

MARTIN'S
ANNOTATED
CRIMINAL CODE
OF CANADA

INTRODUCTION

It is often said that the *Criminal Code of Canada*, 1892, is based upon the English Draft Code of 1878. Although a good deal of the latter was embodied in the Canadian legislation, this is true only to a limited extent—each had its genesis in earlier legislation. On the other hand, it is unjustifiably extreme to speak of the Canadian Code, as has been done, as a “hodge-podge” of the laws of the Colonies which entered into Confederation.

Before 1826, the criminal law of England was scattered through many different Acts. Reformers, notably Jeremy Bentham, Sir Samuel Romilly and Sir James Mackintosh were pressing for change, and in the years between 1826 and 1828 a number of remedial and consolidating Acts were passed at the instance of the Home Secretary, Sir Robert Peel. It is interesting to note that in 1823 he had secured legislation whereby about one hundred felonies were exempted from capital punishment and that, according to his biographer, Sir Fresham Lever, two hundred and seventy-eight earlier Acts relating to criminal law were sifted during his first tenure of office as Home Secretary and such of their provisions as continued to be of any value consolidated in eight new Acts.

1833 saw the appointment of the first of a series of Criminal Law Commissioners, but it was not until 1878 that, from the hand of Sir James Stephen, the English Draft Code came into being. Meanwhile, in 1861, the Parliament of the United Kingdom enacted several Acts to consolidate and amend the criminal law, namely, c.94 (Accessories and Abettors); c.95 (Repeals); c.96 (Larceny); c.97 (Malicious Injuries to Property); c.98 (Forgery); c.99 (Offences against the Coinage); c.100 (Offences against the Person).

Two years after Confederation the Parliament of Canada enacted several Acts relating to criminal law, especially the *Criminal Law Procedure Act*, and also Acts relating to forgery, to larceny, to perjury, to offences against the person, and to offences against the coinage. In introducing

them Sir John A. MacDonald said (May 21, 1869) that "The primary object in introducing these criminal laws was the assimilation of the whole criminal law of the Dominion, and every other consideration was subsidiary to this". These Acts appear in the Statutes of 1869 and in the Revised Statutes of 1886. While these Acts contain many of the provisions of the Imperial Acts of 1861 it is of interest (even if the interest be now no more than historical) to note that a number of provisions had special reference to conditions in Canada. For example, it was said that the *Act respecting the Preservation of Peace at Public Works*, which later became Part III of the *Criminal Code* and was repealed in 1950, was copied from an Act which had existed in Canada for many years and was first enacted when the Lachine Canal was being enlarged.

The Prime Minister said also (May 4, 1869) that "There were reasons in this country only, that the restrictions imposed on carrying weapons should not be so general as those which prevail in England. We were exposed to irruptions from the neighbouring States of lawless characters in the habit of carrying weapons, and were it known that our people were prohibited by law from defending themselves, these parties might be encouraged to greater depredations". From this and from the fact, which appears elsewhere, that the British garrisons were being removed from Canada rather against the will of Canadian authorities, it may be inferred that the memory of the Fenian raids was still very much alive.

Again, in answer to a motion to abolish whipping as a punishment, still a moot subject, he said that it was not new in Canada, but that it had been provided for in an Act passed in 1847 for persons under eighteen years of age convicted of certain offences.

Thus it appears that, while it is true that the English Draft Code of 1878 is the specific basis of the Canadian Code, much of the substance of both was to be found in Peel's Acts and in the Acts of 1861. For many purposes it was still necessary to refer to the common law, and that will continue to be necessary in respect of some aspects of criminal procedure in Canada, although not with regard to offences. It is to be remembered too that the English Draft Code dealt only with indictable offences and that the basis of the procedure on summary conviction is to be found in the *Summary Jurisdiction Act*, 1848 (Imp.), known as Jervis' Act.

Although the British Parliament has passed other Codes, e.g., the *Partnership Act* and the *Sale of Goods Act*, it failed to pass a Criminal Code notwithstanding that several bills based upon the Draft Code of 1878 were introduced in successive years thereafter. The reasons for the opposition are academic so far as Canada is concerned since we have such a Code. It is sufficient to say that the chief opponent was Chief Justice Sir Alexander Cockburn, and that the principal ground of objection was that it put the law in a strait jacket, losing in the process the elasticity of the common law. By this was meant the ability of the common law to adapt itself to new conditions, but critics of this theory say on the other hand that it meant simply taking away from the judges their right to declare new offences. Stephen himself has strongly criticized the achievement of the judges in declaring the offence of common law conspiracy, and, as will be seen later (s.120), the declaration of the common law offence of public mischief met with adverse comment of equal vigour.

What, then, is a Code? To take the dictionary meaning, a code of law is a complete and co-ordinated body of law, approved by legislation and arranged under the public authority, in which the laws enacted and to be specifically applied by the courts are set forth in a brief manner and according to their relation to each crime or condition. In his speech introducing the Criminal Code (Indictable Offences) Bill in the British Parliament of 1879, the then Attorney General said (Parl. Deb., 3 Series, Volume 245, Column 315): "Now, as I understand the term, a Code is nothing more or less than a legislative declaration of the law, and the whole of the law, relating to any particular subject, which declaration is made by an enactment or enactments expressed in precise and perfectly accurate language. The law which is thus declared may be derived from a variety of sources. When, however, it has been declared in such enactments as I have described, this declaration is to be accepted as correct and the Code is made a fresh point of departure and a fresh source of law, beyond which, or behind which it is not permitted to go in order to carry out further investigation." And (at Column 334) he added: "Pass the Code tomorrow and they would soon have commentaries upon it, and reports and digests of the decisions to which the ever changing circumstances of life would give rise. Still, however, it was an important thing that our laws should be classified and arranged, as far as possible in symmetrical form."

The following words spoken by Lord Herschell in *BANK OF ENGLAND v. VAGLIANO*, [1891]A.C.107, at p.145, are illuminating: "The purpose of such a statute (i.e., a statute intended to embody in a code a particular branch of the law) surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code." (The words in brackets added).

This leads to the equally fundamental question, What is a crime? It has been defined as "an act or omission in respect of which legal punishment may be inflicted on the person who is in default either by acting or omitting to act". However, Stephen in his *History of Criminal Law* says that this is too wide for practical purposes and (Vol.1, p.3) he describes criminal law as follows:

"The criminal law is that part of the law which relates to the definition and punishments of acts or omissions which are punished as being

- (1) attacks upon public order, internal or external; or
- (2) abuses or obstructions of public authority; or
- (3) acts injurious to the public in general; or
- (4) attacks upon the persons of individuals, or upon rights annexed to their persons; or
- (5) attacks upon the property of individuals or rights connected with, and similar to rights of property."

Nevertheless these definitions, however apt they may be in Great Britain where one Parliament legislates for the whole country, cannot be applied without qualification in relation to the *Criminal Code of Canada*. To understand why this is so, it is necessary to turn to the *British North America Act, 1867*. Section 91 of that Act empowers the Parliament of Canada to make laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the provinces, and includes among other special categories, the criminal law including the procedure in criminal matters (par.27). Section 92 assigns to the provincial Legislatures a variety of subjects including property and civil rights in the province (par.13) and "The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects enumerated in this section" (par.15). This latter power gives rise to what are sometimes called "provincial crimes", that is to say, infractions of provincial statutes punishable by fine or imprisonment which are crimes in the broad sense of the definitions already quoted but which, of course, have their application only within the province.

It has been found in operation that the line of demarcation between the legislative powers of the Dominion and of the provinces is sometimes not clear. To give one illustration, the right of the former to legislate upon matters of trade and commerce has led to some conflict with the right of the latter to legislate with reference to property and civil rights within the province. Similarly, there has been found to be some overlapping in the field of criminal law.

In *ATTORNEY-GENERAL FOR ONTARIO v. RECIPROCAL INSURERS*, [1924]A.C.328, the Privy Council held that legislation passed as section 508C of the *Criminal Code* was invalid as being an attempt to regulate contracts of insurance, a matter within the powers of the provinces. Referring to some earlier decisions it was said (at p.342):

"In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s.91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid".

And at p. 343 the following appears:

"Their Lordships think it undesirable to attempt to define, however generally, the limits of Dominion jurisdiction under head 27 of s.91; but they think it proper to observe, that what has been said above does not involve any denial of the authority of the Dominion Parliament to create offences merely because the legislation deals with matters which, in another aspect, may fall under one or more of the subdivisions of the jurisdiction entrusted to the Provinces. It is one thing, for example, to declare corruption in municipal elections, or

negligence of a given order in the management of railway trains, to be a criminal offence and punishable under the *Criminal Code*; it is another thing to make use of the machinery of the criminal law for the purpose of assuming control of municipal corporations or of Provincial railways."

On the other hand the same body held s.498A of the *Criminal Code* (s.412, *post*) dealing with discrimination in trade, to be properly within the scope of the criminal law and therefore valid legislation (*ATTORNEY-GENERAL FOR BRITISH COLUMBIA v. ATTORNEY-GENERAL FOR CANADA*, [1937] A.C.368). The following appears at p.375:

"The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s.92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. The object of an amendment of the criminal law as a rule is to deprive the citizen of the right to do that which, apart from the amendment, he could lawfully do. No doubt the plenary power given by s.91(27) does not deprive the Provinces of their right under s.92(15) of affixing penal sanctions to their own competent legislation. On the other hand, there seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments."

It follows that if the Parliament of Canada, acting within its powers declares, expressly or by reasonable intendment, that certain conduct constitutes a criminal offence, the provincial Legislatures are precluded from penalizing the same conduct. Thus, when a provincial Liquor Act declared it to be an offence to refuse to answer questions asked by a peace officer in the course of his duty to enforce it, it was held that this provision infringed upon the *Criminal Code*, under which it was already an offence to obstruct a peace officer in the execution of his duty (*R. v. MAGEE*(1923), 40 C.C.C.10). And when the *Criminal Code* declared it to be an offence for a person to operate a motor vehicle while intoxicated, it automatically superseded similar provincial legislation (*R. v. FIELD* (1928), 51 C.C.C.80).

Here it may be mentioned that the new Code makes a change from the former s.164. Its effect is noted with s.107 *post*.

In considering the legislative competence of Canadian legislatures, especially the Parliament of Canada, it is necessary to refer to the *Statute of Westminster*, 1931, of which the provisions relevant here are as follows:

"2. (1) The *Colonial Laws Validity Act*, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or in-

operative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule, or regulation made under such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts, 1867 to 1930*, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

During the debates on the *Criminal Code* in 1892 the colonial status of the Canadian Parliament was referred to from time to time, for example, with regard to the sections dealing with false trade marks, and it is to be borne in mind too that the *Colonial Laws Validity Act* of 1865 rendered the Acts of a colonial legislature invalid to the extent of any repugnancy between them and Imperial legislation. It will be seen that this Act has ceased, by virtue of the *Statute of Westminster*, to have any effect upon legislation passed since the date of that Act, and that "in truth Canada is in enjoyment of the full scope of self-government". The principal impact of the *Statute of Westminster* is (1) upon the right to pass legislation with extra-territorial effect, and (2) upon the right of appeal.

1. The *Criminal Code* as it was introduced in 1892 contained a clause providing that the "criminal law of Canada extends to all offences committed by any person in Canada or on such part of the sea adjacent to the coast of Canada as is within one marine league from ordinary low watermark or is determined by international law to be within the territorial sovereignty of Her Majesty, or committed by any person on board any British ship or boat on the great lakes or on the high seas or in any place where the Admiralty of England has jurisdiction, and piracy by the Law of Nations wherever committed."

This gave rise to lengthy debate and, in spite of affirmations that it merely declared the existing law, it was finally dropped on the ground that the reference to international law introduced an element of un-

certainty. At the same time, the Admiralty jurisdiction was recognized in sections which appear in the Code of 1927 as ss.589 and 656.

Again, there had been conflicting decisions regarding bigamous marriages contracted outside of Canada. In the case of the *QUEEN v. BRIERLY* (1887), 14 O.R.525, it was held that the bigamy sections were *intra vires* in so far as they dealt with a second marriage outside Canada, but in the *QUEEN v. PLOWMAN* (1894), 25 O.R.656, it was held that they were *ultra vires*. By reason of this conflict, a reference was taken to the Supreme Court of Canada which held (the Chief Justice dissenting) that it was within the power of the Parliament of Canada to make it an offence for a British subject to leave Canada with intent to enter into a bigamous marriage elsewhere: *IN RE CR. CODE BIGAMY SECTIONS* (1897), 27 S.C.R.461.

In so far as territorial waters were concerned, the *Territorial Waters Jurisdiction Act, 1878* (Imp.) applied in Canada. By that Act an 'offence' was defined as 'an act, neglect or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force'. This Act was stated to extend to a distance of one marine league from shore at low watermark.⁽¹⁾ It is mentioned here for the reason that the British Solicitor General said of s.3 of the *Statute of Westminster* that its effect was "that each nation has the capacity to legislate outside the three-mile limit of its own territory in respect of its own subjects in such a way as to make them amenable to the law, as administered in its own courts when they come within its jurisdiction". (See s.420, *post*).

2. As long ago as 1888 the Parliament of Canada inserted in the *Criminal Code*, a section designed to abolish appeals to the Privy Council in criminal cases. This, as noted in *BRITISH COAL CORPORATION v. THE KING*, [1935]A.C.500, at p.514, remained unchallenged until 1926. In that year it came to be considered by the Privy Council in *NADAN v. THE KING*, [1926]A.C.482, and that body held that the powers granted by s.91 of the *British North America Act* "did not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal". They then referred to the *Colonial Laws Validity Act, 1865*, and went on to say that "in their Lordships' opinion s.1025 of the *Canadian Criminal Code*, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of the Canadian Court, is repugnant to the Acts of 1833 (the *Judicial Committee Act, 1833*) and 1844 (the *Judicial Committee Act, 1844*) which have been cited, and is therefore void and inoperative by virtue of the Act of 1865".

After the passage of the *Statute of Westminster* the *Criminal Code* was amended in the same sense (1932-33, c.53, s.17) and the new legislation was considered by the Privy Council and held to be valid in the *British Coal Corporation* case. It was held that the limitations imposed by the *Colonial Laws Validity Act, 1865*, and by the doctrine forbidding

(¹) It is to be noted that for some other purposes, e.g. the protection of the revenue, the distance was not so restricted. See *CROFT v. DUNPHY*, [1933]A.C.156.

extra-territorial legislation had been removed by the Statute of Westminster.

Further consequences of the *Statute of Westminster* were the passing of the *Extra-territorial Act* (R.S.C. 1952, c.107) and the *Canada Shipping Act* (R.S.C. 1952, c.29) and a re-enactment of s.54 of the *Supreme Court Act* (R.S.C. 1952, c.259). The first mentioned is not relevant to this discussion but ss.690, 691 and 692 of the *Canada Shipping Act*, R.S.C. 1952, c.29, contain important criminal jurisdiction supplemental to the Criminal Code.

By s.691 jurisdiction is given to courts, justices, and magistrates over vessels lying off the coasts and persons on board or belonging to such vessels "as if the vessel or persons were within the limits of the original jurisdiction of the court, justice or magistrate". This is expressed to be "in addition to and not in derogation of any jurisdiction or power of a court under the *Criminal Code*". S.692 confers jurisdiction upon Canadian courts in respect of offences committed on the high seas, aboard ships of Canadian registry, or in foreign ports, and this jurisdiction covers within its limitations not only British subjects but others as well. The section applies "notwithstanding anything contained in the Criminal Code or in any other Act". By s.693 Canadian courts are given jurisdiction in respect of offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by members of the crews registered in Canada.

The amendment to the *Supreme Court Act* abolishes entirely appeals to the Privy Council and expressly repeals the Judicial Committee Acts mentioned above. For this reason the prohibition contained in s.1024(4) of the Criminal Code is not continued in the new Code, but is left to the operation of s.54 of the *Supreme Court Act*.

This last mentioned amendment was challenged before the Privy Council in *ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA*, [1947]A.C.127, and held to be *intra vires* of the Parliament of Canada. The following review of the *Nadan* and *British Coal Corporation* cases appears at pages 149 and 150:

"In 1935 there came before the Board the *British Coal Corporation* case in which the same question was raised, but with this vital difference, that in the meantime the *Statute of Westminster* had been passed. The section of the *Criminal Code* then in force purported in unambiguous terms to abolish the appeal to His Majesty in Council: 'Notwithstanding any royal prerogative or anything contained in the *Interpretation Act* or in the *Supreme Court Act*, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority in which in the United Kingdom appeals or petitions to His Majesty may be heard'. The validity of this provision was challenged by certain persons who sought leave to appeal in a criminal case from a judgment of the court of King's Bench (Appeal Side) of the Province of Quebec. But it was challenged in vain. The Board, after once more expounding the nature of appeals to His Majesty in Council, explained the decision in *Nadan's* case thus: 'Their Lordships are of opinion that the judgment

was based on two grounds only: (1) that s.1025 was repugnant to the *Privy Council Acts* of 1833 and 1844 and was therefore void under the *Colonial Laws Validity Act*, 1865; (2) that it could only be effective if construed as having an extra-territorial operation, whereas according to the law as it was in 1926 a Dominion statute could not have extra-territorial operation. These two difficulties as the law then stood could only be overcome by an Imperial Statute Such, their Lordships think, is the meaning of the decision in *Nadan's case* The Board proceeded to consider the question whether the difficulties had been overcome. Recalling the words used by Lord Loreburn L.C., in delivering the judgment of the Judicial Committee in *ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL FOR CANADA*: 'Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand, cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada' (words that their Lordships reiterate in regard to the present appeal); the Board concluded that both difficulties had been removed by the *Statute of Westminster*. 'There now remain,' it was said, 'only such limitations as flow from the Act itself,' the operation of which as effecting the competence of Dominion legislation was saved by s.7 of the statute, a section which excludes from the competence of the Dominion and provincial Parliaments any power of 'repeal, amendment or alteration' of the Act."

If anything further be needed to indicate the effect of the *Statute of Westminster* it is to be found in *CROFT v. DUNPHY*, [1933]A.C.156. In that case the Privy Council declined to express an opinion whether or not the statute was of retrospective effect and contented itself with observing (p.167) that "the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future."²

The following, while not exhaustive, is a summary of the principal changes effected by the new Code:

1. Proceedings for offences at common law are not to be instituted under United Kingdom statutes, pre-confederation statutes or ordinances (s.8). The common law offences which have been codified include common law conspiracy (s.408(2)) public mischief (s.120) indemnification of bail (s.119(2)(d)) and compounding felony (s.121).

2. Provision is made (s.9) for appeals in cases of contempt of court.

3. Treason is redefined to include killing or causing bodily injury to Her Majesty or putting her under restraint, levying war against Canada, assisting an enemy at war with Canada or armed forces engaged in

(¹) Italics supplied.

(²) For further discussion of the *Statute of Westminster* see K. C. Wheare: *The Statute of Westminster*, 1931; Maurice Ollivier: *The British North America Act and selected statutes*; *CANADA STEAMSHIP LINES v. CHARLAND*(1935), 39 Rev. de Jur.70; *MAY v. HARTIN*, [1946]4 D.L.R.202; *R. v. BRITISH COLUMBIA ELECTRIC COMPANY*, [1946]4 D.L.R.81; and, with reference to the *Extra-territorial Act*, Hansard, 1933, Vol.5, p.4744.

hostilities against Canadian forces, using force to overthrow the Government, and the communication to an agent of a state other than Canada, of information likely to be used prejudicially to the safety or defence of Canada (s.46).

4. It is made an offence to incite or assist a subject of a state against whose forces Canadian forces are engaged in hostilities, to leave Canada without the consent of the Crown (s.50(1)).

5. The reference to piratical acts not amounting to piracy by the Law of Nations is limited to acts in relation to or done on board Canadian ships (s.76).

6. Under s.164 it was an offence to disobey a statute of Canada or of a province where the statute does not expressly provide a punishment. The reference to provincial legislation is not continued (s.107).

7. It is made an offence for a witness who has given evidence in a judicial proceeding to give contradictory evidence on a material issue in subsequent judicial proceedings (s.116).

8. On charges of rape, carnal knowledge and indecent assault, where the only evidence implicating the accused is that of the woman who has been assaulted, the judge is required to instruct the jury that it would be unsafe to convict on her uncorroborated evidence unless they are satisfied beyond a reasonable doubt that her evidence is true (s.134).

The provisions requiring corroboration in respect of the offences of living on the avails of prostitution (former s.216(1)), householder permitting defilement (former s.217) and conspiracy to defile (former s.218) are not retained but incest has been added to the cases in which corroborative evidence is required.

9. In cases of seduction of girls between sixteen and eighteen years of age, the requirement which formerly appeared in s.211 that the trial judge must instruct the jury that if they find that the accused is not wholly or chiefly to blame he is entitled to be acquitted, is not retained. Corroboration is still necessary (See ss.131 and 143).

10. The provisions relating to acts of gross indecency which formerly appeared in s.206 are extended to include such acts committed by persons of either sex (s.149).

11. Criminal negligence is defined (s.191). It is made an offence to cause death or bodily harm by criminal negligence (ss.192 and 193). Where death is caused by a motor vehicle a charge may be preferred under s.192 or a charge of manslaughter may be laid.

12. The provision in the former s.260(d) relating to constructive murder, i.e., killing while armed in the commission or attempted commission of specified offences or in flight thereafter, has been redrawn with reference to the decision of the Supreme Court of Canada in *ROWE v. THE KING*(1951), 100 C.C.C.97, and in other respects (s.202(d)).

13. The law concerning infanticide has been changed in several particulars. The definition (s.204) is extended to include cases in which the

mind of the mother is disturbed by the effect of lactation. Where a woman is charged with an offence arising out of the death of her newly born child, a justice may at the preliminary inquiry, remand her for mental examination (s.451(c)). There is further provision that where the evidence upon the trial of a charge of infanticide establishes that the accused caused the death of the child but not that she was mentally disturbed within the definition, she is not entitled to acquittal unless she establishes that her act was not wilful (s.570).

14. The words "receives or retains in his possession" which appeared in the former s.399 have been replaced by the words "has in his possession". The possession of goods obtained by crime thus becomes an offence if there is guilty knowledge (s.296).

15. Minimum punishments for offences under the Code are not retained except in four instances, namely, driving while intoxicated (s.222); driving with impaired ability (s.223); theft of postal matter (s.298); and for a person found to be a criminal sexual psychopath (s.662(3)).

16. Special punishments for subsequent offences under the Code are not retained except for the offences under ss.222 and 223.

17. The provisions which empower courts to make orders to prohibit persons convicted of drunken driving, from driving motor vehicles, are made applicable to persons convicted of driving while their ability is impaired (s.225).

18. The provisions creating various offences of theft and providing special punishments therefor are not retained in detail, and the maximum punishment for that offence has been fixed at ten years' imprisonment (s.280).

19. In an endeavour to overcome the variation in sentences for indictable offences a schedule of sentences of imprisonment has been adopted, namely, two years, five years, ten years, fourteen years, life imprisonment. The death penalty for rape is not continued but whipping for certain offences is retained.

The new Code (s.694) provides a general penalty for summary conviction offences.

20. Provision is made whereby, at the request of an accused convicted in one province, offences which he admits having committed in another may be taken into account in passing sentence. This is subject to the consent of the Attorney General of that other province (s.421(3)).

21. The provision formerly in s.1081 which required the consent of counsel for the Crown to the granting of suspended sentence is not retained (s.638).

22. The provision dealing with failure to collect fares which formerly appeared in s.412 is extended to include tolls and admissions (s.336).

23. The former s.424 which dealt with highgrading is made applicable

throughout Canada. The provision requiring a proclamation before it comes into force in certain localities is not retained (s.337).

24. The provision making it an offence to bill liquor falsely to enable its transportation into a prohibited area (former s.412(3)) is extended to include other contraband goods (s.344).

25. The former s.499 dealing with criminal breach of contract has been redrawn (s.365).

26. The provisions relating to wilful damage to and interference with property are largely consolidated (s.372).

27. The fraudulent use of slugs, etc., in vending machines or receptacles for collecting fares or tolls is made an offence (s.397).

28. The former s.584(c) has been put in more general terms to provide that an offence committed on a vehicle during the course of a journey may be tried in any jurisdiction through which the vehicle passed on that journey (s.419(c)). Similar provision is made with respect to offences committed in an aircraft (s.419(d)).

29. The provisions of the former ss.592, 594, and 596 to 598 requiring the consent of the Attorney-General to the commencement of certain prosecutions, are not retained. On the other hand, such a provision has been added for cases under ss.116 (giving contradictory evidence), 328 (fraudulent concealment of documents), 365 (criminal breach of contract) and 420 (offences in territorial waters).

30. The powers of search and seizure set out in ss.431 and 432 effect changes as follows:

- (a) A peace officer may seize, in addition to things mentioned in the search warrant anything that he has reasonable grounds to believe has been obtained by or used in the commission of an offence.
- (b) A person interested in goods under seizure may obtain an order permitting him to examine them.
- (c) An appeal is provided against an order of forfeiture.

31. The limitation of time for the commencement of prosecutions is retained only in respect of certain treasonable and sexual offences and in summary conviction matters (ss.48(1), 157(2), 184(4) and 693(2)).

32. The provisions in the former s.688 whereby a private prosecutor might be bound over to prosecute is not continued.

33. Private informers will no longer be able to bring penal actions. Such actions will be maintainable only at suit of the Crown, subject to a limitation of two years (s.627).

34. Provision has been made for the granting of bail upon a recognizance with a cash deposit (ss. 451, 461, 463 and 710(3)).

35. The provisions of the *Territorial Waters Jurisdiction Act, 1878* giving the courts jurisdiction over offences committed by a foreigner through the operation of or on board a foreign ship in territorial waters have been adapted (s.420).

36. Parts XVI and XVIII of the repealed Code, which dealt with the trial of indictable offences without jury before magistrates and judges respectively, had various provisions in common and have been combined into Part XVI of the new Code. The principal changes are as follows:

(a) There is a new definition of "magistrate" for purposes of the Part (s.466).

(b) The cases of indecent assault specified in the former s.773(d) have been withdrawn from the absolute jurisdiction of the magistrate and will be subject to election.

(c) Lottery offences and charges of cheating at play have been added to that absolute jurisdiction (s.467(c)(iv) and (v)).

(d) If an accused is before a justice charged with an offence within the absolute jurisdiction of a magistrate under Part XVI, the justice shall remand him to appear before a qualified magistrate (s.450(1)).

(e) In cases where the accused has a right to elect, the justice will give him an opportunity to do so at the preliminary inquiry (s.450(2)).

(f) There will be a right to elect in the following cases in which under the former s.583 it did not exist:

- Spreading false news, s.166;
- Frauds on government, s.102;
- Breach of trust by public officer, s.103;
- Municipal corruption, s.104;
- Selling offices, s.105;
- Defamatory Libel, ss.250 and 251.

(See s.413.)

(g) A judge or magistrate trying an indictable offence will have power to try an issue of insanity (ss.523 and 524). This is an extension of the former ss.966 and 967.

(h) The prosecution is given powers in relation to preferring charges under Part XVI, similar to those which it has in cases in the superior courts (s.478(2)).

37. The judge and not the jury is to try a challenge to the array (s.537).

38. The issues raised by the special pleas of *autrefois acquit*, *autrefois convict* and pardon are to be tried by the judge and not by the jury (s.516(3)).

39. The power to amend indictments is extended to meet a conflict in the decisions regarding the amendment of an indictment which omits an essential averment (s.510).

40. The provisions relating to the finding of verdicts for included offences are extended to permit a verdict for a summary conviction offence where the accused is charged with an indictable offence (s.569(1)).

41. With certain exceptions the power of the court to order costs in criminal cases is not retained. The exceptions are cases of criminal libel (ss.631 and 632), and summary conviction matters. The former s.1044, which provided also for an allowance for expenses, is not continued.

42. A court may make against an accused an order for compensation to a person aggrieved from moneys in his possession at the time of arrest except where there is a dispute in relation to that money by claimants other than by the accused (s.628). The limit of one thousand dollars which appears in the former s.1048 is not retained.

43. The Attorney-General of Canada is given the same right of appeal where the prosecution is conducted by the Government of Canada as the Attorney-General of a province has in other cases (s.601). It may be added that with reference to summary conviction proceedings similar provision is made in ss. 724 and 743.

44. The former section 1025A which required an accused who had been acquitted to provide bail pending the hearing of an appeal on the part of the Crown, is not retained. This had been severely criticized in the courts.

45. The right of the Crown to appeal against an acquittal is extended to include an appeal against an acquittal for the principal offence although the accused has been convicted of an included offence (s.584).

46. There is an important change from the former s.1014(2) concerning the power of the court of appeal to dismiss an appeal where it is of opinion that no substantial wrong or miscarriage of justice has actually occurred (s.592(1)(b)(iii)).

47. With reference to summary convictions, in addition to the provision for a general penalty which has already been mentioned, there are the following principal changes:

(a) More than one offence may be included in an information. Where this is done the justice is given a power of severance similar to that of a superior court (ss.696 and 708(4)).

(b) The provisions of the former Code for the issue of warrants of distress are not retained.

(c) There is provision for use on the hearing of an appeal of evidence taken on the hearing before the justice (s.727(2)).

48. Part IX of the repealed Code which dealt with counterfeiting has been completely rewritten and appears as Part X of the new Code. The principal change is in its application to paper money (s.391(b)).

49. Part X(A) of the repealed Code, which dealt with habitual offenders, appears as Part XXI of the new Code. There have been some changes:

- (a) The former s.1054A referring to criminal sexual psychopaths is incorporated in the Part and its application has been extended.
- (b) It will be for the prosecution to apply for preventive detention of an habitual criminal. The application will be to a judge after notice to the accused and the charge will contain no indication that such an application is to be made.
- (c) The power to impose sentence of preventive detention on an habitual criminal is extended to courts sitting under Part XVI. Where there is a jury it will be the judge and not the jury which will determine the status of the accused.
- (d) The accused is given a right of appeal against a sentence of preventive detention and the Crown is given an appeal against the dismissal of an application therefor (ss.659 *et seq.*).

50. The former Part XXI which is replaced by Part XXII of the new Code has been rewritten so as to simplify it and to provide, in respect of the forfeiture of the bail, a procedure more nearly uniform than the old procedure. It is drawn upon the principle that, as has been held, the recovery upon a forfeited recognizance is a civil, rather than a criminal proceeding.

It is made clear (s.671) that where an accused commits an offence while he is at large on bail his arrest for that subsequent offence does not release the sureties from their recognizance in respect of the previous charge.

51. Part XXIII dealing with extraordinary remedies (formerly Part XXII) has been changed

- (a) to make a uniform provision for appeals in respect of *certiorari*, *mandamus* and prohibition (ss.690 and 691), and
- (b) the new Code contains no reference to *quo warranto*, that being a civil rather than a criminal matter.

52. Ss.1143 *et seq.* of the former Code relating to actions against persons administering the criminal law are not continued. Ss.25 to 33 contain provisions for the justification of those administering the criminal law, and otherwise the matters covered by the repealed sections are left to the operation of provincial laws for the protection of public officers.

By way of conclusion it must be repeated that the foregoing is an attempt only to call attention to the principal changes contained in the new Code and not to set out all that have been made. Others appear in notes to the relevant sections. It is trite to observe that the effect of the changes must await their interpretation by the courts, and it is by reason of the rule that the debates in Parliament cannot be cited in court, that the following pages contain sparing reference to what was said in Parliament when Code Bills were before it.