which only a judge of a superior court of criminal jurisdiction can grant bail.

In cases in which the justice has power to grant bail, if the justice refuses to grant bail, a judge of a superior court of criminal jurisdiction may grant bail or may vary the amount of bail set by the justice. Similarly after an accused has been committed for trial, a judge of a superior court may vary an order for bail made by a county or district court judge or a magistrate, or admit the accused to bail if a county court judge or magistrate has refused to admit to bail.⁸

Prior to 1961, when all murder was capital, the power to admit to bail in murder cases was rarely exercised. When it was exercised it was only in those cases where because of the weakness in the case for the crown, the substantial nature of the defence and the accused's strong ties in the community, there was a strong assurance that the accused would appear for trial and not endanger public safety in the meantime.

Capital murder is now restricted to the class of murder where a person by his own act caused or assisted in causing the death of,

- (a) A peace officer, as defined by s. 202a of the Code, acting in the course of his duties,
- (b) A warden, deputy warden, instructor, keeper, gaoler, guard or other officer or permanent employee of a prison, acting in the course of his duties,

or counselled or procured another person to do any act causing, or assisting in causing, such death.

The restriction of capital murder to these two kinds of murder would make release on bail inapplicable in some cases of capital murder and inappropriate, save in the most exceptional circumstances, in the remaining class of cases falling within the definition.

⁷ Section 464 of the Criminal Code.

⁸ Sections 463, 465 of the Criminal Code.

There have been numerous cases since the offence of non-capital murder was created in which a superior court of criminal jurisdiction has admitted an accused to bail.

It will be seen that in the vast majority of cases it is the justice of the peace or magistrate, since a justice of the peace is defined to include a magistrate, who is required to decide whether an accused shall be released on bail and the conditions upon which he may be released on bail.

Conditions upon which Accused May Be Admitted to Bail

Section 451 of the Criminal Code which applies to indictable offences provides:

A justice acting under this part may

- (a) order that an accused, at any time before he has been committed for trial, be admitted to bail
 - (i) upon the accused entering into a recognizance in Form 28 before him or any other justice, with sufficient sureties in such amount as he or that justice directs,
 - (ii) upon the accused entering into a recognizance in Form 28 before him or any other justice and depositing an amount that he or that justice directs, or
 - (iii) upon the accused entering into his own recognizance in Form 28 before him or any other justice in such amount as he or that justice directs *without any deposit*.*

Similarly, under s. 463 (3) (c) of the Criminal Code, after committal for trial, a judge or magistrate may admit the accused to bail upon the accused entering into his own recognizance before a justice *without any deposit*.⁹

The provisions with respect to bail in relation to summary conviction offences are set out in section 710 (2) of the Criminal Code which provides:

- (2) Where the summary conviction court adjourns a trial it may
 - (a) permit the defendant to be at large,
 - (b) commit him by warrant in Form 14 to a prison within the territorial division for which the summary conviction court has jurisdiction or to such other safe custody as the summary conviction court thinks fit, or
 - (c) discharge the defendant upon his recognizance in Form 28,
 - (i) with or with sureties, or
 - (ii) upon depositing such sum of money as the court directs, conditioned for his appearance at the time and place fixed for resumption of the trial.

*The emphasis is ours.

⁹Different considerations apply to the granting of bail after conviction pending appeal as the presumption of innocence has been held no longer to exist after conviction and the Committee will deal with bail pending appeal separately.

The act of admitting the accused to bail and determining the conditions upon which he is to be released is a judicial act. The taking of the recognizance following the order admitting to bail, which may be performed either by the justice who makes the order admitting the accused to bail, where the order is made by a justice, or by another justice, is an administrative act involving the exercise of a discretion as to the sufficiency of the surety or sureties if they are required. Unnecessary detention may result either from failure to exercise the judicial discretion involved in admitting to bail according to proper principles, or from the application of rigid formulae in taking the recognizance and in determining the sufficiency of the surety or sureties where they are required.

A recognizance is simply an acknowledgement that the person entering into the recognizance is indebted to the crown in the amount specified therein which is no longer to be due if the conditions set out in the recognizance are complied with (for example, that the accused appears and stands his trial).

The judge, magistrate or justice, may by virtue of the provisions of the Criminal Code admit the accused to bail on his giving his own undertaking, whereby he promises to appear at the time and place specified in the recognizance upon penalty of forfeiting a sum of money if he fails to perform his undertaking. In practice, where the accused is admitted to bail on his own recognizance, no effort is made to establish that he is of sufficient worth to make the forfeiture clause of any value. It is to be noted, however, that an accused commits a criminal offence if without lawful excuse he fails to appear in accordance with his undertaking whether or not he is ultimately found guilty.¹⁰

The judicial officer admitting the accused to bail may, however, require him to produce one or more sureties who will enter into a recognizance as well as the accused, binding themselves to forfeit a sum of money determined by the order admitting the accused to bail, if he fails to honour his undertaking to appear for his trial.

As an alternative to producing sureties who are willing to incur the risk of forfeiting the amount fixed as bail should the accused fail to appear in accordance with his undertaking, the proper judicial officer may admit the accused to bail upon entering into his own recognizance and depositing a sum of money determined by the order admitting him to bail.

It has been pointed out that under the present provisions of the Criminal Code, the power of a justice of the peace to admit to bail an accused charged with an indictable offence is a power that is incidental to his jurisdiction to conduct a preliminary inquiry. Similarly, the power to admit to bail in respect to an offence punishable on summary conviction is related to the power of a summary conviction court to adjourn the trial.¹¹ In practice the attendance of the justice of the peace at a police station is considered as an informal first

¹⁰ Section 125 of the Criminal Code.

¹¹ Friedland, M. L. *Detention Before Trial*. Toronto: University of Toronto Press, 1965, p. 53; McWilliams, P. K. "The Law of Bail". 9 *Crim. L. Q.* 21, p. 145 (1966-67).

appearance at which bail is granted. Since preliminary hearings and trials must be held in open court, subject to specific statutory exceptions, some doubt exists as to the legality of this procedure.

In the opinion of the Committee this doubt should be removed by the enactment of legislation expressly conferring power upon a justice of the peace to admit to bail upon arrest except with respect to offenses as to which only a judge of a superior court is empowered to admit to bail. Legislation of this character is necessary, in any event, to confer power upon a police officer to admit to bail following arrest if the recommendation of the Committee is implemented in this respect.

The Practice of Requiring Security in Advance

The Canadian bail practice has been unfavourably contrasted with the English practice, in that the former is said to require the provisions of some form of security which can be realized.¹²

The English bail practice is described by Dr. R. M. Jackson, as follows:

The English practice is to grant bail fairly freely. This is possible because bail in England does not involve the deposit of money or the giving of any security or bond. The form of bail is a recognizance, which is an acceptance by the accused that if he does not appear at the court he will become indebted to the Crown in the specified sum of money. The sum of money may be quite small or it may amount to some thousands of pounds. Added to that, in most cases, is a similar undertaking by a person who agrees to be surety . . .

It is clear that the provisions of the Criminal Code do not require security in advance just as the English law of bail does not require it. It is true that s. 451 (a) (ii) and s. 710 (2) (c) (ii), which permit the justice and the summary conviction court respectively to release the accused upon entering into a recognizance and depositing an amount that the justice or summary conviction court directs, do require a deposit of security in advance, but these provisions are merely alternative to the provisions of those sections which permit the justice or summary conviction court to release the accused on entering into a recognizance with one or more sureties or upon entering into his own recognizance without sureties and without deposit of security.

The Committee considers that the provisions for releasing the accused upon making a deposit as *an alternative to finding sureties* was enacted in favour of the liberty of the individual. A stranger in the community might not be able to provide sureties and thus might be forced to remain in custody in cases where release on his own recognizance without deposit might be considered inappropriate. For example, a person from another country charged with a non-extraditable offence such as drunk driving or impaired

¹² Jackson, R. M. *Enforcing The Law*. New York: St. Martin's Press, 1967, p. 90; see also Friedland, M. L. *Detention Before Trial*. Toronto: University of Toronto Press, 1965, pp. 177-185. Professor Friedland, however, clearly recognizes that the Criminal Code itself does not require security in advance any more than the English law requires it. The requirement of security in advance is derived from practice rather than law.

driving where release on his own recognizance might be totally ineffective to secure his attendance at his trial.

The procedure contained in the Criminal Code for collecting the debt due to the crown upon forfeiture of the recognizance, negates the proposition that the surety must either own real estate or deposit cash as an alternative.

Section 677 (3) of the Code provides that where a forfeiture of the recognizance has been ordered by the court, a writ of execution is to be delivered by the clerk or prothonotary to the sheriff, requiring him to levy of the *goods and chattels*, lands and tenements of the surety the amount specified in the writ. Where the proceeds of the execution are insufficient to satisfy the indebtedness, the surety may be committed to prison. The power to commit a surety to prison seems to have been exercised rarely, if at all, in modern times, and would only seem justified if there has been fraud on the part of the surety.

The justice before whom the recognizance is taken is required to satisfy himself that the proposed surety is of sufficient worth to justify his acceptance as such. There is no legal requirement that the sureties be land owners although they customarily are.

It is the practice, however, in some parts of Canada for magistrates and judges in making a bail order to specify "either property or cash" or "five thousand dollars property or twenty-five hundred dollars cash." This practice has contributed to the misconception that bail *necessarily implies* the furnishing of security in the form of real estate or cash.

It is clear to the Committee, that in practice in some parts of Canada, at any rate, sureties are required to satisfy the justice that they are worth the amount for which they have bound themselves, by producing title deeds to real estate accompanied by a solicitor's certificate that they have a good title, and a real estate expert's evaluation of the property, *or to deposit cash as an alternative*. These procedures are time consuming and productive of delay. Regarded as an inflexible procedure, such requirements are without authority of law. Where bail is granted in very serious cases of theft, fraud or conspiracy; where there may be a strong motive to abscond, although little danger to public safety may be involved, it may be desirable for the justice to take more than the ordinary precautions, which would suffice in a less serious case, to satisfy himself of the substance of the surety, but a sound discretion must be applied in each case rather than inflexible rules.

Requirements which are reasonable in one case may be oppressive in another.

The circumstances to be considered, however, present themselves with such infinite variety that the Committee does not consider that the exercise of the justice's discretion as to the sufficiency of the surety either ought to be controlled by detailed regulation, or is capable of being so controlled. On the other hand, neither should it be controlled by administrative directions issued by law enforcement officers.

The Committee is of the opinion that it would be highly desirable to conduct continuing educational programs for justices of the peace who frequently have to make decisions of great consequence to the individuals directly affected by them and to the community at large, sometimes with very little preparation for the heavy responsibility involved.

The Committee strongly urges the preparation of a booklet on the subject of bail to serve as a guide to justices of the peace and the police. Such a booklet should be prepared by the Department of Justice and the departments of justice or departments of the attorney-general of the different provinces in collaboration.

Principles Which Should Govern Pre-Trial Release

The Committee has already expressed the opinion that pre-trial detention can only be justified where it is necessary in the public interest. An earlier judicial view tended to equate the public interest almost exclusively with the public interest in procuring the attendance of the accused at his trial, and laid down the principle that the proper test of whether bail should be granted or refused is whether it is probable that the accused, if admitted to bail, will appear to take his trial. Certain considerations were held to be relevant to the determination of that question, such as:

- (a) The seriousness of the charge.
- (b) The strength of the evidence in support of the charges.
- (c) The antecedents of the accused.
- (d) The severity of the punishment which conviction would entail.

More recently the courts have emphasized that the public interest is not exclusively limited to the question whether the accused, if admitted to bail, will be likely to attend to stand his trial, but that the protection of the public against offences which might be committed if the accused were admitted to bail is an equally important consideration.

In *R v Phillips*¹³ the English Court of Criminal Appeal held that bail should not be granted if there was a likelihood that the accused would commit further offences prior to his trial. Indeed, in that case the court seemed to assume that a substantial record for house-breaking constituted conclusive proof that the accused, if released on bail, would commit further offences. The view expressed in *R v Phillips* is generally followed in other Commonwealth jurisdictions, but is by no means universally accepted. The principle enunciated in *R v Phillips* has been strongly criticized on the ground that when it speaks of protecting the public against the commission of further offences by the accused, the court has proceeded on the assumption that the accused is guilty—whereas he is presumed in law to be innocent. While this argument has considerable weight there may, nevertheless, in

¹³ (1947), 32 Crim. App. R. 47.

certain cases, be sufficient evidence of a clear and present danger to justify interference with the liberty of the accused in order to protect the public until his innocence or guilt is finally established.

Suppose the case of a man charged with attempting to murder his wife against whom there was overwhelming evidence, and suppose there was the clearest evidence that he would immediately upon his release renew the endeavour; could it be reasonably argued that he had an absolute right to be released as long as the court was satisfied that he would appear for trial?

We are satisfied that the refusal of bail for the protection of the public does not violate *The Canadian Bill of Rights*.

The American law with respect to bail has taken quite a different course to that in England and Canada.

In the United States, with few exceptions in a few of the states, an accused charged with a non-capital crime is entitled by federal and state laws to be released as of right on reasonable bail.¹⁴ In setting the amount of bail the only relevant consideration is the likelihood of the amount fixed ensuring the appearance of the accused for trial.

One eminent American author has written:

The outstanding weaknesses in American bail are two: denial of release to many who should be released, and release of many who should not be. Under the first head it appears that release is denied to many defendants without financial means who are subsequently acquitted or otherwise discharged, and who could be relied on not to jump bail. Under the second head, by virtue of constitutional provisions, bail is granted to many grave offenders, who will commit other crimes while out on bail and will jump bail.¹⁵

The bail system in the United States has recently, however, been the subject of intensive examination and reform with a view to releasing persons without financial means who are likely to attend for their trial.

While the Committee does not subscribe to the view that the only consideration in determining whether the accused should be released on bail is whether he will appear at his trial, the Committee is of the opinion that a defendant should not be denied release on bail simply on the *allegation* of the prosecution that he is likely to commit crimes if released on bail. If a defendant is to be denied release on bail, the onus should rest upon the prosecution to make out a reasonable case for denial of bail. Certainly an accused should not be denied bail *merely* because he has a record, or even a long or bad record. His record may well be a factor, but it ought to be no more than a factor in a determination to deny bail.

As has been pointed out the granting or denial of bail is a judicial function. In many cases an application by the defence will not be opposed by the

¹⁴ Foote, C. (ed.). "A Symposium: Conditional Release Pending Trial". *Studies on Bail*. Philadelphia: International Printing Co., 1966, p. 105.

¹⁵ Orfield, L. B. *Criminal Procedure From Arrest To Appeal*. New York: New York University Press, 1947, pp. 130-131.

prosecution. When the prosecution opposes the granting of bail absolutely, or urges that bail be granted only upon conditions which the accused is unable to meet, the prosecution should be required to make out its case.

In such circumstances it follows that measures should be taken to prevent prejudicing the accused at his trial by the dissemination of prejudicial matter which would not be relevant or admissible at his trial.

Where bail is opposed, the defence should be entitled to an order prohibiting the publication of the proceedings and legislation should be enacted to so provide.

It may be suggested that the accused will be prejudiced by the fact that the same magistrate who heard the bail application may try the accused—with a likelihood of prejudice to the accused—as a result of the disclosure of matters which would not be relevant or admissible at his trial.

Applications for bail which are opposed on the ground that the protection of the public requires the continued detention of the accused are likely to be more frequent in the larger centres, where trial by the same magistrate who heard a contested bail application may be readily avoided.

Contests of this nature are not likely to arise with great frequency in less populous communities. It should be possible therefore, to arrange for an outside magistrate to conduct the trial, if the trial is by magistrate, where the magistrate who would normally try the accused has disposed of a contested bail application where evidence not admissible at the trial has been brought out and in that way might affect his ability to fairly try the accused.

It has been argued that there is no accurate way of predicting the accused's behaviour pending trial. Even if a measure of predictability could be achieved, any fact-finding process for determining this issue would be so time-consuming as to nullify the purpose of bail.¹⁶

We think the issues involved are no more difficult than others which courts are constantly called upon to resolve in other areas of the law. Some reasonable assessment of the probability of the accused's behaviour pending trial is not impossible. If the prosecution does not make out a reasonable case for denial of bail, it follows that it should be granted.

It has been suggested that definite statutory grounds be established for denying bail because of the alleged difficulty of predicting future conduct. Some of the grounds suggested are:

- (a) That a person should be denied bail if he has been previously convicted of an indictable offence while on bail, charged with an indictable offence.
- (b) That he has been previously convicted of absconding bail.
- (c) The fact that the accused has been charged with the commission of an indictable offence while on bail charged with another indictable offence.

¹⁶ Foote, C. (ed.). "The Coming Constitutional Crisis In Bail". *Studies on Bail*. Philadelphia: International Printing Co., 1966, pp. 267-272.

These should no doubt be weighty factors in reaching a conclusion to deny bail, but they should not necessarily be controlling. The previous convictions under paragraphs (a) and (b) might have been registered a number of years before; the accused may have been completely rehabilitated and the charge with respect to which bail is now sought may be completely unfounded. Likewise the charge under paragraph (c) may be devoid of substance, as may be the charge in respect of which he was originally bailed. On the other hand, in a given case criteria with respect to which the legislation is silent, might justify refusal.

The police in representations to the Committee have complained that the bail system is abused, in that people are released who ought not to be released, such as house-breakers with long records and persistent car thieves. The police complain that many such accused are released on bail despite a high degree of predictability that they will commit offences while on bail; that a substantial number of such persons do commit offences while on bail, involving a waste of public funds and the needless expenditure of efforts by the police to apprehend them, when such could have been avoided by a denial of bail in the first instance.

Representations have also been made to the Committee by the police that an accused may be charged with an offence in one place and having been released on bail may go to another place—commit a further offence—and be released on bail without the court being aware that he is already on bail charged with an offence in some other place.

It is said that an accused may be on bail at the one time in respect of offences committed in three or four different places. This latter abuse is perhaps not so much the fault of the bail system as a lack of essential communication between different police forces.

The committee therefore recommends that there should be a central registry in each province for the purpose of maintaining a record of those persons charged with indictable offences who are on bail so that this information would be readily available to the judge, magistrate, justice or police in connection with a further bail application.

Statistics are not now available on a comprehensive basis with respect to the number of persons released on bail charged with indictable offences, who commit indictable offences while on bail, and the relationship of a prior criminal record to the probability of the commission of an indictable offence while on bail.

The Committee recommends that such statistics be collected on a comprehensive basis as a guide to future practice.

The Committee is satisfied that some people are admitted to bail who ought not to be released on bail. On the other hand, we are equally satisfied that many people are needlessly held in custody who should be released on bail; people who could safely be trusted to attend for their trial and

who represent no danger to the community. The Committee is also of the opinion that a great many people who are eventually released on bail are not released as speedily as justice dictates they should. We think that these inequities are caused in large measure by inadequate, and in some situations, archaic procedures, insufficient and inadequately trained justices of the peace in some places, and by rigid attitudes bearing no relationship to the only legitimate basis of pre-trial detention.

It is obvious to the Committee that there is a wide variation in the way the present provisions of the Criminal Code with respect to bail are applied in different parts of the country. Indeed, the view has been expressed to the Committee that the most serious defects in the present bail system relate to existing practices, rather than the substantive law.

The Committee recommends that the term "admit to bail" be extended to include release of the accused in appropriate circumstances upon his entering into a solemn undertaking to appear and that sections 451, 463 and 710 of the Criminal Code be amended accordingly to permit the release of an accused upon his entering into a solemn undertaking to appear, without entering into a recognizance, furnishing sureties or making a deposit.

By a solemn undertaking the Committee means a promise made by the accused, contained in a document to be signed by him, that he will attend to stand his trial on the charge, and will attend as required in connection with any proceedings in relation to the charge. The document should clearly inform the accused that a failure to keep his promise without lawful excuse constitutes an offence.

The Committee recommends that breach of such a solemn undertaking be constituted an offence and that section 125 of the Criminal Code be amended to this effect.

This change is based on the proposition that release upon a solemn undertaking rather than upon a recognizance, would, in many cases, be more meaningful and dignified and equally effective, with concomitant correctional advantages. As has been earlier pointed out, in practice where an accused has been admitted to bail on his own recognizance, no effort has generally been made to establish that he is of sufficient worth to make the forfeiture clause of any value.

The Committee considers that legislation is also necessary to correct abuses and misconceptions which have crept into the Canadian bail system.

The Committee therefore recommends that legislation be enacted to give effect to the following principles:

- 1. That a person charged with an offence shall be admitted to bail by the court, judge, magistrate or justice of the peace having jurisdiction to do so upon proper application being made or upon the appearance**

of such person before such court, judge, magistrate or justice of the peace unless:

- (i) It is made to appear that there are reasonable grounds for believing that the accused will not attend to stand his trial if released on bail, or**
 - (ii) It is made to appear that there are reasonable grounds for believing that the protection of the public requires that the accused be kept in custody pending his trial.**
- 2. On application by the accused or his counsel, the judge, magistrate or justice of the peace shall make an order prohibiting the publication of the proceeding. If the accused is not represented by counsel, the judge, magistrate or justice of the peace shall inform the accused that he is entitled to apply for an order prohibiting the publication of the proceeding.**
 - 3. On any such application to be admitted to bail or bail hearing, the criminal record of the accused may be read or filed but the judge, magistrate or justice of the peace shall not be *required to infer* from the accused's record *alone* that the accused will not likely appear at his trial, or that his release on bail would not be in the public interest.**
 - 4. On any such issue, either the prosecution or the defence may introduce any evidence relevant to the issues to be decided by the judge, magistrate or justice.**
 - 5. Where the judge, magistrate or justice decides that the accused may be admitted to bail, he shall direct that the accused be released upon his solemn undertaking to appear, or upon his own recognizance, without furnishing sureties or making a deposit unless he has reasonable grounds to believe from the seriousness of the offence, the antecedents of the accused, or other circumstances that there is a likelihood that the accused will not attend to stand his trial unless he is required to enter into recognizance with one or more sureties or deposit security in such amount as the judge, magistrate or justice considers sufficient to ensure his appearance.**

The Committee is aware of the efforts of the Vera Institute of Justice and of similar efforts in Canada and the United States. Under these projects, a system has been set up under which those taken into custody are interviewed, usually by law students, with a view to discovering whether they are good risks to be released on bail. The Committee commends any effort to make sure that any useful information is made available to the judge, magistrate or justice determining the bail issue.

Empowering Police to Release Pending Trial

The Committee is of the view that many of the injustices which arise from the delay involved in releasing persons on bail, who ought not to be detained in custody, are due to the necessity for having a justice of the peace admit to bail. This could be obviated if the police were empowered to release on bail prior to the appearance of the accused before a justice. Responsible counsel have informed the Committee that in many large urban centres from fifty to seventy per cent of all persons taken into custody could have been safely released at the police station under the authority of the police.

The police in Great Britain have this power in respect of less serious offences in certain circumstances.¹⁷

In the Provinces of Alberta, Ontario and Newfoundland, the police are empowered to admit to bail a person charged with a breach of a provincial statute or a by-law passed thereunder, who was taken into custody either with or without a warrant.¹⁸

The Committee recommends that the police be empowered, prior to his appearance before a justice, to release on bail a person who is held in police custody whether arrested with or without a warrant with respect to an offence:

- (a) punishable on summary conviction, or
- (b) an indictable offence within s. 467 of the Criminal Code.

The Committee's recommendation will require appropriate amendments to be made in s. 442 of the Criminal Code and in the form of warrant prescribed by the section.

The Committee's recommendation limits the power of the police to admit to bail to the class of offence with respect to which the Committee recommended that a police officer be empowered to issue a summons in the previous chapter. For the reasons there given, the Committee believes that this enlargement of power is sufficient to obviate the delay involved in obtaining early release in respect of the less serious offences, and will leave justices of the peace more free to deal with the more serious type of offences.

The power to release on bail should be vested in the senior officer in charge of the police station or lock-up where the accused is in custody.

In accordance with the principles previously expressed, release on bail should be mandatory unless the officer in charge has reasonable grounds to believe:

- (a) that if released on bail the accused will not appear at his trial.
- (b) his release would endanger the public or himself.

¹⁷ Jackson, R. M. *Enforcing The Law*. New York: St. Martin's Press, 1967, pp. 90-91.

¹⁸ R.S.A. 1955, c. 325, s. 12, as amended Stats. Alta. 1960, c. 102, and Stats. Alta. 1965, c. 89; R.S.O. 1960, c. 387, s. 15; R.S.Nfld. 1952, c. 117, ss. 91-93.

We think that in this class of offence if the public interest does not require the continued detention of the accused, he should normally be released on his own recognizance, or upon signing a solemn undertaking to appear although there may be *some cases* where the deposit of a reasonable sum of money or the furnishing of a surety might be appropriate.

The Committee is of the view, however, that the present practice, in many places in Canada, of requiring the deposit of a sum of money as a condition of securing release from custody with respect to minor offences cannot, *as a general rule*, be justified. It is not only unnecessary but useless. It is in the highest degree unlikely that a person with any roots at all in the community would take to flight to avoid appearing to stand his trial on a relatively minor charge. If he were disposed to take to flight he would not be deterred by the forfeiture of a relatively small sum of money.

We think that perhaps a solemn undertaking may, in some cases, be more meaningful than the execution of a document whereby the accused becomes indebted in a sum of money if he fails to appear. As already recommended by the Committee, breach of a solemn undertaking should be made an offence and notice thereof should be given in the document which the accused is required to sign.

Measures Supplementary to Bail System

The Committee has given careful consideration to the questions whether the entire bail system should be abrogated and other measures substituted to ensure the appearance of the accused at his trial.

Many people take the view that the bail system is discriminatory and operates to the detriment of the poor. That the bail system—unless properly applied—is capable of producing this result cannot be denied, and the Committee is satisfied that the misapplication of the Canadian bail system has produced many discriminatory results.

In Sweden, bail is not recognized because it is considered discriminatory. Bail, while recognized in Norway, Denmark, West Germany, Belgium and France is rarely used for the same reason. Measures such as requiring the accused to surrender his passport and to report to the police at regular intervals are substituted for bail as a means of ensuring the attendance of the accused at his trial.

In England it is common for release on bail to be subject to conditions or to undertakings given by the accused. Undertakings may be required that the accused will report at regular intervals to the police or reside in a particular place. Lord Devlin states that the legal effect of such stipulations and undertakings is not clear, but it is generally held that magistrates have no power to impose such conditions, and that all they can do is obtain collateral undertakings from the accused as to the way he will behave when on bail.¹⁹

¹⁹ Devlin, Lord Patrick. *The Criminal Prosecution in England*. London: Oxford University Press, 1960, p. 74.

The Committee considers that such measures would not be sufficiently effective in Canada, where international movement is relatively easy, to warrant the *complete* abandonment of the bail system.

Very few persons released on bail charged with *serious* crimes fail to appear to stand their trial. No doubt many factors exercise an influence on the defendant's decision to appear at his trial, even when charged with a serious crime where there is a likelihood of conviction and the prospect of severe punishment.

Many, perhaps most, defendants charged with serious offences who do not represent a continuing danger to the public would still appear at their trial if released without sureties, or deposit of property, on their solemn undertaking to appear, even if failure to appear did not constitute a new offence. For those who have deep roots in the community, flight, apart altogether from the deterrent effect of the knowledge that in all probability they will be apprehended and their position made worse, is not an attractive alternative. The loss of face involved in flight, no doubt, is a powerful influence with respect to some kinds of accused persons.

No doubt, in some cases, knowledge on the part of the accused that if he flees he will be apprehended; that his chances of acquittal may be adversely affected, and that he incurs a substantial risk of additional punishment, is a powerful deterrent to flight. The more serious the offence, the more effort will likely be made to apprehend him. Serious efforts to apprehend *all* who skip bail should be made.

The Committee is also of the view that unwillingness to inflict a loss on friends or relatives who have risked their property in the faith that the accused will fulfill his obligation to appear may often be an important factor. Moreover, the fact that friends or relatives are willing to undertake that the accused will appear on penalty of forfeiting the amount fixed as bail provides a powerful testimonial from those who know the defendant that he will not flee.

It may be, although it is more doubtful, that incurring the forfeiture of cash deposited as an alternative to furnishing sureties may have a deterrent effect, where the amount is substantial, having regard to the means of the defendant. Perhaps the real justification for this type of bail is that if the defendant, contrary to expectations flees, the expense of apprehending him will not fall on the public. It is the view of the Committee that this type of bail should have a very limited use.

It is difficult to assess the influence of any one of these factors. What is known is that the combined influence of all these factors results in the vast majority of those charged with serious crimes, who are released on bail, appearing at their trial.

The Committee is of the opinion that the complete abandonment of a bail system which envisages in some cases the furnishing of a surety or sureties who agree to forfeit the amount fixed as a bail if the accused fails to appear, or in some cases the deposit of cash as an alternative to furnish-

ing sureties, would result in more persons charged with *serious* offences being held in custody pending trial because of the abandonment of this additional safeguard—with the inevitable result that pre-trial release in the case of serious offences would be more restricted.

While the Committee, therefore, does not recommend the complete abandonment of the bail system it is, nevertheless, of the opinion that legislation should be enacted as a supplement to the bail system.

The Committee therefore recommends that legislation be enacted to permit the inclusion of such reasonable conditions in the solemn undertaking or recognizance as would provide an additional guaranty that the accused will appear at his trial, and will not in the meantime by misconduct jeopardize the public interest, where the court, magistrate or justice who admits the accused to bail considers it desirable to include such conditions.

The Committee considers that one, or more than one, of the following conditions might be appropriate in certain cases:

- (a) That the accused will report at designated intervals to the police or other designated persons.
- (b) That the accused will give notice of any change of address.
- (c) That the accused will reside at a certain place.
- (d) That the accused will remain away from the complainant.
- (e) That the accused will not intimidate witnesses or engage in criminal misconduct.
- (f) That the accused will surrender his passport.
- (g) That the accused will not leave or attempt to leave the jurisdiction.

Where there is substantial doubt in the mind of the tribunal before whom an application for bail is made as to whether the accused should be released from custody at all, or if having decided that the accused may be admitted to bail there is substantial doubt as to whether the accused's own recognizance or solemn undertaking without sureties or deposit of cash would ensure his appearance at trial, the inclusion of such conditions might provide the assurance required and permit the release of the accused from custody, which might otherwise be denied, or might permit the release of the accused on his own recognizance without deposit or upon his solemn undertaking where sureties or a deposit might otherwise be required.

The legislation should authorize the cancellation of bail for breach of any of the conditions upon which release is granted.

Moreover, representations by law enforcement officers made to the Committee indicate that while the percentage of persons *released on their own*

recognizance who fail to attend for their trial is not large in relation to the total number of persons so released, the number of such persons who fail to attend for their trial is by no means insignificant and a considerable expenditure of police manpower and public funds may be required to trace these individuals. The vast majority of those who fail to appear are charged with minor offences and they represent an irresponsible rather than a dangerous group. The imposition of additional conditions such as those indicated would, no doubt, help to reduce the number of persons who fail to appear in accordance with their undertaking.

While recognizing that a bail system is capable of being applied in such a way that it discriminates against the poor, its proper application is not discriminatory.

A person may be poor but responsible, and thus eligible for release on his own *recognizance* or solemn undertaking even when charged with a serious offence.

If sureties are required, the amount which they are required to bind themselves to forfeit if the accused fails to appear might justifiably be less than would be required in the case of a wealthy man with wealthy friends or relatives, since the loss would fall more heavily upon sureties of small means. Where the accused is poor but has a background of stability, he is not likely to flee; flight even if he were to be so disposed would be more difficult than in the case of a wealthy defendant. These are factors which should be taken into consideration in determining the amount of bail required. The Committee has already pointed out that the Canadian criminal law of bail does not require the deposit of security in advance, except as an alternative to producing sureties and the amount of the *recognizance* may be fixed at a nominal amount.

Professional Bondsmen

The almost unanimous opinion expressed in the written and oral submissions to the Committee was one of opposition to the recognition of professional bondsmen. This view was supported strongly by prominent members of the Bar and of the correctional services in several parts of the United States with whom the Committee has had discussions.

Studies in Philadelphia have shown that private sureties are more efficient in producing defendants for trial than professional bondsmen. The defendant for whom a relative or friend has become a surety knows that if he absconds the loss will fall on the friend or relative who has assumed the risk for the purpose of freeing him from custody. There is no doubt that the unwillingness to inflict loss on a friend or relative operates as a powerful deterrent. The accused, however, feels no obligation to a professional bondsman to whom he has paid a fee or whom he has indemnified.²⁰

²⁰ Foote, C. (ed.), "Compelling Appearance in Court: Administration of Bail in Philadelphia". *Studies on Bail*. Philadelphia: International Printing Co., 1966, p. 37.

In the Committee's view, the recognition of professional bondsmen would institutionalize and formalize financial discrimination in bail practice. It is also conducive to other evils and unhealthy relationships with the Bar and court officials. It may result in the bondsmen controlling the accused's choice of a lawyer and depriving the defendant of his freedom of choice in selecting his counsel.

Restricting professional bondsmen to licensed surety companies does not prevent the undesirable side effects of professional bail since corporations can only act through human representatives.

As professor Friedland has written:

It would be senseless to introduce the American system at the very time when the Americans are discovering its shortcomings and attempting to diminish the scope of its operation.²¹

It has generally been assumed that the payment of a fee to a bondsman or surety for the service provided is an offence under section 119, sub-section 2 (e) of the Criminal Code, which provides that everyone is guilty of attempting to pervert or defeat the course of justice who, being a bondsman, accepts or agrees to accept indemnity in whole or in part, from a person who is released or is to be released from custody under a recognizance; or, if not an offence under the provisions of sub-section (2), is guilty under the general provisions of section 119, sub-section (1) of attempting to obstruct, pervert or defeat the course of justice.²²

It should be noted, however, that section 119 (2) (e) prohibits the bondsman from accepting indemnity in whole or in part from a person who is released, or is to be released from custody under a recognizance. The sub-section does not prohibit the bondsman from accepting indemnity from a third person. Moreover, it is doubtful whether the payment of a fee for the service constitutes "indemnity" which might be more properly interpreted as an agreement or deposit to save the surety harm or reduce his loss if the accused absconded. It may be, however, that such an arrangement is within the more general prohibition of sub-section (1) of section 119 if outside sub-section (2).

The Committee is unanimous in recommending that the use of professional bondsmen be prohibited, and that legislation is desirable to remove the doubt which exists under the present provision of the Criminal Code as to whether the payment of a fee either by the accused or a third person to a surety, or the acceptance of such a fee by a surety, constitutes an offence.

²¹ Friedland, M. L. *Detention Before Trial*. Toronto: University of Toronto Press, 1965, p. 160.

²² Friedland, M. L. *Detention Before Trial*. Toronto: University of Toronto Press, 1965, p. 153.

BAIL ON APPEAL: TO THE COURT OF APPEAL AND TO THE
SUPREME COURT OF CANADA

Right of Appeal

Appeal to Court of Appeal from a Conviction for an Indictable Offence

Under section 583 of the Criminal Code, an accused who is convicted of an indictable offence may appeal to the court of appeal against his conviction,

- (a) *As of right* on any question of law,
- (b) *By leave*, of the court of appeal on any ground that involves a question of fact, or a question of mixed law and fact, or upon the certificate of the trial judge that the case is a proper case for appeal.²⁸

Appeal to the Supreme Court of Canada by a Person Convicted of an Indictable Offence Whose Conviction Has Been Affirmed by the Court of Appeal

Under section 597 of the Criminal Code, a person convicted of an indictable offence whose conviction has been affirmed by the court of appeal may appeal to the Supreme Court of Canada from the judgment affirming his conviction.

- (a) *As of right*:
 - (i) On any question of law on which a judge of the court of appeal dissents, or
 - (ii) If he has been jointly tried with a person who has been acquitted and whose acquittal has been set aside by the court of appeal.

- (b) *By leave* of the Supreme Court of Canada on any question of law.

Appeals to the Court of Appeal and to the Supreme Court of Canada in Summary Conviction Offences

Under section 743 of the Criminal Code a person convicted of an offence punishable on summary conviction whose conviction has been affirmed on appeal by the summary conviction appeal court, as defined by s. 719 of the Criminal Code, or whose conviction has been affirmed on appeal by way of a stated case, where the court hearing the appeal by way of a stated case is not the court of appeal, may appeal to the court of appeal with leave of that court on any ground that involves a question of law

²⁸ Under section 583a of the Code an accused who has been sentenced to death has an appeal as of right to the court of appeal on grounds either of law or fact, or mixed law and fact, and a further right of appeal under section 597a of the Code to the Supreme Court of Canada on similar grounds. From a practical viewpoint, the granting of bail pending appeal in this special class of case is highly unlikely. The Committee has not discussed the right of appeal under section 667 of the Code and section 41 of the Supreme Court Act of a person found to be an habitual criminal or a dangerous sexual offender for the same reason. See *R v Tilley*. (1951), 101 C. C. C. 223.

alone. A further appeal exists by virtue of s. 41 of the Supreme Court Act to the Supreme Court of Canada *by leave* of that court on any ground of law alone.

Appeals under Section 37 of the Juvenile Delinquents Act.

Under section 37 of the Juvenile Delinquents Act, which applies to appeals by adults as well as juveniles, an appeal lies to a judge of the supreme court of the province as defined by s. 2 (1) of the Act, from any decision of a juvenile court judge or magistrate, if special leave to appeal is granted on special grounds by a judge of the supreme court of the province, with a further right of appeal to the court of appeal by special leave of that court. Under s. 41 of the Supreme Court Act, there is a further right of appeal from the court of appeal to the Supreme Court of Canada on a question of law if leave is granted by that court.

Appeals to the Court of Appeal from Sentences Passed by the Trial Court upon Conviction for an Indictable Offence

Under section 583 (b) of the Criminal Code, a person convicted of an indictable offence may appeal to the court of appeal against the sentence passed by the trial court, *with leave of the court of appeal or a judge thereof* unless that sentence is one fixed by law.

Jurisdiction and Procedure as to Bail on Appeal

Jurisdiction to Grant Bail on Appeals to the Court of Appeal and the Supreme Court of Canada

Section 587 of the Criminal Code provides:

The chief justice or the acting chief justice of the court of appeal or a judge of that court to be designated by the chief justice or acting chief justice may admit an appellant to bail pending the determination of his appeal.

Section 424 (2)(d) of the Criminal Code confers on the judges of the court of appeal in each province the power to make rules of court to carry out the provisions of the Criminal Code with respect to appeals from convictions for indictable offences. The judges of the court of appeal in each province have enacted Criminal Appeal Rules applicable to that province.²⁴

Absence of Jurisdiction under the Present Law to Admit to Bail, Where Leave to Appeal is Necessary, Prior to Granting of Leave to Appeal

It has been uniformly held that where leave is required as a condition precedent to the existence of a right of appeal, there is no jurisdiction to

²⁴ Ryan, L. J. (ed.). *Tremear's Annotated Criminal Code*. Toronto: Carswell Co., 1964, 6th ed., p. 686.

grant bail until leave to appeal has been obtained, since until leave is granted, where leave is necessary, no appeal is *pending* within the meaning of section 587 of the Criminal Code.²⁵

This problem is not so acute in appeals to the court of appeal because the appeal is usually based on both grounds of law and fact, and since leave is not necessary where the appeal is on grounds of law, jurisdiction to grant bail consequently exists as soon as the notice of appeal is duly filed.

The problem is more acute with respect to appeals to the Supreme Court of Canada which, although limited to questions of law, require leave to appeal to be granted by that court before an appeal can be said to be pending, unless there is an appeal as of right by virtue of a dissent on a ground of law in the provincial court of appeal or by virtue of the provisions of s. 597 (2) (b) of the Criminal Code. Until leave has been granted, where leave is necessary, there is, therefore, no jurisdiction to admit to bail.

This state of the law can create a real hardship in cases where the judgment of the court of appeal, dismissing an appeal from a conviction, is not delivered until late in June. Leave to appeal could not ordinarily be obtained until October. If the sentence imposed were a short one, it might be substantially served before leave to appeal could be obtained—even though the appellant ultimately succeeded in his appeal.

Jurisdiction to Grant Bail on Appeal to the Court of Appeal against Sentence

In *R v Cavasin*²⁶ O'Halloran J. A. rejected the argument of counsel for the crown that there was no jurisdiction to grant bail on an appeal from sentences only, and held that a judge of the court of appeal designated by the chief justice has jurisdiction to admit to bail a person who desires to appeal against sentence only since such a person is an 'appellant'.²⁷

²⁵*R v Guinness* (1940), 73 C. C. C. 98; *R v Goverluk* (1945), 83 C. C. C. 377; *R v LaRocque* (1952), 101 C.C.C. 125.

²⁶(1944), 82 C. C. C. 171.

²⁷The Judgment of O'Halloran J. A., however, found support in former section 1012 (a) of the Criminal Code which read:—

"In this section and in the following sections of this part, unless the context otherwise requires,

(a) "appellant" includes a person who has been convicted on indictment and desires to appeal under the next following section of this Act;"

The following section was section 1013, which provided for an appeal both against conviction and sentence.

The definition of 'appellant' formerly contained in section 1012 has been dropped from the new Code which came into force on the first day of April, 1955, and which does not expressly define 'appellant'. However, s. 586 (1) of the present Code reads:—

"An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal, in the manner and within the period after the time of the acquittal, conviction or sentence, as the case may be, as may be directed by rules of court."

Section 586, while it does not expressly define 'appellant', by implication includes within that term a person who desires to appeal against his sentence only and who has duly served an application for leave to appeal against his sentence.

Although the applicant for bail in *R v Cavasin* fell within the definition of appellant under former section 1012, O'Halloran J. A. held that no power to grant bail existed until leave to appeal had been granted, since until leave to appeal had been granted, no appeal was 'pending' as required by s. 1019 (now s. 587). Jurisdiction to grant bail on appeal thus depends upon whether there is an appeal 'pending', as well as upon the question whether the applicant falls within the definition of 'appellant'.

The Committee is of the opinion that it is not desirable to confer jurisdiction to admit to bail a person who has appealed against sentence *only* until a judge of the court of appeal, on the application for leave, has determined that the applicant has an arguable case.

The Committee, therefore, does not recommend any change in the law in this respect.

Moreover, since leave to appeal from a sentence may be granted by a single judge, no problem with respect to delay is involved.

The Committee, however, recommends that the jurisdiction to admit to bail be enlarged by amending section 587 of the Criminal Code to confer jurisdiction to admit to bail in appropriate cases a person who desires to appeal to the court of appeal against a conviction, or to the Supreme Court of Canada from a judgment of the court of appeal affirming a conviction, who requires leave to appeal and who has duly filed and served a notice of application for leave to appeal, pending the granting of leave to appeal.

Procedure with Respect to Admitting to Bail Pending Appeal

As has been pointed out, the detailed procedure whereby an appellant may be admitted to bail is contained in the Criminal Appeal Rules passed by the judges of the court of appeal in each province, and which are applicable to that province.

It has been suggested to the Committee that in some provinces the procedure required to be followed involves unnecessary delay. For example, in some provinces the order admitting the appellant to bail must be transmitted to the place where the accused is in custody, so that the justice of the peace can take the recognizance of the appellant and those of the sureties, if any, in accordance with the terms of the order. The recognizance of the appellant and those of the sureties must be certified as to their sufficiency by the attorney-general or crown counsel, and then returned to the registrar of the court of appeal. If satisfied that the recognizances have been duly entered into, the registrar of the court of appeal issues an order for the release of the appellant, which must be transmitted to the keeper of the prison where the appellant is in custody. If the appellant is in custody in a prison distant from the court of appeal many days may elapse before his release.

The Committee is of the view that once the order admitting to bail has been made by the judge authorized to make it, the administrative acts involved in releasing the appellant might be performed at the local level and the order

for release might be signed by a county or district court judge or magistrate. All documents could be transmitted to the court of appeal for the purpose of its records after the appellant's release. The Committee considers that it would be desirable for conferences to be held by the judges of the provincial courts of appeal, with a view to simplification of the administrative procedures involved in releasing an appellant who has been admitted to bail and with a view to the adoption, so far as is practical, of a uniform procedure.

It has been suggested to the Committee that the delay that is sometimes involved under the existing law might be avoided by empowering the trial judge to admit to bail pending appeal, with a right of appeal to a judge of the court of appeal if the trial judge refused to grant bail.

The Committee does not consider that the adoption of this suggestion would necessarily provide a solution and the possibility of an appeal from a trial judge's refusal to admit to bail might actually add to the delay in finally determining the matter.

Bail Pending Appeal to the Supreme Court of Canada

Reference has already been made to some problems with respect to bail pending appeals to the Supreme Court and recommendations have been made with a view to obviating them.

The jurisdiction to grant bail pending the determination of an appeal to the Supreme Court of Canada from the judgment of a provincial court of appeal, is vested in the chief justice of the court of appeal, the acting chief justice or some other judge of that court designated by the chief justice or the acting chief justice.

Under section 587 of the Criminal Code, a *judge of the Supreme Court of Canada* has no jurisdiction to grant bail pending the determination of an appeal to that court.²⁸

The absence of jurisdiction in the Supreme Court of Canada or a judge thereof to grant bail with respect to an appeal to that court might appear to be an anomaly. However, it is normally much more convenient and less expensive for the appellant to make application for bail to a judge of the court of appeal of the province and there seems no valid reason to recommend a change in the present law in this respect.

Principles which Should Govern Bail on Appeal

The English Court of Criminal Appeal has held on many occasions that it will exercise the power to admit to bail pending appeal only in *exceptional* circumstances.²⁹

²⁸ *Steele v The King* [1924], S.R.C. 1, 42 C. C. C. 47.

²⁹ Butler, T. R. F., *et al. Archbold Criminal Pleading Evidence and Practice*. London: Sweet & Maxwell, 1966, 6th ed., p. 303.

It has been held in Canada that the presumption of innocence ceases with conviction, and bail will not be granted pending an appeal unless there are exceptional circumstances.³⁰

An examination of the Canadian cases, however, reveals a wide variation in the practice with respect to granting bail pending appeal. Some judges apply the principle enunciated by the English Court of Criminal Appeal strictly; other judges follow more liberal principles in the granting of bail. A wide variation can be discerned between the attitudes of courts of different provinces with respect to granting bail on appeal.

In *Regina v Pike*,³¹ decided in 1953, the appellant had been convicted in September of the theft of money in excess of \$2,000.00 from her employer and had been sentenced to imprisonment for a term of 15 months. Her application to be admitted to bail pending the hearing of her appeal was refused. The judge to whom the application was made, after referring to the principle previously referred to, that bail, pending appeal will be granted only where there are exceptional or unusual circumstances to warrant it, said:

Counsel for the appellant asserted such circumstances here exist, *inter alia*, because the court reporter's duties in respect of attendance at pending assizes will preclude completion of the lengthy transcript of the trial proceedings until November, and the further necessity of printing the appeal book will delay the hearing of the appeal until the January term. This appears to be too gloomy a view; for even with the pressure on the reporter's time I see no reason why the case should not be ready for hearing well before the end of the year; and the practice of the court is to expedite the hearing of such appeals even out of term.

In any event it is settled that the mere lapse of time involved in securing hearing of an appeal (such as that occasioned by court vacations or the transcription of evidence, etc.), is not considered an exceptional or unusual circumstance warranting bail. . . .

I have considered other matters urged on behalf of the appellant such as absence of previous criminal record, her husband's responsible position and residence in Halifax, and her sex. I have not been convinced, however, that the circumstances in the aggregate are such as to justify departure from the sound principle which governs the granting of bail, particularly in the case of one convicted of the serious crime here involved, and in the absence of any obvious indication of probability of ultimate success in the appeal.

On the other hand, in *R v Smith; R v Barnard*,³² decided in 1924, the applications by the appellants to be admitted to bail pending appeal from convictions for offences arising out of the Home Bank failure were granted. The appellants were sentenced respectively to imprisonment for a term of six months, with an added indeterminate sentence of six months, and to imprisonment for eighteen months and a further indeterminate sentence of six months. The judge in granting the application said:

³⁰ *R v Goverluk* (1945), 83 C. C. C. 377.

³¹ *Regina v Pike* (1953), 109 C. C. C. 396.

³² *R v Smith; R v Barnard* (1924), 43 C. C. C. 24.

The circumstances attending each case should be carefully considered by the court before admitting to bail any one who has been convicted of an offence; but, if the circumstances are such as to convince the court that the ends of justice will be served by admitting to bail, and that there is no sufficient reason why that course should not be observed, then it would seem to me a proper case for admitting to bail.

In deciding such a question, the court may obtain such assistance by considering the nature of the offence of which the accused has been convicted; the amount of bail to be given; the previous character of the accused, his family ties and obligations; whether the appeal is frivolous or substantial; and any other circumstance calculated to enable the court reasonably to determine whether the prisoner will or will not surrender himself in accordance with the order of the court.

It is clear to the Committee that bail pending appeal is more liberally granted in some provinces than in others. Fully recognizing that some variation in practice in different provinces may be warranted by particular local conditions, at particular times, the adoption of different *principles* with respect to the granting of bail pending appeal is not desirable. In the opinion of the Committee, the principle that bail will only be granted pending appeal in *exceptional* circumstances is too restrictive, having regard to the more liberal policy with respect to bail which the Committee has recommended should be adopted prior to the trial of the accused. Moreover, the rule of exceptional circumstances does not provide sufficiently precise guidance for the judge to whom the application is made.

The Committee has taken the view that an accused who is not yet proved guilty should not be kept in custody unless it is necessary for the protection of the public, or to ensure his appearance at his trial. The Committee has taken the position that the onus should rest upon the prosecution to justify pre-trial detention, and not upon the accused to justify his release.

It would seem, however, that after the conviction the onus should rest upon the applicant to justify release on bail pending appeal. While he is no longer entitled to be presumed to be innocent, he may nevertheless not be guilty. If he is denied bail and is acquitted by the court of appeal, an injustice has resulted.

The Committee recommends that legislation be enacted to provide that where an application is made by an appellant for release on bail pending appeal from conviction or pending the granting of leave to appeal from such conviction the application shall be granted if the judge to whom the application is made is satisfied by a preponderance of probability:

- (i) That the appeal is not frivolous and is not taken for the purpose of delay.**
- (ii) That the appellant, if admitted to bail, will surrender in accordance with the terms of the order admitting him to bail.**
- (iii) That the appellant will not, if released on bail, constitute a danger to the public.**

Where an application for bail is made in respect of an appeal against sentence *only*, it would seem reasonable that different considerations should apply. In the view of the Committee, it would not be sufficient for the applicant to show that his appeal is not frivolous, but he should be required to show not only that there are substantial grounds to be argued, but that refusal of bail might work a prejudice to him by virtue of the length of time that would elapse before his appeal could be heard. The appellant should, of course, be required, in addition, to satisfy the court that if admitted to bail,

- (a) He will surrender in accordance with the terms of the order admitting him to bail.
- (b) That he will not, if released on bail, constitute a danger to the public.

Legal Aid

It is suggested that where legal aid is provided to an appellant with respect to an appeal, that the legal aid should cover services performed in relation to a bail application in appropriate cases pending appeal.

BAIL ON APPEAL: TO SUMMARY CONVICTION APPEAL COURT

In summary conviction matters, an appeal exists by way of a re-hearing to the summary conviction appeal court as defined by s. 719 of the Criminal Code, which in most provinces is the county or district court. In the Province of Quebec it is the Superior Court, in Prince Edward Island it is the Supreme Court and in Newfoundland it is a Judge of the Supreme Court.

Under the provisions of s. 724 of the Criminal Code, a person who has been convicted of an offence punishable on summary conviction who has been sentenced to imprisonment, must either remain in custody pending the determination of his appeal or enter into a recognizance.

Section 724 (2) provides that the recognizance may be entered into with one or more sureties and may, where it is not entered into by one or more sureties, be required to be accompanied by a deposit of such sum of money as the summary conviction court that made the conviction or order has directed.

The condition of the recognizance is set out in s. 724 (3) and includes as a part of the condition that the appellant will pay any costs that are awarded against him.

No costs are payable by a person convicted of an indictable offence whose appeal is dismissed. A person convicted of a less serious offence punishable on summary conviction is accordingly in a worse position in some respects with respect to bail on appeal than a person convicted on indictment.

The Committee considers that the provisions of the Criminal Code which permit costs to be awarded against a person in summary conviction proceedings, constitute an anomaly which should be corrected. The procedure governing appeals in summary conviction matters should be re-examined with a view to its simplification.

Whether or not the power to award costs against a defendant or appellant in summary conviction proceedings is entirely dispensed with, the provisions of s. 724 (3) which require an appellant to enter into a recognizance which contains a condition requiring payment of any costs that are awarded against him in order to obtain release from custody pending the hearing of his appeal, cannot be justified.

The Committee is of the opinion that in most cases an accused should be released on his own recognizance pending an appeal from an offence punishable on summary conviction.

*Doubt as to Power to Admit to Bail Pending
Appeal from Sentence only*

Under the provisions of the present Code, an appeal against "conviction" and an appeal against "sentence" are provided for separately.

Section 720 of the Criminal Code, in part, reads:

Except where otherwise provided by law,

- (a) The defendant in proceedings under this part may appeal to the appeal court
 - (i) from a *conviction* or order made against him, or
 - (ii) against a *sentence* passed upon him;

Section 724 (1) of the Criminal Code reads in part as follows:

- (1) The following provisions apply in respect of appeals to the appeal court, namely,
 - (a) where an appeal is from a conviction imposing imprisonment without alternative punishment the appellant shall
 - (i) remain in custody until the appeal is heard, or
 - (ii) enter into a recognizance;

The term "conviction" may be used to mean the adjudication of guilt or, in a wider sense, to include the sentence imposed following the adjudication of guilt.

The fact that the right to appeal from conviction is dealt with separately from the right to appeal against sentence in section 720, clearly shows that the term "conviction" is used *in that section* in the narrower sense of the

adjudication of guilt.³³ The term "conviction" is used in the same sense in sections 722 and 725. If the word "conviction" in s. 724 is used in the narrower sense of the adjudication of guilt, a person who is appealing against a sentence only would have no right to be released on bail, since release on bail is restricted to a person who appeals against a "conviction".

The term "conviction" is, however, still used in the wider sense in s. 713 of the code, and the words "conviction imposing punishment" in s. 724, itself suggest that it is used in the wider sense, which includes both adjudication and sentence, in relation to the provisions with respect to release on bail pending appeal.

The Committee recommends that any uncertainty that may exist as to whether a person who is appealing from a sentence only has the right to be released on bail, should be removed by legislation clearly authorizing release on bail where the appeal is from a sentence only.

³³ Section 749 of the former Criminal Code, which conferred the right of appeal in summary conviction matters prior to the coming into force of the present Criminal Code, provided that "any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal". In *R v Vanek*, 82 C. C. C. 53 it was held that the word "conviction" was used in its broadest sense to include both the adjudication of guilt and the sentence imposed. Hence a defendant who wished to appeal against sentence imposed upon him appealed against the "conviction" since the sentence was included in the term "conviction".