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**Report of the  
Canadian Committee  
on Corrections**

toward unity:  
criminal justice  
and corrections



*André Nadeau*

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# 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 OUIMET, CHAIRMAN

G. ARTHUR MARTIN, VICE-CHAIRMAN

J. R. LEMIEUX, MEMBER

DOROTHY MCARTON, MEMBER

W. T. McGRATH, MEMBER AND SECRETARY



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# 1

## 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.<sup>1</sup>

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.

---

<sup>1</sup> 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. <sup>2</sup>
- MR. A. M. KIRKPATRICK,  
Executive Director, John Howard Society of Ontario, Toronto,  
Ontario.
- MR. MARC LECAVALIER,  
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.<sup>3</sup>
- MR. JAMES MACKAY,  
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.<sup>4</sup>
- 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.<sup>5</sup>

<sup>2</sup> Appointed July 1, 1967

<sup>3</sup> Appointed September 7, 1967.

<sup>4</sup> Resigned October 19, 1966, on his retirement from the Salvation Army.

<sup>5</sup> 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.<sup>6</sup>
- 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.<sup>7</sup>
- 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.<sup>8</sup>
- MR. RAY SLOUGH,  
Director of Corrections and Inspector of Gaols, Department of the Attorney General, Winnipeg, Manitoba.<sup>9</sup>
- 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.

---

<sup>6</sup> Appointed June 3, 1966.

<sup>7</sup> Appointed March 4, 1967.

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

<sup>9</sup> 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;  
Reformative 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.<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

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

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<sup>2</sup> 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 way<sup>3</sup>:

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

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<sup>3</sup> 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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> 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-

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<sup>1</sup>The 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.

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

<sup>3</sup>For 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.

<sup>4</sup>These 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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup> Translated into rates per 100,000 population 16 years and older<sup>8</sup> 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

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

<sup>6</sup> *New York Times*, August 27, 1968.

<sup>7</sup> 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.

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

FIGURE 1 — GRAPHIQUE 1

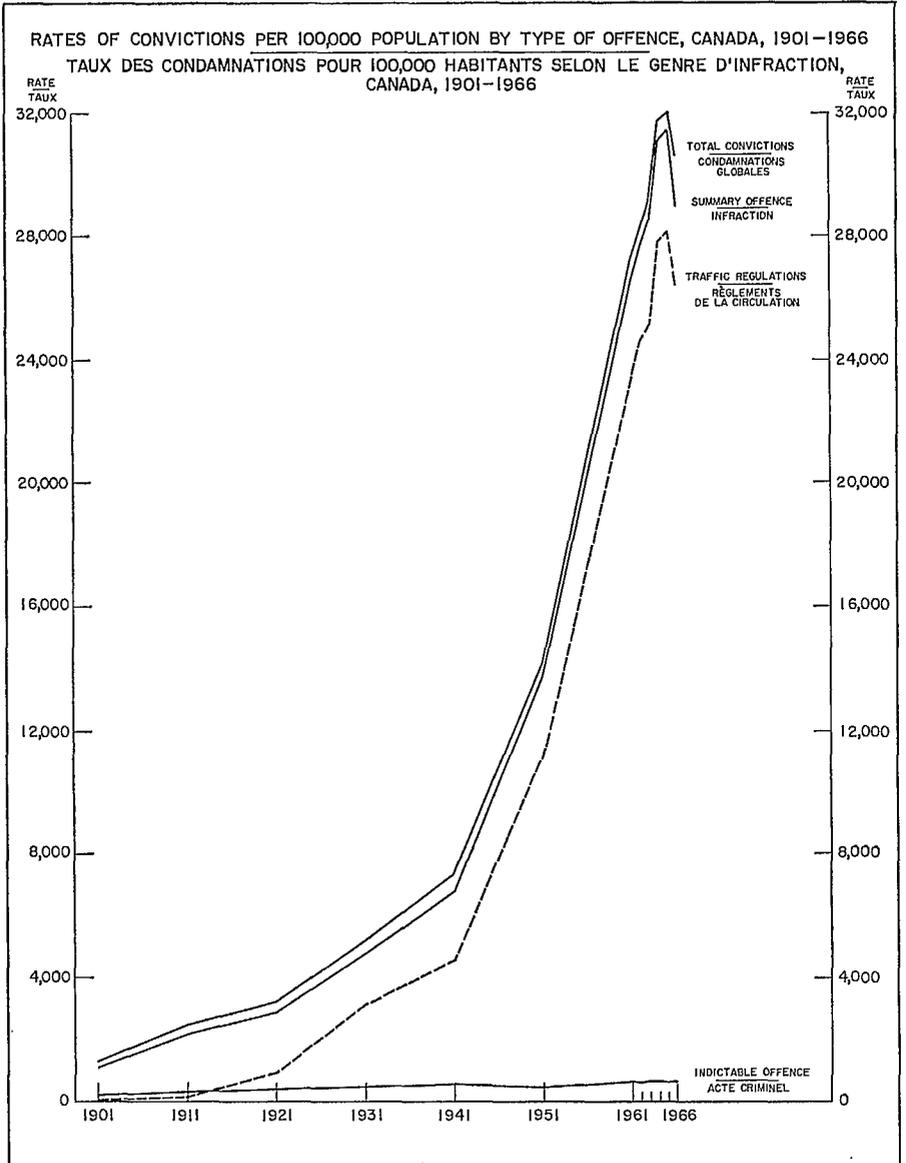
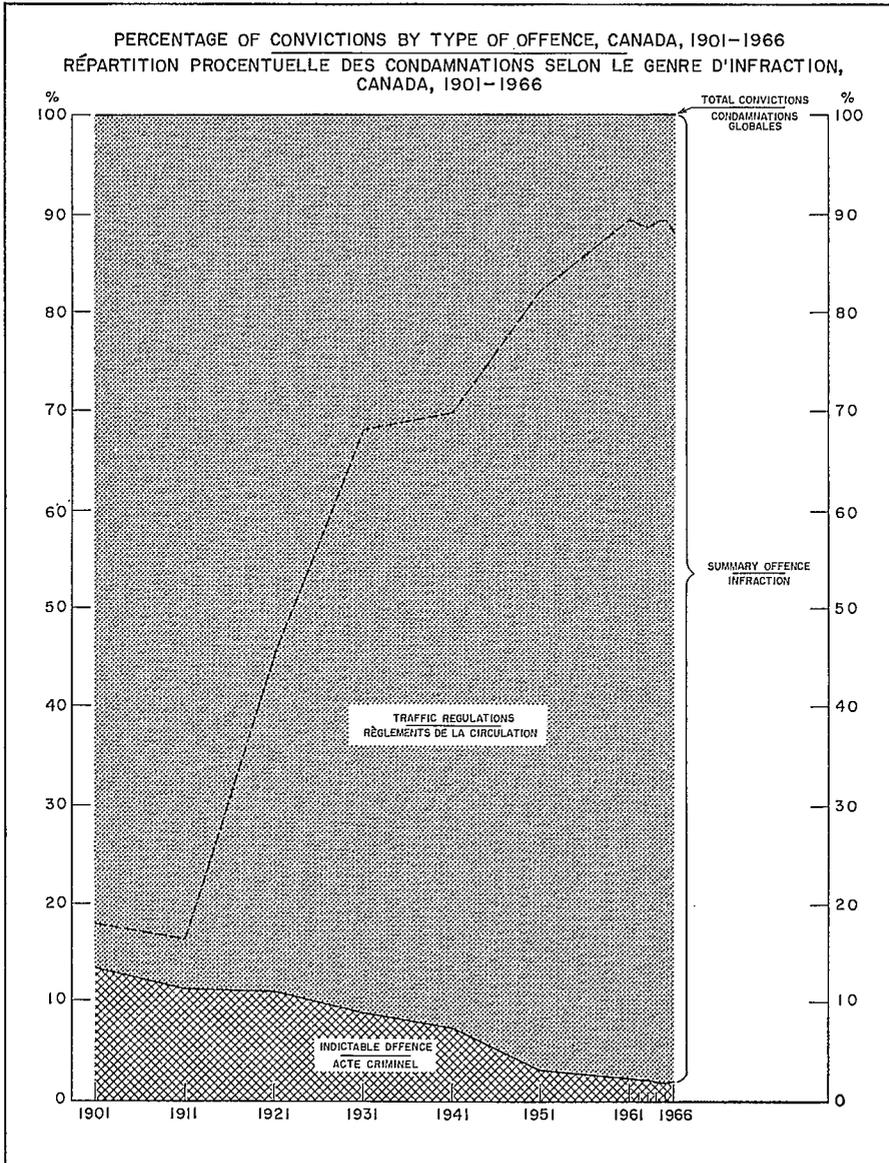


FIGURE 2 — GRAPHIQUE 2



residents.<sup>9</sup> 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.<sup>10</sup>

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

<sup>9</sup> Giffen, 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.

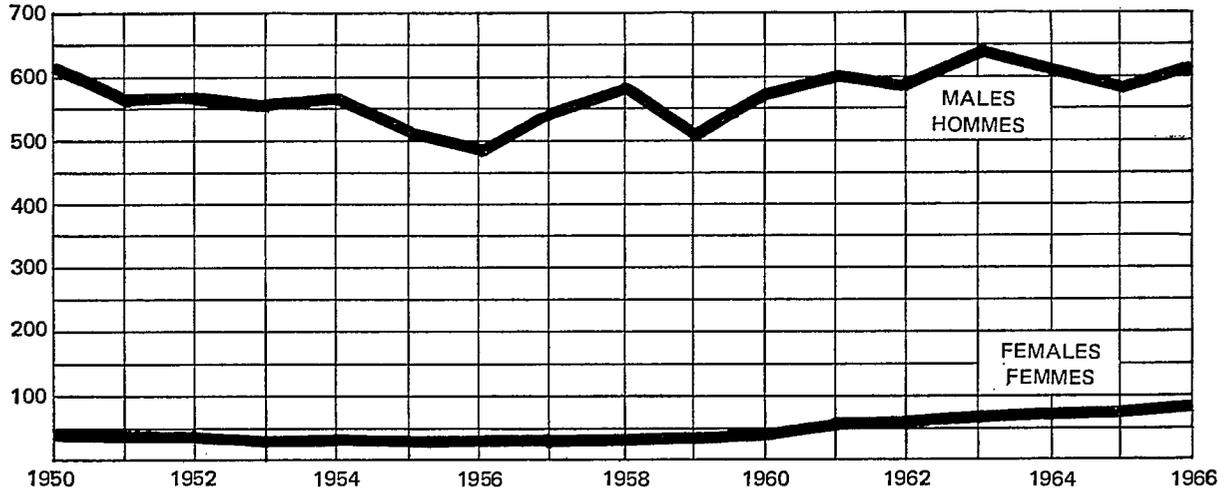
<sup>10</sup> Including a decline in the proportion of first generation immigrants in the population, since they have had considerably lower crime rates in Canada than the native-born. Giffen, *op. cit.* pp. 83-85.

FIGURE 3 — GRAPHIQUE 3

PERSONS CONVICTED OF INDICTABLE OFFENCES, RATE PER  
100,000 POPULATION, BY SEX, CANADA, 1950-1966

PERSONNES CONDAMNÉES POUR ACTES CRIMINELS, TAUX POUR  
100,000 HABITANTS, SELON LE SEXE, CANADA, 1950-1966

RATE  
TAUX



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.<sup>11</sup> 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.<sup>12</sup> 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.

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

<sup>12</sup> 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 Commission<sup>1</sup>, the Prévost Commission<sup>2</sup> and the Alberta Penology Study.<sup>3</sup>

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

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

<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

### *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.

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<sup>4</sup>Harris, 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.<sup>5</sup> 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.<sup>6</sup>

### *Prisons*

In 1956 there were eight federal penitentiaries in Canada.<sup>7</sup> 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.

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<sup>5</sup> See Table 11, Chapter 16.

<sup>6</sup> 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.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> Hostel facilities for offenders have increased considerably. Developments in after-care are dealt with more comprehensively in Chapter 20.

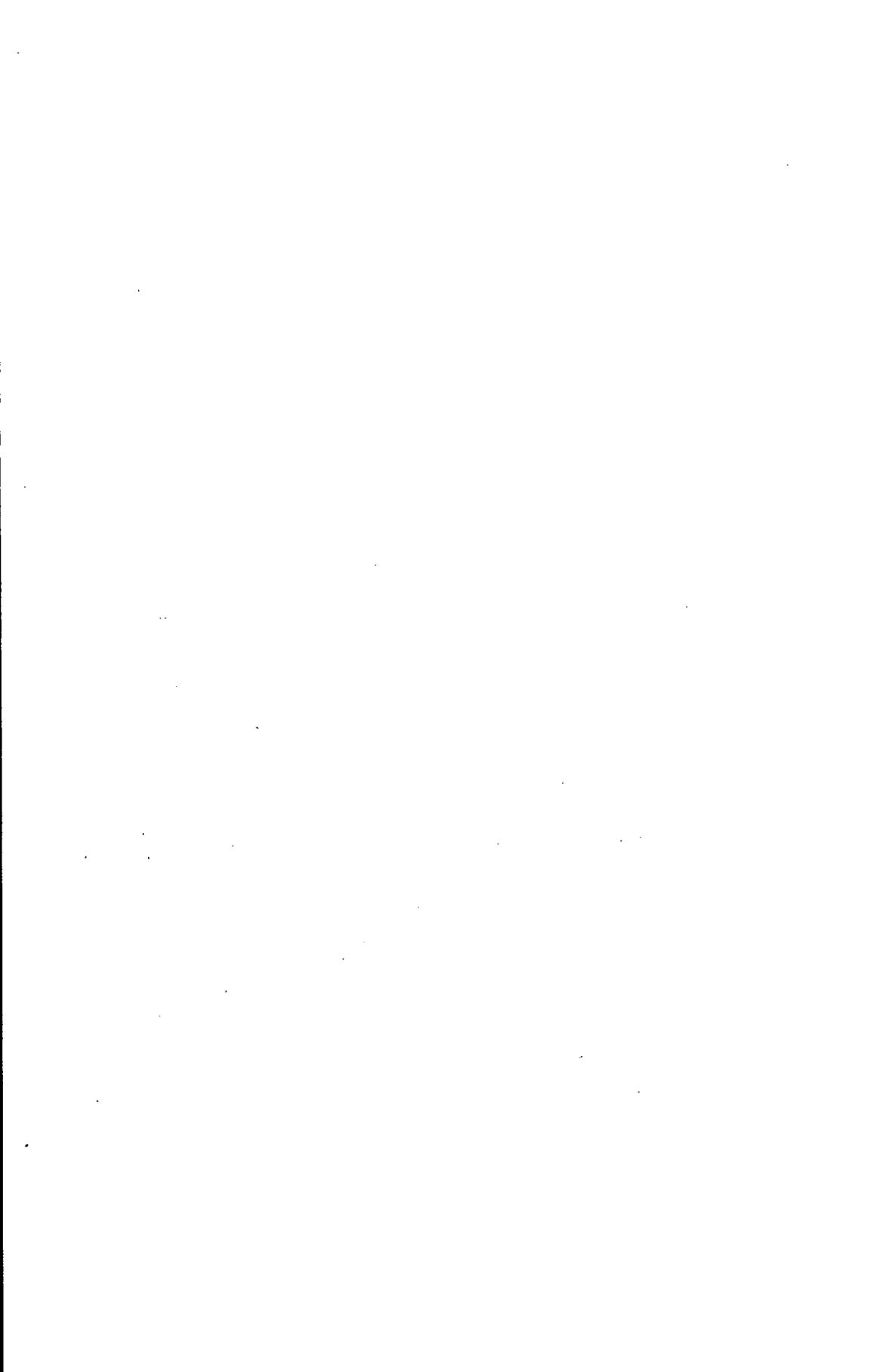
### *Conclusion*

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.

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<sup>8</sup> See Table 14, Chapter 18.

<sup>9</sup> 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.<sup>1</sup>

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

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<sup>1</sup> 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.<sup>2</sup>

### *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.<sup>3</sup> 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."<sup>4</sup>

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.

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

<sup>3</sup> 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.

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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<sup>5</sup> Great 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.

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

<sup>7</sup> Maloney, 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 interest<sup>8</sup> 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.<sup>9</sup> 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.

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<sup>8</sup> 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.

<sup>9</sup> 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.<sup>10</sup> 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

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<sup>10</sup> *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.<sup>11</sup>

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.<sup>12</sup>

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.

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<sup>11</sup> 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.

<sup>12</sup> 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.<sup>13</sup> 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.

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<sup>13</sup> 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.<sup>14</sup>

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

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<sup>14</sup> "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*,<sup>15</sup> 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.<sup>16</sup>

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.

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<sup>15</sup> 334 U. S. 436 (1966).

<sup>16</sup> 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*<sup>17</sup> 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*<sup>18</sup> 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.<sup>19</sup> 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.

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

<sup>18</sup> [1956] S.C.R. 958, p. 963-4.

<sup>19</sup> *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.<sup>20</sup>

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,

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<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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<sup>21</sup> *Terry v Ohio*, 88 s. ct. 1868 (1968).

<sup>22</sup> 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.<sup>23</sup>

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.

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<sup>23</sup> 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.<sup>24</sup>

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

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<sup>24</sup> *The 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.<sup>25</sup>

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.

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<sup>25</sup> 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.<sup>26</sup>

*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.<sup>27</sup> This judgment has, however, been severely criticized.<sup>28</sup>

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.**

<sup>26</sup> 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 . . ."

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

<sup>28</sup> 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).<sup>20</sup>

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.

<sup>20</sup> [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.*<sup>30</sup> 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*,<sup>31</sup> 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.

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<sup>30</sup> 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.

<sup>31</sup> 387 U.S. 294 (1967).

The learned authors of a recent work on criminal justice in the United States<sup>92</sup> 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

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<sup>92</sup> 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.<sup>33</sup>

... 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...<sup>34</sup>

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*<sup>35</sup> 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", ...

<sup>33</sup> *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).

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

<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup>

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,<sup>38</sup> fire marshalls' acts and fire commissioners' acts, as well as provincial public inquiry legislation, confer similar power.

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

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

<sup>38</sup> 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*<sup>39</sup> 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*.<sup>40</sup>

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.<sup>41</sup>

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.

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<sup>39</sup> Assented to the 21st of June, 1968.

<sup>40</sup> 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."

<sup>41</sup> 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.<sup>42</sup> 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

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<sup>42</sup> *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.<sup>43</sup>

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.<sup>44</sup>

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*.<sup>45</sup> 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.

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

<sup>44</sup> *A.G. for Quebec v Bevin*, 1955 S.C.R. 593; *R v McNamara* (1951), 99 C.C.C. 107.

<sup>45</sup> [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.<sup>46</sup>

### *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.<sup>47</sup> 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."<sup>48</sup>

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.<sup>49</sup>

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

<sup>47</sup> *Mapp v Ohio*, 367 U.S. 643 (1961).

<sup>48</sup> *Ibid.* at p. 656.

<sup>49</sup> 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.<sup>50</sup>

A striking illustration of the working of the rule is found in the recent case of *Sibron v New York*.<sup>51</sup> 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:<sup>52</sup>

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.

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<sup>50</sup> Soble, 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.

<sup>51</sup> 38 S.Ct. 1889 (1968).

<sup>52</sup> 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.<sup>63</sup>

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,<sup>64</sup> 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.**

<sup>63</sup> Parker, G. E. "The Extraordinary Power to Search and Seize and the Writ of Assistance". 1 *U.B.C. Law Rev.* 688 (1963).

<sup>64</sup> *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,<sup>65</sup> 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

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<sup>65</sup> *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*.<sup>56</sup>

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-

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<sup>56</sup> (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*.<sup>57</sup> 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*<sup>58</sup> 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

<sup>57</sup> [1967] S.C.R. 492.

<sup>58</sup> 287 U.S. 435 (1932).

criminal but the instigation of an innocent person to commit a crime which the law frowns upon.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup>

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

<sup>60</sup> *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.

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

<sup>62</sup> Criminal Code s. 407.

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

Section 14 (1) of the *Alberta Police Act*<sup>64</sup> 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.**

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<sup>64</sup>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.<sup>65</sup>

*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

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<sup>65</sup> 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.<sup>66</sup>

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.<sup>67</sup> 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.<sup>68</sup>

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.

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<sup>66</sup> 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.

<sup>67</sup> *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).

<sup>68</sup> 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.<sup>69</sup> 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 Act<sup>70</sup> 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.

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

<sup>70</sup> 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.<sup>71</sup>

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

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<sup>71</sup> 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*<sup>72</sup> 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:

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<sup>72</sup> 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.<sup>78</sup>

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.

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<sup>78</sup> *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.<sup>74</sup>

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.

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<sup>74</sup>*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.<sup>75</sup>

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.

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<sup>75</sup> 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;<sup>1</sup> 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,<sup>2</sup> 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:

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<sup>1</sup> An 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.”

<sup>2</sup> Sowle, 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*.<sup>3</sup>

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.<sup>4</sup>

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.

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

<sup>4</sup> New 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,<sup>5</sup> 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.<sup>6</sup>

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

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<sup>5</sup> 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.

<sup>6</sup> 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.<sup>1</sup>

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.

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<sup>1</sup> *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.<sup>2</sup>

#### *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.<sup>3</sup>

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.<sup>4</sup>

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

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<sup>2</sup> United 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.

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

<sup>4</sup> *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.<sup>5</sup> 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-

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<sup>5</sup> "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.<sup>6</sup>

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

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<sup>6</sup>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.<sup>7</sup>

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.<sup>8</sup>

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.

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<sup>7</sup> Section 464 of the Criminal Code.

<sup>8</sup> 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*.<sup>9</sup>

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.

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\*The emphasis is ours.

<sup>9</sup> Different 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.<sup>10</sup>

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.<sup>11</sup> In practice the attendance of the justice of the peace at a police station is considered as an informal first

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<sup>10</sup> Section 125 of the Criminal Code.

<sup>11</sup> 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.<sup>12</sup>

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

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<sup>12</sup> 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*<sup>13</sup> 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

<sup>13</sup> (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.<sup>14</sup> 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.<sup>15</sup>

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

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

<sup>15</sup> 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.<sup>16</sup>

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.

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<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

**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.

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<sup>17</sup> Jackson, R. M. *Enforcing The Law*. New York: St. Martin's Press, 1967, pp. 90-91.

<sup>18</sup> 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.<sup>19</sup>

<sup>19</sup> 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.<sup>20</sup>

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<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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.**

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<sup>21</sup> Friedland, M. L. *Detention Before Trial*. Toronto: University of Toronto Press, 1965, p. 160.

<sup>22</sup> 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.<sup>28</sup>

*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

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<sup>28</sup> 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.<sup>24</sup>

*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

<sup>24</sup>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.<sup>25</sup>

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 Cvasin*<sup>26</sup> 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'.<sup>27</sup>

<sup>25</sup>*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.

<sup>26</sup>(1944), 82 C. C. C. 171.

<sup>27</sup>The 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.<sup>28</sup>

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.<sup>29</sup>

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<sup>28</sup> *Steele v The King* [1924], S.R.C. 1, 42 C. C. C. 47.

<sup>29</sup> 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.<sup>30</sup>

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*,<sup>31</sup> 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*,<sup>32</sup> 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:

<sup>30</sup> *R v Goverluk* (1945), 83 C. C. C. 377.

<sup>31</sup> *Regina v Pike* (1953), 109 C. C. C. 396.

<sup>32</sup> *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.<sup>33</sup> 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.**

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<sup>33</sup> 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".



# 8

## REPRESENTATION OF THE ACCUSED

### *Legal Representation at Trial and Corrections*

The Committee considers that equal justice under the law requires that no person charged with a serious offence should be precluded by poverty from having the assistance of counsel.

In a democratic society, as the Committee has previously observed, the effective enforcement of the criminal law requires public support. The administration of criminal justice cannot hope to command public respect if it is at variance with fundamental concepts of fairness and if it operates in such a way that an accused person is disadvantaged because he lacks the financial means to procure the assistance of a lawyer. The wider interests of society as a whole, no less than those of the individual, are thus involved.

From the standpoint of corrections, the criminal law must, so far as possible, avoid dealing with the individual, who is subject to its process, in a way that provides just cause for bitterness and leaves him with a sense of injustice.

During its visits to Canadian penal institutions, the Committee was informed by senior staff officials that lack of adequate legal representation, or none, was a frequent cause of bitterness on the part of many inmates. It was also a contributing factor in creating or aggravating hostilities and anti-social attitudes. The likelihood that the accused will be embittered if he has not been properly represented has also been emphasized in written and oral representations made to the Committee.

At the Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Stockholm in August, 1965, the following statement of principle was enunciated:

... that adequate and timely legal assistance must be available as of right to all arrested and accused persons at a sufficiently early stage in the criminal process adequately to protect their human rights and to ensure the fair and

non-discriminatory application of the criminal law to all citizens. This aim is justified not only in terms of human rights and social decency, but also because the failure to provide adequate legal aid may well leave the convicted person with a sense of injustice. . . .<sup>1</sup>

The view was also expressed at the Congress that the sense of injustice that may be created in the accused by discriminatory application of the criminal law tends to increase recidivism.

A study of 184 persistent offenders in Canadian penitentiaries, conducted as part of a research program by the Department of Psychiatry of McGill University, showed that the majority were without counsel at their first appearance in court. Most pleaded guilty. The authors state:

The number of men who appeared at court without counsel among our 184 subjects is alarming, but more disturbing is that even when they knew their legal rights, which most did not at their first appearance in an adult court, they were unable to secure them or to use their right to defend themselves through ignorance, youth, emotional immaturity or lack of money. They faced the law undefended.<sup>2</sup>

The Committee is of the view that a person experiencing a deep-seated sense of injustice is unlikely to engage in honest self-criticism or to identify with the values of those he considers part of an unjust system. Thus, so long as he considers himself the victim of injustice he is unlikely to be receptive to treatment and training programs based on a recognition of a need to change.

On the other hand, the offender receiving proper legal representation may well feel that his case is being dealt with according to a process which is fair and rational, and which does not abridge his dignity as a human being. Feeling that he has experienced fairness in his encounter with the representatives of the administration of justice during a time of personal crisis, he is more likely to identify with the values of society.

The correlative proposition that adequate legal representation of those charged with offences will minimize or reduce the sense of injustice with which many convicted persons are left at the present time derives strong support from surveys conducted in Ontario.

After the Ontario Legal Aid Plan had been in operation for three months, a survey was conducted with respect to the operation of the plan. Among those interviewed who had received legal aid were persons who had been convicted and sentenced to imprisonment. Ninety-eight per cent of all persons interviewed stated that they felt they had been well represented, and that everything had been said or done on their behalf that could have been.

<sup>1</sup> United Nations. *Third United Nations Congress On The Prevention of Crime And The Treatment of Offenders*. New York: U.N. Publications, 1967, p. 23.

<sup>2</sup> Cormier, B. M., M.D., and J. M. Sangowicz, M.D., M. Kennedy, P.S.W., A. Bert, P.S.W., R. A. Washbrook, M.D., A. T. Galardo, M.D., R. Boyer, Ph.D., A. L. Thiffault, L.Ps. "The Persistent Offender and His Sentences". 9 *Can. Psychiatric Assoc. J.* 462 474 (1964).

In subsequent surveys, the vast majority of those who received legal aid have continued to express similar sentiments. Not surprisingly, a few voiced expressions of dissatisfaction, even where they had been represented by lawyers of superior experience and ability.

The Committee emphasizes the need for *adequate* representation. There is a vast difference between legal representation characterized by careful preparation and personal encounter between lawyer and client and representation which is essentially casual, hurried and fleeting, and which may leave the accused bewildered and confused.

The need for the assistance of counsel at his trial by one charged with a crime, a conviction for which may entail the most serious consequences, scarcely requires elaboration. Writing in the last half of the nineteenth century, Sir James Stephen in this connection said:

... if the facts are at all numerous, if the witnesses either lie or conceal the truth, an ordinary man, deeply ignorant of law, and intensely interested in the result of the trial, and excited by it, is in practice utterly helpless if he has no one to advise him.<sup>3</sup>

In more recent times Mr. Justice Sutherland in *Powell v Alabama*<sup>4</sup> has eloquently and forcefully stated the defendant's need for a lawyer:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

A Committee was appointed in September, 1961, by the Board of Directors of the John Howard Society of British Columbia to report on legal aid in British Columbia.<sup>5</sup> In its report the Committee asked<sup>6</sup>:

Our Criminal Code in Canada provides that a person is entitled in a criminal case: "to make full answer and defence personally, or by counsel." Can a person who is untrained in the law ever make a *full* answer and defence personally without trained counsel? Our Bill of Rights says that an individual in Canada has the right to "equality before the law." Can an accused person be "equal before the law" if required to defend himself without counsel

<sup>3</sup> Stephen, Sir J. A. *A History of the Criminal Law of England*. 3 vols. London: Macmillan & Co., 1883, vol. 1, p. 382. Sir James Stephen was the author of the English draft Code from which the Canadian Criminal Code of 1892 was largely derived.

<sup>4</sup> 287 U.S. 45, pp. 68-69.

<sup>5</sup> The Committee consisted of Mr. Clare Skatfield, Chairman; Professor Graham Parker, Mr. Vaughan Lyon and Professor John Fornataro.

<sup>6</sup> "Report on Legal Aid in British Columbia." 7 *Crim. Law Q.* 72 p. 74 (1964-65).

when arrayed against him on the other side are the well organized and trained police with their scientific laboratories and experienced investigators and legally trained prosecutors?

The Dominion Bureau of Statistics shows that convictions are registered against approximately 90 per cent of all those charged with indictable offences in Canada. During the years 1955 to 1966 inclusive, the conviction rate ranged from a low of 87.3 per cent in 1955 to a high of 90.2 per cent in 1964. The conviction rate in 1966 was 89.5 per cent. As professor Friedland has pointed out, the Dominion Bureau of Statistics ignores withdrawals in arriving at the conviction rate. If withdrawals were counted as acquittals, the conviction rate would be substantially lower and the acquittal rate correspondingly higher.<sup>7</sup>

It is perhaps open to question whether withdrawals which occur because the police at the present time consider it necessary to bring a person who has been arrested without a warrant before a justice of the peace in order to release him, where subsequent investigation has cleared him, or has failed to produce sufficient evidence upon which to proceed, should be included as acquittals.

It must also be remembered that a very large percentage of the convictions are registered as a result of pleas of guilty. Although statistics are not collected by the Dominion Bureau of Statistics to show the percentage of convictions which result from pleas of guilty, it is believed by law enforcement officers that at least from 40 to 50 per cent of all convictions for indictable offences are the result of pleas of guilty. These figures are supported by limited studies which have been made. If 50 per cent of all convictions result from pleas of guilty the conviction rate in respect of charges which are tried on a plea of not guilty would be approximately 81 per cent, and the acquittal rate in respect of such charges would be approximately 19 per cent.

An analysis of the results of 963 cases conducted by 187 lawyers in different parts of the province under legal aid certificates under the Ontario Legal Aid Plan over a three-month period, shows an acquittal rate of approximately 35 per cent with respect to charges of indictable offences.<sup>8</sup> This percentage of acquittals would seem to be startlingly high compared to the national average or even to the acquittal rate with respect to clients who are able to pay for their legal services.

It must be borne in mind, however, that a high percentage of those who plead guilty do so at the time of their first court appearance. Consequently, a considerable proportion of the total number of those pleading guilty in

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<sup>7</sup> 41 *Can. Bar Rev.* 475 (1963). Based on a study of 5,539 cases in the Magistrates' Courts in Toronto of which 2,645 cases were in respect of indictable offences, Professor Friedland arrived at a conviction rate of 72 per cent for indictable offences, counting withdrawals as acquittals. The withdrawals exceeded the acquittals, namely, 16 per cent withdrawals as against 11 per cent acquittals. See also Friedland, M. L. *Detention Before Trial*. Toronto: U. of T. Press, 1963, p. 77.

<sup>8</sup> Statistics supplied by D. J. McCourt, Controller under the Ontario Legal Aid Plan.

Ontario would have pleaded guilty, assisted by duty counsel under the Ontario Legal Aid Plan, prior to the issuing of a certificate, which would inflate the acquittal rate of those to whom certificates were issued. Moreover, the 35 per cent acquittal rate includes withdrawals, which would also tend to inflate the acquittal rate. Most withdrawals, however, occur at the time of the first court appearance if the withdrawal is being used to clear a case where arrest has been made without warrant; these withdrawals would therefore have occurred when the accused was being assisted by duty counsel. Hence, the withdrawals at the stage where a certificate has been issued would not be as numerous and would consequently be of less significance.

On the other hand, the 963 cases would also include cases where pleas of guilty have been entered on the advice of defence counsel, acting under a certificate. This would, of course, reduce the acquittal rate.

In the Province of Alberta, which has a government-supported legal aid plan, the statistics are seemingly even more dramatic.<sup>9</sup> Legal aid in criminal cases was granted in 1967 to 1,563 persons in the Province of Alberta. Legal aid in Alberta is primarily confined to indictable offences. The results were as follows:

Number of cases in which legal aid provided	1,558
Convictions	740
Acquittals, dismissals and withdrawals	519
New trial ordered	5
Pending	294

The acquittal rate was, accordingly, approximately 41 per cent. The fact that the Alberta and Ontario figures are roughly comparable is in itself significant. The somewhat higher acquittal rate in legally aided cases in Alberta may be accounted for by the fact that legal aid in Alberta, with one exception, is not extended to those indictable offences of a less serious nature which the magistrate is empowered to try without the consent of the accused. The conviction rate tends to be higher with respect to this class of offence than that with respect to the more serious indictable offences.

In contrast to the above figures, the *conviction* rate in respect of indictable offences in 1963 in a province which has no organized legal aid was 97.6 per cent.<sup>10</sup>

These figures must be interpreted with caution because of the limited nature of the statistics presently available. They do, however, after making allowance for the above factors, strongly support the natural assumption that an accused person who is denied the services of a lawyer because of poverty has not received equal justice, and they indicate that the right to equality before the law has not been achieved in practice. The percentage of acquittals in cases where legal aid has been granted cannot be taken as the only measure of the value of counsel. Even where a conviction has been registered, the accused

<sup>9</sup> Statistics supplied by the Department of the Attorney-General of the Province of Alberta.

<sup>10</sup> *Canada Year Book 1966*, p. 424.

may have derived a considerable benefit from the assistance of counsel in bringing out facts in mitigation.

It is axiomatic that no innocent person should be subject to correction.

In any system of criminal law, whatever precautions are taken, some miscarriage of justice will inevitably occur. The damage done to the individual in such cases is obvious and irreparable. What is frequently overlooked is the grave damage to society, in terms of loss of confidence in the administration of justice, when a miscarriage of justice occurs.

Providing an accused person with competent counsel at a sufficiently early stage for legal assistance to be effective is a powerful and additional safeguard against an innocent person being convicted. It is an additional assurance that a person, although not entirely free from criminality, will not be convicted of a more serious crime than that warranted by the facts.

*A high percentage of those charged with criminal offences cannot afford to employ a lawyer.*

The Joint Committee on Legal Aid was appointed by the Attorney-General of Ontario in 1963. In its report the Joint Committee indicated that probably 60 per cent of all persons accused of serious offences in Ontario could not afford to retain a lawyer.<sup>11</sup> The report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice in the United States, which was submitted on February 25, 1963, states:

It has been estimated that in the country as a whole, in state as well as in federal courts, about sixty per cent of the accused are financially unable to obtain counsel. In some courts, particularly the small-crimes courts in our large cities, the number of unrepresented defendants may often far exceed even that fraction.<sup>12</sup>

The Committee of the John Howard Society of British Columbia, whose report is dated June 25, 1963, was of the opinion that probably over one-half of all accused persons in Canada charged with indictable offences were undefended at trial.

Professor Friedland, prior to the enactment of the Ontario Legal Aid Act 1966, found as a result of a study of some 5,539 cases in the magistrates' courts in Toronto that over one-half of those defendants who pleaded not guilty to a charge in respect of an indictable offence, and who were in custody at their trial, were not represented by counsel. Ninety-five per cent of those persons in custody who pleaded guilty on their first appearance in court were not represented by counsel.

The Committee has not attempted to arrive at exact figures for the whole of Canada with respect to the percentage of persons charged with serious

<sup>11</sup> Ontario. *Report of the Joint Committee on Legal Aid*. Toronto: Queen's Printer, 1965, p. 19.

<sup>12</sup> United States. *Report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice*. Washington: U.S. Gov't Printing Office, 1967, p. 18.

offences who lack the financial means to employ counsel. However, discussions with officials in the corrections field and members of the Bar across Canada, as well as our own observations and experience, lead us to believe that the figure is not substantially different from that estimated in the reports to which reference has been made.

The number of persons requiring legal representation in criminal matters who are either unable to pay any part of the costs or are unable to pay the whole cost involved in retaining counsel for themselves, is further demonstrated by the number of persons who have received legal aid in criminal cases during the first twelve months of the operation of the Ontario Legal Aid Plan. During that period, commencing on March 29, 1967, and ending March 31, 1968, some 18,502 certificates were issued in criminal matters and 52,668 persons were assisted by duty counsel in magistrates' courts. In addition, 9,550 provisional certificates were issued, approximately half of which were issued in respect of criminal matters.<sup>13</sup>

### *Legal Representation as a Human Right*

It was not until 1836<sup>14</sup> that an accused in England charged with a felony (the name given to the more heinous class of offences other than treason) was entitled to the assistance of counsel with respect to all aspects of his trial. Similar provisions were enacted in Canada in 1841,<sup>15</sup> from which s. 557(3) of the present Criminal Code is derived.

Section 557(3) of the Criminal Code, which deals with indictable offences, provides:

- (3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

Section 709 of the Criminal Code, which deals with summary conviction offences, provides:

- (1) The prosecutor is entitled personally to conduct his case and the defendant is entitled to make his full answer and defence.
- (2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.

The right to counsel originally meant no more than that an accused who had retained counsel was entitled to his assistance. From the standpoint of the jurisdiction of a court to try an indigent defendant who lacks counsel, the right to counsel under Canadian law still has this limited meaning. The right to counsel in this legal sense loses much of its meaning if the accused is too poor to hire a lawyer. The concept of the right to counsel as a social

<sup>13</sup> Statistics supplied by D. J. McCourt, Controller under the Ontario Legal Aid Plan.

<sup>14</sup> 6 & 7 WILL. 11, c. 114.

<sup>15</sup> 4 & 5 VICT., c. 24.

or human right implying an obligation on the part of the state to provide counsel for an accused who lacks the means to obtain the services of counsel for himself has largely developed in contemporary society.

In the landmark decision in *Gideon v Wainwright, Corrections Director*,<sup>16</sup> decided in 1963, the Supreme Court of the United States held that the right of a defendant to have the assistance of counsel is a fundamental right, and that the trial of an indigent defendant charged with felony in a state court, whose request to have counsel assigned to him has been denied, is invalid as being in violation of the due process secured by the Fourteenth Amendment.

It is not without interest that Gideon, who was convicted of breaking and entering and sentenced to five years imprisonment at his first trial when he was unrepresented, was acquitted at his second trial after the Supreme Court—because he had not been represented by counsel—ordered a new trial.

The same rule had been enunciated twenty-five years earlier with respect to trials in the federal courts of the United States in which the right to counsel is secured by the Sixth Amendment.

The English and Canadian courts, unlike the Supreme Court of the United States, have never held that the assistance of counsel, unless the defendant has waived his right to counsel, is a requirement of a valid trial. In *Reg. v Piper*<sup>17</sup> the accused pleaded guilty to a charge under s. 125 (a) of the Criminal Code of unlawfully escaping from prison. The accused when apprehended was still on the penitentiary grounds. He was not represented by counsel; made no request for counsel and was not informed that counsel was available to him. The Manitoba Court of Appeal in sustaining the conviction said:

It would have been preferable if [the magistrate] had informed the accused that he might request the services of the Legal Aid Committee but, under the circumstances of the case, there was no infringement of any rights guaranteed under the *Bill of Rights* since he was not deprived of the privilege to retain and instruct counsel.

The court rejected the argument of counsel that the right to counsel in a criminal trial is a fundamental right without which a fair trial is impossible and expressed the view that the right contended for was a matter for legislation.

The English Court of Criminal Appeal has, however, not hesitated to quash the conviction of a defendant who, in the opinion of the court, has been improperly denied legal aid, where the court was of the opinion that

<sup>16</sup> 372 U.S. 335 (1963).

<sup>17</sup> (1964), 51 D. L. R. (2d) 534. See also Grosman, Brian A. "The Right to Counsel in Canada". 10 *Can. Bar J.* 189 (1967); Tarnopolsky, Walter S. "The Lacuna in North American Civil Liberties—The Right to Counsel in Canada". 17 *Buffalo Law Rev.* 145 (1967).

the result of the trial might have been different if he had had a lawyer, or where the refusal of legal aid has rendered the trial unsatisfactory.<sup>18</sup>

The Committee is of the opinion that legal representation is a matter of right and not an act of grace or an extension of charity; that it is a responsibility of government. Moreover, we feel that the administration of criminal justice cannot be regarded as satisfactory if adequate provision is not made for legal representation for every defendant in a criminal case where conviction may involve a serious penalty if the defendant is unable, by reason of poverty, to obtain the services of counsel himself.

The Committee has given careful consideration to the desirability of legislation requiring the assistance of counsel as a requisite of a valid trial, unless the defendant states that he does not wish the assistance of counsel. A *mere* requirement that counsel be assigned to an indigent defendant, without providing the necessary machinery to ensure the availability of competent counsel, will not assure effective representation. Moreover, such an assignment may be made too late to enable counsel effectively to defend the accused.

Effective legal aid also requires that provision be made for supplying the defence with necessary transcripts of evidence and with funds to employ expert witnesses in appropriate circumstances. It must also be borne in mind that due regard for the expenditure of public funds, if counsel is to be compensated, requires the existence of machinery to determine whether a defendant who requests legal aid lacks the means to employ counsel himself.

The Committee also recognizes that *legislation enacted at the present time*, making the assistance of counsel, unless the defendant waives the right to counsel, a requirement of a valid legal trial, must necessarily be limited in its scope to the more serious offences. Wider legislative provisions can not be implemented *immediately* because of lack of sufficient courts, judges, magistrates, and defence counsel in some parts of Canada to cope with the extra demands that will be made upon the machinery of justice.

The Committee is concerned lest such legislation may have a tendency to freeze at the *present* level of practicability the right of financially disadvantaged defendants to be provided with counsel. The Committee considers that this would not be desirable.

The Committee has, however, come to the conclusion that legislation requiring that an indigent defendant, charged with one of the more serious offences, be provided with counsel, unless the defendant waives the right to counsel, should be enacted as an interim step until the right to counsel can be fully implemented in accordance with the recommendations made later in this chapter. The Committee is of the view that such legislation would be

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<sup>18</sup> *Reg. v Sowden* [1964], 1 W.L.R. 1454. In *Reg. v O'Brien*, [1967] *Crim. Law Rev.* 367, the English Court of Criminal Appeal quashed the conviction of the accused who had been refused legal aid and who alleged that he had no opportunity to prepare his defence or arrange for the attendance of witnesses, on the ground that the trial was not satisfactory.

supportive of the longer term objectives sought to be achieved by such recommendations.

**The Committee therefore recommends:**

- 1. That the Criminal Code be amended to provide that a defendant charged with an indictable offence, other than an indictable offence within the absolute jurisdiction of a magistrate, who lacks the means to employ counsel shall, unless he states that he does not wish to be represented by counsel, be provided with counsel and that in such circumstances representation by counsel is a requirement of a valid trial.**
- 2. That a person against whom an application is made for preventive detention who lacks the means to employ counsel shall be provided with counsel or, in the event that the Committee's recommendations with respect to dangerous offender legislation is implemented, that a person who is alleged to be a dangerous offender shall be provided with counsel.**

Later in this chapter, the Committee will discuss more specifically what it considers should be the objectives in providing legal representation for those who lack the means to secure it for themselves, and the best means of ensuring adequate representation in accordance with those objectives. The Committee, moreover, considers that the right to counsel at the trial is merely one aspect of a larger problem and can not be viewed in insolation from the role of the lawyer in the total criminal process.

### *Legal Representation before Trial*

*Legal assistance must be provided at an early stage of the criminal process to be effective.* Effective legal representation of an accused person frequently involves intensive investigation to gather and sift evidence. If the investigation is not commenced soon after the alleged occurrence, which is the subject matter of the charge, potential witnesses may not be able to be traced. Physical evidence which may throw light on the matter may disappear or be destroyed. Experienced defence counsel are well aware of the impediment to the successful conduct of a defence at trial by an inadequately conducted preliminary hearing.

A high percentage of accused persons plead guilty on their first appearance before the magistrate. Not infrequently, an accused pleads guilty on his first appearance before the magistrate because he does not understand the elements of the offence with which he is charged and mistakenly assumes that he is guilty when his behaviour has not brought him within the legal definition of the offence, or where he lacked the necessary state of mind to constitute the offence. Sometimes he is advised to plead guilty by fellow prisoners or by the police—sometimes from worthy motives—on the supposition that a plea of guilty will lead to a more lenient sentence.

It is, therefore, imperative that an accused receive legal assistance before his first appearance in a court having jurisdiction to accept a plea of guilty from the accused in respect of the criminal offence with which he is charged. Sometimes magistrates or crown counsel become aware that the accused is under a misapprehension after a plea of guilty has been entered and the magistrate will order that the plea of guilty be struck out and a plea of not guilty be entered followed by a dismissal of the charge.

Sometimes probation officers in the course of preparing a pre-sentence report discover that an accused has pleaded guilty in ignorance of what is involved in the commission of the offence with which he was charged. Steps are then taken to remedy the error. We are not satisfied that all such errors are discovered.

The judiciary and crown counsel are concerned to protect the rights of the accused, especially when they become alerted to the fact that an error may have occurred. But the crown counsel is appointed to prosecute and however fair he may be in the discharge of his duties, his function is not to search for possible defences in respect to the cases that he brings before the court. Magistrates, especially in the larger centres, are required to deal with a very heavy work load. However competent and careful they may be, they cannot be expected to perform the functions of a defence counsel as well as those of a magistrate.

A high percentage of the people who appear in the criminal courts for the first time are poor, frightened and bewildered. Legal assistance at the time of the first appearance may assist the accused to obtain release from custody on his own recognizance or solemn undertaking pending his trial, by the presentation of facts with respect to his family status, employment record and other relevant considerations and thereby preserve his job and prevent serious social dislocation.

Even where the proper advice to be given is to enter a plea of guilty, there is frequently much that can be done by way of bringing out mitigating circumstances, by arranging for psychiatric examination where it is appropriate, and by assisting in formulating a helpful plan for the rehabilitation of the offender which may enable him to remain out of prison. Services such as these, when performed in accordance with high standards, assist the offender, the court and society.

#### *Right to Counsel while in Police Custody*

The existence, nature and extent of the right of a suspect to counsel, while in the custody of the police, and the consequences which should attach to the wrongful denial of counsel at this stage have given rise to some of the most controversial legal issues of our time.

It is the view of the Committee that in this country the right of an accused in police custody to communicate with a lawyer, or the right of a lawyer retained by the accused to consult with him at the police station, does not

admit of doubt. The right of a person in police custody to retain and instruct counsel without delay imposes a corresponding obligation on the police to afford a prisoner in their custody a reasonable opportunity to communicate with a lawyer and to permit the lawyer to consult privately with his client.\*

The Canadian Bill of Rights<sup>19</sup> reads in part as follows:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding *The Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement, of any of the rights or freedoms herein recognized and declared, and in particular no law of Canada shall be construed or applied so as to...
  - (c) deprive a person who has been arrested or detained
    - (i) of the right to be informed promptly of the reason for his arrest or detention,
    - (ii) of the right to retain and instruct counsel without delay... (the emphasis is ours)

The Supreme Court of Canada has held<sup>20</sup> that the rights and freedoms recognized by the Bill of Rights are the rights and freedoms which existed in Canada immediately before the statute was enacted. The right of a person under arrest to communicate with his family or to consult with a lawyer had been recognized in Canada prior to the enactment of the Bill of Rights<sup>21</sup>.

Section 2 (c) (ii) of the Bill of Rights is, in the opinion of the Committee, a clear direction by Parliament that the law of arrest is not to be construed or applied so as to abrogate, abridge or infringe this fundamental right.

In *Regina v O'Connor*<sup>22</sup> Roach J.A., said:

*Haines J., in his reasons seems to indicate that the police in this case were following a rule that a prisoner in custody shall be given only one opportunity to get in touch with a lawyer. If that is an iron-clad inflexible rule within the*

\**Reg. v Ballegeer* (1969) 1 D.L.P. (3rd) 74.

<sup>19</sup> Stats. Can. 1960, c. 44.

<sup>20</sup> *Robertson and Rosetanni v The Queen*, [1963] s. C.R. 651.

<sup>21</sup> *Koehlin v Waugh and Hamilton* (1957), 118 C.C.C. 24. The Report of the Honourable Mr. Justice Roach sitting as a Commissioner appointed by the Attorney-General under s. 46 of the Police Act R.S.O. 1950, c. 279 (now R.S.O. 1960 c. 298, s. 48) to investigate a complaint made against the conduct of the police contains the following statement:

"The suggestion that any detective or other police officer is justified in preventing or attempting to prevent a prisoner from conferring with his counsel is a most shocking one. The suggestion that counsel, if he is permitted to confer with his client who is in custody, might thereby obstruct the police in the discharge of their duties is even more shocking. The prisoner is not obliged to say anything and the lawyer is entitled to advise him of that right. The lawyer is an officer of the Court and it is the function of the courts to administer justice according to the law. To prevent an officer of the Court from conferring with the prisoner who in due course may appear before it, violates a right of the prisoner which is a fundamental to our system for the administration of justice."

Law Society of Upper Canada. "Arrest and Interrogation". *Special Lectures, 1963*. Toronto, Richard de Boo, 1963, at p. 57.

<sup>22</sup> [1966] 2 C.C.C. 28 at p. 34, aff'd on appeal to the Supreme Court of Canada in [1966] S.C.R. 619, without reference to the passage quoted from the judgment of the Court of Appeal.

department then in my opinion it is wrong and not compatible with the right given a prisoner by the Canadian Bill of Rights.\* Circumstances will differ from case to case and in determining whether or not in any given case the prisoner's right has been violated the circumstances must be taken into consideration and it is for the court to say whether every reasonable opportunity was given to the prisoner to retain and instruct counsel without delay. There may be cases in which one telephone message would suffice—a message by or on behalf of a prisoner to a member of his family or to a friend who, not labouring under disability, could retain counsel on the prisoner's behalf. In the instant case I think a further opportunity should have been given to the accused to reach counsel direct or through a member of his family or a friend.

The Committee is in agreement with the views expressed by Mr. Justice Roach. Later in this chapter we make specific recommendations with respect to the enactment of legislation to ensure that a person in police custody is afforded a reasonable opportunity to communicate with counsel.

No sanctions are, however, contained in the Bill of Rights for a violation of the right recognized therein of a person who has been arrested or detained, to retain and instruct counsel without delay, although it has been suggested that such a violation attracts both civil and criminal liability.<sup>23</sup> As the Committee has pointed out, civil actions for damages have proved reasonably effective to deter trespassory interferences with person or property arising out of assaults, false arrests and illegal searches. Neither civil remedies nor criminal sanctions are, however, likely to be effective to restrain violations of a civil liberty, such as the right to counsel, because of the lack of supporting physical evidence and corroborative circumstances.

Contrary to popular belief such a violation does not invalidate the subsequent trial. Nor does it render inadmissible real or physical evidence discovered subsequent to, or as a consequence of, a violation of accused's rights to retain counsel.<sup>24</sup>

Prior to the enactment of the Canadian Bill of Rights, it had been held that an improper refusal of a prisoner's request to consult counsel was a factor—but only a factor—to be considered by the trial judge in determining whether a subsequent confession or incriminating statement was made

\* The emphasis is ours.

<sup>23</sup> In *Reg. v Steves*, [1964] 1 C.C.C. 266 Coffin J. was of the view that a violation of the rights which are recognized by the Bill of Rights might give rise to a civil action for damages in tort, and perhaps to criminal liability under s. 107 of the Code, which provides that every one who without lawful excuse contravenes an Act of the Parliament of Canada for which no express penalty is provided by law, is guilty of an offence. It is, to say the least, doubtful whether federal legislation can create a civil cause of action and s. 107 is of doubtful application because s. 2 (c) (ii) of the Bill of Rights does not command a police officer to do anything. It is a direction to a court not to construe the law of arrest in such a way as to infringe the right of a person who has been arrested to retain a lawyer. Cf. however Tarnopolsky, Walter S. *The Canadian Bill of Rights*. Toronto: Carswell Co., 1966, at p. 180.

<sup>24</sup> *Reg. v O'Connor*, [1966] S. C. R. 619; *Reg. v Steves*, [1964] 1 C. C. C. 266; *Attorney-General for Quebec v Begin*, [1955] S. C. R. 593.

voluntarily. In *R v Emele*<sup>25</sup> the trial judge rejected incriminating statements made by the accused, who was charged with the murder of her husband, following a request to see her solicitor, Mr. Diefenbaker, which was ignored by the police. In setting aside the acquittal and ordering a new trial the Saskatchewan Court of Appeal said:

Without wishing to sanction the conduct of the police touching such request in any way, we would say that we cannot sustain the views of the learned trial Judge in this respect. After all the question he had to determine was not what would have happened if the respondent had been permitted to see her solicitor but whether the statements alleged to have been made by her were voluntary. The fact that her request was ignored was, in our opinion, but one of a number of circumstances requiring consideration in determining that question.

Even though an incriminating statement made to the police in such circumstances may be "voluntary" in the strict sense, it might well be, however, that even in the present state of the law the judge presiding at the trial would be justified in exercising his discretion to reject an incriminating statement so obtained.

### *Police Attitudes*

The right of a person in police custody to consult with counsel, while recognized by many police officers, is not universally recognized by the police. However, we wish to point out that the Royal Canadian Mounted Police instructions to their members require its members to inform a prisoner upon arrest that he has a right to counsel. The Committee considers that these instructions constitute a model and they are reproduced as Annex A to this chapter. Some police officers feel that this right has never been authoritatively stated in the law. The Committee has already indicated that, in its view, the law is clear that immediately upon arrest a person has the right to be afforded a reasonable opportunity to communicate with counsel.

Undoubtedly back of the objection on the part of some police officers is the fear that if a suspect is permitted to consult a lawyer, the lawyer will advise him of his legal right not to make a statement, or will advise him not to make a statement and that this would have a detrimental effect on law enforcement. It would seem that the short answer to this objection is that under our law an accused is not under any legal obligation to answer questions put to him by the police. An objection to a lawyer advising an accused as to his legal rights implies that the system of police questioning is based on keeping an accused in ignorance of his legal rights. A system of law enforcement based on keeping people in ignorance of their rights could not hope to command public respect.

The unacceptability of a system of law enforcement based upon keeping people in ignorance of their rights was forcefully stated by Mr. Justice Gold-

<sup>25</sup> (1940), 74 C. C. C. 76 at p. 81.

berg, speaking for the majority of the Supreme Court of the United States in *Escobedo v Illinois* when he said:

If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.<sup>26</sup>

The Committee believes that the professional criminals, who are likely to know their rights in any event, represent the most serious danger to society. Consequently, the only people likely to be affected by the denial of counsel to persons in custody of the police are the ignorant and unsophisticated. Nor does it necessarily follow that counsel will in all cases advise silence, although counsel will in all probability advise his client not to make a statement until counsel has become familiar with the facts of the case. After becoming acquainted with the facts, he will advise his client to remain silent or make a statement accordingly, as he thinks it best serves his interest.

We think the police views previously referred to do not represent the views of all police officers; indeed, a major police brief received by the Committee states:

Possibly the only general principle which should govern the right to counsel is that *every person is entitled to counsel at any time and should not be prevented from obtaining this service.*\* To do so would be to abrogate a right to which all persons are entitled. In all cases where an indigent accused requires counsel it should be provided at public expense upon verification of his inability to pay.

### *Right in other Jurisdictions*

*Right to Counsel in Scotland.* The law of Scotland goes further than many other legal systems in protecting a person who is detained by the police.

Under the law of Scotland, a person who has been arrested on any criminal charge is entitled *immediately* upon such arrest to have intimation sent at once to a solicitor informing him that his professional assistance is required and to have a private interview with him.<sup>27</sup>

The relevant sections of the Scottish statutes are set out in Annex B to this chapter. The right of a person who has been arrested to consult a solicitor and to have a private interview with him is regarded as an important constitutional right in Scotland.

As has been pointed out, the Scottish law is much more restrictive than the Canadian law with respect to police questioning. Once a person is arrested, statements elicited as a result of police questioning in relation to the charge upon which he has been arrested are not admissible in evidence. However,

<sup>26</sup> 378 U.S. 478 (1964).

\*The emphasis is ours.

<sup>27</sup> Watt, F. C. (ed.). *Renton and Brown's Criminal Procedure*. 3rd ed. Edinburgh: W. Green & Sons, 1956, at p. 36; Criminal Procedure (Scotland) Act (1887), 50 & 51 VICT., c. 35, s. 17; Summary Jurisdiction (Scotland) Act (1954), 2 & 3 ELIZ. 11, c. 48, s. 12.

a statement which is "volunteered" by a person in custody is admissible providing that there has been no element of unfairness to the accused.

The Scottish courts have laid down the principle that a person who is accused has the right from the moment of apprehension to have the advice of a skilled law-agent as to whether or not he should make a statement, or in order that immediate steps may be taken to preserve evidence or in other directions which would lead ultimately to his exculpation.<sup>28</sup> The High Court of Justiciary has not hesitated to reject even statements which have been volunteered by a person in custody, where the court was of the opinion that a violation of the accused's right to counsel has resulted in unfairness to the accused.

Indeed, the court has expressed the view that under some circumstances a denial of the accused's right to consult a solicitor, which has resulted in prejudicing an accused with respect to his defence, might have the effect not only of rendering inadmissible an incriminating statement made by him, but of completely terminating the entire proceedings in his favour.<sup>29</sup>

*Judges' Rules in England.* The preface of the latest edition of the Judges' Rules in England<sup>30</sup> states:

These rules do not affect the principles . . . .

- (c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his so doing.

If the limitation contained in the Judges' Rules means that there is any *general* discretion vested in the police to deny a person under arrest a *reasonable* opportunity to confer with a lawyer until their investigation is complete, such a limitation on the right of a person under arrest to communicate with a lawyer is inconsistent with the Canadian Bill of Rights, which recognizes the right to retain and instruct counsel *without delay*.

On the other hand, the processes of investigation ought not to be held up indefinitely if the accused, having been afforded a reasonable opportunity to consult a lawyer, is unable to procure one.

It is also possible to imagine cases where the failure to afford an accused the right to consult counsel immediately might be excused where it was necessary to save life or avert some great evil. For example, if the police arrested a person who was reasonably believed to have planted a bomb in an airplane, immediate police questioning in order to discover the plane

<sup>28</sup> *H. M. Advocate v Aitken*, 1926 J. C. 83.

<sup>29</sup> *Cheyne v McGregor*, 1941 J. C. 17.

<sup>30</sup> [1964] 1 W.L.R. 152 at p. 153.

in which the bomb had been planted would clearly be their duty. Furthermore, failure to first afford the accused an opportunity to consult counsel should be excused in accordance with the general principle of the criminal law that, subject to certain exceptions, conduct which would otherwise constitute a breach of the law may be excused on the grounds of necessity—where the act is done to avert some greater evil.

A rather striking example of a case of this kind may be found in the California case of *People v Modesto*.<sup>31</sup> A child had been murdered and her sister was missing. It was suggested to the defendant by an officer that the missing girl might still be alive and her life could be saved. The defendant then gave incriminating information which led to the discovery of the body of the missing child. The court held that the paramount interest in saving the child's life, if possible, justified the officers in not impeding their rescue efforts by informing the defendant of his constitutional rights. The court held that the investigatory and rescue operations were inextricably interwoven and admitted the incriminating statement in evidence.

In the view of the Committee, the right to counsel as recognized in the Bill of Rights is similarly subject to the above principle. No change in the law in that respect is desirable. The fact that the police procedure is justified by the circumstances of the case ought not to be a ground, however, for admitting an incriminating statement if the statement is otherwise inadmissible.

*The United States.* In addition to the constitutional guarantees contained in the United States Constitution, more than half of the states have enacted legislation specifically providing for the right of a person upon arrest, or within a short time after arrest, to communicate with counsel and for counsel to consult with his client privately.<sup>32</sup> The legislation varies considerably in detail. The statutes commonly provide a penalty by way of fine or imprisonment for a violation of their provisions. The Kansas statute, which provides for the right of a lawyer to consult with his client in private, prohibits the presence of any recording or "listening in" devices.

Most of the statutes, however, contain no provision for clearly insuring that the prisoner will learn of his rights. The statutes in Vermont and Illinois require that copies of the provisions of the statute be posted in police stations and other places where arrested persons are held. An excellent example of legislation of this kind is contained in the Illinois Code of Criminal Procedure of 1963, the relevant parts of which are set out in Annex C to this chapter.

The model Code of Pre-Arrest Procedure of the American Law Institute similarly sets out—although in somewhat greater detail—provisions designed to secure effective implementation of the right of a person who

<sup>31</sup> 398 p. 2d. 753 (1965).

<sup>32</sup> "Right to Communicate With Retained Counsel Upon Detention or Arrest: State Statutory Guarantees". 1962 *University of Illinois Law Forum* 641.

has been arrested to communicate with counsel. The case for legislation along similar lines in Canada is well put by Professor Grosman when he says:

It may be that the general principles propounded in the Bill will gain in legislative effectiveness from their detailed implementation in a Code of Criminal Procedure. If the Legislature has, in the Bill of Rights, enunciated valid social standards then their implementation so that they become part of the living fabric of the administration of criminal justice can only promote the means to those valid ends. Principles become illusory if not implemented by Judges, legislators and lawyers. They become ineffective if sanctions for their non-observance are unavailable.<sup>33</sup>

*Right to Counsel in Continental European Systems.* The Committee has studied the right to counsel in various European countries, but has found it difficult to draw parallels due to fundamental differences in investigative procedures.

#### *Notification of Right to Counsel*

Under Canadian law there is no affirmative obligation on a police officer to advise a prisoner that he has a right to communicate with counsel if he wishes to do so.<sup>34</sup> The obligation of a police officer is limited to not depriving a person under arrest of the right to communicate with counsel if he wishes to do so.

The Attorney-General's Joint Committee on Legal Aid in Ontario considered the question as to whether the police should have the responsibility for informing persons upon arrest of the availability of legal aid. That committee took the view that it is undesirable to place the police in the position where they are giving advice which, in a given case, could be misleading.<sup>35</sup>

With this view the Committee is in general agreement. We believe, however, that it is possible to set up machinery to provide reasonable means for informing a suspect with respect to his rights with a minimum involvement of the police in this process. This could be achieved by the posting of appropriate notices in police stations or handing the prisoner a leaflet or a card clearly stating his right to counsel and the facilities for legal aid, or by the use of both such devices. The Report of the Departmental Committee on Legal Aid in Criminal Proceedings in England under the chairmanship of the Honourable Mr. Justice Widgery states:

It has been represented to us that the need for legal advice is particularly urgent in the case of an accused person who is held by the police prior to appearing in court and it has been suggested that an emergency service

<sup>33</sup> Grosman, Brian A. "The Right to Counsel in Canada". 10 *Can. Bar J.* 189, p. 207 (1967).

<sup>34</sup> *Reg. v DeClercq* [1966] 2 C. C. C. 190, p. 192.

<sup>35</sup> Ontario, *Report of the Joint Committee on Legal Aid*. Toronto: Queen's Printer, 1965, pp. 70-73.

of solicitors should be established in large towns so that any person arrested could be given immediate advice at the police station by the solicitor on duty.<sup>86</sup>

The Widgery Committee recommended that every person taken into custody should at an early stage be handed a leaflet explaining the facilities for legal aid, and that a list of solicitors on the legal advice panel should be kept at every police station.

In both written and oral submissions made to the Committee, it has been suggested that notices informing the accused of his right to counsel and the facilities for legal aid should be posted in police stations and lock-ups.

The Report of the Committee of the John Howard Society on Legal Aid in British Columbia expressed the opinion that every accused person should receive notice of the right to request a lawyer forthwith. The report states:

Such notice should in our opinion appear in clear and simple language in every gaol cell, in every police "interrogation" and "interviewing" room, and should be notified to every accused by every arresting police officer.<sup>87</sup>

Under the Scottish law, the statutes which confer the right to the advice of a solicitor from the moment of arrest do not impose a duty upon anyone to inform the accused of his right to summon professional assistance. The High Court of Justiciary has, however, held that failure on the part of the police to notify a person under arrest of his right to communicate with counsel *may* result in the rejection of an incriminating statement volunteered by the accused, if such failure has resulted in unfairness to the accused, although the failure to notify the accused of his right to communicate with a solicitor will not necessarily result in the rejection of a statement volunteered by him. As has been pointed out, statements elicited *as a result of interrogation* in relation to the charge following an arrest are inadmissible under Scottish law notwithstanding that accused has been warned and notified with respect to his right to counsel.

The extreme fairness of the Scottish legal system is illustrated by the case of *H.M. Advocate v Cunningham*.<sup>88</sup> The accused was under arrest, charged with assault and robbery. He received the usual caution required by the Scottish law that anything he might say in answer to the charge might be used in evidence. The officer conducting him to the cells drew the accused's attention to a notice hanging in the corridor, which stated that a prisoner was entitled to communicate with a law agent, and that he would be assisted to do so. The constable also explained the notice and informed the accused that if he could not pay for a lawyer he would be entitled to free legal aid. At a later hour that night the accused expressed a desire to make a statement and after being again cautioned, made an incriminatory statement. Lord

<sup>86</sup> United Kingdom. *Report of the Departmental Committee on Legal Aid in Criminal Proceedings*. London: Her Majesty's Printing Office, 1966, p. 57.

<sup>87</sup> "Report on Legal Aid in British Columbia". 7 *Crim. Law Q.* 72, pp. 97-98 (1964-65).

<sup>88</sup> 1939 J. C. 61, p. 66.

Moncrief, in dealing with the question whether adequate notice of his right to legal assistance had been given to the accused, said:

I think, accordingly, that the requirement tabled by Lord Anderson in the case of *Aitken*, of intimation to this effect may be regarded as having been adequately observed. While I am of opinion that in future cases it would be desirable, and would be in the spirit of the requirements of section 17 of the Criminal Procedure (Scotland) Act, 1887, that this intimation should in practice be given at an earlier stage, I am prepared to hold in this case that the intimation was adequately given.

The Committee has been informed by the administrative secretary of the Legal Aid Central Committee of the Law Society of Scotland that the charge rooms of police stations are "well placarded" with notices advising accused persons of their right to see a solicitor and to apply for legal aid.

In England, Home Office circular No. 31/1964 under the heading of "*Facilities for defence*" states:

Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices.

#### *Recommendations with Respect to the Right of an Arrested Person to Consult Counsel*

The Committee is of the opinion that the right of a person in police custody to communicate with a lawyer upon request is a fundamental right. In our view, the abrogation or any infringement thereof is incompatible with the dictates of a free society.

We are also of the view that reasonable means should be adopted to inform a person who has been taken into custody by the police of his right to communicate with counsel and the facilities for legal aid.

The Committee considers that the obligation to give reasonable notice would normally be met by: the posting of appropriate notices in police stations and lock-ups, and, in particular, in any room where a suspect is interviewed or questioned, and by handing the suspect a document setting out his right to communicate with counsel and the facilities for legal aid. Such documents should be printed in appropriate languages, in addition to the two official languages. There is an expectation that the police will communicate such information verbally to persons who are illiterate. These suggestions are not intended to be exhaustive or to exclude other measures to inform the accused of his right to communicate with counsel.

*The Committee is of the opinion that the right of a person under arrest to consult counsel without delay, recognized by the Bill of Rights as a fundamental right, should be spelled out more fully in a section of the Criminal Code dealing with the rights of an accused upon arrest.*

**The Committee therefore recommends:**

- (a) That the Criminal Code provide that a person who is under arrest has the right to be afforded a reasonable opportunity to communicate with a lawyer upon request and to consult in private with a lawyer who is retained by him or on his behalf.**
- (b) That the proposed legislation should also contain a provision requiring that reasonable means be taken to inform an arrested person of his right to counsel by the posting of notices in police stations and by handing the accused a document setting out his rights or by any other reasonable means.**

The Committee has expressed the view in Chapter 3 that, subject to the exclusionary rules which would be suggested in this chapter, the test of admissibility with respect to incriminating statements made to persons in authority should continue to be whether they were voluntarily made and that the broad question should continue to be left to the court.

In *Boudreau v The King*, Rand J. said:

What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case.

The Committee is of the opinion that the denial of a reasonable opportunity to communicate with counsel, after a request for permission to do so has been made, or a refusal to permit counsel retained by or on behalf of the prisoner a reasonable opportunity to consult with him, casts so much doubt on the voluntary nature of any incriminating statement thereafter made to a person in authority, prior to being afforded such reasonable opportunity, that the necessary assurance that it was made voluntarily is lacking and that such a statement should not be admitted in evidence.

**The Committee recommends that legislation be enacted to provide:**

- (a) That failure to afford a person under arrest a reasonable opportunity to consult with counsel, after a request for permission to do so has been made, or failure to afford counsel retained by or on behalf of the accused a reasonable opportunity to consult with him privately shall render inadmissible in evidence any incriminating statement subsequently made to a person in authority prior to such reasonable opportunity being afforded.**
- (b) That an incriminating statement made by a person in custody in any police station or lock-up as a result of police questioning, should be inadmissible unless reasonable means have been taken to inform the accused of his right to communicate with counsel.**

It should be a question of fact to be determined by the trial judge in each case whether reasonable means have been taken to notify the accused with

respect to his rights. The Committee recommends that legislation should be enacted to so provide.

The Committee has confined this latter recommendation to incriminating statements made in answer to questioning in a police station or other place under the control of the police used to question suspected persons where the accused, alone and in the presence of officers, may feel that he is surrounded by a compulsive atmosphere. Where the accused is interviewed in his home or at his place of business different considerations prevail. The Committee is also aware that incriminating remarks are sometimes blurted out upon arrest before there has been any opportunity to take measures to inform the suspect of his rights. Such statements would not be within the scope of the rule proposed.

#### *Function of Counsel when Consulted by a Person in Police Custody*

The Committee considers that it is appropriate to discuss briefly what the Committee conceives to be the *principal* functions of counsel when consulted at the investigation stage of the criminal process. The Committee considers that it is the function of counsel under such circumstances to:

- (a) Ascertain the charge, if any, with which the client is charged.
- (b) Advise the client with respect to his legal rights and express his opinion as to what he considers is the best course for the client to follow and to take such legal proceedings as he considers are appropriate to protect his client's rights.
- (c) Advise the client with respect to the legal rights of the police.
- (d) Assist the client to obtain his release on bail where the nature of the charge is such as to make release on bail at that stage possible.
- (e) Commence any investigation appropriate to the defence of his client, or take appropriate steps to preserve evidence which may be relevant to his defence.

The Committee does not consider that it is the function of counsel to oversee police conduct. The assignment of such a role to defence counsel would destroy his independence as an advocate and convert him into a witness. As Professors Elsen and Rosett have written:

It also raises sharp ethical problems for counsel, who may have to testify against his client's interest.<sup>99</sup>

In the view of the Committee, concepts which are basic to the adversary system, and hence appropriate to a court, are not applicable to the conduct of police investigations. We consider that the right of a person in custody to *consult* with counsel if he wishes to do so is fundamental, but we point out that under Canadian law it is not a condition of the admissibility of a statement made by a person in custody to a police officer that counsel be present

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<sup>99</sup> Elsen, Sheldon H. and Arthur Rosett. "Protections for the Suspect Under *Miranda v Arizona*". 67 *Columbia Law Rev.* 645 p. 666 (1967).

when such a statement is made. We recommend no change in the law in that respect.

### *Effect on Law Enforcement*

Proposals for securing for individuals their fundamental rights with respect to counsel frequently excite apprehension that effective law enforcement will be jeopardized. The Committee is of the view that the provisions which we have recommended will not impair effective and *proper* enforcement of the criminal law.

Moreover, we consider that they constitute imperatives—if the fundamental right of a person who has been arrested or detained to consult counsel without delay, recognized by the Canadian Bill of Rights, is not to be wholly illusory and chimerical. We are of the opinion that it would be preferable to repeal s. 2 (c) (ii) of the Bill of Rights if its provisions are not to be made meaningful. This Committee is not prepared to recommend the repeal of this section of the Bill of Rights or any other section thereof.

As we have indicated in an earlier part of our report, *undue* reliance upon the eliciting of incriminating statements by police questioning may in the long term actually be detrimental to law enforcement by removing the incentive to develop more imaginative and effective investigation techniques, and to expend the effort that other forms of investigation may require.

Recent studies in the United States, following the decision of the Supreme Court of the United States in *Miranda v Arizona*, would seem to indicate that in spite of the restrictions imposed by that decision on the police with respect to the interrogation of suspects, which restrictions greatly exceed those which flow from the recommendations of this Committee, the police still obtain incriminating statements in a substantial number of cases notwithstanding compliance with the requirements laid down by the Supreme Court of the United States. What is even more significant, available evidence would seem to indicate that a decline in the *confession* rate does not necessarily result in a decline in the *conviction* rate.<sup>40</sup>

It should be noted that the conviction rate in Scotland does not appear to differ significantly from the present Canadian conviction rate. Taking the conviction rate as an indication of the effectiveness of law enforcement, it appears that the extreme fairness shown by the Scottish legal system towards the accused does not impair the effective enforcement of the law.<sup>41</sup>

<sup>40</sup> Elsen, Sheldon H. and Arthur Rosett. "Protections for the Suspect Under *Miranda v Arizona*". 67 *Columbia Law Rev.* 645 p. 654 (1967); Seeburger, R. H., and R. Stanton Wettick Jr. "Miranda in Pittsburgh; a Statistical Study". 29 *University of Pittsburgh Law Rev.* 1 ff. (1968); Special Project. "Interrogation in New Haven: The Impact of *Miranda*". 76 *Yale Law J.* 1519 ff. (1966-67).

<sup>41</sup> The D. B. S. Statistics for indictable offences give the 1963 conviction rate for indictable offences in Canada as 90.1 per cent. The comparable Scottish conviction rate with respect to cases tried in solemn procedure for the same year calculated from the Scottish Home Office criminal statistics, notwithstanding the existence of an advanced system of legal aid in Scotland, was 91.1 per cent. The Scottish conviction rate for all offences in 1966 (i.e. offences tried in solemn procedure as well as those tried on summary jurisdiction) was approximately 92 per cent and for offences tried in solemn procedure was approximately 88 per cent calculated on the same basis as D. B. S. ignoring withdrawals.

Even where the rights of the accused are fully protected, there are strong psychological pressures upon a person under suspicion to speak to avoid the appearance of guilt.<sup>42</sup> Many persons speak freely at this time and frequently incriminate themselves in the belief that they are exonerating themselves. We do not consider that it is or should be the policy of the criminal law to prevent or discourage the making of *voluntary* statements to the police, but sound criminal policy requires that basic rights recognized by law should receive adequate protection.

It would appear that from a purely *quantitative* or statistical standpoint, emphasis on the protection of the basic right of a person under arrest to consult counsel has very little effect on law enforcement. The effects likely to be achieved are rather in the direction of increased respect for the entire system of criminal justice on the part of the public and the individual by upgrading the *quality* of that system.

### *Legal Aid at the Police Station*

Providing legal advice to persons in police custody who require legal aid presents difficult problems. It has been suggested in representations made to the Committee that in every large police station there should be a legal aid officer available to advise those who request his services.

The Committee considers that legal aid lawyers should not be attached to police stations any more than private lawyers should be entitled to post themselves in police stations. Obviously, the person who lacks means should be placed in the same situation as a person who is able to pay for the legal services he requires. He should not be placed in any higher position.

The Widgery Committee, although it recommended that provision should be made for providing legal advice to persons in police custody who required legal aid, was of the view that provision under legal aid for visits by solicitors to police stations should be confined to offences of some seriousness. The report states:

We have not attempted to define such offences as it would be undesirable to lay down a hard and fast rule, and we recommend that it should be left to the discretion of the solicitor consulted to decide whether the case is of such a nature that a visit to the police station would be justified.<sup>43</sup>

With this viewpoint this Committee is in agreement. In some cases advice given over the telephone might be sufficient.

We think, however, that the view of the Widgery Committee that it would not be desirable to make special arrangements for after-hour visits is open to question. We think that in the larger centres, where the problem is likely to be most acute, there should be no difficulty in providing a panel of solicitors on a rotating basis or a duty counsel who would provide legal aid

<sup>42</sup> Glasbeck, H. J. and D. D. Prentice. "The Criminal Suspect's Illusory Right of Silence in the British Commonwealth". 53 *Cornell Law Rev.* 473 (1967-68).

<sup>43</sup> United Kingdom. *Report of the Departmental Committee on Legal Aid in Criminal Proceedings*. London: Her Majesty's Stationery Office, 1966, p. 58.

after hours in serious cases on request. The comprehensive Ontario Legal Aid Plan makes no provision for legal advice at the police station, although duty counsel are available to assist indigent defendants immediately prior to and during their first appearance in court.

### *Legal Representation on Appeal*

In the view of the Committee, all the safeguards of the criminal law should be available to every accused without regard to his financial means.

The Report of the Attorney-General's Committee on Poverty and the Administration of Federal Criminal Justice in the United States contains the following statement:

The Committee is of the view that the basic objective of a system of criminal appeals is no different from that of other areas of criminal-law administration: namely, the establishment of procedures adequate to protect the legitimate interests of the accused irrespective of his financial status.

Any government-financed system of legal aid in respect of appeals must, of course, contain adequate safeguards to prevent the expenditure of public funds on frivolous appeals.

Section 590 of the Criminal Code provides:

A Court of Appeal or a Judge of that court may, at any time, assign counsel to act on behalf of an accused who is a party to an appeal or to proceedings preliminary or incidental to an appeal where, in the opinion of the court or Judge, it appears desirable in the interests of justice that the accused should have legal aid and where it appears that the accused has not sufficient means to obtain that aid.

Where legal aid is provided under the provisions of s. 590 of the Criminal Code, it is provided on a purely voluntary basis by the lawyer whom the court has requested to act.

In those provinces which have legal aid plans, whereby legal aid is extended to appeals, there may be two different systems of legal aid in relation to appeals operating at the same time: one voluntary where counsel is assigned by the court under s. 590 of the Code, and one under a legal aid plan in which compensation is paid to the lawyer providing legal services.<sup>44</sup> One system may impose restrictions on the granting of legal aid which are not imposed in the other.

<sup>44</sup> In New Brunswick there is no organized legal aid but the *Poor Prisoner's Defence Act*, R.S.N.B. 1952, c. 171 (as amended by Stats. N.B. 1957, c. 49) provides that the Chief Justice of New Brunswick or a Judge of the Court of Appeal designated by him shall issue an appeal certificate to a person sentenced to death whose means are insufficient to enable him to obtain aid in the conduct and preparation of his appeal. The statute provides that where an appeal certificate has been granted the costs of the appeal shall be paid out of the consolidated revenue fund. Under the Act the costs are limited to the cost of a copy of the evidence and the judge's charge, a fee not exceeding one hundred dollars (\$100.00) for the preparation of the appeal and a fee not exceeding fifty dollars (\$50.00) per day while engaged at the hearing of the appeal.

If a uniform and adequate system of legal aid with respect to criminal appeals were to be established in all the provinces, the anomaly at present existing could be removed by repealing s. 590. In the event that the court of appeal or a judge thereof was of the opinion that legal aid had been improperly refused by the authority responsible, under a provincial plan, for granting legal aid in respect of appeals, the court could refer the matter back to such authority together with its views as to the propriety of granting legal aid. The Ontario Legal Aid Plan requires the approval of an area committee as a condition of the issuance of a certificate for legal aid on appeal, but provides that where the court of appeal is of the opinion that it is desirable in the interests of justice that the appellant or respondent be represented by counsel, a certificate may be issued by the director of legal aid where he is satisfied that the appellant or respondent lacks sufficient means to procure counsel for himself.

### *Legal Aid in Canada at the Present Time*

Most of the provinces of Canada have some form of legal aid under which legal aid is provided to defendants in criminal cases on an organized basis.

In those provinces which have legal aid plans there is, however, a considerable variation in the extent to which legal aid is provided. For example, some legal aid plans exclude a person with prior conviction—except in special circumstances or in respect of certain kinds of proceedings.

Under some legal aid plans, summary conviction offences and indictable offences within the absolute jurisdiction of the magistrate are excluded. Under some legal aid plans, legal aid with respect to appeals is more restricted than in others.

In some of the provinces which have legal aid plans, the plans are organized on a purely voluntary basis and the lawyers are not paid for their services. In other provinces lawyers providing legal aid are paid an honorarium which is not intended to compensate for the services supplied, but is more in the nature of a contribution towards the office expense of the lawyer who is providing the service. Legal aid provided on this basis is provided as a charitable undertaking and not as a social right. Alberta, Ontario and Saskatchewan have government-supported legal aid plans which provide for payment to lawyers rendering legal aid on a modest but reasonable basis for the services rendered.

In some provinces there is no organized legal aid at all and legal aid, when provided, is on a charitable basis by individual members of the Bar. Provision is made in virtually all provinces for assigning counsel in capital cases and very serious cases with compensation on a modest basis being paid by the provincial government.<sup>45</sup>

<sup>45</sup> Parker, G. E. "Legal Aid—The Canadian Need". 6 *Can. Bar J.* 179 (1963); Tarnopolsky, Walter S. "The Lacuna in North American Civil Liberties—The Right to Counsel in Canada". 17 *Buffalo Law Rev.* 145, p. 159 (1967).

The Ontario Legal Aid Plan, which came into operation in March of 1967, has been described as one of the most comprehensive legal aid plans in the world.

Under the Ontario plan, legal aid is supplied on a contributory basis to those who can pay some part, but not all, of the cost of the legal aid provided. It is supplied without contribution to those persons who are unable to bear any of the cost of the legal aid applied for. Under the Ontario plan, the province is divided into a number of areas for the purposes of the plan. An area director is appointed for each of such areas who is responsible for the operation of the plan in his area.

In each area there is an area committee which, in addition to performing the duties required of it under the statute, is required to advise the area director in respect of any matter upon which he requests its advice. The majority of the members of each area committee are lawyers, since the committee frequently has to deal with purely legal questions, but *provision is also made for community representation on area committees*. The chief executive officer of the plan is the provincial Director, who is responsible to The Law Society of Upper Canada for the working of the plan. While the plan is administered by the Law Society, it is subject to certain governmental controls since public funds are being expended.

Lawyers who provide legal aid are paid three-fourths of their fees as determined by a legal aid tariff. The cost of operating the plan is borne by the province.

A person who qualifies for legal aid receives a certificate which entitles him to select the lawyer of his choice to represent him, provided only that such lawyer has agreed to serve on a legal aid panel. Lawyers acting under a legal aid certificate are prohibited from disclosing that fact, except where such disclosure is necessary for the operation of the plan. The person who qualifies for legal aid is, therefore, placed as far as it is possible to do so in the same position as a person who can pay for the legal services which he requires.

Under the Ontario plan a person who is financially eligible and who is charged with an indictable offence, or against whom an application for preventive detention is brought, is entitled to legal aid as of right.

In the discretion of the area director, a person who is financially eligible and who is charged with an offence punishable on summary conviction, is entitled to legal aid if upon conviction there is likelihood of imprisonment or loss of means of earning a livelihood.

In the discretion of the area director, legal aid may be granted in hearings before administrative or quasi-judicial tribunals. Legal aid may also be granted in respect of appeals with the consent of the area committee.

Under the Ontario plan, duty counsel are appointed to interview persons in custody or who are summoned to appear on a criminal charge, prior to their appearance before a magistrate and who wish legal aid. The primary function of duty counsel is to advise the defendant with respect to his legal

rights, to advise him as to the elements of the offence with which he is charged, and to represent him on an application for bail or an adjournment. Duty counsel may also speak in mitigation of sentence where the accused, after having been advised as to the elements of the offence with which he is charged, and of his right to plead guilty or not guilty, wishes to plead guilty. In certain restricted situations, if the accused requests it, duty counsel may also conduct a defence. Under the comprehensive Ontario plan no provision is made for providing legal aid at the police station.

In addition to the provincial legal aid plans, the federal government provides legal aid in each of the ten provinces for indigent Indians charged with either capital or non-capital murder. In addition, the federal government administers a legal aid programme in criminal cases in the Northwest Territories and the Yukon Territory.

### *Public Defender System*

The public defender system which has been established in some parts of the United States has not taken root in Canada, and legal aid has developed along different lines. The public defender, like his counterpart, the public prosecutor, is a public official. Generally speaking the public defender is a salaried lawyer in public employment who represents accused persons who cannot afford to retain counsel for themselves.

In the larger centres the public defender's office is composed of a number of lawyers who devote themselves full-time to duties of their office and are paid a salary. Some of the public defender organizations have, in addition, a staff for investigation purposes. Many public defender offices, however, operate with part-time lawyers especially in the smaller centres. Undoubtedly a public defender service is more economical to operate than a comprehensive legal aid plan. The proponents of the public defender system assert that public defenders devoting their full time to the defence of criminal cases become experts in this field and are, therefore, able to provide a better service than a lawyer in private practice who devotes only a part—perhaps a small part—of his time to the defence of criminal cases.

The principal defects in the system are that the defendant exercises no choice as to who will represent him. He gets the lawyer who is assigned to him. The defendant is, therefore, not placed in the same position with respect to legal representation as the person with means. Representation by the public defender informs the court and the public that the defendant is in receipt of charity. There is in addition the danger that because of the volume of cases that may be handled by an individual public defender, the service rendered may tend to become perfunctory and impersonal.

One of the arguments that is most frequently made against the public defender system is that being in the employ of the same governmental authority which is conducting the prosecution, the independence of the public defender may be jeopardized or at least the person being defended may think so.

While recognizing that many public defender offices are staffed by highly competent defence counsel, the Joint Committee appointed by the Attorney-General of Ontario, whose terms of reference included investigating and reporting upon legal aid and public defender schemes in other jurisdictions, considered that the advantages of the public defender system were outweighed by its disadvantages. The same view was taken by the Widgery Committee in England. On the other hand the Report of the John Howard Society Committee on Legal Aid in British Columbia found features in the public defender concept which commended themselves to that Committee.<sup>46</sup>

### *Recommendations with Respect to Legal Aid*

The Committee is of the opinion that it is within the legislative competence of Parliament, because of its exclusive jurisdiction over criminal law and procedure, to enact legislation to provide legal aid in respect of criminal matters. The Committee, however, considers that the establishment of a separate system of legal aid in criminal cases would not be desirable for the following reasons.

Legal aid in its wider aspect is primarily within the jurisdiction of the provincial legislatures.

It is preferable for each province to develop the legal aid plan or public defender concept, as the case may be, that is best suited to its needs, having regard to its population, the number of lawyers available and geographical considerations.

As has been pointed out, most of the provinces already make some provision for legal aid, although there is a considerable variation with respect to the comprehensiveness of the legal aid provided in the different provinces. In the provincial plans, legal aid in civil and criminal matters forms part of an integrated plan. In some provinces legal aid and its sufficiency is undergoing re-assessment. For example, Manitoba has long had a legal aid plan whereby legal aid is provided in respect of indictable offences. Compensation is paid on a modest basis, except with respect to indictable offences tried in the magistrates' courts, where legal aid is provided on a voluntary basis unless the defending lawyer is required to travel outside his resident office area. A recent amendment to the Attorney-General's Act (Statutes of Manitoba, 1968, Ch. 3) authorizes the Attorney-General to establish and administer a scheme for assisting persons charged with indictable offences under the Criminal Code, including indictable offences that are tried summarily, who are unable to afford a lawyer.

The Committee considers it would be wasteful and not in the interest of efficiency to have a federal system of legal aid in criminal matters which would involve unnecessary duplication of costs and administrative personnel.

<sup>46</sup> "Report on Legal Aid in British Columbia", 7 *Crim. Law Q.* 72 pp. 80-86 (1964-65). See also Parker, G. E. "Legal Aid—The Canadian Need". 6 *Can. Bar J.* 179 (1963).

The Committee is, however, of the view that in Canada, where a single system of criminal law and procedure is applicable to the entire country, the right of the defendant charged with a criminal offence to legal representation should be substantially the same in all the provinces.

The report of the President's Commission on Law Enforcement and Administration of Justice in the United States, states:

The objective to be met as quickly as possible is to provide counsel to every criminal defendant who faces a significant penalty, if he cannot afford to provide counsel himself.<sup>47</sup>

The Committee is of the opinion that the following goals with respect to the representation of the accused should be achieved as soon as it is possible to do so, namely:

1. That every defendant in a criminal proceeding in respect of which imprisonment may be imposed or which involves a likelihood of loss of means of livelihood (for example, loss of a driver's license when it is necessary for employment) should be provided with adequate legal assistance before his first appearance in court and until the termination of the trial proceedings if he lacks the means to procure such assistance for himself.
2. That every person convicted of any offence involving imprisonment or loss of means of livelihood, should be provided with adequate legal assistance for the purpose of an appeal if he is financially unable to provide such assistance himself, subject to reasonable safeguards to prevent the expenditure of public funds on appeals which are without merit.
3. That provision should be made under all legal aid plans to provide lawyers to advise persons in police custody charged with a serious offence who request legal assistance.

**The Committee recommends that steps be taken by way of consultation between the Canadian government and the provincial governments to provide legal aid for defendants in criminal cases in accordance with the above principles and that federal assistance be provided, to the extent that it is necessary in order to achieve adequate basic standards of legal aid in Canada in conformity with the above principles.**

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<sup>47</sup> 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. 150.

## **Annex A**

Instructions to members of the Royal Canadian Mounted Police Force with respect to advising prisoners of their right to counsel:

1576. (1) The following rules shall be observed concerning prisoners and counsel.

(2) Prisoners shall be advised of their right to engage counsel but must neither be encouraged to seek nor hindered from obtaining the service of counsel to ensure their adequate defence.

(3) An alphabetical list of all barristers, practising at the point where a prisoner is held in custody, shall be made available to him on request and he is to be permitted to make free choice therefrom. The names of the various barristers are to be set forth with equal prominence in the list. In large centres it will be sufficient if the telephone book is given the prisoner to enable him to make a free choice.

(4) Members shall not engage counsel for prisoners, nor suggest any particular barrister or influence a prisoner's choice of legal assistance in any way.

(5) In unusual circumstances where the prisoner is unable, because of language difficulties, physical injury or lack of communication facilities to contact personally the barrister of his choice, a member of the Force may do so on his behalf. Whenever this is done the member concerned should obtain either a written request from the prisoner naming the barrister of his choice or arrange to have a witness present when a verbal request is made.

## Annex B

Criminal Procedure (Scotland) Act, 1887. 50 & 51 Victoria, Chapter 35.

17. Where any person has been arrested on any criminal charge, such person shall be entitled immediately upon such arrest to have intimation sent to any properly qualified law agent that his professional assistance is required by such person, and informing him of the place to which such person is to be taken for examination; and such law agent shall be entitled to have a private interview with the person accused before he is examined on declaration, and to be present at such examination, which shall be conducted according to the existing practice, provided always that it shall be in the power of the sheriff or magistrate to delay such examination for a period not exceeding forty-eight hours from and after the time of such person's arrest, in order to allow time for the attendance of such law agent.

Summary Jurisdiction (Scotland) Act 1954, Chapter 48.

12. In any proceedings under this Act the accused, if apprehended, shall immediately on apprehension be entitled, if he so desires, to have intimation sent to a solicitor, and to have a private interview with such solicitor prior to being brought before the court.

## Annex C

### ILLINOIS CRIMINAL LAW AND PROCEDURE

#### Illinois Revised Statutes 1967

#### Chapter 38

#### Article 103. Rights of Accused.

##### 103-1. *Rights on Arrest.*

- (a) After an arrest on a warrant the person making the arrest shall inform the person arrested that a warrant has been issued for his arrest and the nature of the offense specified in the warrant.
- (b) After an arrest without a warrant the person making the arrest shall inform the person arrested of the nature of the offense on which the arrest is based.

##### 103-2. *Treatment While in Custody.*

- (a) On being taken into custody every person shall have the right to remain silent.
- (b) No unlawful means of any kind shall be used to obtain a statement, admission or confession from any person in custody.
- (c) Persons in custody shall be treated humanely and provided with proper food, shelter and, if required, medical treatment.

##### 103-3. *Right to Communicate with Attorney and Family; Transfers.*

- (a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner. Such communication shall be permitted within a reasonable time after arrival at the first place of custody.
- (b) In the event the accused is transferred to a new place of custody his right to communicate with an attorney and a member of his family is renewed.

103-4. *Right to Consult with Attorney.* Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. When any such person is about to be moved beyond the limits of this State under any pretense whatever the person to be moved shall be entitled to a reasonable delay for the purpose of obtaining counsel and of availing himself of the laws of this State for the security of personal liberty.

103-7. *Posting Notice of Rights.* Every sheriff, chief of police or other person who is in charge of any jail, police station or other building where persons under arrest are held in custody pending investigation, bail or other criminal proceedings, shall post in every room, other than cells, of such buildings where persons are held in custody, in conspicuous places where it may be seen and read by persons in custody and others, a poster, printed in large type, containing a verbatim copy in the English language of the provisions of Sections 103-2, 103-3, 103-4 . . .

# 9

## THE CRIMINAL COURT

*The criminal court is the central, crucial institution in the criminal justice system.<sup>1</sup>*

Under the British North America Act 1867, the Parliament of Canada is given exclusive legislative authority with respect to "the Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters" (91:27). The creation, operation and maintenance of criminal courts in Canada is therefore a matter of provincial legislative authority subject to the limitation in s. 96 whereby the appointment of judges of the superior, district and county courts is reserved to the Governor-General. Magistrates and justices of the peace and, in the Province of Quebec, judges of the sessions of the peace and provincial judges are appointed by the lieutenant-governors-in-council.

With the exception of the appointment of judges to the higher courts, the operation of criminal courts in Canada is a provincial responsibility. The Committee, therefore, in this chapter, confines itself to setting out criteria by which the adequacy of criminal courts can be assessed, in the expectation that reasonable and uniform standards can be accepted and implemented in all jurisdictions in which Canadian criminal law is applied. The criteria have been formulated on the assumption that criminal courts may in the future be created and maintained for the disposition of crimes to the exclusion of such petty quasi-criminal matters as traffic offences. The Committee expects important changes in substantive criminal law so that the criminal process would be reserved for seriously disruptive social conduct not susceptible to control by any other means. In particular, it is assumed that common drunks and vagrants will for little longer clog the machinery of criminal justice.

A criminal court must be assessed with respect to three attributes, the judge, the court in its physical sense, and the ancillary services and per-

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<sup>1</sup> United States. 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. 125

sonnel. Attention was concentrated on the so-called lower courts in view of the fact that approximately 95 per cent of the indictable offences and all summary conviction offences are disposed of at this level of the judicial hierarchy.<sup>2</sup> Observations derived from an examination of these courts has provided a basis for establishing the following criteria applicable to the entire system of criminal courts.

### *The Judge*

*A judge in a criminal case should be legally qualified.*

Law has as one of its principal objects the securing to the individual of those rights which he is accorded by the political system in effect. No person should be allowed to adjudicate in a criminal matter who has not received a training adequate to alert him to situations where the basic constitutional rights of a citizen are in issue.

While all supreme, superior and county court judges are recruited from the ranks of the legal profession, it is noted that not all lower courts are presided over by legally qualified persons.

The Committee acknowledges that there are many instances where persons without formal legal qualifications have made very substantial contributions to the administration of justice in the performance of judicial duties. It appears, nonetheless, that in view of the serious nature of charges within the jurisdiction of the lower courts and the gravity of sentences that may be imposed, that future appointments to the Bench should require not only formal legal qualification but substantial practical experience.

*A judge in criminal cases should be secure from the risk of pressure from those appointing him or others.*

As Lord Hewart (then Lord Chief Justice of England) pointed out:

It is not merely of some importance but of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.<sup>3</sup>

The present position in Canada is unsatisfactory in at least two respects; judges provincially appointed have less security of tenure than have judges in the superior courts; judges of the so-called lower courts generally enjoy a lower standard of remuneration than do their brothers in the superior courts. These discrepancies tend to lay the magistracy open to the criticism that they are susceptible to pressure either from the provincial government who appointed them or from those who appear before them.

<sup>2</sup> Ontario. Royal Commission Inquiry into Civil Rights. *Report No. 1* (McRuer Report). Toronto: Queen's Printer, 1968, p. 526

<sup>3</sup> *R. v. Sussex Justices* [1924] 1 K.B. 256, p. 259.

*A judge should not be liable to be regarded as part of the police apparatus.*

The term "Police Magistrate" still appears in the Criminal Code. While such a description has a sound, historical justification, it is felt that a close identification between any level of the judiciary and the police can only strike at the respect in which the public ought to hold the impartiality of the administration of justice and the police. This matter will be returned to in our analysis and discussion of the physical facilities presently enjoyed by criminal courts.

*A judge, in a criminal case, should be adequately informed not only as to the philosophy of sentencing subscribed to by the legal system but also as to the real consequences of any sentence he imposes.*

These propositions appear to be self-evident. The layman would expect that a philosophy of sentencing would have been articulated with sufficient clarity that those charged with the responsibility of administering it could comprehend and apply it. A layman might also reasonably expect that a judge imposing a particular sentence would have tailored it not only to the offender but to the climate and facilities available for his punishment or rehabilitation.

Neither of these presumptions would appear to be founded in fact. Neither the appropriate philosophy of sentencing nor the reality of the correctional institutions available, would appear to have been made clear to those charged with the responsibility of imposing sentence in 95 per cent of Canadian criminal cases. It may well be that this lack of information extends throughout the judicial hierarchy. Recommendations are made in the chapter on sentencing to ensure a more adequate flow of relevant information to the courts.

#### *The Court: Its Location and Construction*

*The court should not be confused with the police station.*

The relationship between the police and the courts—in particular the proximity of the magistrates' courts to the police station—has caused great concern in many jurisdictions throughout Canada. Practice varies from province to province, from municipality to municipality within the province, and from court to court within the municipality. For example, in most of the principal cities of Canada, the police and the magistrates' courts occupy the same building, sometimes euphemistically described as a "public safety building". In other jurisdictions, on the other hand, an attempt has been made to keep the police station and the court building separate.

Most will agree that this separation is desirable; the key question is, how separate should they be? The general principle should be sufficient separation of the courts and the police to ensure that the public does not confuse their roles and will be aware of their mutual independence.

A great number of factors will effect the creation of such an impression: the physical proximity of the police station and the court building; whether the court is referred to as a "police court" (and until recently some courts were officially so designated); control of the administration of the courts by the same municipal body which controls the police; whether the court clerk and the other court officials are police officers; whether there is a common entrance to the police station and the court (and whether there is a sign or other indication on the outside of the building that there is a court inside); the existence of other public buildings in the same area; and many other factors, some subtle and some obvious.

No single factor by itself will be decisive; their cumulative effect is the important consideration. Physical separation is probably essential. Without it, it is almost impossible to prevent at least some members of the public from confusing the law enforcement and adjudicative aspects of the administration of justice. The main argument in favour of having the police and the courts together is that it is more efficient for the police and thus decreases public expenditure of funds. But with a well-regulated system of court-liaison officers and a properly organized method of scheduling cases, the amount of time lost can be cut to a minimum. And if steps are taken to remove the offence of drunkenness from the courts, the saving in cost will be further increased. Of course, it is not necessary for the courts to be widely separated from the police; provided that the effect of separation is maintained, they can be adjacent buildings, particularly if there are other public buildings in the same area.

It is not just physical proximity which must be examined, but the total relationship between the courts and the police. To insist on physical separation and yet, for example, to permit the police to control the functioning of the court may accomplish very little.

Having all the criminal courts in one structure would enable the magistrates to have contact with other members of the judiciary, would give them access to a better library than is usually available in the magistrates' courts, and would be more convenient for the other participants, such as lawyers and police, who now appear in both the higher and lower courts. Moreover, a central lockup would be much more workable if all criminal courts were in one building.

*The physical facilities should be such as to provide that degree of dignity which is necessary to maintain respect for the law and the administration of justice.*

Most of the magistrates' courts in Canada are badly designed and, in the larger centres at least, are overcrowded. The McRuer Report states that the accommodation provided "in many cases is very unsatisfactory<sup>4</sup>"; and one practitioner has observed that "many of our magistrate's courts resemble factory lunch rooms<sup>5</sup>".

<sup>4</sup> Ibid p. 538.

<sup>5</sup> Virtue. *Survey of Metropolitan Courts: Final Report* (1962).

Perhaps the first obvious deficiency in design is the too common difficulty of finding the specific courtroom one is looking for—assuming that one has found the proper court building. In many cases there are no visible directions when one enters the building. When there is more than one courtroom in which a case might be tried, it is usually difficult to decipher the posted court list, particularly when there are a great many other persons crowded around the area where the list is posted.

Little need be said about the necessity for adequate lighting, ventilation and acoustics. The latter two are interrelated because in many courts the only way of providing any ventilation (a need usually extreme because of the large number of persons in the courtroom) is to open the windows, bringing in outside noise and making it difficult to hear what is going on inside the courtroom. This is a choice faced by many courts: whether to hear or to breathe. All courts, should, of course, have effective air-conditioning; and outside noise and visual distractions should be eliminated either by constructing the courts in the centre of the building, or at least by placing the courts in that part of the building which is away from a busy street. In a few courts in Canada it is possible for someone in the public section to hear what is taking place in court. Amplification is one solution; better design would be a better one.

The physical relationship between the various participants in the courtroom requires rethinking. The day may well be past in which it was necessary to place the accused as a “prisoner” in a guarded dock. An accused person might well be permitted to sit near his lawyer.

*Courtrooms should be adaptable to the various functions performed.*

Courtrooms tend to be designed solely for the trial of cases whereas, in fact, magistrates' courts are used to a substantial degree for adjournments and guilty pleas rather than for trials. No account is taken of the fact that a great number of persons not in custody appear in court to plead guilty or to have the case put over to another day. Usually no attempt is made to place these persons in the prisoners' dock. In some courts the accused simply walks up to the front of the court without being particularly sure where he should stand. In other courts the court officials have devised techniques such as placing a chair with its back towards the spectators to serve as the place behind which the accused stands. A proper design would take this function of the court into account and would provide an easily recognized place for an accused on remand to stand. A further indication that the adjournment function of the court has normally been totally forgotten is that no arrangement has been made for a proper calendar to be placed on the wall. All courts require such a calendar which is used by the participants to decide on the date to which a case will be adjourned. Normally an ordinary commercial calendar is used; this is often too small to be properly seen and has inelegant advertising on it. No doubt these are minor points but they do illustrate that little thought has been given to the various functions of a magistrates' court.

*Confusion should be avoided.*

Good planning can help reduce the appearance of confusion often found in the courts. Because the courts process a large number of cases, a great number of people are constantly coming and going, with witnesses, accused, lawyers, and police officers congregating in the halls. The result is that the halls are necessarily noisy and people are constantly attempting to enter and leave the courtroom. One of the most common sights in courtrooms throughout Canada is a police officer blocking the door and preventing people from coming in or out, often causing confusion. Two techniques are also effective in reducing confusion. When a case or the name of a witness is called, it should be transmitted to the hall by means of a loudspeaker. This simple device would eliminate the necessity of first calling a name in court and, if there is no reply, having a police officer open the court door and repeat the name in the hall. There should also be a system which could instantly convey court documents from the clerk to the administrative office, enabling those convicted or required to enter into a recognizance to comply with the court order without waiting for an official to bring the required papers from the court. In most courts the accused has to wait around for a period of time and a clerk periodically disrupts the court proceedings in order to obtain the necessary documents.

*Adequate holding facilities should be provided.*

The holding facilities of the courts for accused persons in custody are uniformly bad throughout Canada. In many there is no drinking water or toilet facilities—yet accused persons often remain in such places for several hours before their case is reached. The facilities (usually in a police station) for holding persons overnight and in some cases for short remands are often equally as bad. In many cases there are no mattresses for the steel beds. In general, the atmosphere is oppressive and punitive. Conditions for those who have appeared in court and are then remanded in custody to a local jail are equally depressing.

*The Ancillary Services*

*Delay should be avoided.*

Consistent (and in some instances shocking) delay exists in almost all courts in Canada. Even in cases in which both the crown and the defence wish the case to proceed there may be periods of delay ranging up to several months. The introduction of effective legal aid is to produce fewer guilty pleas, with a consequent increase in the problem of delay.

Delay produces a number of harmful effects on the administration of justice. Not only is it unfair and costly to the accused and witnesses, but it wastes the time of the prosecutor and the court. Delay is particularly harmful if the accused is in custody, and steps should be taken to ensure

that these cases are tried first. In many courts the remand date is set before the question of bail is discussed. It would be more sensible if this procedure were reversed. Delay leads to further delay, for each adjournment no matter how quickly it can be processed, requires a certain amount of time and this cuts down on the time available for trying cases. Moreover, congestion and delay mean that the individual case is likely to be given more cursory attention. Because of pressure the magistrate may tend to rely unduly on the crown for bail decisions; may not advise the accused of his rights; may show annoyance at a lengthy presentation of evidence or argument; may pass sentence without a pre-sentence report; may tend to be somewhat inconsiderate.

Delay is particularly unfortunate when both sides are ready to proceed with the case but cannot do so because court personnel or facilities are not available. There are many possible reasons why a case cannot be proceeded with and these vary from time to time and from place to place. In some cases, for example, it is because there are not enough magistrates; in others because there are not enough courtrooms; and in still others—although this is often overlooked—because of a shortage of crown prosecutors. Obviously, there must be sufficient personnel and facilities available to cover the cases as they arise.

Although the crown attorney in many municipalities has control of the scheduling of cases, it would be preferable to have a magistrate perform the function of reducing delay. He should be able to co-ordinate the work in the various courtrooms and should have clear authority to shift cases from one magistrate to another in order to equalize the case load and to ensure that cases are processed at the first reasonable opportunity. Not only should there be someone in charge of the court in a particular municipality but there should be a chief magistrate for the province who is given legal authority to move magistrates from one area to another depending upon need. All magistrates should have territorial jurisdiction throughout the province.

In most magistrate's courts throughout Canada proceedings start at 10 o'clock in the morning and all the cases are called for at that time in order to avoid a gap in the proceedings. The sensible procedure would be to stagger the cases throughout the day; if there is a gap in the proceedings the magistrate and other participants can retire to their respective chambers. As one efficiency expert has pointed out, "After all, a dentist does not start work with all his patients for that day mustered in the waiting room, so why the magistrate?" Certainly there should be at least a morning and afternoon court (which many cities now have) and, in the larger centres, a night court to which certain cases could be adjourned for trial and which would also handle the first appearance of persons arrested during the day. There is no reason why cases cannot be further staggered, perhaps by hourly periods. A simple step such as this would cut down on the usual waiting around and confusion which now tends to be a hallmark of magistrates' courts.

In many courts in Canada no one appears to be in charge of administration. It is not uncommon to find extremely crowded dockets and complaints about the length of time before a case could be tried and yet to find that courts are not operating in the afternoon. With better co-ordination of personnel and facilities such an unfortunate situation could probably be avoided. Confusion might also be lessened if a simple document outlining how the court handles such matters as remands and guilty pleas were available (in appropriate languages) to accused persons and witnesses. The introduction of legal aid duty counsel should mean that the court procedure will run more smoothly.

A further technique applicable in the large centres is to have all new cases appear first in one court—the court of first appearance—and to fix a trial date at that time where there is no plea of guilty. This technique is now used in a number of the larger centres and is certainly more effective than an initial division of the new cases among the various courts. A further advantage of a court of first appearance is that magistrates can devote more time and consideration to setting bail and remand dates. Moreover, since they will not necessarily conduct the trial, the risk of prejudice (because of knowledge of the accused's prior conduct) will be reduced.

We have been dealing with cases in which both sides were prepared to proceed. But of course it often happens that either the crown or the accused or both do not wish to proceed. If neither wish to proceed, very little can be done by the magistrate. If the defence wishes to proceed but the crown is not ready and the magistrate feels that the crown has had adequate time to prepare its case and that there is no justifiable reason for not proceeding at this time, he can and should proceed with the case; if the evidence does not justify a conviction, he should dismiss the charge.

Probably a greater cause for delay is the unwillingness of defence counsel to proceed. The magistrate is placed in a difficult position if he forces the accused to proceed without his lawyer, for this might appear to be a denial of the accused's right to counsel. On the other hand, if the magistrate accedes to the accused's counsel's request he will only encourage delay. Many magistrates in Canada readily grant adjournments in these cases; to force an accused person on with his case, when there has been ample opportunity for preparing it, would be desirable. In jurisdictions in which there are duty counsel, the magistrate should be able to assign duty counsel to assist the accused in such instances in the trial of the case.

The treatment of witnesses in magistrates' court has already been touched on; techniques should be developed to ensure that they are treated with consideration, are adequately compensated, and do not have to spend too much time waiting for the case to be heard. Certainly they should be notified in advance if the case is not to be proceeded with. Moreover, techniques should be explored which would enable witnesses to stay at their jobs and yet be ready to be called on very short notice.

Finally, something should be said about the use of computers in the scheduling of cases. In the larger centres this is now done for traffic cases. Examination should be made of its use in assigning and adjourning criminal cases. The computer can more effectively take into account such factors as existing case loads, time requirements, and availability of personnel than can a magistrate and crown counsel who have to make this decision on the spur of the moment.

A serious weakness in the administration of many magistrates' courts in Canada is the inefficient manner of preparing, presenting and integrating the various documents used in the criminal and correctional processes. There are few courts which would not benefit greatly from serious examination by an efficiency expert.

One of the most hopeful developments in correcting the deficiencies has come through the Dominion Bureau of Statistics which has started to work closely with a number of provinces in developing new forms to serve provincial administrative, research, and statistical needs as well as the Bureau's requirements for data and for statistical research.

*Adequate diagnostic services should be available to a court sentencing an offender convicted of a criminal offence.<sup>6</sup>*

Pre-sentence reports are neither required nor obtained in many cases presently disposed of by a sentence of imprisonment. Pre-sentence reports should be required by law as a preliminary to the imposition of any sentence involving serious loss of liberty or loss of means of livelihood and adequate facilities should be made available for their preparation.

*Adequate post-disposition report should be available to all criminal courts.*

At present there appears to be no formal process by way of which a judge or magistrate is informed as to what actually happens to an offender as a result of a particular disposition arrived at. An informal although negative information service exists in that a judge or magistrate may well recognize an offender as one previously sentenced in his court or may have an offender brought before him in breach of a probation order. It would seem desirable that a flow of positive statistical information be established so that the judge or magistrate would be aware of the subsequent career of those sentenced by him. Such a system would of necessity be confined to indictable offences.

### *Conclusion*

The Committee is firmly of the view that criteria should be established with reference to which the performance of the Canadian criminal courts could be assessed.

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<sup>6</sup> This matter is fully dealt with in Chapter 11

At stake is the success of the criminal process. As the *American Task Force Report on the Administration of Justice* states:

No program of crime prevention will be effective without a massive overhaul of the lower criminal courts. The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference to their situations and to the ideals of fairness, equality, and rehabilitation professed in theory, yet frequently denied in practice. The result may be a hardening of anti-social attitudes in many defendants and the creation of obstacles to the successful adjustment of others.<sup>7</sup>

Only with a sufficient number of qualified personnel, adequate physical resources, effective supervision, and a constant examination of the system can the courts in Canada properly meet the demands placed upon them by society.

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<sup>7</sup> Presidents Commission on Law Enforcement and Administration of Justice. *Task Force Report on the Courts*. op. cit., p. 29.

# 10

## USE AND PROTECTION OF INFORMATION ACQUIRED THROUGH A CONFIDENTIAL RELATIONSHIP

Very great concern has been evidenced to the Committee on this matter and from briefs and interviews it is obvious that those engaged in diagnostic, counselling, treatment, or related functions, including doctors, clergymen, social workers, psychologists and psychiatrists, find what appears to be a serious conflict of interest between what they conceive to be their duty to their patients or clients and their duty to the public authorities.

For example, clients come to an agency expecting to receive help. Effective service is based upon the development of a close and individual relationship with the caseworker as representative of the agency or service. To receive help involves a great degree of trust to ensure the production by the applicant not only of identifying information but of highly emotional and intimate material or secrets of great depth. This information may affect not only the client himself and his feelings but his attitudes and actions concerning others in inter-personal and family relationships.

The public also has an attitude to this helping relationship. There is good reason to believe that the public expects a priest, minister, doctor or lawyer, in the exercise of his professional function, to maintain confidence. The work of the social worker falls within the same general type of relationship. It is hard to distinguish between the responsibility of the psychiatrist and the social worker since they are both dealing with emotional matters.<sup>1</sup>

We think the main concern is the possibility of compelling disclosure in court of a variety of social or personal behaviour which no-one would normally want to become public knowledge. The point to emphasize is that the emergence of organized, well established social agencies and mental health clinics is a comparatively recent phenomenon, and has brought about the widespread practice of recording highly personal material which did not previously exist anywhere in comparable recorded form, and which often affects others besides the client or patient himself. The recording of this

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<sup>1</sup>The above two paragraphs are taken from a brief submitted to the Committee by the John Howard Society of Ontario.

material, both for reference during a lengthy treatment process, and for sharing within the agency or clinic with certain other persons involved in the treatment process to whom disclosure was not made directly, is a legitimate and necessary practice if used solely for the purpose for which it was obtained and recorded. If used for other purposes however, it could constitute a gross invasion of privacy.

We suggest, in view of this *recent* emergence of the existence of such recorded material, that a particular responsibility rests upon the courts to establish, first, the *relevance* of any such material which is sought to be introduced, and secondly, to establish the presence of sufficiently compelling *reasons* that, in the public interest, it should be introduced, which will override what are in our view, serious reasons of public interest requiring the protection of such material. It must be emphasized that this material has usually been shared with a psychiatrist or social worker in the pursuit of goals which were in the personal interest of the patient or client but which may in another context be used against him.

The Committee accepts the proposition that the effectiveness of the correctional services and treatment agencies is related to the degree that confidentiality may be maintained between the offender and those involved in his treatment. We agree that the confidentiality of such relationships should be protected to the extent that is consistent with other public interests also to be protected. New therapeutic techniques have not as yet become sufficiently stable to allow easy legal recognition; however, there is no reason why the trend to recognize them should not continue to develop.

It appears, however, that much of the concern evidenced to the Committee arises not so much from the inadequacy of the existing law but from a regrettable failure to clarify the existing law and from a failure to appreciate that a number of different situations arise in which those working with offenders assume entirely different roles. For example, a probation officer will typically serve to collect information for the court before sentence and assume a blended role of supervisor and counsellor in the post-disposition stage. A probation officer is bound to supervise a probationer and report any breaches of the probation order. In his capacity as counsellor, he is under no obligation to report information. Similarly, a psychiatrist to whom a person is sent for assessment may inevitably engage in some form of treatment thereby confusing his role. The significance of the relationship in terms of confidentiality obviously presupposes that the relationship has been identified.

### *Rights and Duties of Citizens Generally*

There appears to be a widespread misunderstanding as to the duties of any citizen with respect to communication of information to the authorities. These duties must be considered with respect to both the law enforcement agencies and the courts. A citizen is under a strong social and moral duty to assist both the law enforcement agencies and the courts in the prevention of crime and the apprehension and conviction of criminals.

This obligation however is *not* enforceable by law with respect to law enforcement agencies and no citizen is under any obligation under existing law to report to the law enforcement authorities, information which indicates that a crime (other than treason)<sup>2</sup> is about to be committed or under any legal duty to report information that a crime has been committed. The police are, of course, entitled to ask questions but, as indicated, no one, subject to specific statutory exceptions,<sup>3</sup> is under any legal obligation to disclose any information which he has in reply. It is, of course, an offence to assist in the preparation or commission of a crime or to positively assist a criminal to escape but to refrain from disclosing information either before or after a crime is not considered in law a form of prohibited resistance to authority.

Different considerations apply where the criminal process has reached the point of court proceedings against a particular accused. At such stage, everyone, save the accused and in most instances, his spouse and members of certain very limited classes such as ambassadors, is bound to appear in court and give evidence when called upon to do so by either party to the proceeding. When such a person has entered the witness box, he is bound, again generally speaking, to answer any question put to him and refusal to answer such questions will put him in contempt of court.

#### *Privilege Arising from Particular Relationships*

There are a small number of instances where a witness may be excused or indeed prevented from answering certain questions. This power to refuse or prevent answers has traditionally been referred to as "privilege".

The most widely publicized and frequently misunderstood privilege is that which arises from the relationship of lawyer and client. A lawyer may not disclose, without his client's permission, matters which have been communicated to him in his capacity as lawyer, except where the information was communicated to him for the purpose of enabling a crime or fraud to be committed. To dissipate the misunderstandings which do exist, it must be emphasized that this privilege does not extend to matters of which a lawyer becomes aware otherwise than in his capacity as lawyer. Were a lawyer to see a man assault another, he would be liable to be called as a witness and to tell the court what he saw despite the fact that the accused whom he saw was already a client at the time of the assault. Similarly, except for information collected by the lawyer for the purpose of conducting litigation on behalf of the client or giving him legal advice, he would be bound to disclose in court anything he learned. The privilege does not extend to matters related to projected crimes and frauds. The justification for this privilege is obvious; if a man is to be fully advised as to his legal rights he must obviously be protected

<sup>2</sup> Criminal Code, Statutes of Canada 1953-54, 2-3 Eliz. II as amended to 1967:

50 (1) Everyone commits an offence who

(b) Knowing that a person is about to commit treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing treason.

<sup>3</sup> For example, Ontario Highway Traffic Act, R.S.O. 1960 C. 172, S. 143, 144, 143A S.O. 1960-61 C. 34, S. 15.

from subsequent disclosure. In some jurisdictions in Canada, a similar privilege is extended to the relationship of spiritual advisor and parishioner. Such provincial privilege has been held to apply only to civil cases<sup>4</sup> but it is thought unlikely that any Canadian court even in a criminal matter, would hold in contempt a clergyman of a recognised religion who claimed to be bound to silence in his capacity as spiritual advisor. Generally speaking, save for provincial legislation, no privilege attaches to the relationship of doctor and patient, although, in one unreported decision, the Ontario High Court refused to compel a psychiatrist to give evidence in divorce proceedings.<sup>5</sup> This discretionary power to refuse to compel a witness to answer must not be confused with an established privilege of a witness to refuse to answer.

### *State Privilege*

Apart from a privilege arising out of a particular relationship, a privilege may be claimed by the state itself to refuse to disclose certain facts or to prevent others from disclosing such facts. A typical example of a claim for such privilege is found in an English case concerning plans for an experimental submarine which sank while on trials. Dependents of those lost in the disaster brought action against the ship builders, claiming negligence, and sought production of the plans of the submarine. The action arose in 1939 and the British Admiralty intervened to prevent disclosure of the plans by way of an objection by the First Sea Lord that such production would "not be in the public interest." The court accepted the binding effect of such restriction when expressed in proper form.<sup>6</sup> In a more recent Canadian case involving the liability of the Department of National Revenue to produce income tax returns made by an accused person, the Minister objected to production on the ground of prejudice to the public interest. The accused were charged with bookmaking offences and the prosecution had information that income tax returns had been filed showing the amount and source of this illegal income. Counsel for the Department of National Revenue argued that the Minister's objection was final and that the public was to be protected from the danger that the revenues of the Crown would suffer if criminals feared to make a true return of their unlawful profits. It was argued for the Minister that his objection was conclusive. The Supreme Court of Canada held that the Minister's objection was *not conclusive* unless the facts involved were such as it *could* be against the public interest to disclose. The court would not permit an objection on untenable grounds to prevail.<sup>7</sup>

### *Statements without Prejudice*

Closely linked to the matter of privilege is the existence of so-called 'statements without prejudice.' As Dr. Rupert Cross points out:

<sup>4</sup> *Marshal v. R.* [1961] S.C.R. 123, p. 128-9 (1961) 26 D.L.R. (2d) 459, p. 464-465.

<sup>5</sup> per Stewart, *J. Dembie v. Dembie* (unreported) April 6th, 1963, Ontario High Court of Justice.

<sup>6</sup> *Duncan v. Cammell, Laird and Co. Ltd.* [1942], A.C. 624.

<sup>7</sup> *R. v. Snider* [1954] 4 D.L.R. 483; 109 C. C. C. 193; (the Department of National Revenue has since been protected from compulsory disclosure by sec. 133 Income Tax Act).

As part of an attempt to settle a dispute, the parties frequently make statements "without prejudice". When this is done, the contents of the statement cannot be put in evidence without the consent of both parties, the case being one of joint privilege. The statements often relate to the offer of a compromise, and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. Obviously it is in the public interest that disputes should be settled and litigation reduced to a minimum, so the policy of the law is in favour of enlarging the cloak under which negotiations may be conducted without prejudice. . . . Some recent cases have been concerned with statements made to a mediator and the question arises as to whether he can decline to give evidence concerning them without the consent of the parties. The answer is in the affirmative, and although this would probably be the case with all negotiations carried on through a mediator, the promotion of marital harmony is an additional reason in favour of the promotion of the fullest possible privilege when the dispute is between husband and wife. . . .<sup>8</sup>

### *Confidentiality with Respect to Corrections*

The general legal position as to privilege has been set out in the above brief summary. In the light of this general statement, the legal position of the psychologist, psychiatrist or social worker involved in the correctional process, may be ascertained.

It appears to the Committee that problems of confidentiality arise at two stages of the criminal process, pre-disposition and post-disposition. In the pre-disposition stage, a person called upon to prepare a pre-sentence report may feel that there are certain matters which he would like to divulge to the court but which he would prefer to withhold from the offender. Again, a social or treatment agency is likely to have been in confidential contact with many persons not charged with offences at that time but who subsequently are alleged to have committed offences.

In the post-disposition stage, a similar concern exists and it appears that some persons involved in the treatment and correction of offenders acquire information from or about the offender which they would prefer to withhold from law enforcement authorities and to be privileged from disclosure as evidence in court.

The two chronological stages indicated will be dealt with separately.

#### *Pre-Disposition*

One problem at this stage concerns the confidentiality of information acquired to assist the court in arriving at a proper sentence. Information may be obtained by the court from a variety of sources but is typically contained in a pre-sentence report. A probation officer or other person gathering information is clearly acting at this stage as agent for the court and is bound to disclose to the court all relevant information acquired in his pre-sentence investigation. As noted earlier, the services concerned have shown substan-

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<sup>8</sup> *Evidence* by Rupert Cross, 3rd ed., London, 1966, pp. 247-248.

tial concern on the issue whether this information should, in suitable circumstances, be withheld from an accused person. The services fear that information contained in some pre-sentence reports which is presently unknown to some accused persons, if conveyed to an accused may cause serious psychological or social damage to him. A typical example is information that the accused is illegitimate. Except in so far as this fact, if known to others, may have a bearing on their attitude towards him, it is hard to see the relevancy of such information if the accused was up to now unaware of his illegitimacy. Nothing should be put before the court which is not logically relevant to one of the issues before the court. If those furnishing information applied more stringent tests to the use of information collected, then it is believed that many of the problems would disappear

There is also a fear that the informant may make himself liable in an action for defamation based upon the allegations contained in a pre-sentence report. Also, there appears to be a fear that sources of information will dry up if the source learns that the information is being communicated to the offender.

Nevertheless, it is axiomatic in terms of Canadian concepts of fair trial and due process that an accused or his counsel be made aware of any allegations which may affect his sentence so that they may be explained, denied or rebutted. Any damage inflicted by this communication must be balanced against the need for a system which is not only fair but is seen to be fair. The same is true as to the security of the sources of information. Fairness demands that the accused be entitled to not merely the allegations but their source. The risk of liability to a defamation action by an informant is illusory in that an informant acting without malice and bona fide would be protected by qualified privilege; an officer of the court would, it is submitted, be protected absolutely.

Where information is being collected for use in relation to the sentencing of the offender, the offender should be notified and all information collected should be placed before him or his counsel. Informants should be warned that the offender will be made aware of the reports. The relationship which governs is that between the informant and the court and no question of confidentiality arises as between the informant and the offender<sup>9</sup>.

<sup>9</sup> See the Criminal Justice Act 1954 of New Zealand which provides:

5. Report of probation officer to be shown or given to offender—

(1) Where, under any provision of this Act or of any other enactment, a written report is made to the Court by a probation officer, a copy of the report shall be shown, or if the Court so directs shall be given, to the solicitor or counsel appearing for the offender, or, if the offender is not represented by a solicitor or counsel, to the offender.

(2) The offender or his solicitor or counsel may tender evidence on any matter referred to in any report, whether written or oral, that is made to the Court by a probation officer.

(3) Failure to show or give a copy of any report in accordance with this section shall not affect the validity of the proceedings in any Court or of any order made or sentence passed by the Court.

It is difficult to justify §(3) where the failure may have prejudiced the offender.

See also the Canadian case *R. v. Benson and Stevenson* (1951), 100 C. C. C. 249 in which the British Columbia Court of Appeal held that the probation officer's pre-sentence report, excepting those items concerning the prisoner's mental condition, must be revealed to the prisoner. This case was followed by the same court in *R. v. Dolbec* [1963] 2 C. C. C. 87.

## *Post-Disposition*

At this stage entirely different considerations may apply.

*Supervision of Probation or Parole Conditions.* Where an offender is released subject to conditions, which include to be of good order and to keep the peace, a probation or parole officer serves the double function of supervision and treatment. In his supervisory function, his duty is clearly to the court to see that the conditions of probation or parole are observed and no question of confidentiality arises as between himself and his probationer or parolee in this respect.

*Treatment under Probation, Parole or After-care.* Probation and parole involve both supervision and treatment while after-care has no supervisory ingredient. However, the legal position of an agency supplying treatment within the correctional process would seem to be no different from that of a similar agency outside the correctional process. The incidents which attach to the relationship are determined by reference to the general law as set out in the summary above. A treatment agency is under no higher duty to report actual or contemplated crimes to the law enforcement authorities than is any other person. The decision to report such crimes or to remain silent is left to the conscience and professional ethics of the individual concerned. As was pointed out above, if a member of such an agency is summoned as a witness to court he must attend. Having entered the witness box, he must in general answer any question put to him. The possibility of extending a formal and fixed professional privilege like that which attaches to the lawyer-client relationship, appears to be remote because of the difficulty of defining the professional roles involved and the social value of protecting certain kinds of information. No true analogy to "without prejudice" negotiations can be drawn as they are based on the traditional policy of the courts that settlement is better than litigation. In the situations here discussed, the social agency is *not acting as mediator* between two parties. The matrimonial cases are, therefore, without relevance. The correct analogy is with the relationship between those standing in a spiritual or medical relationship which a judge may, not must, recognise as privileged in a particular case.

There are, however, two ways of *claiming privilege* for information obtained through such relationship; one is by way of intervention by a minister of state who would claim that the information should not be disclosed as it would be against the public interest so to do. Should he make such objection, the courts would sustain it unless his grounds were patently lacking or untenable. In England, ministers of state have successfully objected to such things as the production of reports made by doctors and police officers concerning the mental condition of a prisoner awaiting trial who had assaulted the plaintiff, a fellow prisoner, and to the production of a soldier's medical sheets at the hearing of a divorce case. It is clearly established that a minister may interfere even where the witness is not a member of a state agency,

provided that the state has a general interest in the matter involved<sup>10</sup>. Admittedly, the English courts are asserting themselves and no longer feel themselves bound to accept the minister's decision as final—nonetheless it is felt that in each of the above cases there was an element of public interest which the courts could not have regarded as illusory. It is felt that a Canadian court might well have arrived at similar decisions, under the current Canadian rule. The minister's objection in such case would be based upon the propositions that the effectiveness of service of the type involved depended on the trust of the persons served and that the value to society of the services generally was so important as to override the interest of discovering the facts in any particular case.

The other way of claiming privilege is for the particular witness to object to answering a particular question with respect to information acquired in a confidential way. An individual trial judge might or might not protect the witness depending not only on the nature of the proceeding but on the importance of the evidence sought to be compelled. This appears to be a matter of judicial discretion and there appears to be no reason why any witness should not claim the privilege. With increasing clarification of the nature of the relationship it is to be expected that judicial recognition will correspondingly increase.

#### *Particular Problems*

##### *1. The use of a pre-sentence report in subsequent criminal or civil proceedings.*

It would appear that on the basis of the general law of evidence, an actual pre-sentence report would not be admissible as such in subsequent civil or criminal proceedings in that to do so would offend many of the exclusionary rules (e.g. the rules relating to hearsay, opinion and character evidence). Those supplying the information could of course be called as witnesses in any subsequent proceeding.

It has been suggested that the appellate courts are sometimes supplied with copies of a pre-sentence report used by the sentencing judge at trial. This practice is, of course, sound where the appeal relates to the sentence imposed. Different considerations apply where the appeal is against conviction and it is suggested that there are good reasons why in such a situation the pre-sentence report should not be placed before the appellate court.

##### *2. The use of agency or hospital records as evidence in subsequent civil or criminal proceedings.*

As previously noted, this type of documentary material may not, save in a limited number of exceptional cases, be admissible as evidence

<sup>10</sup> *Broome v. Broome* [1955] P. 190; [1955] 1 all. E.R. 201. In this case crown privilege was successfully invoked with respect to records compiled by an agency which had no connection with the crown. It was further held that though the minister could not prevent the compiler of the records generally from testifying that if the minister had appeared at the hearing he could have objected to specific questions put to the witness and the court would be likely to uphold the claim of crown privilege in respect of such questions.

by reason of the operation of the exclusionary rules. Once again, persons designated as informants, might be called as witnesses.

3. *The use of law enforcement agencies or hospital records as sources of information.*

Voluntary disclosure of information to law enforcement agencies is, as has been noted earlier, a matter of ethics rather than law although in at least one province it may be a provincial offence to disclose such information without lawful justification.

Where the agency or hospital does not wish to disclose its records to the police, is it bound to do so? Once again the general rule applies that no one is legally bound to disclose information to, or answer questions put to them by police officers. Nonetheless, there appears to be very real concern in agencies and hospitals that their records may be made available to law enforcement officers greatly to the detriment of a particular confidential relationship and generally to the agency or hospital's reputation for trustworthiness. Coupled with this concern is much confusion stemming from a failure to realise that a duty to disclose to the police must be distinguished from a duty to disclose to the courts.

There appears to be grave doubts as to whether documents, which are not evidence themselves, may be seized in order to inspect them for the purpose of obtaining information.<sup>11</sup>

4. *The liability of individuals to appear as witnesses or produce documents in court under sub-poena.*

As has been made clear, individuals are liable to be called as witnesses and questioned in the witness-box as to information acquired in a confidential relationship. It appears that the most common situation is in matters involving family or matrimonial disputes where a person involved with one of the parties in a correctional or welfare relationship is asked to disclose matters acquired through that relationship. At the moment, it has been

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<sup>11</sup> The possibility of employing search warrant procedures to examine records in the possession of a person not suspected of or charged with a crime was considered in the recent Ontario case of *R. v. Mowat* [1968] 1 O.R. 179. The issue in that case was whether a search warrant authorising search and seizure of records maintained by a bank, should be quashed. It was held that the bank was protected by the Canada Evidence Act which in section 29(5) creates a special privilege with respect to bankers' books. A more general authority on this matter may be an earlier Ontario case, re *The Bell Telephone Co.* [1947] O.W.N. 651. This was also an application to quash a search warrant which purported to authorise police officers to enter certain premises and observe the operation of certain devices which indicated the origin and destination of telephone calls. In quashing the warrant, McRuer C. J. H. C. appeared to draw a distinction between the use of a search warrant to procure things for use as evidence and the use of a search warrant to procure things in connection with an offence. This second extended use was not lawful. It may be that the interest of the police in agency and hospital records is analogous to their interest in telephone equipment—the interest being in observing the records in order to discover facts and the identity of potential witnesses, not in seizing the records in order to preserve them for use in evidence.

suggested that a person faced with such question has two courses open to him if he wishes to be excused from answering.

- (a) He may ask the presiding judge to exercise his discretion and grant him privilege which the trial judge may, subject to appeal, grant or refuse; and/or
- (b) He may rely upon an objection to his answering the question made by the appropriate minister on the ground that to pry open relationships of this class would be contrary to a specified public interest. In such case, the presiding judge would be bound to uphold the objection unless he found it completely without merit. This course depends on prior agreement by the minister to intervene, and actual intervention by or on behalf of the minister at trial. The witness cannot raise this ground of privilege himself as the privilege is entirely that of the state.

### *Summary of Views and Conclusions*

The discretion hitherto exercised by the courts in refusing to compel a clergyman or a psychiatrist to disclose information received as a spiritual adviser or by way of communication from a patient is capable of expanding to meet the needs of the newer professional groups involved in corrections. Declaratory legislation confirming the right of a judge to exercise his discretion in refusing to compel a witness to answer a question would, no doubt, provide a firm basis for such expansion in that witnesses would be encouraged to seek protection in suitable cases.

**The Committee accordingly recommends that the Canada Evidence Act be amended by adding a new section 5A expressed as follows:**

### **Objection By Witness**

- s. 5A (1) A witness may object to answering any question on the ground that it would be contrary to the public interest to compel him to answer.**
- (2) Where a witness has objected to answering a question on the ground that it would be contrary to the public interest to compel him to answer, the presiding judge or magistrate may, where in his opinion it would be contrary to the public interest to compel the witness to answer, excuse the witness from answering the question.**

# 11

## SENTENCING

### *Introduction*

A unity of purpose and philosophy is essential to any system of criminal justice which purports to deal in a meaningful way with an offender against the criminal law. Legislative policy in the creation of offences, the extent of police powers in prevention and investigation of crime, the operation of the courts and lawyers, judicial policy in the disposition of offenders, the construction and operation of correctional services, must rest upon a common principle.

The Committee has stated in Chapter 2 its view of the proper function of the criminal and correctional process: to protect society from the effects of crime in a manner commanding public respect and support, at the same time avoiding needless injury to the offender.

The greatest obstacles to the development of a unified system of criminal law and corrections have been the absence, to date, of any clearly articulated sentencing policy and the inadequacy of the services and facilities available to a judge responsible for the key operation in the entire process. The Committee makes far reaching recommendations which respect both to sentencing policy and to the necessity for increasing the range of dispositions available to a sentencing judge.

The overall views of the Committee may be summed up as follows: segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account.

An examination, however cursory, of the history of judicial sentencing in the Western world, indicates both the magnitude and complexity of the task

which faced the Committee. No clear patterns or cycles can be detected and perhaps the only conclusion that can safely be drawn is that conditions are not adverse to further changes in the directions proposed by us.

### *Historical Positions on Sentencing*

A study of the changes that have occurred in our ideas of how to deal with offenders against the criminal law brings us into contact with one of the most fascinating and challenging aspects of social history, the history of punishment. It is by and large, a sordid history; a record of our slow progress in finding effective means of reducing criminality by punishment; a record of much violence, brutality, torture and indifference to human suffering, but also of charity, compassion and honest search for methods of correctional treatment that will salvage rather than destroy those who are its objects.<sup>1</sup>

### *Punishment*

There can be little doubt that the emphasis on correction, rather than punishment, is of comparatively recent origin. Any attempt to assess early positions on sentencing policy can only result in the conclusion that early sentencing policy was vindictive, retributive or, at the best, negative. Both quality and quantity of the sentence were supposed to reflect the seriousness of the offence. There was a wide variety of serious punishments.

The Bible mentions "being put to the sword, stoned, decapitated, rendered asunder, crucified, strangled, and burned to death". Drowning was also an ancient form of punishment. The Romans executed parricides by putting the murderer into a bag with a dog, a cock, a viper, an ape and throwing the menagerie into the Tiber. In Mediaeval Europe male felons were often broken on the wheel.

That the seriousness of the offence was relative rather than absolute is indicated by the widely divergent conduct to which very serious penalties were applied. For example, the Mosaic Code listed no fewer than 33 capital crimes including witchcraft and failure to keep the Passover. During certain periods of the Roman republic one could suffer death for publishing a libel and singing insulting songs.

In Mediaeval England, consorting with gypsies, as well as clipping coins carried the penalty of death. In 1722, the Waltham (so-called *Black*) Act was passed by parliament. It brought to about 350 the number of existing capital crimes including such offences as stealing rabbits or fish, or maiming or wounding cattle. Some sections of the Act remained in existence for over 110 years, that is, until 1833.

In Massachusetts Bay Colony, idolatry, witchcraft and a child's cursing or hitting his parents; in Newhaven Colony profaning the Lord's Day by work or sport and doing it "proudly, presumptuously and with a high head," were capital offences.

<sup>1</sup> Thorsten Sellin. "Correction in Historical Perspective," *Law and Contemporary Problems* (1958) Vol. 23, p. 585.

In Virginia any Englishman found North of the York River and any Indian found South of the James River were guilty of capital offences.

Punishment was self-justifying: crime demanded punishment. Such protection as was achieved, was by elimination of the offender and the possible deterrent effects of his elimination upon others tempted to commit similar crimes. Prisons, so far as they existed, were used to hold persons awaiting trial rather than as punishment devices.

### *Penitence*

With the construction of prisons, a penitential theory appeared. For example, in the New World, two philosophies based on this common purpose were translated into action by the construction of two penitentiaries; one, the "Cherry Hill" Institution (Eastern Pennsylvania Penitentiary), in Philadelphia, and the other, the Auburn Prison in the State of New York.

These two prisons were built between 1820 and 1830. They appear to have influenced, until about a decade ago, the design and program for carceral institutions in the Western world.

In the Eastern Pennsylvania Penitentiary, a man was put into a cell alone with his Bible and his thoughts (the theory being, that he would repent and reform); whereas in the Auburn Prison inmates were let out of their cells by day to work together in shops while being forbidden to speak and required to march in lockstep with a downcast gaze. The latter system rested on the theory that hard work, not solitary penance, would both punish and reform. However, the efficacy of such methods has not been demonstrated.

The penitential theory has a fundamental defect in that it rests on the proposition that an offender must be imprisoned in order to provide an opportunity for his reform.

There is mounting evidence that treatment in the community may frequently be much more effective.

### *Correction*

Correction refers to the contemporary theory and potential practice in the treatment of offenders against the criminal law. Correction, in the view of the Committee, involves an averment of the value, or potential value, of an offender and seeks to find more subtle means than mere punishment or penitence to accomplish his return to and acceptance by society. Contemporary correctional philosophy treats the offender as a continuing member of society and while condemning his behaviour, seeks to correct him.

The claims of different correctional approaches should be made the subject of long-term empirical research. The Committee feels, however, that the success of measures involving treatment in the community is sufficiently impressive to justify the Committee's position. If society can be as well, if not better, protected by measures involving a reduction in imprisonment and the abolition of corporal punishment, we believe that such steps should be taken at once.

### *Contemporary Positions on Sentencing*

The aim of sentencing should be the protection of the community. Contemporary positions on sentencing take into account three possible approaches to this desired result:

- (i) punishment for general or particular deterrence,
- (ii) segregation, and
- (iii) rehabilitation.

There is occasional and generally derogatory reference in sentencing literature to what may appear to be a vestigial remainder of punishment as punishment, generally referred to as retribution. Retribution may be understood as either vengeance or repudiation. The satisfaction of a desire for vengeance is a very expensive, and in our view fruitless, luxury. The cost to the community of incarceration and the damage to and the subsequent danger from, an individual punished for vengeance make the execution of vengeance totally unacceptable to any rationally motivated community. Repudiation is, however, a different matter. Repudiation relates to the solemn denunciation of certain behaviour. It is the view of the Committee that any sentence based on the principle of deterrence inevitably involves repudiation. Society says to the offender, "We repudiate this behaviour" and indicates the degree of repudiation by the degree of sentence imposed. Repudiation is thus inextricably interwoven with deterrence, whether general or particular.

Contemporary approaches to sentencing might well be described as of a compromise nature. A judge is said to be required to take the three measures of deterrence, rehabilitation and segregation into account when deciding how best to ensure the protection of the community. These approaches require him not to select one technique to the exclusion of others, but rather to blend all three into an appropriate disposition.

In order to determine the degree and extent of control which is appropriate in a particular case, the judge must first decide which is the *predominant* consideration.

In one case reform and rehabilitation may be the predominant consideration. In another case the deterrence of others may be paramount to reform of the individual and in another case prevention of the particular offender from continuing his activities may be paramount.<sup>2</sup>

The Committee agrees with the proposition that one approach must be predominant or paramount. It appears to us that when all approaches are given equal measure in the so-called blending process then the result may serve none rather than all the aims of sentencing. No paramount approach aimed at the protection of society will obliterate all secondary effects of the subordinate approaches.

<sup>2</sup> Per McLennan J. A. in *Reg v. Wilmott* (1966), 58 D.L.R. (2nd) p. 33 at p. 39.

Any blending process involves an acceptance of the propositions that control protects society from the particular offender for the period of control; that whatever control is imposed is unwelcome and operates as a deterrent; that some degree of control is involved in any known technique of rehabilitation.

### *Contemporary Canadian Law*

The Canadian Criminal Code does not contain a general definition of the words "sentence" and "sentencing". In general it affords the sentencing authority a choice which is limited to fines, fines in addition to imprisonment, imprisonment, sometimes with corporal punishment, and probation dependent upon a suspended sentence, accompanied by a "bond to keep the peace and be of good behaviour". No guidelines are provided, except in some few cases where a statutory minimum sentence does away partly with the discretionary power of the courts, and in all cases where a maximum penalty draws the line. However, minimum sentences have been infrequently prescribed in the latest revision of the Criminal Code. The maximum sentence provided for an offence appears to mark the seriousness with which Parliament viewed that category of offence. The degree of "punishment" (an omnibus expression applying to sentences in the Code) is otherwise left to the discretion of the court, subject to limitations prescribed in the applicable enactment.

Under our federal system of divided responsibility a reasonably consistent and pervasive sentencing policy is difficult to attain. In addition to the noticeable inequalities existing among the provinces in the standard of custodial care and correction, judges and magistrates are limited in the sentencing process by the available custodial and correctional institutions.

### *The Committee's Approach*

The Committee sees the criminal justice system as existing to protect society and recognizes that the infliction of punishment is justified where necessary for that purpose. We accept that at the present time protection is secured by way of deterrence, segregation and rehabilitation. It is worth reiterating that the Committee believes that the ultimate rehabilitation of the individual offers the best long-term protection for society, since that ends the risk of a continuing criminal career.

Relatively little is known as to the effectiveness of the deterrent techniques and at present protection by way of segregation is, in general, both erratic and irrational in that it is imposed by way of fixed sentences at the end of which the offender, however dangerous, must be set free. Existing legislative provision for indefinite segregation does not appear to us either in theory or in practice to have protected Canadian society from the dangerous offender.

### *Dangerous Offenders*

This lack of adequate protection from the chronically dangerous offender is perhaps the most serious defect in the present legislation governing habitual offenders and dangerous sexual offenders and the Committee recommends the creation of a new category of offender, the *Dangerous Offender*, who would be liable to indefinite segregation, not for punitive or exemplary purposes, but purely to protect the community by physically preventing the repetition of the dangerous conduct for which he has been convicted and by affording him such treatment as may be available in an appropriate setting. Detailed proposals for the repeal of the present preventive detention legislation and its replacement by dangerous offender provisions are set out in a separate chapter. Generally, it is recommended that where a conviction has been registered for certain specified crimes involving serious danger to the person, the sentencing judge may remand the offender for a period of observation and assessment after which he would be returned to the court for a determination as to his chronic dangerousness. If so classified, he would be sentenced to indefinite detention, provision being made for regular review.

### *Necessity for Imprisonment*

Were this dangerous group to be identified and segregated, many of the long sentences presently imposed, and at least in part justified by the need to protect society by removing an offender suspected to be dangerous from the community, would be unnecessary and the protection of the public from the chronically dangerous might be achieved by segregation from which all deliberate elements of example and retribution had been eliminated.

It is the Committee's view that in all cases where there has been no finding of dangerousness, sentences of imprisonment should be imposed only where protection of society clearly requires such penalty, for example, where there is grave risk from a few, where there is grave temptation for many, or where the failure to impose a sentence of imprisonment would inadequately reflect society's view of the gravity of the crime.

The Committee wishes to emphasize the danger of overestimating the necessity for and the value of long terms of imprisonment except in special circumstances. The serving of a long term imposes an enormous financial burden upon society and at the same time greatly reduces the chance of the inmate on release assuming a normal, tolerable, role in society and may indeed result in the creation of a social cripple.

The members of the Fauteux Committee did not hesitate to express a strong opinion about the severity of sentences of imprisonment in Canada:

We are particularly struck by the fact that the length of sentences imposed in Canada, when compared with those imposed in England for comparable offences, are (sic) generally much greater.<sup>3</sup>

<sup>3</sup> 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. 18.

In some cases of crime of a casual nature, short exemplary sentences may be appropriate. It is suggested that for casual offences, society might better be served by the creation of such part-time, night or weekend sentences as will be discussed later.

### *Change of Approach*

It appears to the Committee that the way in which sentencing provisions are set out in the Criminal Code has inclined the courts to take a particular attitude as to their duty to impose sentences of imprisonment. For example, a fine may *not* be substituted for imprisonment where the offence may be punished with more than five years imprisonment; sentence may *not* be suspended where more than one previous conviction is proved. The existence of such restrictions upon the power of a court to sentence otherwise than to imprisonment all too frequently leads to a practice of imposing a sentence of imprisonment in the absence of mitigating factors.

A different approach is predicated by the provisions of the Model Penal Code of the American Law Institute, which in section 7 provides that:

- (1) The Court shall deal with a person who has been convicted of a crime *without imposing sentence of imprisonment unless*, having regard to the nature and circumstance of the crime and history, character and condition of the defendant, it is of the opinion that his imprisonment is necessary for the protection of the public because:
  - (a) there is undue risk that during the period of a suspended sentence or probation the defendant will commit another crime; or
  - (b) the defendant is in need of correctional treatment that can be provided most effectively by his commitment to an institution; or
  - (c) a lesser sentence will depreciate the seriousness of the defendant's crime.<sup>4</sup>

The Committee endorses this approach.

**The Committee recommends that the Criminal Code be amended to provide Canadian courts with statutory direction on their approach to sentencing and that this legislation be framed to encompass the principles contained in section 7 of the Model Penal Code.**

### *Disparity of Sentences*

The Committee is aware that to adopt this recommended approach might result in an even greater impression of disparity than is created by the present uneven application of the so-called tariff system of sentencing to imprisonment.

<sup>4</sup> A.L.I. Model Penal Code, proposed official draft, May 4, 1962.

However, we share the opinion of Professor J. LL. J. Edwards concerning disparities in sentencing:

Much is heard nowadays of the disparities in sentencing with the underlying assumption that justice would be better served if divergencies in judicial assessments of the appropriate penalty were to be eliminated altogether. To a certain extent this approach is very understandable but '*it would be folly to suppose that sentencing can ever be reduced to a scientific equation*'. In some respects, however, Canada displays a marked absence of uniformity in the *principles* of sentencing and this is to be regretted.<sup>5</sup> (emphasis added)

Unfortunately, offenders who are sentenced by different judges or magistrates to different terms of imprisonment for what they may consider similar offences, are likely to meet eventually at a common place of detention. They will inevitably compare the kind of penalties imposed by judges in different parts of the country, or even parts of a province, for what they, within the prison subculture, consider to be identical crimes. A deep sense of injustice may then arise in their minds, because they may not be capable of appreciating the very real differences between the circumstances surrounding the commission of one offence which is comparable to another. Therefore, they will normally feel aggrieved by such apparent inequalities or inequities and their rehabilitation may present additional difficulties.

#### *Necessity for Reasons*

The Committee feels that this risk of creating a sense of injustice by reason of the individualization of sentences, could be minimized were all judges to give adequate reasons in fact as well as in law for all sentences.

**The Committee recommends that any court when imposing or any court of appeal when varying a sentence of imprisonment express publicly as fully as possible, the reasons for such adjudication, disposition or sentence and that the Criminal Code be amended to require such reasons.**

Other considerations supporting the desirability of requiring reasons for sentence are set out in the later section of this chapter entitled "Mechanics of Sentencing".

#### *Proposed Sentencing Scheme*

##### *The Scheme in Principle*

Il faut savoir et savoir faire, mais il ne faut pas attendre de tout savoir pour commencer à faire . . .<sup>6</sup>

<sup>5</sup>Paper delivered at the Ninth Alumni Conference on Crime and Punishment, University of Manitoba, March 19, 1966 (p. 9).

<sup>6</sup>Professor Lyon-Caen in a lecture before the Université Libre de Bruxelles, quoted by L. de Bray, *Travail Social et Délinquance*, Université Libre de Bruxelles, édition de l'Institut de Sociologie, p. 376 (1967).

The range of dispositions necessary to permit the implementation of a rational, and at the same time humane, sentencing policy must be widened. A wide range is necessary if there is to be proper opportunity for just individualization of sentences.

It is time, therefore, that reformers of the criminal law faced the fact that the feasibility of a reliable technique of individualization is crucial to the entire program of scientific and humane criminal justice. If, in fact, a reasonably sound individualization cannot be accomplished by *the means at hand*, then, despite the lofty aims of modern correctional philosophy, and regardless of the most elaborate investigations and case histories, the system will not work.<sup>7</sup> (emphasis added)

The Committee is of the view that such means must be made available now. What the Committee considers as a desirable range of alternative dispositions is set out below:

- (1) Absolute discharge, with or without conditions.
- (2) Probation.
- (3) Fines.
- (4) Suspended sentence.
- (5) Restitution, reparation or compensation to the victims.
- (6) Confinement
  - (a) weekend detention;
  - (b) night detention with programmes of compulsory or voluntary work in the community;
  - (c) in reform institutions, penitentiaries, or other places of segregation.

It is the view of the Committee that indeterminate sentences should properly be reserved for the offender who has been carefully assessed as chronically dangerous. We do not feel that corporal punishment is appropriate to be continued either as a judicial or institutional punishment.

While we stress the desirability of individualization of disposition, it is proper to note that certain generalizations can be made with respect to certain classes of persons. The Committee, accordingly, states its view with respect to certain very broad classes, such as:

- (a) young adult offenders;
- (b) dangerous offenders;
- (c) mentally disordered persons.

Because of the wide range of sentences proposed, with "absolute discharge" at one pole and "indefinite segregation" at the other, the Committee considers that the words "sentence" and "sentencing" (which, in some jurisdictions, such as those of France and Belgium are not, as yet, considered

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<sup>7</sup> Sheldon Glueck. "Prediction devices and the individualization of justice". *Law and Contemporary Problems*, Vol. 23 (1958), p. 462.

apart from the *conviction* itself) should be replaced wherever appropriate in legislation and in criminological and correctional writing by the expressions "adjudication" and "disposition".

### *General Principle*

In keeping with the basic principles and purposes formulated in Chapter 2, the Committee, therefore, affirms that:

The primary purpose of sentencing is the *protection* of society. *Deterrence*, both general and particular, through knowledge of penalties consequent upon prohibited acts; *rehabilitation* of the individual offender into a law abiding citizen; *confinement* of the dangerous offender as long as he is dangerous, are major means of accomplishing this purpose. Use of these means should, however, be devoid of any connotation of vengeance or retribution.

We begin this examination of sentencing alternatives with an examination of those sentences which do not involve total loss of liberty.

### *Sentences Not Involving Confinement*

#### *Absolute Discharge with or without Conditions*

The handicaps that accompany a criminal record are dealt with in another section of this report, and recommendations are made to introduce a system intended to reduce the effects of such a record after an appropriate period of time. However, there should be provisions that permit the court to deal with first offenders charged with a minor offence in such a way that would avoid the damaging consequences of the existence of a criminal record.

A conviction against a first offender establishes a record that can carry with it life-long consequences that continue long after rehabilitation is complete and risk to the community is no greater from this individual than from the average citizen. In fact, the record may be the result of what the individual considered a prank and the individual may at no time have been a danger to society. In other cases the exposure to public trial has a deterrent effect in itself so that the imposition of additional punishment is superfluous, costly and damaging to both the individual and the community.

An alternative should be open to the court, at this preconviction stage, so that action appropriate to the individual case may be planned, including a period on probation to test the court's assessment of the offender. This should take the form of *absolute discharge*, either with or without conditions. This form of disposition has been adopted in a number of jurisdictions. The Committee proposes the following definitions:

In this report, the term ABSOLUTE DISCHARGE means "a disposition of the court whereby, although a charge has been proved, it is, having regard to the circumstances including the nature of the charge and the character of the accused, inappropriate to record a conviction, and punishment or a probation order is not appropriate." Absolute discharge has the same effect as *acquittal*.

The term ABSOLUTE DISCHARGE WITH CONDITIONS means "a disposition of the court whereby, although a charge has been proved, it is, having regard to the circumstances including the nature of the charge and the character of the accused, inappropriate to record a conviction at that time, but appropriate to discharge the accused subject to the conditions that the accused keep the peace and be of good behaviour, that he accept probation supervision if that condition is ordered by the court, and that he will report to the court if and when called upon to do so.

The juvenile or welfare courts in this country have been using *sine die* adjournments to accomplish this end, and the Discussion Draft of the Children and Young Persons Act (which incidentally uses the terms "adjudication and disposition") contains a provision that would give formal recognition to such a procedure. Some adult courts in Canada have been experimenting with the use of long adjournment before a conviction is registered, discharging the case if the offender responds. There is no legal basis for this procedure and magistrates in all parts of Canada have recommended to the Committee that the aims sought by this procedure be given legislative approval by permitting the court to grant an absolute discharge with or without conditions when such a disposition is suitable.

**The Committee recommends that where a person, not having previously been given an absolute discharge, is charged, the trial court or the court that hears the appeal, although finding that the charge has been proved, after considering the evidence and having regard to the circumstances including the nature of the charge and the character of the accused may, without conviction, make an order of absolute discharge with or without conditions; that when a person named in an order of absolute discharge with conditions has violated any of the conditions therein, the court may convict the person and, on the basis of evidence heard at the original trial, make whatever disposition it could have made when the matter was originally heard; that either the offender or probation officer be empowered to request and have heard an application to reconsider and/or vary the conditions of the order; that an order of absolute discharge with conditions be in effect for a period of up to one year.**

There are difficulties related to such procedures. There is the danger that the same person might be charged with a number of offences over a period of years, each time being dealt with as a first offender. This could be overcome if it were possible to maintain a registry of those who have been dealt with in this manner.

The Committee is of the opinion that provision for an appeal should be made because an individual might feel himself aggrieved in that he considered himself entitled to an absolute acquittal.

The Committee is aware that these measures would not be fully successful in protecting the offender against the effects of a record. If the charge is in connection with an indictable offence the offender normally would have been finger-printed and the fingerprints recorded by the National Registry of

Fingerprints and the local police. Information could be obtained from court records. The record would also exist in people's memories, and in private agency files and in newspaper morgues. Further, the offender would have to answer "yes" to a question on a job or visa application form: "Have you ever been charged with a criminal offence?" These difficulties are similar to those set out in Chapter 23.

Although they will not supply a complete solution, these measures should be introduced and their effectiveness assessed after some years' experience.

### *Probation*

As appears from Chapter 16, probation is now firmly established as a correctional measure in many countries. The United Nations, in one of their publications, had this to say:

Deux institutions juridiques ont marqué d'une empreinte profonde et durable l'administration de la justice pénale pendant la première moitié du XXI<sup>e</sup> siècle: les tribunaux pour enfants et la probation. Leur origine et leur évolution ultérieure ont été étroitement liées et elles se sont développées dans de nombreux pays.<sup>8</sup>

In Canada the most important legislative change in the power to suspend sentence came with the 1961 Criminal Code amendment authorizing the imposition of probation.<sup>9</sup>

Two of the main conditions precedent to the expansion of the use of probation in our country depend on the extensive increase of discretion on the part of the courts or judges as well as on the organization of services in different provinces. Our Committee has been informed by a number of judges and magistrates that they would have ordered probation much more often, had they felt that there were adequate provisions to render it operative in their different jurisdictions. Many times, sections 637, 638 and 639 of the Criminal Code have appeared so unnecessarily restrictive that judges who believed a case was a proper one for probation have rendered sentences which technically were illegal in order to prevent persons from going to jail. For example, the prosecution, sometimes with the court's tacit approval, has refrained from establishing the offender's previous criminal record, in order that the prohibition contained in paragraph 1 of section 638 be inoperative.

The Committee's attention has been drawn to section 637 (1) (a) of the Criminal Code providing for the "binding over" of a person convicted of an indictable offence, "in addition to any sentence that is imposed upon him." There is no doubt in our mind that this cannot be considered as *probation* but an entirely different form of control, now substantially obsolete in view of the development of parole.

Probation, as defined in this report, is considered so important in the correctional pattern that a whole chapter has been devoted to it. The Committee's recommendations are to be found in Chapter 16.

<sup>8</sup> Nations Unies. Département des affaires économiques et sociales. *La sélection des délinquants à mettre en probation*. New York: 1939, p. 1.

<sup>9</sup> Statutes of Canada 1921, Chapter 25, section 19.

## *Fines*

An offender who pays a fine thereby acknowledges that he is an offender. Not much attention has been directed to the significance of this acknowledgement but from time to time there are cases in which a convicted offender will refuse to pay a nominal fine and will almost insist on being sent to prison because he is not prepared to admit that he has done anything wrong. In other words, the nominal fine may perform a useful social function. The most appropriate area for the use of fines of this sort is probably with respect to breach of regulatory laws. If the proposed system of absolute discharge with or without conditions is introduced, there would be no need to use a fine as a last resort where no sentence at all seems appropriate.

There is no doubt that a substantial rather than a nominal fine, however, may operate as a deterrent to the offender and other potential offenders in appropriate cases. The Committee considers that deterrent fines may be appropriately imposed with respect to casual offences committed by people with general law abiding tendencies, for example, with respect to such offences as dangerous driving.

The imposition of a substantial fine appears to be particularly appropriate where the offender has benefited financially from the commission of the offence. In such cases fines may be imposed either in lieu of or in addition to any other punishment depending on the circumstances of the case.

The Committee believes that serious consideration should be given to the enactment of legislation to specifically authorize a court, where there is reason to believe that the defendant benefited financially from the commission of the offence<sup>10</sup>, to hold a hearing to determine the extent to which the offender benefited financially from the offence and his present financial ability to pay a fine. At any such hearing the defendant should have the right to be present and to give evidence with respect to the extent to which he benefited financially from the commission of the offence and his present economic condition.

Consideration should also be given to the possibility of introducing legislation whereby a deterrent fine could be made recoverable directly by civil process without further litigation. Prior to 1955, the Criminal Code contained such a provision. In the 1955 revision, the procedure, for no apparent reason, disappeared. It would not seem that any constitutional difficulty was involved, as a provision in section 623 of the Criminal Code provides for recovery of fines on corporations or legal "persons" by filing a conviction as a civil judgment. There is no reason why section 623 should not be extended to cover fines on real persons. If this were done, the obsolescent notion of imprisonment in default of payment might well become less significant. Such legislation would have the effect of making immediately available civil remedies such as proceedings to set aside fraudulent conveyances and the examination of the defendant as a judgment debtor.

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<sup>10</sup> Comments by Prof. Graham Parker of Osgoode Hall Law School of York University, Toronto, on *Regina v. Hinch and Salanski*, 62 W.W.R. 205 (B.C.C.A.). *The Canadian Bar Review*, Volume XLVII, March 1969, No. 1, p. 115, at p. 124.

In connection with the use of financial sanctions, the memoranda of the Council of the Law Society regarding criminal bankruptcy to the British Royal Commission on the Penal System have been carefully considered. In its memorandum dated July 1965, the Council proposed that "the fact of conviction for any indictable offence occasioning loss or damage to property which has not been the subject of restitution by the defendant would constitute an act of bankruptcy." In a second memorandum dated February 1966, the Council further developed the notion of the institution of criminal bankruptcy proceedings whereby would be achieved "the best possible means of depriving the criminal of the fruits of his crime."

While it is apparent that a great many nominal gains would flow to the criminal process from the institution of the proposed criminal bankruptcy proceedings, it appears that all real gains would be equally available through the re-introduction of a scheme whereby an appropriate fine could be recovered as if it were a judgment in a civil case.

The Committee is very strongly of the opinion, however, that no one should be imprisoned for mere *inability* to pay.

The observations of the Committee across Canada indicate that a very large percentage of persons incarcerated in provincial institutions are serving terms simply because of their inability to pay fines imposed routinely or according to what has been described as the "revolving door" and the "tariff" process.

The fact that a fine—however substantial—has been imposed rather than a sentence of imprisonment cannot be considered as anything but an implicit acknowledgment that the offender presents no problem of dangerousness. But if he has not enough money—as happens mostly in the case of smaller fines—he is quasi-automatically imprisoned for a number of days roughly corresponding to the number of dollars stipulated in the sentence. Moreover, the equation between "thirty dollars" and "thirty days" is totally unrealistic in times of inflation, and so is the provision allowing for a proportionate reduction of imprisonment on part payment of the fine.

In all cases, a court should be reasonably satisfied that the offender is in a position to pay a fine, or to pay a fine in the amount contemplated, before the fine is imposed. A pre-sentence report would, in many cases, constitute a suitable means test. In cases where the court contemplates the imposition of a substantial fine where there is reason to believe that the offender has benefited financially from the commission of the offence, the Committee considers that a hearing of the kind previously described may be desirable. The amount of the fine in the view of the Committee should not, however, be such as to incapacitate the offender with respect to making restitution to the victim, if any, where that appears possible. Moreover, the Committee considers that where a fine has been imposed and remains unpaid, and the defendant claims inability to pay, procedures should be established to:

- (a) permit the court to review its decision to impose a fine and impose a different sentence if it appears desirable to do so;

- (b) consider whether the failure to pay the fine is due to the defendant's inability to pay or his wilful refusal to do so;
- (c) grant the defendant an extension of time within which to pay the fine or alter the terms upon which it is to be paid or alter the amount of the fine.

In the view of the Committee, imprisonment should only be imposed for failure to pay a fine where the offender, although able to do so, has refused to pay the fine or fraudulently divested himself of his assets.

The Committee is of the opinion that the restrictions contained in section 622 of the Criminal Code which preclude the imposition of a fine in lieu of imprisonment where the offender is convicted of an offence punishable with imprisonment for more than five years should be repealed, since there are a great many offences with respect to which a fine only may be an appropriate sentence, which are punishable by imprisonment for more than five years, e.g. *theft where the value of what is stolen exceeds \$50.00 is punishable by ten years imprisonment.*

**The Committee, therefore, recommends that:**

- (a) **greater use be made of fines, in suitable cases, where the offender has benefited financially from the commission of the offence either in lieu of or in addition to a sentence of imprisonment;**
- (b) **legislation be enacted to establish procedures to determine, prior to the imposition of a fine, the ability of the offender to pay a fine or to pay a fine in a particular amount and to determine the amount by which the offender has benefited financially from the commission of the offence where there is reason to believe that the offender has so benefited;**
- (c) **time be allowed for the payment of fines, at the discretion of the sentencing authority but within a reasonable period to be defined by law;**
- (d) **legislation be enacted to establish procedures to review the ability of the offender to pay the fine imposed where the fine imposed remains unpaid and to review the sentence;**
- (e) **imprisonment in default of payment only be ordered where the offender, although able to pay, has refused to pay the fine or has fraudulently divested himself of his assets;**
- (f) **legislation be enacted to provide that a sentence imposing a fine take effect as a civil judgment and that all civil remedies be immediately available without first resorting to civil litigation;**
- (g) **the restrictions of section 622 of the Criminal Code precluding the imposition of a fine in lieu of imprisonment where the offender is convicted of an indictable offence punishable by more than five years be repealed.**

### *Suspended Sentence*

The distinction between probation and suspended sentences lies essentially in the fact that under an ordinary suspended sentence the offender would not be placed under supervision of a probation officer. Provision for suspended sentence is made in s. 638(1) of the Criminal Code.

In French-speaking countries of continental Europe, the expression "sursis simple" is used for suspended sentence, and "sursis avec mise à l'épreuve" for *probation*, although the latter word has now acquired a respected niche of its own in legal and correctional parlance. A choice is afforded to the sentencing authority, viz: suspending the *execution* of a definite sentence or suspending the *imposition* of a sentence.

The Committee has been informed that in Canada some courts suspend sentences for a given period while informing the convicted person of the length of the sentence to be later imposed in case there is evidence of lack of good behaviour within the allotted period of suspension. Our view is that such a procedure is not authorized by law and does not conform with the principles of modern corrections.

The Committee feels that a disposition normally could be suspended without probation as regards an offender whom the court does not consider eligible for absolute discharge but who does not require probation. It has been said that the high success rate of probation may be due to the fact that the courts often use probation for people who are really not in need of it. There are instances when conviction followed by unconditional suspension of a sentence will have the desired salutary effect.

A definite period should be specified in relation to such suspension. The mere knowledge that a punitive disposition could be meted out should the offender be brought back before the court on another charge within the period of suspension would prevent a large number of first offenders from becoming recidivists, as long as the disposition itself is properly recorded in a central registry and knowledge of it be made available to the court before whom the offender is brought on a second charge.

**The Committee recommends that having regard to all the circumstances of the case the court be empowered to suspend a sentence for a definite period of time without any other condition than if the convicted person is found guilty of an offence during the period of suspension, it then be the court's duty to review the original case and decide whether or not to impose the suspended sentence with or without consideration for any other sentence in respect of the second offence.**

### *Restitution or Reparation to the Victims of Crime*

Contemporary writings on restitution, compensation or reparation to the victims of crime tend to concentrate on the injustice of leaving the victim without redress. The making of restitution, compensation or reparation may, however, have profound correctional significance. The awareness of the

amount of damage or injury caused by the crime and the imposition of responsibility to make such damage good may have the most beneficial correctional effects in that these possibilities relate correction to natural rather than artificial results.

Existing provisions in the Criminal Code offer limited opportunities to order restitution or compensation. Section 373 relates to wilful destruction or damage to property not exceeding fifty dollars. Section 628 makes much broader provision for the payment of satisfaction or compensation for loss or damage to property suffered by a victim of crime. Section 629 provides for compensation to a bona fide purchaser to whom property had been sold and who had been forced to return the property to its true owner. Section 630 provides for the restitution to the person entitled to it of property obtained through the commission of an offence. Restitution may also be ordered under section 638 as a condition for suspension of sentence.

These provisions have been on the statute books for quite some time but have rarely been invoked, with the exception of the provisions directing return of property to the true owner and restitution as a condition for suspension of sentence. It appears to the Committee that this failure to invoke let alone expand those provisions can be attributed to the difficulty likely to be experienced by a criminal court in assessing damages which arise from personal injury or complicated interference with property rights. Criminal procedures are not readily adaptable to the trial of civil issues. Furthermore, difficult constitutional questions would arise in Canada were the general award of civil damages to be vested in a criminal court.

The Committee makes these observations but no recommendation other than that the correctional possibilities of such disposition be kept under review with a view to their development.

Representations have been made to the Committee regarding the establishment of state compensation to the victims of crime. However, this is outside the terms of reference of the Committee and also essentially of a provincial nature. This does not preclude the Committee from expressing the wish that provinces study without delay the opportunity of establishing a system of public or state compensation to victims of crimes.

### *Conviction and Confinement*

A sentence of detention can, in the view of the Committee, be justified only where it is shown to be necessary for the protection of society. Imprisonment may serve this purpose by segregating the chronically dangerous offender; by offering a deterrent to the offender and others with similar inclinations; by affording an opportunity for the application of correctional conditions within a strictly controlled environment.

The indeterminate segregation of the chronically dangerous will be dealt with in Chapter 13. Confinement for fixed periods certainly protects society

for the period of the sentence and might offer longer term protection if the length of sentence were based upon an accurate prediction. However, prediction techniques have not yet reached that point of development which would allow reliable assessment to be made.

Detention for deterrent purposes, whether particularly addressed to the offender or more generally to the community, is based on tradition and its success is difficult to evaluate. Obviously those subsequently in conflict with the criminal law were not sufficiently affected. Nonetheless, the Committee feels that there is a clear case for deterrent sentences where there is grave public risk from rational but illegal activity, such as professional crime, or where there is grave public temptation as in the case of impaired driving, thus warranting imprisonment in some circumstances such as upon conviction for a second offence. It has, however, already been pointed out that an adequate legislative framework for the imposition and collection of substantial fines would afford an additional and effective deterrent against the commission of crimes for profit. In cases where there is general public temptation, the risk of detection, apprehension and trial may in some cases achieve the maximum deterrent effect of labelling as criminal the behaviour involved.

Detention for correctional purposes remains to be considered. Dr. Denis Szabo, Director of the Department of Criminology of the University of Montreal, has had this to say:

Comme on le sait, les prisons n'ont pas toujours existé et, par conséquent, elles n'existeront peut-être pas toujours... Historiquement parlant, la première fonction de la prison est celle de protéger la société de certains de ses membres qui représentent un danger pour son intégrité corporelle, matérielle et morale. . .

Il n'est donc pas dit, ou pas encore, qu'une peine privative de liberté peut ou ne peut pas réhabiliter un criminel. Ce qui paraît évident à la lumière de l'expérience unanime des pays occidentaux, c'est que la punition ne protège pas, à elle seule, la société contre les criminels. Des expériences en vue de «réformer», de réhabiliter les criminels ont à peine commencé et aucune conclusion définitive ne peut encore être tiré à cet égard.<sup>11</sup>

While the Committee agrees with Dr. Szabo that no definite conclusions can yet be drawn with respect to the possibility of true rehabilitation under detention, we are of opinion that there are certain obvious possibilities deserving further serious exploration. Furthermore, it is evident that sentences of imprisonment will continue to be imposed for purposes other than rehabilitation but which offer an opportunity for study and treatment in the future interest both of society generally and of the offender in particular.

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<sup>11</sup> Szabo, Denis. *Criminologie*. Montréal: Presses de l'Université de Montréal, 1965, pp. 444 and 446.

There are two types of control exercised partly within the community which appeal to the Committee's consideration under the caption:

*Intermittent Sentences:*

- (a) night detention with compulsory work programmes within the community;
- (b) weekend detention.

There appear to be two separate correctional techniques and two separate social functions involved in the general context of part-time detention. The Committee is of the opinion that careful distinction must be made.

Firstly, the sentence imposed by the judge might be expressed in part-time or intermittent terms, e.g., a sentence of thirty days imprisonment to be served on consecutive weekends. Such a sentence would serve as both general and particular deterrence without unnecessary social disruption of the life of the offender. Such technique may be described as the imposition of an intermittent sentence.

Secondly, a sentence imposed by the judge in terms of a period of consecutive units of time might be served in what the correctional authority decided was the manner most likely to assist in rehabilitation, e.g., a sentence of six months is imposed and the correctional authorities decide that the offender may be released at an appropriate time on a part-time basis to work or study in the community. Such technique may be described as correctional work-release.

Semi-detention (or semi-liberty, as it is known in Europe) is applied differently in practically every country. It has been looked upon as a transitional period between a stay in prison and the return to freedom. Results have proven to be so satisfactory that in more than one country it was considered as the true alternative to imprisonment, especially short-term imprisonment. Indeed, it allows the offender the opportunity to continue working in his trade or profession. In the morning he goes to work from the institution to which he returns every night. He is in residence (being classified as a "resident" and not an inmate) during weekends and on holidays. In this fashion the "resident" does not cut off all links with society, and his family is protected against want. Finally, such a system allows for the recovery of fines (wherever fines are added to a sentence) and of any indemnification or compensation to the victim of an offence.

"Weekend detention" refers to a disposition whereby an offender is sentenced to a certain number of days instead of months. These are served inside the institution, during weekends. A weekend is equivalent to two days. Thus one month in "residence" represents fifteen weekends spent in gaol.

It goes without saying that if such legislative provisions are to be made effective and used for a significant number of offenders, there will be need to locate detention quarters and adjust staffing accordingly, because no conceptual correctional measure can be successfully implemented in the absence of the necessary physical and staff facilities.

**The Committee recommends that the court be empowered to impose a sentence of imprisonment to be served intermittently, the total period of imprisonment not to exceed six months.**

### *Full Confinement*

The Committee is not recommending a change at this time in the general division of responsibilities between the provinces and the federal government, although we are recommending that certain present anomalies be eliminated.

Moreover, it is the Committee's earnest hope that all provinces will endeavour to develop a uniformly effective system of reform institutions.

It has come to our attention that many judges would wish to have authority to sentence a convicted person to a particular institution. But their position, at that stage, does not appear to be very different from that of psychiatrists admitting or committing a patient to a mental hospital. Even though they may have some opinion as to the probable nature and length of treatment they do not possess sufficient information at that juncture to be able to set a discharge date with precision or to set dates on which the patient will be moved from one section of the hospital dealing with certain kinds of patients or patients at different stages of their illness.

On the other hand, it often happens that the sentencing authority is cognizant of certain facts which constitute important factors toward the rehabilitation of an offender but which, because of lack of adequate recording systems, do not always reach the institutional files concerning the offender. Whenever a judge makes specific recommendations or expresses an opinion about the manner in which the convicted person ought to be dealt with, it should be possible to transmit this material to the authorities of all institutions in which the offender is to be confined. Otherwise, whenever the sentencing authority learns that recommendations which were hopefully preferred have miscarried, have been mislaid or simply were ignored without any explanation, there is, understandably, a sense of frustration.

In other jurisdictions (notably in France, since the establishment of the "juges de l'application des peines") it has been found that interrelation between the sentencing and correctional authorities has improved to a marked extent due to the flow of information exchanged between the two. On the other hand, it is a well known fact that before such time as an adequate and comprehensive range of facilities and dispositions is put at the disposal of the sentencing authority, it will be well nigh impossible to make a value judgment about the appropriateness of one institution as against another.

In conclusion the Committee maintains that imprisonment or confinement should be used only as an ultimate resort when all other alternatives have failed, but subject to its other recommendations concerning different types of offenders and different categories of dispositions.

### *Indefinite or Indeterminate Sentences*

It will be remembered that the words "indefinite" or "indeterminate" carry no special legal significance except under the existing provisions of the Prisons and Reformatories Act where they imply the right of release on parole by provincial authorities.

In our chapter on the Purposes and Organization of the Adult Correctional Services (Chapter 14), we recommend the abolition of the system of indeterminate sentences as it exists in Ontario and British Columbia, and in Chapter 13 we recommend indeterminate sentences for Dangerous Offenders.

Some arguments against abolition have been advanced which are summarized as follows:

An indeterminate sentence of two years less a day for all young adult offenders considered to be in need of training provides a uniform sentence of indeterminate length regardless of the offence committed—the emphasis is thus strictly on the offender's need for training, not the offence. Being a sentence of indeterminate length it more readily conveys the idea, both to the offender and those associated with him and his training, that his time in custody will depend entirely on the progress he makes and that he can be paroled at any time once he is considered ready for it.

The Committee feels that similar objectives of control and correction as regards all offenders can be better achieved by resorting to a *definite* sentence, provided the parole authority is sufficiently close to the situation and considers all cases for parole. This, in the Committee's opinion, would be the direct result of the Committee's recommendations in the chapter on parole. This is in keeping with a recommendation of the Archambault Commission.<sup>12</sup>

Moreover, many experts from the United States, where indefinite or indeterminate sentences are recognized by statute, appear to believe that definite sentences combined with parole have the same force and effect as indeterminate sentences with less danger of uncertainty and with a character of finality.

**The Committee recommends that indeterminate sentences as they now exist be abolished, subject to our recommendations concerning the dangerous offender.**

The Committee has also considered the possibility of recommending that the sentencing authority be empowered and directed by statute to take into account, when determining the length of time to be served in an institution, the calculation of earned remission, statutory remission or statutory conditional release, and the possibility of parole.

<sup>12</sup> Canada. Royal Commission to Investigate the Penal System of Canada. *Report* (Archambault Report). Ottawa: Queen's Printer, 1938, p. 248.

It is true that a number of judges presently do, subconsciously or not, take such factors into account. But they very seldom indicate to the interested parties (and to the public at large) the reasons for such a choice, perhaps because there is presently a conflict of judicial authority as to the propriety of taking such matters into account.

However, it is well nigh impossible to predict the institutional conduct of a particular offender in the vast majority of cases. The anticipated conduct of an individual parolee while on parole, including the time element, is equally difficult to predict.

Moreover, the Committee is concerned that a recommendation that the sentencing authority be directed to take earned remission, statutory remission (or statutory conditional release) and the possibility of parole into account in determining the length of sentence might be construed as a justification for the imposition of inappropriately long sentences.

For these reasons the Committee has not seen fit to make a relevant recommendation on this point.

### *Disposition of Outstanding Charges*

The liability of an offender, sentenced to imprisonment or who has been placed on probation, to be prosecuted in respect of a further existing charge is a source of frequent difficulty to correctional administrators in planning a course of correctional treatment. The existence of other charges, which have not been disposed of, may affect an offender's parole and may make him less responsive to treatment.

Section 421(3) of the Criminal Code contains provisions which were enacted for the purpose of alleviating this problem and which permit a person in custody in one province to plead guilty in that province to charges in respect of offences committed in another province. These provisions, however, do not extend to the offences listed in s. 413(2) of the Code which are triable only in a superior court of criminal jurisdiction and which, speaking generally, constitute the most serious offences, such as murder and rape. These charges are accordingly not transferable.

The existing provisions of the Criminal Code permit the transfer of an outstanding charge from one province to another only where the accused is in custody and where he signifies his intention in writing to plead guilty and does plead guilty. Legislation has been proposed which will extend the present provisions of the Code to cases where an accused is not in custody but wishes to plead guilty to a charge with respect to an offence alleged to have been committed in another province.

Similar provisions in the Code permit a person who is charged with an offence alleged to have been committed in another territorial division in the same province to have the charge disposed of in the territorial jurisdiction where he then is, provided that he signifies his intention to plead guilty and pleads guilty.

The transfer of a charge from one province to another requires the consent of the attorney-general of the province where the offence is alleged to have been committed. The Committee is informed that a considerable variation exists among provincial attorneys-general in their readiness to facilitate the transfer of charges.

We consider that the present provisions of the Code are too restricted in scope.

**The Committee therefore recommends that provisions be made to:**

- (a) require the transfer of charges from one province to another where the accused wishes to plead guilty, provided that the offence is a transferable offence;**
- (b) require all other outstanding charges, including non-transferable charges and those to which the accused does not want to plead guilty, to be disposed of within a reasonable and stated time after an offender has been convicted and to provide that failure to so dispose of outstanding charges within the time prescribed is a bar to a subsequent prosecution.**

The Committee is also of the opinion that consideration should be given to requiring all other offences with respect to which there is sufficient evidence to warrant a prosecution, whether or not a charge has been laid, to be dealt with and disposed of within a reasonable time after a person has been convicted of an offence.

### *Corporal Punishment*

The Committee deems it necessary to record and deplore the fact that corporal punishment may lawfully be included as part of a sentence imposed by a Canadian court. Despite the fact that sentences of whipping are rarely imposed by present-day courts, the emphasis on liability to be whipped in the Criminal Code presents an astonishing anachronism.

There are a substantial number of serious offences under the Criminal Code with respect to which a sentence of whipping may be imposed, *e.g.*, rape, indecent assault, robbery and breaking and entering when armed. Females and juvenile offenders are not subject to whipping under the Criminal Code.

A court may sentence an offender to be whipped on one, two or three occasions, and the precise time of execution of the sentence is left to the discretion of the prison warden, subject to the provision that no sentence of whipping may be implemented until after the time of appeal has expired, and that whenever practicable not less than ten days before the expiration of the term of imprisonment of the convicted person.

The instrument used for whipping is the cat-o'-nine-tails (the lash), unless otherwise specified by the court. However, some courts order whipping by way of the paddle which is administered by a leather strap across the buttocks. The Code provides for the supervision of the prison doctor or a duly qualified medical practitioner named by the attorney general.

The Committee considers that the imposition of such punishment is brutal and degrading both to the recipient and the person imposing it.

Moreover, the number and percentage of sentences of corporal punishment has been steadily decreasing in Canada since 1931 as shown from the report of the Joint Committee of the Senate and House of Commons on Corporal Punishment.<sup>13</sup>

In England, the Cadogan Report on Corporal Punishment (1938) concluded that it should be abolished.<sup>14</sup>

The report of the Advisory Council on the Treatment of Offenders presented a further study to the British Parliament in 1960 after strong pressure had been applied on the government to reintroduce the use of corporal punishment. The Council reached the conclusion that to reintroduce the use of corporal punishment would be a retrograde step and would turn the clock back not twelve years, but a hundred years. It stated that:

The reintroduction of judicial corporal punishment could be justified only if there was a reasonable assurance that it would substantially reduce crime and afford real protection to potential victims. We think that there cannot be any such assurance. There is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others.<sup>15</sup>

The written and oral evidence received by the Committee has confirmed that judicial corporal punishment offers no definite assurance that offenders who suffer it are deterred by it or that it deters others. We are satisfied that it has no long-term reformatory or rehabilitative value and, on the whole, believe that it has the contrary effect.

**The Committee recommends that corporal punishment, as a sentence of the court, be abolished.**

### *The Mechanics of Sentencing*

The Committee has found from its observation the disquieting impression that the "rule of thumb" is all too frequently applied in the determination of sentences.

In order that a rational and consistent sentencing policy be created and developed, the following deficiencies in the present system must be remedied. There is:

- (i) a lack of easily available information as to the range of sentencing alternatives available and as to the facilities and services presently existing to implement any disposition which is made;

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<sup>13</sup> Joint Committee of the Senate and House of Commons on Corporal Punishment. *Report*. Ottawa: Queen's Printer, 1956, p. 43.

<sup>14</sup> Great Britain. Home Department. Committee on Corporal Punishment. *Report*. (Cadogan Report). London: HMSO, 1938.

<sup>15</sup> Advisory Council on the Treatment of Offenders. *Report on Corporal Punishment*. London: 1960.

- (ii) a lack of comprehensive information as to the personal characteristics and environmental background of the offender;
- (iii) a lack of information as to the reasons why judges impose certain sentences and their expectations in particular cases.

### *Guides to Sentencing*

The Committee believes that the deficiency arising from the lack of information about the correctional institutions and services could and should be immediately remedied. There appears to be no possible justification for the present policy of "sentencing in the dark". In England, the Home Office has produced a booklet purportedly directed to supplying this information. It is doubtful whether a booklet will satisfy the deficiency and we are of the opinion that a comprehensive and frequently up-dated document containing the fullest information as to the range of alternative dispositions and the existing facilities for implementing them should be produced as soon as possible. Institutions and services should not merely be listed but should be particularly described with reference to their actual operation and to the purpose of the services or institutions as seen by the correctional personnel directing them.

**The Committee recommends that a Guide to Dispositions in Criminal Cases be prepared and issued by the federal government in cooperation with provincial governments, covering the whole field of correctional institutions and services but excluding, unless it is specifically requested by the provinces, any reference to offences under provincial statutes.**

### *Pre-Disposition Reports*

If the above recommendation is accepted and implemented, judges will, for the first time, be given clear and official information as to what will be the possible results of the imposition of a given sentence or disposition in terms of what typically is done with reference to those sentenced in such a way. Such information is, however, not enough and information is needed not only about offenders generally but about this offender in particular.

Some knowledge, if a trial has taken place, will stem from the facts thus elicited. But in any case potentially involving loss of liberty or loss of means of livelihood further information should be required in the form of a presentence or pre-disposition report.

In all the countries visited by the Committee, especially since the inception of probation, the development of pre-sentence reports or social inquiries has been remarkable. Needless to say, there are not enough probation officers, psychologists, psychiatrists or social workers to investigate *every* offender who comes before the courts. In order to make the best use of available manpower, pre-disposition reports should be requested where it is anticipated they will be most useful, in line with the recommendations in this chapter.

Where no official machinery exists to provide such report to the judge or magistrate, he should be required to inform himself to the extent which is

reasonable having regard to the severity of the sentence likely to be imposed and to the availability of information.

Dr. Nigel Walker, Reader in Criminology at Oxford, has suggested the following rule which might be considered:

One possible rule would be that there should be a social inquiry report in every case in which the offender had been recently convicted of similar offences. Such a record would demonstrate the existence of some state of affairs—whether psychological or environmental—which made it unlikely that he would respond to ordinary measures. The number of occasions and the period could be adjusted in the light of the volume of work involved and the experience gained by those carrying out the investigation. Another rough and ready, but probably sound rule would be that no sentence involving detention or supervision should be imposed on *first offenders* without a social inquiry report.<sup>10</sup>

An impressive number of judges and magistrates who have met with the Committee have stressed the necessity for adopting the *principle* of pre-disposition reports. The Committee also takes note that in their representations to the Prévost Commission on the Administration of Justice, the Judges of the Sessions of the Peace for the District of Montreal have made a strong plea for the extension of the provincial probation service which is in the course of being implemented, and for the availability of pre-sentence reports on a regular basis.

The Committee is of the opinion that minimum mandatory sentences in cases other than murder constitute an unwarranted restriction on the sentencing discretion of the court.

**The Committee recommends that:**

- (a) existing statutory provisions which require the imposition of minimum mandatory sentences of imprisonment upon conviction for certain offences other than murder be repealed;**
- (b) no sentence of imprisonment be imposed upon an offender not proved to have been previously convicted unless a pre-disposition report has been submitted to the court;**
- (c) no sentence involving imprisonment for more than six months be imposed on any offender unless a pre-disposition report has been submitted to the court;**
- (d) no sentence involving imprisonment be imposed upon a young adult offender (as defined in Chapter 21) unless a pre-disposition report has been submitted to the court.**

It is the view of the Committee that the person preparing a pre-disposition report may properly be invited to make a recommendation as to a suitable disposition. In many cases, at the moment, such recommendations are not made, due to an understandable fear that to do so would be to interfere with the function of the court.

<sup>10</sup> "The New Society", September 18, 1968.

Finally, the Committee points out that the pre-disposition report should properly form part of the correctional record of an offender, and hence be made available to the correctional authorities.

**The Committee recommends that:**

- (a) where a sentence of imprisonment has been imposed upon an offender preceded by a pre-disposition report such report be transmitted forthwith to the institution in which the offender is incarcerated.**
- (b) such documents be coded to provide the basis for research as to the extent to which correctional aspirations and predictions are satisfied.**

Magistrates or judges should, of course, when circumstances so warrant, hold one or more pre-sentence hearings in the presence of all parties or their representatives, to obtain proper assistance in the consideration of any matter relevant to the sentence and also to resolve any discrepancies between the pre-sentence report (or other information the court has received) and the defendant's own representation, if any.

There is no doubt in the minds of the members of the Committee that the correctional process, as has been expressed earlier, ought to be a continuum in which disposition is regarded as a vital link between, on the one hand, the law enforcement authorities who have brought a suspect before a court and, on the other hand, such institutions or persons as will be entrusted with the help, guidance, custody, resocialization or rehabilitation of the offender. Cooperation between these different disciplines is essential if corrections in Canada is to cope with 20th century problems and prepare for 21st century situations.

*Reasons for Sentence*

Clearly articulated reasons would serve at least three purposes: to provide material for synthesis and development of sentencing policies by the courts of appeal; to incorporate the offender in the correctional process in the hope that the rational statement of aims might influence his attitude to his sentence; to inform the public as to the expectations and performance of the courts.

At the present time, relatively few magistrates and judges give anything but very perfunctory reasons for sentencing offenders.

Judges should properly be required to give reasons for the particular disposition of a criminal case just as they are presently required to charge a jury. A judge should indicate why he selected a particular disposition and the aims which he hoped to accomplish. If suitably recorded, such selection and expectation would be available for valuable empirical research.

The Committee has considered recommending an immediate change in legislation to require the giving of reasons for sentence. However, in view of the fact that in many areas of Canada court calendars are crowded and auxiliary services inadequate, the Committee makes no recommendation for a change in legislation at this time with respect to all sentences. We have recommended earlier that no sentence of imprisonment should be imposed unless it is necessary for the protection of the public.

**The Committee recommends that the Criminal Code be amended to provide that no sentence of imprisonment should be imposed without an accompanying statement of reasons.**

### *The Sentencing Authority*

#### *Training and Education*

It is well known that in Canada 90 per cent to 95 per cent of all criminal cases are heard and disposed of by magistrates or provincial judges, country or district court judges or, in the Province of Quebec, by judges of the court of the sessions of the peace or provincial or municipal judges. Judges of the high court handle the balance, the percentage of which hovers between 5 per cent and 10 per cent.

Sentencing or disposition is a value judgment and, as we have pointed out at the beginning of this chapter, it is a heavy responsibility to rest on the shoulders of one person. Appeals with leave are available to those who feel aggrieved by the sentence. However, such appeals are relatively infrequent when compared to the total number of sentences rendered.

In continental Europe, judges who constitute a distinct profession from that of a barrister or solicitor (*avocat* ou *avoué*) generally sit in groups of three, so that sentencing is not left to the discretion of one person.

Since March 1, 1959, a new "school" for future judges has been established in France under the name of "Centre National d'Études Judiciaires". It was sponsored according to the following principles:

La lecture du Code ne suffit plus au juge. Plus encore que de traités et de procédures celui qui tiendra le glaive, a besoin de l'expérience des hommes et des choses . . . La mission humaine du juge de demain avant tout requiert de lui une connaissance de la vie et des êtres, une compréhension . . . des grands courants de pensée, de la transformation du monde si rapide et si complexe de nos jours.<sup>27</sup>

In Canada, it is a single judge who must assume the onerous duty of imposing sentence. Judges are not required, either before or after their appointment to the Bench, to participate in courses especially designed to assist them with respect to sentencing. It has been said, of course, that judges are trained and educated every day of the year by the barristers who plead before them. While this may be true, the value of the teaching and the competence of the teachers vary immensely.

In the United States, since 1964, the National College of State Trial Judges annually conducts a four-week programme of intensive study primarily for judges who have recently been appointed to the Bench. In the first two years, 200 judges from forty-nine states attended classes at the College. A case method of instruction is used in the course on sentencing. The judges

<sup>27</sup> Georges Verpraet, «Le nouveau visage de la magistrature», Paris, ministère de l'Éducation nationale. Bureau universitaire de Statistique et de Documentations scolaires et professionnelles, 1966, pp. 53 and 54.

are given a set of pre-sentence reports and the sentence which each judge selects is discussed and evaluated by the other judges in the class. The Federal Sentencing Institute Programme was inaugurated in 1959 and the States of California, New York and Pennsylvania were chosen to carry on institutes, sixteen of which have been held and the judges of all circuits have had an opportunity to participate in at least one institute.<sup>18</sup> The first California Institute followed the procedures used in the federal system.

Other ways and methods have been used such as the "sentencing councils" which is a procedure by which several judges of a multi-judge court meet periodically to consider what sentences should be imposed in pending cases. They have been instituted on a regular basis in three United States District Courts. In Canada, a seminar on the "Sentencing of Offenders" took place at the Law School, Queen's University, Kingston, from June 4 to June 15, 1962. Conferences of county court judges, magistrates and judges of the sessions of the peace have taken place in several of the provinces and are becoming a yearly institution.

The Centre of Criminology of the University of Toronto convened a National Conference of Judges on Sentencing in 1964.

In June 1965, a week-long National Conference on the Prevention of Crime was held under the same auspices. It was attended by judges of different jurisdictions, including magistrates, judges of the sessions of the peace, county court and superior court judges who participated in work groups, together with law enforcement officers, university professors, correctional specialists, criminologists and legislators.

The question of sentencing was also discussed on many occasions between members of various disciplines, including the judiciary, under the auspices of the Centre of Criminology of the University of Montreal.

At the "Colloque international et interassociations" held at Bellagio, Italy, from the 6th to the 10th of May 1968, sentencing was the sole subject to be studied. The report of the meeting contains the following observations:

Le deuxième colloque avait pour objet la question aussi délicate que complexe du "sentencing", cette élaboration de la sentence pénale dont les aspects sont si variés. Il s'agissait d'une vaste problématique qui n'intéresse pas seulement les personnes qui administrent la justice pénale (juges, procureurs, avocats, experts, pénologues et policiers) mais aussi tous ceux qui s'intéressent aux divers domaines de la lutte contre la criminalité et les déviations sociales dangereuses, comme du traitement des délinquants et des personnes de conduite irrégulière . . .

Le rapporteur traita de la formation technique et culturelle des magistrats, des avocats, des experts et des autres collaborateurs de justice . . .

<sup>18</sup> United States. President's Commission on Law Enforcement and Administration of Justice. *Task Force Report: The Courts*. Washington: United States Government Printing Office, 1967, p. 22.

Il fut notamment relevé que les problèmes relatifs aux «enquêtes sociales» et aux «observations de personnalité» se poseraient tout différemment si le procès pénal était divisé en deux phases, se terminant respectivement par la décision d'imputabilité et par la décision de sanction . . .<sup>20</sup>

We welcome this evidence that the judiciary are prepared to participate in programmes of this nature.

Because of the fact that lawyers form the greatest majority of those who are appointed to the Bench, it is essential that proper training and education in criminology, psychology, social science and sociology be available to all students-at-law. Moreover, once an appointment is made to the Bench, irrespective of the court to which the appointment is made, but with an accent on the criminal courts, refresher courses should be attended by all new incumbents.

### *Sabbatical Leaves*

The Committee has directed its mind to the possibility that members of the judiciary might be given leave of absence on full pay periodically, in the same way that members of the academic community have been given sabbatical leave. The Committee is of the opinion that great advantage would flow to the Bench from an opportunity to participate in academic life either by way of further study or by joining the faculty of a university as a visiting professor. Both federal and provincial governments should give serious consideration to the creation of such a scheme of sabbatical leave. Both Bench and university would benefit greatly from such an interchange.

This idea of training, education and meeting with various disciplines is gaining favour and momentum in all quarters. To quote Eric Stockdale:

By all means let the judges express their views but let them do so across a conference table in the presence of other interested parties, and let sweeping statements be checked by research. One suspects that two immediate benefits would result. First, the judges would speak as individuals with different, and sometimes opposing views. Secondly, they would be able to modify their views on hearing the opinions of other experts, whose views they could come to respect on arguing with them face to face. The converse would also be true. In England we rightly respect our judiciary, but we may have made the mistake in the past of placing our judges on a pedestal, and of regarding them too much as a symbol of semi-divine wisdom and justice. In consequence, criticizing a judge is generally considered to be only slightly less grave than speaking disrespectfully of the Queen, whilst being rather more serious than blasphemy. By all means let us keep the trumpets for the opening of the Assizes, but let the judge argue his views on the Judges' Rules, or flogging, or probation, across the table with police officers, psychiatrists and others. A judge who has discovered from contacts outside his court that many psychiatrists are sensible practical men with their feet

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<sup>20</sup> Bulletin de la Société Internationale de Défense Sociale, n° 11, p. 77 et seq. Imprimerie Amibel, Bruxelles, Belgique (1968).

on the ground, is more likely to listen with respect to their evidence in court, and they will come to respect him more if he tries to improve his professional skills by an exchange of views.<sup>20</sup>

Programmes now exist in the State of California to cover education and training for criminal justice in a great number of institutions of learning.<sup>21</sup> Recently the Department of Justice of Canada has provided for a seminar of superior court judges at which will be discussed developments in criminal law, statutory interpretation and external relations of the courts with the law reform agencies. The sentencing of prisoners will also be considered.

Mr. A. Doucy, in his preface to the work of Madame L. de Bray, Inspectrice principale honoraire au Ministère de la Justice, Service des Prisons, (Belgique) has put the issue well when he wrote:

L'évolution de la politique criminelle impose de plus en plus *au sociologue* de rejoindre *le juriste et le criminologue*. La délinquance est davantage envisagée comme un phénomène social et la conception abstraite de la responsabilité morale cède progressivement devant une acception concrète de la responsabilité sociale. (emphasis added)<sup>22</sup>

**The Committee recommends that:**

- (a) conferences of judges and magistrates in all jurisdictions be held with a view to discussing matters related to corrections with law enforcement officers, crown prosecutors, defense attorneys, social workers, sociologists, probation and parole officers and officials, criminologists and correctional officers (including chaplains) and that these be arranged at regular intervals so as to allow for discussion of common correctional problems from different points of view.**
- (b) groups of judges and magistrates be invited on a regular basis to attend federal and provincial correctional institutions for the purpose of familiarizing themselves with the correctional facilities available.**

*Courts of Criminal Appeal*

No provision is made under Canadian law for the creation and maintenance of courts of criminal appeal. The Committee's concern is that the development of a consistent sentencing policy is hampered by the absence of specialist courts charged with the responsibility for synthesis and exposition of principle. It is our view that serious consideration should be given by the provinces to the possibility of establishing provincial courts of criminal appeal as a division of the provincial supreme court in those provinces where the volume of

<sup>20</sup> Stockdale, Eric. *The Court and the Offender*. London: Victor Gollancz Ltd., 1967, pp. 17 and 18.

<sup>21</sup> Education and Training for Criminal Justice, a Directory of Programs in Universities and Agencies (1965-1967).

<sup>22</sup> *Travail social et délinquance* (1967) Éditions de l'Institut de Sociologie de l'Université Libre de Bruxelles. Preface by A. Doucy, Directeur de l'Institut de Sociologie.

criminal litigation would justify the creation of such a separate court. The Committee envisages that such a court of criminal appeal would be constituted by judges of the appellate division with special skills and experience in criminal law.

### *Non-Judicial Sentencing*

Many of those interested in corrections have considered the advisability of establishing sentencing authorities chosen among specialists other than the judiciary. In some few jurisdictions, this step has been taken. The following description given by an eminent writer in the field of corrections in the United States of America appears to reflect the practice in some states:

In California and Washington the discretion of the judge is limited when he commits the defendant to a penal or correctional institution. He does not determine the duration of the term; in form, his commitment is for the maximum provided by the statute, and subsequently the sentence limits are fixed by a board. In California the Adult Authority determines, and may redetermine after six months, the length of time the prisoner shall serve. Before acting, the Authority must give notice to the judge, the district attorney, and the sheriff. It then fixes a term not more than the maximum of the statute for the offence and not less than the minimum so provided. The sentence fixed is subject to revision by the board. In Washington the Board of Prison Terms and Paroles has similar authority with respect to the minimum term.<sup>23</sup>

Administrative sentencing has, on the other hand, been described as:

mainly a form of indeterminate commitment, like other forms that provide for automatic maximum terms, and suffering, therefore, the same destructive features, principally terms so long that they almost defeat efforts at rehabilitation...<sup>24</sup>

Members of the Committee were given the opportunity to attend sittings of the California Adult Authority. They were impressed by the thoroughness with which hearings of the parole applications were conducted as well as with the exhaustive social references and information contained in their respective files.

We are of the opinion that the sentencing authority should make the fullest possible use of experts and knowledgeable members of other disciplines such as psychiatrists, psychologists, probation officers, social workers, criminologists, in short, of an array of talent well-versed in correctional philosophy. But those disciplines must, in turn, involve themselves in active participation in all phases of the criminal justice system.

As an alternative to having sentencing responsibility centered in a single person, Dr. Nigel Walker has suggested "a small board, with a full-time chairman and part-time members who are at other times engaged in work

<sup>23</sup> Sol Rubin, *The Law of Criminal Correction*. St. Paul: West Publishing Co. (1963).

<sup>24</sup> *Ibid*, p. 130, par. 14.

connected with the penal system. The judiciary should be represented on it, and so should the police, forensic psychiatry and psychology, and the probation service."<sup>25</sup>

In principle, there would seem to be no objection to this arrangement. But the drain it would impose on all disciplines concerned would soon become a major obstacle. Additional delays would be encountered. Majority adjudications would have to be the rule, with one dissenting voice sufficient to provide for an appeal. On the other hand, if the non-judicial members are given the status of "assessors", or "experts" (as in Admiralty Court, for example) there would be danger of frustration on their part, or of quasi-automatic concurrence.

"Collégialité", as it is called in French-speaking countries of Continental Europe, has been severely criticized as follows by two well-known authorities in criminology:

Pour la plupart des affaires, il n'existe pas de délibéré (90% des décisions sont rendues «sur le siège»). Le principe dilue la responsabilité de ceux qui ont rendu la sentence, et la justice serait sans doute meilleure et plus efficace si elle était rendue par des juges uniques à qui l'on ferait une situation matérielle et morale supérieure à celle que possèdent aujourd'hui les magistrats. Enfin, le système de la collégialité est évidemment moins économique que celui du juge unique.

Aussi, n'est-il pas étonnant que le système du juge unique ait de nombreux adeptes. Très en faveur près des anglo-saxons (mais leur organisation judiciaire est faite différente de la nôtre), il a été consacré aussi par des pays dont l'organisation judiciaire est voisine de la nôtre.<sup>26</sup>

On the other hand, the Committee has studied the question of sentencing councils as they operated in some states, and more especially in the District Court of the Eastern District of Michigan.<sup>27</sup> But such councils, limited in scope as they are, can only work in those places where there are three or four judges available in the same location and preferably in the same building. Regional meetings would prove an unsatisfactory substitute.

In conclusion, the Committee does not favour the establishment of sentencing boards.

**The Committee recommends that power to pronounce a sentence or disposition remain vested in the magistracy and the judiciary as heretofore, but subject to all its other recommendations regarding sentencing.**

<sup>25</sup> The New Society, *op. cit.*

<sup>26</sup> Pierre Bouzat et Jean Pinatel. *Traité de Droit Pénal et de Criminologie*. (Paris: Dalloz), 1963, Vol. II, p. 868, No. 1122.

<sup>27</sup> *Proceedings of the Seminar on The Sentencing of Offenders*, Queen's University, Kingston, Ontario, June 4-June 15, 1962.



# 12

## MENTALLY DISORDERED PERSONS

### UNDER THE CRIMINAL LAW

In considering this difficult and sensitive area, we were most fortunate in obtaining the views of a multi-disciplinary body which was concurrently examining many similar issues. The Canadian Mental Health Association's Committee on Legislation and Psychiatric Disorder<sup>1</sup> composed of psychiatrists, lawyers and other professionals from across Canada collaborated closely with us. Consequently, we have had the full benefit of their knowledge and experience.

The substantive law relating to the defence of insanity has long been a source of controversy among lawyers and psychiatrists. Evolved originally from the Rules in *M'Naughten's Case*,<sup>2</sup> the law in Canada is now embodied in section 16 of the *Criminal Code*, which provides:

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
- (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
- (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.
- (4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

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<sup>1</sup> The subject Committee has investigated, reported and published on many fields of the law as it relates to the mentally disordered. See Chalke *et al*, *The Law and Mental Disorder—Part One: Hospitals and Patient Care* (Toronto: Canadian Mental Health Association, 1964); Chalke *et al*, *The Law and Mental Disorder—Part Two: Civil Rights and Privileges* (Toronto: Canadian Mental Health Association, 1967). The third and final volume—dealing with the criminal process—is in press.

<sup>2</sup> (1843), 10 Cl. & F. 200.

A defence of insanity, when established, completely exempts the individual from criminal responsibility. He is found "not guilty by reason of insanity", and as a result he not accountable within the ordinary correctional process. Such a person is, in the interests of public safety, placed in a controlled situation which is dealt with later in this chapter.

We do not voice opinions on the ingredients of the substantive law as it relates to the insanity defence, since it is not within our terms of reference. The test employed, however, should not be regarded as an unimportant matter from the corrections aspect. Indeed, the test of responsibility happens to determine who will and who will not be channelled through the correctional system. In this context, our Committee feels justified in taking a brief look to see where we in Canada find ourselves in respect of the insanity defence.

Generally speaking, the terms of section 16 of the *Code* are criticized as not conforming with modern psychiatric principles. A significant number of informed professionals share the view that if contemporary psychiatric knowledge were recognized in a new test of criminal responsibility, it would result in many more persons being exempted from criminal liability. Those who advocate a broader basis of exemption are not without ready substitute tests. Over the years, many alternative tests of criminal responsibility have been formulated and some of these implemented. We think it appropriate here to document some of them.

#### *The New Hampshire Rule*<sup>3</sup>

No person shall be convicted of an offence in respect of an act or omission on his part done or omitted while he is mentally deficient or has disease of the mind if such act or omission is the product of such deficiency or disease of the mind.

#### *Irresistible Impulse Doctrine*<sup>4</sup>

1. Was the defendant at the time of the commission of the alleged crime as a matter of fact afflicted with a disease of the mind, so as to be either idiotic, or otherwise insane?
2. If such be the case, did he know right from wrong as applied to the particular act in question. If he did not have such knowledge, he is not legally responsible.
3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:
  - (1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed.
  - (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect as to have been the product of it solely.

<sup>3</sup> *State v. Pike* (1869, 49 N.H. 395; see also *State v. Jones* (1891), 50 N.H. 369.

<sup>4</sup> *Parsons v. State* (1866), 81 Ala. 577, 2 So. 854 (terms for the jury).

### *Durham Rule*<sup>5</sup>

An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.

### *American Law Institute Model Penal Code*<sup>6</sup>

Section 4.01. Mental Disease or Defect Excluding Responsibility.

- (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.
- (2) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

### *Rule Recommended by Gowers Commission*<sup>7</sup>

No person shall be convicted of an offence in respect of an act or omission on his part done or omitted while he is mentally defective or has disease of the mind to such a degree that he ought not to be held responsible.

### *Currens Rule*<sup>8</sup>

The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirements of the law which he is alleged to have violated.

### *Freeman Rule*<sup>9</sup>

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

The relevant law in Canada was, just over a decade ago, the exclusive subject of a Royal Commission. The report<sup>10</sup> of the Commissioners was presented in 1956 and concluded essentially that subsection 2 of section 16 afforded a sufficiently wide exemption from criminal responsibility. Emphasis was placed upon the word "appreciating" in relation to "appreciating the nature and quality of an act". Incapacity to "appreciate", it was felt, had been receiving an interpretation which was acceptably broad. The Rules in *M'Naughten's Case* had not used the word "appreciate" but the word "know". "Know" is stated to have a more restrictive meaning than "appreciate". Two of the five Commissioners, however, while agreeing with the interpretation

<sup>5</sup> American Law Institute, Model Penal Code, Article 4. Responsibility (1955).

<sup>6</sup> *Durham v. United States* (1954), 214 F. 2d 862, at pp. 874-875.

<sup>7</sup> *Report of the Royal Commission on Capital Punishment 1949-53* p. 116, para. 333, (Cmd. 8932, 1953), London: Her Majesty's Stationery Office.

<sup>8</sup> *United States v. Currens*, (1961), 290 F. 2d 751, at p. 774.

<sup>9</sup> *United States v. Freeman* (1966), 357 F. 2d 606.

<sup>10</sup> Report of the Royal Commission on *The Law of Insanity as a Defence in Criminal Cases*, (1956), Hull: Queen's Printer.

of the majority, concluded that the broad interpretation was not the usual one given by the Canadian criminal courts. The dissentients would have substituted a new test of criminal responsibility.

We are of the view that section 16 of the *Criminal Code* could now reasonably stand a full and complete reassessment. The fact is that the 1956 report, on the vital point, was decided upon a close division of three to two members. Moreover, in a field so dynamic, the period which has elapsed since 1956 has, we are sure, seen changes in psychiatric thinking which could well place us in a far better position now to evaluate the fairness of the law. Other tests proposed since 1956 could, at the same time, be taken into account.

One point potentially to be dealt with in reassessing the provisions relates to that arm of subsection 2 of section 16 referring to "knowing that an act or omission is wrong." Some thought might be directed to the possibility of extending the broader exemption concept through substitution of the word "appreciating" for "knowing".

The Canadian Mental Health Association's Committee, referred to earlier, has, in the context of other proposals, recommended that the defence of insanity under section 16 of the *Criminal Code* should be confined to capital cases only. Without passing comment on such a recommendation, we think that it is one which can be explored if the substantive law relating to the defence of insanity were reconsidered on a comprehensive basis. Our Committee's proposals and recommendations rest upon the assumption that some form of statutory defence of insanity will continue.

Any extensive reconsideration relating to the issue of responsibility would, of course, be bound to take cognizance of the concept of "diminished responsibility". In this connection, reference would have to be made to the English *Homicide Act*, 1957<sup>11</sup> which, by virtue of section 2, reduces the offence of murder to manslaughter where the defence of diminished responsibility is established. As a point of interest, it should be noted that something akin to the defence of diminished responsibility might be available even in the absence of a statutory defence.<sup>12</sup>

The vigorous debate concerning the issue of criminal responsibility has tended to minimize the attention directed to other related questions which are equally, if not more significant than "insanity" at the time of the alleged offence. Under the present law, there are various stages during both the criminal trial and correctional processes at which the mental condition of an accused or convicted person can be questioned. An accused may be specially remanded for psychiatric examination pursuant to certain sections of the *Criminal Code*.<sup>13</sup> Such remands have sometimes had the effect of excluding

<sup>11</sup> 5 & 6 Eliz. 2, c. 11.

<sup>12</sup> See the English case of *Regina v. Lenchitsky*, (1954) *Criminal Law Review* 216, where it was held by the English Court of Criminal Appeal that the jury were entitled to take into consideration the fact that the accused was a feeble-minded person in assisting them in coming to a conclusion as to whether or not he had an actual intent to kill or inflict grievous bodily harm.

<sup>13</sup> See ss. 451(c), 524(1a) and 710(5). Provincial legislation also appears available for the same purpose in certain jurisdictions: see, for example, *The Mental Health Act*, 1967 (Ontario), S.O. 1967, c. 51, s. 15.

the criminal process either temporarily or permanently, without the person having been found by the court to be unfit to stand trial.<sup>14</sup> Where a court finds unfitness to stand trial, the trial of the accused is precluded until such time as he is fit for that purpose.<sup>15</sup> As already mentioned, an accused who does in fact stand trial and with respect to whom the court finds insanity at the time of the act charged, is acquitted on that ground.<sup>16</sup> An appeal court may substitute such a verdict for a conviction.<sup>17</sup> Once a person is convicted, there are yet provisions for conducting special determinations into his mental condition. These determinations could take the form of a pre-sentence report to assist a court in ascertaining what should be done with the individual. There are legislative provisions or procedures for conducting psychiatric examinations at the post-sentence level as aid to the federal cabinet in deciding whether or not to commute the sentence of death;<sup>18</sup> by penitentiary<sup>19</sup> or provincial correctional<sup>20</sup> officials where it is indicated that a penitentiary or provincial correctional institution is not the appropriate place of confinement; or to assist the National Parole Board or a provincial parole board in its deliberations.

A determination of "dangerousness" following a finding of guilt is another phase where mental disorder is relevant to the criminal process. This aspect is dealt with separately in the chapter embracing habitual and dangerous offenders.

### *Psychiatric Services to the Courts*

Our Committee has studied various systems which, in different ways, provide for psychiatric guidance to be given to criminal courts. In addition, we have had the advice of many experts in order to arrive at a sound position in keeping with what would be most appropriate in Canada today. The crucial question is whether the adversary system should be modified to enable a court to have attached to it, or to appoint, a psychiatrist or panel of psychiatrists to serve as an "assessor" on psychiatric matters, with particular reference to the issues of fitness to stand trial and criminal responsibility. Many eminent psychiatrists have not felt that such a modification would be feasible or desirable and we have come to a similar conclusion.

Much of the criticism levelled against an adversary type proceeding on psychiatric issues is that the criminal trial forum becomes a "battle of the experts". We do not view this so-called "battle" necessarily as an undesirable

<sup>14</sup> Consider the possibility of a person being remanded for observation to a psychiatric facility and being "certified" there to be mentally disordered and, by some arrangement, the criminal trial process appears to be discontinued. Also see s. 527 of the *Code* and its potential employment before trial having the effect of excluding further trial proceedings.

<sup>15</sup> *Code*, s. 524.

<sup>16</sup> *Code*, s. 523.

<sup>17</sup> *Code*, s. 592(1) (d).

<sup>18</sup> See a description of this procedure contained in the McRuer Report on Insanity, *ibid.*, footnote 10, at pp. 1-3.

<sup>19</sup> *Penitentiary Act*, S.C. 1960-61, c. 53, s. 19.

<sup>20</sup> See, as an example, *Mental Patients Institutions Act* in Quebec, R.S.Q. 1964, c. 166, s. 24.

practice since both the prosecution and defence are entitled to seek out and put forward the testimony of any expert who supports the argument presented for the respective sides. We do feel, however, that it is possible to alleviate certain of the unfortunate implications of contradictory psychiatric evidence. This could be done by restricting the latitude for disagreement. Specifically, there is no reason why the experts for opposing sides could not exchange reports with a view to resolving as many of their differences as possible. A mandate to strive for agreement might very well result in such agreement. After all, psychiatric experts—as part of the criminal trial forum—do have a common purpose: that is, one of assisting the court in arriving at a fair and just verdict.

**The Committee recommends that where psychiatric evidence is to be presented by the prosecution and the defence, the judge or magistrate should be empowered—through amendment to the Code—to require the respective sides to exchange psychiatric reports, thereby minimizing the risk of disagreement which, so often, arises purely out of the element of surprise at trial.**

Recognizing that short psychiatric examinations taking place in a common gaol are, in many instances, felt to be unsatisfactory, our Committee directs its attention now to the laws concerning remands for psychiatric observation. Three sections of the *Code* deal specifically with remanding a person charged with an offence for such observation. These are sections 451(c), 524(1a) and 710(5) which deal respectively with remands on preliminary inquiry, at trial of an indictable offence and upon trial of a summary conviction offence. In the case of each of these sections, the duration of remand may be for a period of up to thirty days, and each requires as a condition precedent the supporting evidence of a medical practitioner that the accused is believed to be “mentally ill”.

In examining these provisions, we have also looked at provincial statutory provisions which purport to authorize a court to remand an individual for psychiatric observation even where the offence charged is one under the *Criminal Code*.<sup>21</sup>

While some persons doubt the constitutional validity of a provincial statutory authority for this purpose, the question would be purely academic were the *Code* provisions sufficiently wide and flexible to accommodate appropriate remands in every case. We are of the opinion that the three pertinent sections of the *Code* could stand improvement from the point of view of the aspects discussed below.

**The Committee recommends that the provisions respecting remands for psychiatric observation under the Code be amended in such a way as to: (1) allow a remand for up to sixty days. (It is not uncommon for the authori-**

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<sup>21</sup> See, for example, Saskatchewan's *Mental Health Act, 1961*, S.S. 1961, c. 68, s. 17 as amended.

ties at a psychiatric facility to feel that additional time, in some cases, is required in order to reach a sound judgment. The court has the power to set the period of remand and could, in its discretion, prescribe a shorter period. Moreover, should it happen that the authorities at the psychiatric facility have completed their observation before the period of remand has expired, arrangements could be made to have the individual returned to court at the earliest point possible.) (2) substitute the term "mentally disordered" for the term "mentally ill". (The term "mentally ill" is not defined in the Code. There are some who feel that this term, popularly interpreted, would not include the "mentally retarded". The existence of mental retardation is equally significant for the purposes of the criminal trial process as is mental illness. "Mental disorder" is more and more appearing in legislation as an all-embracing generic term. In order that there be no mistake of interpretation, we propose along with the substitution of term, that "mental disorder" be defined in the Code as "any disease or disability of the mind."<sup>22</sup>) (3) enable a court to order a remand in the absence of the evidence of a physician, since delay may otherwise be occasioned. (We must recognize that legislation is intended to serve all regions of the country and it is still the case that a physician is not always readily available in many of these areas. We do, however, feel that the circumstances where remands are ordered in the absence of such supporting evidence, should be compelling ones. Consequently, we would suggest that an amendment be framed to include expressly that "compelling circumstances" do exist, thereby restricting those remands ordered without supporting medical evidence.)

The Committee wishes to point specifically to section 527 of the *Criminal Code*. Subsection (1) of that section provides that:

The Lieutenant-Governor of a province may, upon evidence satisfactory to him that a person who is insane, mentally ill, mentally deficient or feeble-minded is in custody in a prison in that province, order that the person be removed to a place of safe-keeping to be named in the order.

The foregoing provision has been used in two basic ways. Firstly, it has been employed to transfer to a mental hospital a prisoner who is serving a sentence in a provincial correctional institution or gaol. Parallel legislation is found in the provincial sphere to accomplish a similar purpose.

Secondly, subsection (1) of section 527 authorizes the removal of a prisoner to a mental hospital at the pre-trial level. Such transfers appear to have been effected where it appears that the accused is so mentally disordered and in need of hospitalization that a decision is taken by the administrative authorities not to proceed to the fitness to stand trial issue. Our Committee believes transfers on such a basis to be dangerous. It is possible that the stringent measures inherent in detention under the authority of the lieutenant-governor could be applied to cases without the individual

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<sup>22</sup>This is precisely the definition attached to the term "mental disorder" in Ontario's *Mental Health Act, 1967*, S.O. 1967, c. 51, s. 1(f).

at all coming before a judicial officer. While we do not question the humanitarian motives of officials who have brought about pre-trial transfers under the authority of section 527, we believe the potential loss of rights to the individual could lead to outstanding injustice. Other recommendations contained in this chapter of our report, particularly the one dealing with amending the Code to permit advancement of the fitness to stand trial issue, would seem to negate altogether occurrence of the type of situation which has led to the use of section 527 at a pre-trial level.

**The Committee recommends that the Code be amended so as to restrict the use of the transfer contemplated to sentenced prisoners.**

### *Fitness to Stand Trial*<sup>23</sup>

The Canadian law concerning fitness to stand trial is embodied in section 524 of the *Criminal Code*. Where it appears that there is sufficient reason to doubt that an accused person is, "on account of insanity", capable of conducting his defence, a court, judge or magistrate may, at any time before verdict, direct that an issue be tried whether the accused is then unfit to stand his trial. The *Code* does not define "insanity" for this purpose, but the criteria used to determine fitness to stand trial generally involve the answers to the following questions: does the accused have the capacity to understand the nature and object of the proceedings against him?; is he capable of comprehending his own condition in reference to such proceedings?; is he capable of making a rational defence?

The determination of fitness to stand trial is one which is made by a jury, unless there is no jury sitting in which case the judge or magistrate renders a verdict on that issue. Where the verdict is that the accused is not unfit to stand trial, the arraignment or the trial proceeds as if no such issue had been directed. Where, however, the verdict is one of unfitness to stand trial, the court, judge or magistrate must order that the accused person be kept in custody until the pleasure of the lieutenant-governor of the province is known. A person found unfit to stand trial may be subsequently tried on the indictment.

The concept of fitness to stand trial is often confused with that of "certification" to a mental hospital. Unlike the criteria employed to determine fitness to stand trial which relate solely to the criminal trial process, the question of "certifiability" has to do with whether the combination of a person's mental condition and his actions requires mental hospitalization on a compulsory basis. While mental hospitalization may be, and in most cases is medically indicated for a person who is unfit to stand trial, the two concepts do not always go hand in hand. Consequently, it is possible that an individual found unfit to stand trial is not a proper candidate for mental hospitalization.

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<sup>23</sup> See the comprehensive treatment given to this topic in Swadron *Detention of the Mentally Disordered*, Butterworths (Toronto: 1964), especially Chapter 9.

Conversely, it would be perfectly consistent with the principles involved for some patients in mental hospitals to undergo a criminal trial. Our Committee emphasizes these points.<sup>24</sup>

Canadian practice sees a resolution of the fitness question as soon as the matter is placed in doubt. This has meant that the special issue has sometimes been determined as a preliminary one at the commencement of a trial. Should the accused be found unfit under such circumstances, not only is there no opportunity to present a defence, but the prosecution has not been called upon to test its own case. The main issue at trial, that is innocence or guilt, is left untouched. Some might argue that the accused has no cause for complaint since he should be held in a mental hospital in any event. As we point out above, however, a finding of unfitness should not be equated to a determination that the person requires mental hospitalization. Had it not been for the existence of a criminal charge, we believe that a number of persons who are now confined as unfit to stand trial would be in the community.

Although it is possible that persons found unfit will be returned to court to stand trial at a subsequent time, many will not have such an opportunity. Where the accused has a certain degree of mental retardation, for example, he is, and will always be unfit to stand trial. To state the potential injustice at its highest, it is conceivable under the law for an innocent person who does not require hospitalization to be detained for the rest of his life. Such a situation is shocking and, by amendment to the *Criminal Code*, we believe that the risk can be minimized. It should be permissible under prescribed circumstances, for a judge to postpone the trial of the fitness issue so that, where possible, the general issue of guilt or innocence can be developed if not disposed of altogether.

Clause 45 of Bill C-195 would have amended section 524 of the *Code* to permit the court, judge or magistrate to postpone directing the trial of the fitness issue until any time up to the opening of the case for the defence, where the issue arose before the close of the case for the prosecution. Where the court, judge or magistrate had postponed direction of the trial of the special issue and the accused was acquitted at the close of the case for the prosecution, the issue would not have been tried. The Canadian Committee on Corrections endorses the principle embodied in the amendment which was proposed, but believes that the special issue could be postponed even beyond the point of opening of the case for the defence.

**The Committee recommends that the Code be amended to authorize postponement of the trial of the fitness issue beyond the stage which Bill C-195 would have allowed. There is no reason why the defence itself should not be allowed to present evidence before going ahead with the trial of the fitness issue. In this way, the defence itself could call witnesses to establish a defence of, for example, alibi or self-defence.**

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<sup>24</sup> See a discussion relevant to this point in Swadron, *The Unfairness of Unfitness* (Guest Editorial), 1966, 9 *Canadian Bar Journal* 76, which elaborates on this issue and also puts forward an argument for amending the *Code* to permit the postponement, in certain cases, of the issue of fitness to stand trial.

Another innovation which was sought to be introduced via Bill C-195, had to do with representation by counsel where fitness is in issue. Also by clause 45, this Bill would have required a court, where it appeared that there was sufficient reason to doubt fitness, to assign counsel to act on behalf of the accused if he was not already so represented.

**The Committee recommends that such assignment of counsel be guaranteed by law where fitness to stand trial is an issue: we believe this right to be fundamental.**

No appeal lies under the present *Criminal Code* from findings of either fitness to stand trial or unfitness to stand trial. In the case of a fitness finding which led to a conviction, the person convicted would have to allege that the conviction was bad since it was based upon a trial which should not have been held. Where the verdict is one of unfitness to stand trial, the matter can be brought before the court again only by subsequent trial. We concede that an appellate court is not in as good a position to determine the issue of fitness as the court at trial. Nonetheless, we believe that maximum flexibility and process is desirable to meet the ends of justice. The provisions of Bill C-195, had they been enacted, would have provided for appeals from determinations on the fitness issue.

**The Committee recommends that a finding of fitness to stand trial or unfitness to stand trial be subject to statutory appeal.**

Most of the recent attention in regard to the fitness issue has been focussed upon the need for authorizing postponement of the issue at trial. Some years ago, the late H. H. Bull, Q.C., eminent Toronto prosecuting attorney, expressed the view that a magistrate having jurisdiction to hold a preliminary hearing should also have jurisdiction to hear and determine whether the accused was, when called for preliminary hearing, unfit to stand trial. Mr. Bull pointed out to the McRuer Commission on Insanity<sup>25</sup> that "by leaving the issue to be tried by the tribunal having jurisdiction to try the offence the accused is often required to remain for some considerable time in the common gaol, when in fact it is obvious and well known that he is on account of insanity unfit to stand his trial." The Commissioners termed Mr. Bull's suggestion "commendable" and reported that: "We think that a person who is unfit to instruct counsel at a preliminary hearing ought not to be asked to undergo a preliminary hearing." Our Committee concurs in the position taken by the McRuer Commissioners. It should not be difficult to formulate procedural rules appropriate to a change of law in this respect. Moreover, the protection which would be afforded by review bodies (which we recommend later in this chapter) for persons detained under the authority of a lieutenant-governor's order should provide an adequate safeguard to the

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<sup>25</sup> Ibid., footnote 10, at p. 5.

individual. That the ordinary course of the criminal law could require severely disturbed persons to languish in prison awaiting assizes is, to us, clearly unacceptable.

**The Committee recommends that the Criminal Code be amended to allow, in appropriate cases, the fitness issue to be considered upon preliminary inquiry.**

We have considered whether the presence of the accused should be mandatory during the trial of the fitness issue. This question arises because his appearance in person, experts suggest, could in certain instances cause him psychological damage. We accept that there are some instances wherein the fitness hearing would better take place in the absence of the individual than risk aggravation of his mental state.

Subsection 2 of section 557 of the *Code* provides that the court may:

- (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible, or
- (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper.

Subject to these clauses, by virtue of subsection 1 of section 557 an accused person must be present in court during the whole of his trial. In respect of the trial on the main issue, our view is that the provisions of section 557 are straightforward and adequate. There is some doubt, however, what the situation is in the case of a hearing on the issue of fitness to stand trial. Determination of the fitness issue may not, strictly speaking, be part of the trial proper, and the *Code* is silent on whether the quoted provisions may be applied to a fitness hearing. We think that an accused should be in attendance when his fitness to stand trial is being determined, except where compelling circumstances exist to justify proceeding in his absence. The court should have a discretionary authority to permit, upon application, the trial of the fitness issue without the accused having to appear. Such an authority, we submit, would be clear only if expressly conferred by the *Code*.

**The Committee recommends that an amendment be made to section 557 to authorize, in appropriate cases, the trial of the fitness issue in the absence of the accused person.**

#### *Detention under Warrant of the Lieutenant-Governor*

Where an accused is found not guilty on account of insanity or unfit to stand trial, section 526 of the *Criminal Code* authorizes the lieutenant-governor of the province to make an order for the safe custody of the accused in the place and in the manner that he may direct. The lieutenant-

governor, by virtue of section 527 of the *Code*, is authorized also to make an order for the "safe-keeping" of an individual where, upon evidence satisfactory to the lieutenant-governor, the individual is "insane, mentally ill, mentally deficient or feeble-minded" and is in custody in a prison.

Detention under "Executive Pleasure" is a most drastic legal measure. The duration of the detention is absolutely indeterminate. There is grave doubt whether, even by extraordinary legal remedy, the discretion of the lieutenant-governor can be reviewed by the courts.

Despite the far-reaching effect of detention under the lieutenant-governor's authority, population statistics are generally not published. Indeed, in most instances they are not even collected. This is a singular situation. It is also alarming.

In some provinces, such individuals are detained both in prisons and in mental hospitals, although detention in a prison is a rare exception. In those provinces where detention may be either in prison or a mental hospital, the jurisdiction over them is not to be found in one administrative authority. Requests for information for the purposes of this report led, in some instances—even where only one governmental department had jurisdiction—to an initial collection of statistical data. From information received, we would estimate that there are now approximately one thousand persons so detained in Canada. Because the various legal circumstances under which persons may be confined pursuant to the authority of a lieutenant-governor tend often to be complicated, we cannot state frankly that this is a reliable figure, but merely a rough estimate.

Some individuals found detained under lieutenant-governor's warrants in a given province, were they in another province, would be detained under another authority. Such situations may result either from diversities of provincial legislative provisions or disparities in practice.

An illustration of diversity in legislation is to be found in the case of transferring a person in custody in a prison to a mental hospital. Such transfers may be effected by lieutenant-governor's warrant under the *Criminal Code* (and under provincial enactment in certain provinces). Other provinces have legislation authorizing the transfer by other means: for example, by attorney-general's order.

Disparate practices are evidenced by the manner in which cases of accused persons are handled. For example, a man charged with a relatively minor offence in one province and "certified" mentally disordered may become the subject of lieutenant-governor's warrant detention. In another province, a person charged with murder might be held under a medical certification procedure and not a lieutenant-governor's warrant. Such disparities are difficult to comprehend. Moreover, inconsistent practices exist also domestically within given provinces.

The conditions of detention of persons held under lieutenant-governor's orders are, in many jurisdictions, upsetting. Observers report that the circumstances of detention, treatment and programme offered to such persons vary from province to province. While we are told that some of these conditions

are remarkably good in particular provinces, the situation in others is no less than shocking and appalling in this day and age. Most provinces do not have adequate facilities for keeping such individuals. One of the obvious reasons for this is that a majority of provinces do not have a sufficient number of patients held under such custody to enable an adequate programme to be established. Not infrequently, provinces with a smaller population of persons so detained request provinces with better programmes to make their facilities available. Some suggest that certain provinces pool their resources and establish regional interprovincial facilities in this regard. There is no easy solution to the problems with which we are here confronted.

The degree of security provided for these persons varies widely. Some facilities described as of a "maximum security" nature are hardly secure. Certain liberties which may be afforded lieutenant-governor's warrant patients in one province may not be granted in another province. These are matters which demand close re-examination within each province. Furthermore, all provinces should collaborate in examining what each of the others offers, better to determine what should be minimum standards.

When one thinks of custody pursuant to an order of the lieutenant-governor, the mind may automatically focus upon the need for a maximum security setting as the place of detention. While it may be true that the criminal charge involved in the majority of cases of those acquitted on account of insanity or found unfit to stand trial is classified as a serious one, this is not always the case. Lesser, and what many would feel are minor charges representing no danger have and may be involved. Accordingly, custody awaiting the pleasure of the lieutenant-governor should not always evoke further detention of a maximum security nature. Indeed, our Committee can envisage instances where it is secure and desirable for the lieutenant-governor to issue his initial order, not for further custody, but for discharge from custody. We believe that appropriate measures should be taken in each province to screen those who await the pleasure of the lieutenant-governor in the first instance, to determine what will be a proper disposition in each case on its individual merits. Flexibility of disposition is essential. The reinforcement of community psychiatric facilities is making it more and more possible for a greater number of individuals to be treated and cared for in the community. There appears doubt whether the flexibility of disposition which we contemplate is authorized under the present terms of the *Code* and this question should be resolved.

**The Committee recommends that section 526 of the Code be amended so as to remove any doubt that an order of the lieutenant-governor may encompass a broad scope of disposition, including discharge from custody in the initial instance.**

The stringent effect of detention under a lieutenant-governor's order combined with the often disturbing conditions under which these unfortunates are kept demand that there be adequate reviews of their cases. If one were to trace the history herein, discharge from lieutenant-governor's custody

was not too many years ago a rare exception. Although there is a common belief that lieutenant-governor's warrant custody means detention for life, this no longer holds true. Persons have been and are being discharged and returned for trial throughout the country. However, there is a need for greater checks and balances than now exist in most provinces. Unlike the situation with noncriminally involved mental patients, hospital authorities are not in a position legally to dictate when a lieutenant-governor's warrant patient leaves hospital.

The need is clear for properly constituted review boards with appropriate safeguards built into their procedural functions. We do not find it necessary to describe in detail the various procedures adopted in the individual provinces for the consideration of the cases of lieutenant-governor's warrant patients. These range from the appointment of *ad hoc* committees who are given no procedural guidelines with which to work to special statutory provisions guaranteeing the right to a review, coupled with prescribed procedures therefor.

**The Committee recommends that there be adequate review, provision for which is made by statute, of every person in Canada who is detained under the authority of an order made by a lieutenant-governor.**

As to the adequacy of review, we offer the following guidelines:

- (a) Because of the unique nature of the detention, reviews should take place automatically and not be dependent upon applications therefor.
- (b) Reviews should be conducted periodically in each case, but not less than once in each year.
- (c) The reviewing body should be multi-disciplinary in composition, having psychiatric, legal, and lay membership.
- (d) Review procedures should be such that due regard is given to civil rights including the right to be represented by counsel if the individual so chooses.

Concerning the passage of appropriate legislation, and the establishment of machinery for review, we have considered the various possibilities involved. There is a constitutional question arising since, on the one hand, orders for detention derive their authority from the *Criminal Code*. The lieutenant-governor who makes the order is, however, acting on behalf of his own province in a manner apparently unfettered by the *Code* as to the way in which his discretion is exercised. The constitutional issue, if tested, would hinge upon the answer to the question of when has the criminal trial process run its course. We find it unnecessary to discuss this question, as detention of such persons should hardly be a matter of conflict between any of the legislatures and Parliament. The important consideration is that the field be occupied and there be some legislation, of application in every province, dealing with the review of persons held on the order of the lieutenant-governor. In this regard, we put forward the following avenues of approach:

- (a) It would be in order for any province to enact its own legislation and establish its own reviewing body or bodies for these purposes.
- (b) Where, for any reason, a province does not see fit to enact its own legislation in this regard, it is essential for that province to rely upon legislation which would be passed by Parliament.
- (c) Statutory provisions within the federal sphere, which would be amendatory to the *Criminal Code* could assume a variety of forms. They should not be universally mandatory, since their application is indicated only for those provinces having to rely upon them. We have given serious thought to the pertinent proposals embodied in clause 46 of Bill C-195 (1957). If the interpretation of that proposed amendment is such that the provisions would be universally permissive, we cannot agree that the course is a good one to follow: the door would be left open for no review machinery to exist in any province not having its own legislation for review. Clause 46 may represent no more than a series of guidelines which might be adopted by a province. What is required is a guarantee that every province have review mechanisms.

**The Committee recommends that any amendment placed in the Code should provide to apply in those provinces where the field is not already occupied. Even then, there are two modes of dealing with the matter. One would involve provision for review bodies to be established by the individual province concerned. The second would see the creation of a federal reviewing body to handle these cases for any province having no such body of its own. We lean in favour of the establishment of a federal reviewing body. The existence of such a body would likely be welcomed by certain provinces.**

One further point should be made. Detention under order of the lieutenant-governor being discretionary, the review body is nothing more than advisory in function. This being so, the lieutenant-governor or cabinet (where the effective decision is made there), as the case may be, need not follow the advice of the review body. While we recognize that these matters should be given serious consideration in every interested forum, it is to be hoped that the recommendations emanating from the review machinery are accorded the weight they deserve when the ultimate determination is made.

### *Hospital Permits*

One of the most crucial questions considered by our Committee was whether a Canadian criminal court should have the power to sentence a person to a mental hospital. We have examined the issue in an exhaustive manner. Later in this chapter, procedures and practices relating to the transfer of sentenced prisoners from penitentiaries and other correctional institutions to mental hospitals are discussed. Such transfers, however,

take place at a point after the individual has undergone the court process. They are arranged by administrative authorities. It has been stated that if transfers could be arranged with ease at the commencement of an individual's sentence, it might not at all be necessary to provide a legislative system which would allow a court to have any involvement. Indeed, it has been argued that an individual, by virtue of legislative transfer provisions, could be sent directly from a court to a mental hospital, thereby short-circuiting the need for him physically to be placed in a prison previous to hospitalization. This argument, however, skirts the issue of whether the court should be involved in directly determining the disposition.

When an individual is placed in the court process, he is the centre of attention and an excellent opportunity is thereby afforded of observing the needs of his particular circumstances. Once sent to prison, there is a risk that any mentally disordered condition from which he suffers will go undetected. In those instances where mental hospitalization is indicated at the time of verdict and sentence, appropriate steps should be taken then.

We have studied the concept of "hospital orders" under the English *Mental Health Act, 1959*<sup>26</sup>. By virtue of that statute, under certain circumstances, a court may authorize by order a convicted person's admission to and detention in a hospital. A court of assize or quarter sessions in the case of a conviction of an offence the sentence for which is not fixed by law, or a magistrates' court in the case of a conviction of an offence punishable on summary conviction with imprisonment, may so authorize where the following conditions are satisfied:

- (a) the court is satisfied, on the written or oral evidence of two medical practitioners. . . .
  - (i) that the offender is suffering from mental illness, psychopathic disorder, subnormality or severe subnormality; and
  - (ii) that the mental disorder is of a nature or degree which warrants the detention of a patient in a hospital for medical treatment, . . . ; and
- (b) the court is of opinion, having regard to all the circumstances including the nature of the offence and the character and the antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section.

In limited cases, under the English statute, a "hospital order" may be made without convicting the accused, notwithstanding that he could be properly convicted. Such an order is limited to certain offences tried in magistrates' courts and further restricted to persons suffering from mental illness or severe subnormality. The hospital to which the offender is to be sent is specified in the court order. The court has no jurisdiction to make a hospital order unless it is satisfied that arrangements have been made for the admission of the offender within twenty-eight days to the hospital, in the event of such an order being made. Where a court makes a hospital

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<sup>26</sup> 7 & 8 Eliz. 2, c.72.

order, it cannot pass sentence of imprisonment, impose a fine or make a probation order in relation to the offence, but may make any other order which it has the power to make. In certain instances, a court has the power to restrict discharge from the hospital. Where an order is made by a court of assize or quarter sessions, and it appears to the court, having regard to the nature of the offence, the antecedents of the offender and the risk of his committing further offences if set at large, that it is necessary for the protection of the public so to do, the court may further order that the offender be subject to special restrictions either with or without limit of time or during such period as the order specifies. Certain matters in relation to the custody of a patient held under a restriction order, such as the granting of a leave of absence, transfer and discharge, are exercisable only with the consent of the Secretary of State. The Secretary of State may, while a restriction order is in force, discharge the patient from hospital, either absolutely or with conditions. The statute contains provision for certain persons convicted by a magistrates' court also to become the subject of a restriction order through that court committing him to the custody of quarter sessions.

Our observers who travelled across the country and interviewed many interested persons asked the specific question whether a system of "hospital orders" referred to above should be adopted in Canadian law. The reaction they received was mixed, but basically against the English system as it is structured. Those identified with mental health facilities were particularly concerned that a court should appear to have the right to order admission to and restrict discharge from hospitals. It was felt that hospital officials should be able to determine who, based upon appropriate admission criteria, would be admitted to and discharged from psychiatric facilities. Most of those whose opinions were sought did not object to persons coming to their hospitals directly from the courts, but felt that it was the hospital authorities' decision to make.

We agree that hospital authorities should be able to control the flow of admissions and discharges within their facility. The appropriate gauge, as we see it, would be the criteria utilized with respect to admission and discharge as contained in the mental health legislation of a given province. Hospital officials should have no objection whatsoever to admitting as patients those who would qualify under the relevant laws in that regard. Moreover, if such officials could dictate discharge pursuant to their sound judgment based upon the criteria in statutes governing "civil" mental hospitalization, they would be in control of the entire hospitalization cycle.

The Canadian Committee on Corrections concludes that there is now an opportunity to establish a fresh system within our criminal law, using a concept known as a "hospital permit". Where it is indicated that an offender would benefit from treatment in a psychiatric facility, the court should be empowered to authorize placement of the individual in such a facility. This placement would be conditional upon the circumstances being such that his eligibility otherwise met the terms of the mental health legislation in

the particular province involved. The person could spend as long a period of his sentence as, in the opinion of the hospital authorities, was justified. Hospitalization in this instance would not exceed the total period of imprisonment imposed, unless the individual were continued as an involuntary patient on the basis of the mental health legislation of that province. Our Committee is strongly of the view that the innovation proposed is a much-needed reform to our law.

**The Committee recommends that the Code be amended to authorize a court to issue a "hospital permit" to allow an offender to benefit at once from treatment in a psychiatric facility.**

The relationship between criminal law and mental disorder envisaged by the Committee would then be as follows:

1. A person so mentally disordered as to be unfit to stand trial would be withdrawn from the criminal process at the earliest convenient point and dealt with on the authority of a lieutenant-governor's warrant.
2. A person found not guilty by reason of insanity would be withdrawn from the correctional process and dealt with on the basis of a lieutenant-governor's warrant.
3. A person fit to stand trial and found guilty, might be disposed of in appropriate cases by discharge without conviction upon condition that he avail himself of psychiatric help. A similar condition could be imposed where sentence was suspended and a probation order made.
4. A person fit to stand trial and found guilty, might be sentenced to a term of imprisonment. In appropriate cases, the court might issue a hospital permit which would permit the offender to enter a hospital for treatment and to provide that time spent in hospital should count towards sentence. The Committee envisages that these hospital permits would be issued in conjunction with relatively short sentences of imprisonment and that in appropriate cases, the parole authorities would permit the offender to be discharged from the hospital directly to serve the balance of his sentence under control in the community.
5. A person sentenced to imprisonment and to whom no hospital permit had been issued, would have available such psychiatric services as exist within the penitentiary or other correctional system subject to the possibility of transfer to an outside hospital.

It follows that certain psychiatric facilities not heretofore having accommodated patients somehow involved with the criminal law should now be expected to do so. This is a matter which, of course, must depend upon local circumstances but, in any event, it is something which should naturally result from the growing concepts of community psychiatry.

## *Mentally Disordered Persons in Correctional Institutions*

Even if the recommendation we make concerning "hospital permits" is implemented, there will, of course, still be many mentally disordered convicted persons who are not appropriate candidates for psychiatric hospitalization *per se*. Psychiatric treatment may be indicated for them. During their period of imprisonment there may be a need for transfer to a psychiatric facility. Accordingly, we have directed our attention to the services available for identification and treatment at correctional institutions. Observers report that these services vary from jurisdiction to jurisdiction and domestically within any given jurisdiction. Although we could point to some services in this regard which are considered adequate, the cross-Canada picture indicates that most psychiatric services within correctional systems are minimal and leave much to be desired.

The Canadian Committee on Corrections believes that no mentally disordered person serving a sentence of imprisonment should be deprived of mental health services which would be available to him if he were not in custody. All penitentiaries and prisons should have psychiatric consultants and access to treatment services.

Where a prisoner in a penitentiary or other correctional institution requires treatment outside of that institution, such treatment should be given to him without delay. There is legislation, both in the federal and provincial spheres authorizing the transfer of a prisoner to a psychiatric facility. Reference is made to section 527 of the *Code* which, through the vehicle of an order of the lieutenant-governor, provides authority for the placement of a mentally disordered prisoner in a psychiatric facility. There also exists provincial legislation to effect a similar purpose. Section 19 of the *Penitentiary Act* makes provision for the transfer of penitentiary inmates to provincial psychiatric facilities. Once again, there seems to be a large variation with respect to the ease and speed involved in effecting such transfers. Some enabling legislative provisions permit transfers to take place by local arrangement, thereby facilitating early treatment. For the most part, however, the pertinent provisions of the law require that central administrations be involved and transfer for treatment is delayed. We sympathize with the position of those officials who take it upon themselves to conduct transfers before arrangements are fully satisfied purely out of humanitarian motives. Yet, we believe these officials should not be expected to do so.

**The Committee recommends that statutes providing the authority for transfers from correctional institutions to psychiatric facilities be amended, where indicated, so as to allow transfers to take place immediately upon the basis of local negotiation.**

Where the transfer is one from a provincial correctional institution to a provincial mental hospital, only one level of government is concerned. On the other hand, where the inmate to be transferred is in a peniten-

tiary, two levels of government are involved. In most areas of the country, a suitable degree of cooperation between the federal authorities and the particular provincial authorities is maintained. There are instances, however, where provincial authorities flatly refuse to accept for treatment mentally disordered inmates from the penitentiary. The theory of the officials who do not wish to accept these inmates for treatment is based upon the proposition that the penitentiaries should provide their own psychiatric services. Our Committee finds this situation appalling and is of the opinion that there is no room for intergovernmental dispute in a matter of this kind. We believe it is the duty of all of those involved to ensure the well-being of every individual by placing him in that setting which is most appropriate to his needs. It is more important that all available services be employed to their fullest extent than individuals to suffer merely because one governmental agency insists that the responsibility lies with another governmental agency.

Looking across Canada at psychiatric facilities for those who have in some way been involved with the criminal law, the Canadian Committee on Corrections recognizes a need for the federal government to provide additional resources. Installations such as the Penetanguishene Psychiatric Hospital in Ontario and L'Institut Philippe Pinel in Quebec serve a valuable purpose. Not all provinces, however, are endowed with the fortune of being able to maintain facilities of such a nature.

To bridge an obvious gap, our Committee recognizes as desirable the planned establishment of special medical centres in penitentiaries. Such centres could not only serve the needs of penitentiaries, but they could be placed at the disposal of those provinces which have neither the resources nor the number of inmates to justify an adequate programme. Penitentiary medical centres could certainly be employed for housing provincial prisoners from reform or correctional facilities. Moreover, some consideration could be given to the possibility of placing additional categories of persons therein. For example, it might be indicated that persons acquitted on account of insanity would be appropriate candidates for penitentiary medical centre care.

The Committee is aware of the understandable concern that there is, in some cases, a risk of an extremely dangerous offender being released at the expiry of his sentence. Legislation in all provinces protects, to some extent, the public from the risk involved in the release of an offender who is mentally disordered and dangerous. Prior to such a release, the custodial authorities may arrange psychiatric examination and invoke the application of civil "commitment" proceedings, thereby ensuring the continuing protection of the public.

This protection is, however, limited by psychiatric interpretation of the limits of "mental disorder". A dangerous "psychopath" or "sociopath" may well not fit into the psychiatric definition of a mentally disordered person.

We have looked at the difficulties presented by the "psychopath" or "sociopath". It is clear that we are not coping with him effectively. This is not a problem peculiar to Canada, but it is a universal one. Special facili-

ties are needed for him, coupled with the opportunity for research. We believe that the penitentiary medical centres for some and special correctional units for others could serve in this way. In the absence of acceptable data, the Committee makes no recommendation with respect to this class of offender.



# 13

## THE DANGEROUS OFFENDER

It appears to the Committee that the protection of the public from unlawful violence, or from unlawful conduct which represents a serious threat to the physical safety of citizens, is one of the most urgent problems of the criminal law.

The President's Commission on Law Enforcement and Administration of Justice stated:

Obviously the most serious crimes are the ones that consist of or employ physical aggression; wilful homicide, rape, robbery and serious assault. The injuries such crimes inflict are grievous and irreparable. There is no way to undo the damage done to a child whose father is murdered or to a woman who has been forcibly violated. And though medicine may heal the wounds of a victim of a mugging, and law enforcement may recover his stolen property, they cannot restore to him the feeling of personal security that has been violently wrested from him.<sup>1</sup>

The Committee agrees with the view expressed by Professor J. Ll. J. Edwards, Director of the Centre of Criminology, University of Toronto, that in determining priorities of research, a place of high importance should be given to research directed to the development of improved methods of identifying the dangerous offender.

The Committee also takes the view that improved methods of identifying the dangerous offender would promote a wider acceptance of community-based treatment for non-dangerous offenders with a consequent reduction in the use of imprisonment as a correctional measure.

The Committee has examined the present Canadian habitual offender legislation and dangerous sexual offender legislation with a view to determining their adequacy to protect the public from the dangerous offender, as well as with a view to determining whether they are capable of being

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<sup>1</sup> United States. President's Commission on Law Enforcement and Administration of Justice. *The Challenge of Crime in a Free Society*. Washington: Government Printing Office, 1967, p. 3.

applied and have been applied against persons who are not dangerous in terms of representing a threat to personal safety.

### *Habitual Criminals*

The present legislation with respect to habitual offenders is contained in sections 660, 662, 663, 665, 666 and 667 of the Criminal Code. Section 660 of the Criminal Code provides:

660. (1) Where an accused has been convicted of an indictable offence the court may, upon application, impose a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired, if, [1960-61, c. 43, s. 33(1)]
- (a) the accused is found to be an habitual criminal, and
  - (b) the court is of the opinion that because the accused is an habitual criminal, it is expedient for the protection of the public to sentence him to preventive detention.
- (2) For the purposes of subsection (1), an accused is an habitual criminal if
- (a) he has previously, since attaining the age of eighteen years, on at least three separate and independent occasions been convicted of an indictable offence for which he was liable to imprisonment for five years or more and is leading persistently a criminal life, or
  - (b) he has been previously sentenced to preventive detention.
- (3) At the hearing of an application under subsection (1), the accused is entitled to be present. 1960-61, c. 43, s. 33(2).

Section 662 of the Criminal Code provides:

662. (1) The following provisions apply with respect to applications under this Part, namely,
- (a) an application under subsection (1) of section 660 shall not be heard unless
    - (i) the Attorney General of the province in which the accused is to be tried consents,
    - (ii) seven clear days' notice has been given to the accused by the prosecutor, either before or after conviction or sentence but within three months after the passing of sentence and before the sentence has expired, specifying the previous convictions and the other circumstances, if any, upon which it is intended to found the application, and
    - (iii) a copy of the notice has been filed with the clerk of the court or the magistrate, as the case may be; and
  - (b) an application under subsection (1) of section 661 shall not be heard unless seven clear days' notice thereof has been given to the accused by the prosecutor either before or after

conviction or sentence but within three months after the passing of sentence and before the sentence has expired, and a copy of the notice has been filed with the clerk of the court or with the magistrate, where the magistrate is acting under Part XVI.

- (2) An application under this Part shall be heard and determined by the court without a jury. 1960-61, c. 43, s. 35(1).
- (3) For the purposes of section 660, where the accused admits the allegations contained in the notice referred to in paragraph (a) of subsection (1), no proof of those allegations is required. 1959, c. 41, s. 30.
- (4) Where an application under subsection (1) of section 660 or subsection (1) of section 661 has not been heard before the accused is sentenced for the offence for which he has been convicted, the application shall not be heard by the judge or magistrate who sentenced the accused but may be heard by any other judge or magistrate who might have held or sat in the same court.
- (5) The production of a document purporting to contain any nomination or consent that may be made or given by the Attorney General under this Part and to be signed by the Attorney General is prima facie evidence of such nomination or consent. 1960-61, c. 43, s. 35(2).

Sub-section 2 of section 665 of the Code provides:

665. (2) An accused who is sentenced to preventive detention may be confined in a penitentiary or part of a penitentiary set apart for that purpose and shall be subject to such disciplinary and reformatory treatment as may be prescribed by law.

Section 666 of the Criminal Code reads:

666. Where a person is in custody under a sentence of preventive detention, the Minister of Justice shall, at least once in every year, review the condition, history and circumstances of that person for the purpose of determining whether he should be permitted to be at large on licence, and if so, on what conditions. 1960-61, c. 43, s. 39.

Section 24 (5) of The Parole Act, however, provides that the powers, functions and duties of the Minister of Justice are transferred to the National Parole Board, established by the Act.

Section 667 of the Code makes provision for an appeal by a person sentenced to preventive detention either as an habitual offender or as a dangerous sexual offender.

Habitual offender legislation was enacted in Canada in 1947. The legislation was derived from the English statute, *The Prevention of Crime Act*, 1908, and was enacted in Canada at a time when its defects were already being recognized in England. As Mr. Arthur Maloney has observed, when this legislation was first introduced into Parliament, "the then Minister of Justice,

Mr. Ilsley was far from being positive about it.”<sup>2</sup> Section 37 of *The Criminal Justice Act* of 1967, has since abolished preventive detention in England. Under the present Canadian habitual offender legislation, a person found to be an habitual criminal may be sentenced to preventive detention for an indeterminate period, which may be for life, subject to a yearly review.

In England, The Criminal Justice Act, 1948 (prior to the abolition of the provision for preventive detention in 1967) provided for a sentence of preventive detention of not less than five years and not more than fourteen years.

The basic concept of preventive detention was that it was not imposed as punishment, but to remove an incorrigible offender from society for a long time.

It is of the essence of the system that the offender is not being punished for the last offence of which he was convicted but is confined for the protection of society, and for a period which will, in all probability, far exceed any period for which he would have been imprisoned as a punishment.<sup>3</sup>

In Canada, persons sentenced as habitual offenders to preventive detention are neither kept in a special institution nor in a special part of existing penitentiaries. Incarceration may be limited only by the natural life of the person so sentenced. The recommendation contained in the Archambault Report that habitual offenders be confined in separate facilities has not been implemented.

The Committee is of the view that indeterminate detention which may be for life can only be justified in the case of *dangerous* offenders.

#### *Failure of Habitual Offender Legislation in England*

A number of studies of preventive detention in England have indicated that it was most frequently used in relation to the persistent petty offender who is a serious social nuisance, but not dangerous in terms of violence.

A report on a study of persistent offenders by W. H. Hammond and Edna Chayen states:

We found that in some ways the offenders sentenced to preventive detention are less of a danger to society than many given long terms or other sentences of imprisonment; many of the preventive detainee's current and also past offences are quite trivial and these offenders include very little violence among their offences.<sup>4</sup>

The report also states:

There is some danger of preventive detainees being regarded as the dregs of the criminal population for whom there is little hope save to keep them away

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<sup>2</sup> Maloney, Arthur E.M., Q.C. "Proposed Amendments to the Criminal Code". 1 *Crim. Law Q.* 207, p. 209 (1957-58).

<sup>3</sup> Great Britain. *Prisons and Borstals*. London: Her Majesty's Stationary Office, 1960, at p. 45 and quoted in Hammond, W. H. and Edna Chayen. *Persistent Criminals*. London: Her Majesty's Stationary Office, 1960, p. 10.

<sup>4</sup> Hammond, W. H. and Edna Chayen. *Persistent Criminals*. London: Her Majesty's Stationary Office, 1960, p. 10.

from society (as indeed is implicit, to some extent in the nature of the sentence) yet only a small proportion of offenders sentenced to preventive detention had ever been given corrective training, many had never received any other treatment than imprisonment and for two-thirds, probation had never been tried.<sup>5</sup>

Recently, Dr. Leon Radzinowicz has eloquently described the failure of preventive detention in England:<sup>6</sup>

Yet preventive detention has been a conspicuous and notorious failure. The Prevention of Crime Act of 1908 provided an additional sentence of detention for the habitual criminal convicted of an offence punishable by penal servitude. During the debates Lord Gladstone reiterated that it had been devised as a weapon against the dangerous, hardened offender, not against those who were "a nuisance rather than a danger to society". But only three years later Winston Churchill had to hammer home this lesson in a memorandum and letter to the police. The aim was to gain control over the professional, the offender who had given himself up to a life of crime. In the main he would be a man over 30 who had already failed to respond to penal servitude and who had again been convicted of a serious offence. His dangerousness would be confirmed by such factors as the use of violence in conjunction with his other offences, the possession of firearms or other lethal weapons, and the sophistication of his tools or techniques. . . .

Still more serious, it became clear that Churchill's warning had been forgotten, that the sentence was being imposed largely upon the wrong offenders. The majority were merely offenders against property, property often worth less than £100. Only a tenth of them had committed violence against the person, sexual crimes or robbery. Serious criminals such as bank robbers and wage snatchers were more likely to be dealt with by long fixed terms of imprisonment. It was again the nuisances rather than the dangerous, the sort of inadequates described by Dr. West, who were the chief recipients of preventive detention under the 1948 Act.

When these so-called indeterminate sentences of preventive detention and corrective training were introduced, the continent of Europe again looked upon England as the precursor in an enlightened approach to the problem of combining security for the community with humane conditions for the offender. But it has come to nothing. The indeterminate factor in their release has given rise to much sense of unfairness and has shown no compensating advantages in reformation. Until recently the men were not being provided with a regime very different from that of others in central or regional training prisons. They have tended to become less rather than more able to stand on their own feet. The value of the sentence as a general deterrent has appeared to be slight, especially as it has been used in so few cases. And because it has been comparatively little used, and for minor rather than for dangerous criminals, it has failed to fulfil its promise as an additional means of protecting the public.

<sup>5</sup> *Ibid*, p. 187.

<sup>6</sup> Radzinowicz, Leon. "The Dangerous Offender." 41 *The Police J.* 411 (1968).

## *Habitual Offender Laws in the United States*

Myrl E. Alexander, Director, United States Bureau of Prisons, has expressed similar views with respect to the failure of habitual offender statutes in the United States.<sup>7</sup>

The fact is, however, that habitual offender statutes are inherently futile, and they always turn out to be a travesty on our concepts of justice. They usually make no distinction between relatively minor felonies such as forgery and car theft and major felonies such as robbery and murder. They permit no consideration of the circumstances surrounding the commission of the previous offences nor the current offence. They really permit no consideration of the question 'is the defendant much of a menace to society'?

And he concludes:

Instead of passing more mandatory penalty laws and more habitual offender laws, we should repeal those we have now and once and for all reject the philosophy expressed in them.

In an article entitled *Penal Reform and the Model Sentencing Act* by Alfred P. Murrah and Sol Rubin,<sup>8</sup> the authors state:

In its investigation of sentencing, the Council of Judges of the National Council on Crime and Delinquency, the body charged with the responsibility of drafting the *Model Sentencing Act*, began with what it considered to be the most urgent consideration of the penal law: the assurance of public safety.

Attention was first focused on the proper disposition of the dangerous offender, for it is in this area that existing sentencing laws are most glaringly ineffective. The so called Baumes Laws, which provide increased penalties for second, third, and fourth offenders (including, in some cases, life terms for the latter two classes), too often do not have their major impact on the dangerous offender. Many of the defendants sentenced under laws of this type are the 'small fry' of the underworld; frequently they are only property offenders.

### *Application of the Present Habitual Offender Legislation in Canada*

From the introduction of habitual offender legislation in Canada up to August 30, 1968, 159 persons were found to be habitual criminals. Four of the 159 were not sentenced to preventive detention. In 18 cases, the finding that the offender was an habitual criminal or the sentence of preventive detention passed upon the offender, was set aside on appeal.

Prior to the amendment to the Criminal Code in 1960-61, section 660 of the Criminal Code permitted the passing of a sentence of preventive detention upon an offender found to be an habitual criminal *in addition* to any sentence imposed for the offence of which he was convicted. The amendment to the Criminal Code in that year eliminated the mandatory determinate sentence.

<sup>7</sup> Alexander, Myrl E. "A Hopeful View of the Sentencing Process". 3 *American Crim. Law Q.* 189, p. 197 (1964).

<sup>8</sup> 65 *Columbia Law Rev.* 1167 (1965).

One person found to be an habitual criminal under the provisions of the Criminal Code prior to 1961, was released on the expiration of his definite sentence. Another person similarly found to be an habitual offender was released on parole, and his parole has expired on the termination of the definite sentence.

Nine detainees have died in custody and six have died while on parole. One detainee has been transferred to a mental hospital. Fifty-one of those found to be habitual criminals were on parole as of August 30, 1968 and 72 detainees were in custody as of that date.<sup>9</sup>

In the view of the Committee, the deterrent effect of the habitual offender legislation is necessarily slight, owing to its infrequent application.

Moreover, we have not been able to discover any consistent or rational basis upon which it has been invoked. Its discriminatory application against a few offenders, from among the large number of recidivists against whom the legislation might be applied, naturally results in bitterness and feelings of injustice among the few offenders against whom it has been invoked.

Specifically, on February 26, 1968, there were 80 persons in Canadian penitentiaries who had been sentenced to preventive detention under the habitual offender provisions of the Criminal Code.<sup>10</sup> The Committee has examined the lifetime criminal records of these 80 persons sentenced to preventive detention as habitual offenders with a view to ascertaining the class of persons to whom the legislation had been applied. We have done this in order to determine whether the legislation had been applied in such a way as to protect the public from the dangerous offender or whether, on the other hand, it has been principally applied to non-dangerous offenders.

The total offences committed by the 80 persons during their lifetime, including offences committed in other jurisdictions but excluding juvenile offences, amounted to 2228 offences. A breakdown of the offences is included in the annex to this chapter. Two thousand and fifty-one convictions were in respect of property offences, narcotic drugs and miscellaneous offences, including vagrancy, trespass, and drunkenness. The most numerous single class of offences was theft and breaking and entering, which comprised 1219 offences. Fraud, and related offences, was the next most numerous class, containing 270 offences ranging from conspiracy to defraud to obtaining food by false pretences.

Of the total of 2228 offences, 177 were offences against the person, ranging from assaults and affrays to armed robbery. Robbery has the dual character of being both an offence against the person and against property. There were 79 convictions for robbery. There were 77 convictions for assault—virtually all of which would appear not to be of a serious nature as appears from the penalties imposed. Five convictions were for wounding, nine were

<sup>9</sup> Statistics supplied by National Parole Board.

<sup>10</sup> The sentences of preventive detention passed upon two of 80 persons have since been quashed on appeal; one of the detainees has died, and an examination of the finger-print serial record of one of the 80 persons shows that he was released on parole shortly before February 26th, 1968. The records of these four persons have, however, been included for statistical purposes.

for indecent assault, three were for rape, one was for attempted rape, two were for kidnapping and abduction, and one was for manslaughter. There were, accordingly, approximately 13 offences against property or for offences other than against the person, for every offence against the person.

The average age of the 80 detainees when the sentence of preventive detention was passed was 40.4 years. The youngest was 25 and the oldest 63.

The average age at which the first serious offence against the person was committed is 26.2 years.

The average age at which the last serious offence against the person was committed is 32 years.

These figures tend to support the conclusion that a weakness in the application of the legislation is that it appears to be most frequently applied against the offender at a time when his behaviour pattern has assumed a non-violent character.

For the purpose of the following analysis, the Committee has not included within the category of serious offences against the person, common assault, or other assaults (other than indecent assault), where the sentence imposed did not exceed three months.

Indecent assault, unlawful wounding, robbery, and attempted robbery, have however, been characterized as serious offences against the person, irrespective of the nature of the sentence imposed, together with rape, attempted rape, kidnapping and abduction, and manslaughter.

Twenty-three or approximately 27.5 per cent of the 80 persons sentenced to preventive detention as habitual offenders have not been convicted of any offence against the person. An additional eight have no conviction for a serious offence against the person. Consequently, approximately 37.5 per cent of those sentenced to preventive detention have either no convictions for offences against the person or have committed no serious offence against the person.

Twenty-two of the 80 persons have only one conviction for a serious offence against the person. Only three detainees among this group were sentenced to preventive detention as the result of an application for preventive detention made following such convictions.

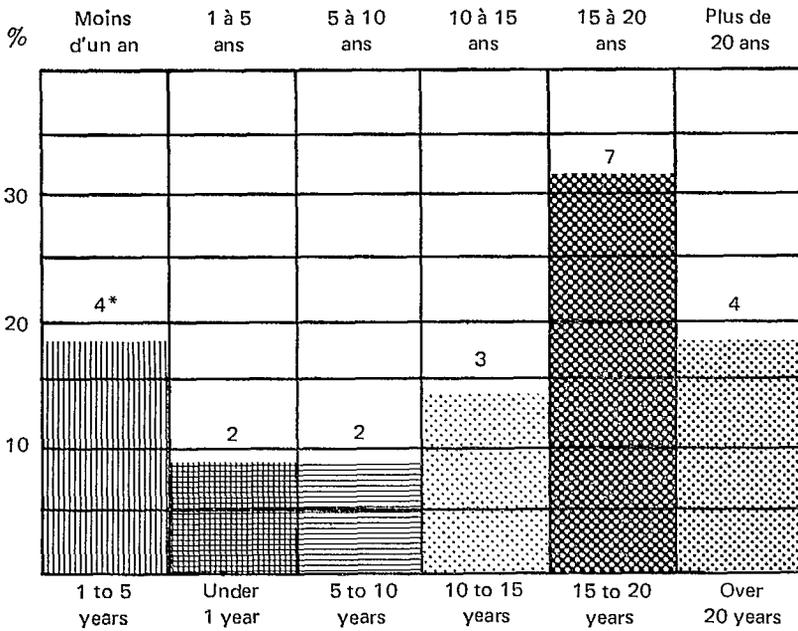
Eleven detainees, or 50 per cent of this group, were sentenced to preventive detention as a result of the commission of an offence other than an offence against the person after an interval of more than ten years had elapsed from the termination of the sentence imposed in respect of the single conviction for the serious offence against the person.

In the case of five detainees out of this group, over 15 years had elapsed. The distribution of the length of the interval between the conviction for the single serious offence against the person, and the sentence of preventive detention as an habitual offender is shown in Figure 4. The distribution of the length of the interval between the single serious offence and the sentence of preventive detention adjusted for the sentence served for such offence is shown in Figure 5.

FIGURE 4 — GRAPHIQUE 4

INTERVAL IN YEARS BETWEEN ONLY SERIOUS OFFENCE AGAINST  
A PERSON AND DETENTION AS HABITUAL OFFENDER

NOMBRE D'ANNÉES COMPRIS DANS L'INTERVALLE ENTRE  
SEULEMENT LE DÉLIT GRAVE CONTRE LA PERSONNE  
ET LA DÉTENTION COMME REPRIS DE JUSTICE



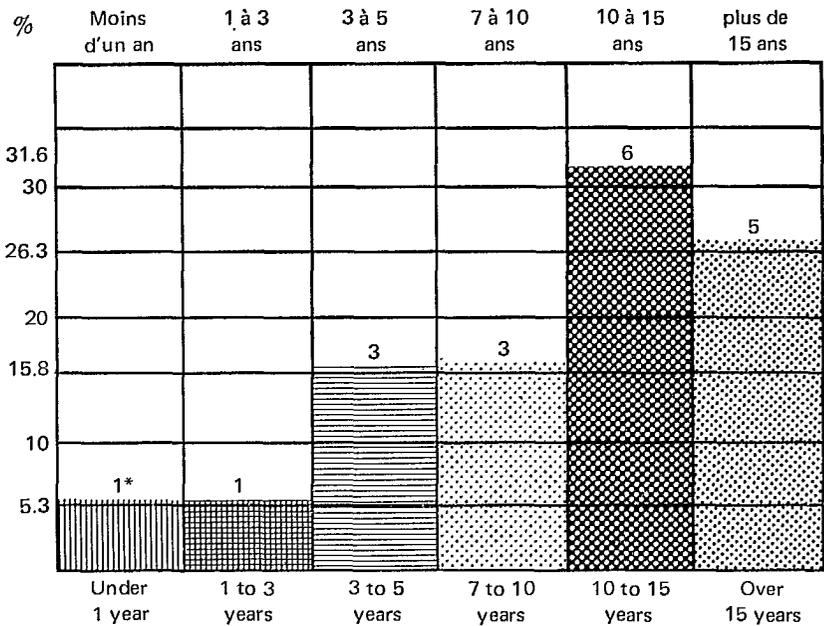
\*Number of individuals involved.

\*Nombre de délinquants en cause

FIGURE 5 — GRAPHIQUE 5

DISTRIBUTION OF LENGTH OF INTERVAL BETWEEN ONLY SERIOUS OFFENCE AND DETENTION AS HABITUAL OFFENDER  
(ADJUSTED FOR SENTENCE SERVED FOR SINGLE SERIOUS OFFENCE)

RÉPARTITION DE LA DURÉE DE L'INTERVALLE ENTRE SEULEMENT LE DÉLIT GRAVE ET LA DÉTENTION COMME REPRIS DE JUSTICE  
(TENANT COMPTE DE LA PEINE IMPOSÉE POUR UN SEUL DÉLIT GRAVE)



\*Number of individuals involved

\*Nombre de délinquants en cause

Twenty-seven of the 80 persons have convictions for two or more serious offences against the person. Two out of this group had convictions for eight such offences.

However, only ten of these 27 persons with convictions for two or more serious offences against the person were sentenced to preventive detention as a result of the commission of a substantive offence against the person. The habitual offender provisions were invoked in the other 17 cases as a result of the commission of offences other than offences against the person.

The following table shows the limited use of the habitual offender legislation in relation to the 49 persons convicted of one or more serious offences against the person, out of the 80 detainees.

Also, the table shows that the habitual offender legislation was invoked following a conviction for a serious offence against the person against only 13 detainees out of 49 detainees with one or more convictions for serious offences against the person.

TABLE 3

Detainees under Habitual Offender Legislation Who Have Been Convicted of One or More Serious Offences against the Person, by Number of such Convictions and whether the Habitual Offender Legislation Was Invoked on the Occasion of One of the Convictions<sup>a</sup>

	Number of Convictions for Serious Offences against the Person					Percent
	1	2	3 or 4	Over 4	Total	
Number of Detainees.....	22	11	9	7	49	
Per Cent of Detainees.....	44.9	22.9	18.4	14.3	100	
Habitual Offender Legislation Invoked on the Occasion of One of these Convictions.....	3	4	2	4	13	26.5
Habitual Offender Legislation not Invoked on the Occasion of One of these Convictions.....	19	7	7	3	36	73.5

<sup>a</sup>In those cases where the habitual offender legislation was not invoked on the occasion of one of these convictions for a serious offence against the person, it was invoked later on the occasion of an offence against property.

The inescapable conclusion is that the habitual offender legislation has been principally invoked in respect of offences against property.

It appears to the Committee that an examination of the criminal records of the 80 persons sentenced to preventive detention as habitual offenders supports the following conclusions:

1. That almost 40 per cent of those sentenced to preventive detention would appear not to have represented a threat to the personal safety of the public.

2. That perhaps a third of the persons confined as habitual offenders would appear to have represented a serious threat to personal safety.
3. That there is a substantial number within the 80 persons with respect to whom there is not enough evidence to warrant a conclusion that they represented a serious threat to personal safety.

The Committee concludes that while the present habitual offender legislation has been applied to protect the public from some dangerous offenders, it has also been applied to a substantial number of persistent offenders who may, perhaps, constitute a grave social nuisance but who do not constitute a serious threat to personal safety.

We also conclude that the present habitual offender legislation has been applied very unevenly across Canada, as the figures given below will demonstrate:

TABLE 4  
Sentences of Preventive Detention on the 80 Persons  
Found to Be Habitual Offenders, by Place

City	Number
Vancouver.....	39
Montreal.....	7
Edmonton.....	6
Winnipeg.....	6
Victoria.....	2
Calgary.....	2
Quebec City.....	2
Halifax.....	2
New Westminster.....	1
Burnaby.....	1
Revelstoke.....	1
Kelowna.....	1
Ft. McLeod.....	1
North Battleford.....	1
Swift Current.....	1
Brandon.....	1
Toronto.....	1
Windsor.....	1
Peterborough.....	1
St. Catharines.....	1
Belleville.....	1
Welland.....	1
Total.....	80

Forty-five of the 80 persons sentenced to preventive detention have been sentenced in British Columbia and 39, or almost one-half, have been sentenced in a single city.

TABLE 5

Sentences of Preventive Detention on the 80 Persons Found to Be Habitual Offenders, by Province

Province	Number
British Columbia.....	45
Alberta.....	9
Saskatchewan.....	2
Manitoba.....	7
Ontario.....	6
Quebec.....	9
Nova Scotia.....	2
Total.....	80

The Committee considers that legislation which is susceptible of such uneven application has no place in a rational system of corrections.

*Dangerous Sexual Offender Legislation*

The Canadian dangerous sexual offender legislation is contained in sections 659, 661 and 662 of the Criminal Code.

A dangerous sexual offender is defined by s. 659 (b) of the Criminal Code as follows:

- (b) "Dangerous sexual offender" means a person who, by his conduct in any sexual matter, has shown a failure to control his sexual impulses, and who is likely to cause injury, pain or other evil to any person, through failure in the future to control his sexual impulses or is likely to commit a further sexual offence. 1960-61, c. 43, s. 32.

Section 661 of the Criminal Code provides:

- 661. (1) Where an accused has been convicted of
  - (a) an offence under
    - (i) section 136,
    - (ii) section 138,
    - (iii) section 141,
    - (iv) section 147,
    - (v) section 148, or
    - (vi) section 149, or
  - (b) an attempt to commit an offence under a provision mentioned in paragraph (a), the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.
- (2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.

- (3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of the Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.
- (4) At the hearing of an application under subsection (1), the accused is entitled to be present. 1960-61, c. 43, s. 34.

Under the provisions of section 661 of the Code, on an application under s. 661 for a determination that the accused is a dangerous sexual offender, the court is required to hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney-General.

It should be noted that where the court determines that the accused is a dangerous sexual offender, the court is required to sentence the offender to preventive detention.

The Committee has been informed by eminent psychiatrists that it is extremely difficult—if not impossible—to determine on the basis of an interview or two, with any reasonable degree of accuracy, whether an offender is a dangerous sexual offender. Frequently the opinion of two psychiatrists formed as a result of one or two interviews, supplemented by the evidence given at trial and an examination of such documentary evidence as may be available, constitutes the principal evidence upon which a finding is made that the accused is a dangerous sexual offender.

The Committee is gravely concerned that the present law permits a determination that a person is a dangerous sexual offender upon such an inadequate basis, with the resulting consequence that an indeterminate sentence must be imposed.

Dr. A. M. Marcus, Assistant Professor, Department of Psychiatry, University of British Columbia, in a paper entitled *A Multi-Disciplinary Two Part Study of Those Individuals Designated Dangerous Sexual Offenders Held in Federal Custody in British Columbia, Canada*,<sup>11</sup> presented at the 5th International Criminological Congress, held at Montreal, states:

The group were concerned regarding the testimony of the appointed psychiatrists by the Department of the Attorney-General. Undoubtedly the intention of the Act is to have independent expert opinion as a friend of the court. Psychiatric opinion given at the application is descriptive and concise. It is, however, observed by the group that in British Columbia, two or three men alone continually accept the responsibility for the courts when appearing as the psychiatric expert at the application.

It was noted that there is need for considerable care on the part of those concerned with the various phases of the application. In one case for application (Mr. B.) there was no probation officer to gather the facts of the

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<sup>11</sup> 8 *Can. Journal of Corrections* 90 p. 95 (1966).

man's family background, he spoke only French and lacked a great deal of awareness regarding the proceedings. He pleaded guilty and was designated a sexual offender, although this was his first offence. Other variables that must be mentioned include the energy of the police department requesting the application and the particular Judge at the hearing.

If the application succeeds, a man receives a sentence to life imprisonment. A far more intensive investigation should be undertaken of persons for whom such an application is to be made.

It is suggested that an individual be examined following the application in a specially designated diagnostic or reception unit, with appropriate security measures, for a period of thirty to sixty days by a team of specialists, independent of the courts, functioning as a part of the Forensic Psychiatric Divisions of a University Medical School for example. It was felt that thorough investigation into all aspects of the man's personality and social background be undertaken prior to the hearing, so that detailed findings regarding an individual are available to the court.

A report to the Committee by Dr. George Scott, the consulting psychiatrist at Kingston Penitentiary, indicates that of the 20 persons presently confined in Kingston Penitentiary who have been sentenced as dangerous sexual offenders, nine (45 per cent) are not dangerous in terms of physical violence. Of the remaining 11 (55 per cent) considered dangerous, five or almost half are mentally ill and certifiable as such.

It also appears from the study conducted by Dr. Marcus that a significant number of persons found to be dangerous sexual offenders in British Columbia exhibited sufficient evidence of mental illness as to require long term treatment in an appropriate psychiatric setting.

Dr. Marcus states:

In terms of the standard psychiatric nosology the psychiatric diagnosis of each man examined is as outlined, yet a number of the men examined showed areas of reality distortion (Mr. G., Mr. K., and Mr. W.), impulsivity (Mr. G., Mr. K., Mr. L., and Mr. W.), poor judgment (Mr. G., Mr. L., and Mr. W.) and inappropriateness of affect (Mr. B., Mr. G., Mr. K., Mr. L., and Mr. M.) indicating severe psychiatric disturbance best described as borderline states requiring long term treatment in an appropriate psychiatric setting.<sup>12</sup>

The recent judgment of the Supreme Court of Canada in *Klippert v The Queen*<sup>13</sup> indicates that the present dangerous offender legislation is not restricted to those who are dangerous.

The Committee was informed that as of February 26, 1968, there were 57 persons in Canadian penitentiaries sentenced to preventive detention as dangerous sexual offenders. The Committee has listed the places where the 57 persons were found to be dangerous sexual offenders. The present danger-

<sup>12</sup> *Ibid.*, p. 98.

<sup>13</sup>[1968] 2 c.c.c. 129.

ous sexual offender legislation appears to have been more uniformly enforced across Canada than the present habitual offender legislation, although it is obvious that substantial disparity exists with respect to its enforcement in different parts of Canada.

TABLE 6  
Place where Accused Were Found to Be Dangerous Sexual Offenders

City	No.	City	No.	City	No.
Vancouver.....	8	Calgary.....	1	Cloverdale.....	1
Ottawa.....	4	Windsor.....	1	Sarnia.....	1
New Westminster.....	4	Inuvik.....	1	Cobourg.....	1
Burnaby.....	3	Owen Sound.....	1	London.....	1
Hamilton.....	3	Fort Erie.....	1	Peterborough.....	1
Regina.....	2	Winnipeg.....	1	Welland.....	1
Quebec City.....	2	Moose Jaw.....	1	Vernon.....	1
Montreal.....	2	Richmond.....	1	Nelson.....	1
Edmonton.....	2	Charlottetown.....	1	Drumheller.....	1
Toronto.....	2	Amherst.....	1	Sault Ste. Marie.....	1
Yellowknife.....	2	St. Catharines.....	1	South Porcupine.....	1
				Williams Lake.....	1
				Total.....	57

TABLE 7  
Province where Accused Were Found to Be Dangerous Sexual Offenders

Province	Number
Ontario.....	20
British Columbia.....	20
Quebec.....	4
Alberta.....	4
Saskatchewan.....	3
North West Territories.....	3
Nova Scotia.....	1
Prince Edward Island.....	1
Manitoba.....	1
Total.....	57

The Committee considers that dangerous sexual offenders constitute only one type of dangerous offender and that it would be preferable to enact legislation which would encompass all dangerous offenders.

Dr. Manfred Guttmacher, an outstanding authority in this field, has said:

Thus I find it far sounder psychiatrically to include the really serious sex offenders among the general group of dangerous offenders than to isolate them in a separate category. This is justified from a practical point of view, for the disposition and treatment of the dangerous sex offender need not differ radically from that of the more general group.<sup>14</sup>

This is the view which is reflected in the *Model Sentencing Act*<sup>15</sup>, previously referred to.

Another approach employed to detect and confine dangerous offenders—one which has been as ineffective as the Baumes Laws—is the enactment of sexual psychopath laws. These laws have not been uniformly enforced, and the inequities in their application are a reflection more of varying judicial attitudes than of any distinctions in the 'danger potential' of different offenders. Many sex offenders are, in fact, harmless individuals who would profit more from treatment under out-patient supervision than from enforced confinement in an institution—especially a penal institution. Furthermore, in view of the scarcity of diagnostic resources in nearly all State correctional services, it would be more sensible to expend such efforts for the purpose of detecting all types of dangerous offenders, whether their crimes involve sex offences or not, rather than use them, as is now being done, almost entirely for sex offences.<sup>16</sup>

#### *Conclusions and Recommendations of the Committee*

**The Committee recommends that the present habitual offender legislation and dangerous sexual offender legislation be repealed and replaced by dangerous offender legislation.**

In recommending the repeal of the existing habitual offender legislation, the Committee has been influenced by the following considerations:

- (a) The present legislation is broad enough to bring within its reach persistent petty offenders, many of whom are essentially inadequate, non-dangerous people.
- (b) The present legislation has in fact been applied, in a substantial percentage of cases where it has been invoked, to persistent offenders, who while constituting a serious social nuisance, are not dangerous. The Committee considers that such persistent offenders can be appropriately dealt with by substantial sentences, when warranted, under the appropriate provisions of the Code.
- (c) The present habitual offender legislation is so framed that many seriously dangerous offenders are beyond its reach because of the

<sup>14</sup> Guttmacher, Manfred S., M.D. "Dangerous Offenders". 9 *Crime and Delinquency* 381 (1963).

<sup>15</sup> Prepared by the Advisory Council of Judges of The National Council on *Crime and Delinquency*.

<sup>16</sup> Murrah, Alfred and Sol Rubin. "Penal Reform and the Model Sentencing Act". 65 *Columbia Law Review* 1167 p. 1171 (1965).

requirement of three previous convictions for an indictable offence for which the offender could have been sentenced to imprisonment for five years or more. The present legislation does not protect society against the offenders from whom society requires maximum protection.

In recommending the repeal of the present provisions of the Criminal Code relating to dangerous sexual offenders, the Committee has been influenced by the following considerations:

- (a) It is capable of being applied against, and has in fact been applied against, sexual offenders who are not dangerous.
- (b) The present basis upon which a person may be found to be a dangerous sexual offender is inadequate.
- (c) The dangerous sexual offender is only one class of dangerous offender and the present legislation obscures this fact.

#### *Proposed Dangerous Offender Legislation*

The Committee is of the opinion that dangerous offender legislation should not only define with as much precision as possible the criteria of dangerousness, but that such legislation should provide an appropriate clinical procedure for identifying a particular offender as dangerous.

The definition must be wide enough to encompass, for example, the emotionally disturbed person who has a compulsion to set fire to dwelling houses, the kidnapper, the person who is likely to sexually molest children by acts which, while not causing serious physical injury, may cause serious psychological damage. At the same time, it must be sufficiently restrictive to exclude persons who are likely to commit crimes which do not seriously endanger the person. Such a definition must also exclude the situational offender who does not represent a continuing danger.

The Committee proposes the following definition:

Dangerous offender means an offender who has been convicted of an offence specified in this Part [of the Criminal Code] who by reason of character disorder, emotional disorder, mental disorder or defect constitutes a continuing danger and who is likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others.

Since a *conviction* for one of the enumerated offences is a condition precedent to the application of the proposed legislation, it follows that those persons who suffer from a mental disorder or defect of such a nature as to exempt from criminal responsibility and who would, accordingly, be found not guilty by reason of insanity, do not fall within the proposed legislation. Such persons would continue to be dealt with under the existing provisions of the Code relating to persons found not guilty by reason of insanity.

The Committee considers that the proposed legislation should give effect to the following principles:

- (a) That legislation be enacted to empower the court where an offender has been convicted of any one of certain specified offences, and where from the circumstances under which the offence was committed, the evidence, if any, as to character disorder, emotional disorder, mental disorder or defect, and the criminal record of the offender the court is of the opinion that the offender may be a dangerous offender, to remand the offender in custody to a diagnostic institution for a period not exceeding six months for diagnosis and assessment before imposing sentence.
- (b) If the offender is diagnosed as a dangerous offender, the offender shall be given suitable notice that it is alleged that he is a dangerous offender, whereupon the issue as to whether the offender is a dangerous offender shall be determined by the court.
- (c) A person who is alleged to be a dangerous offender shall have the right to make full answer and defence to the allegation that he is a dangerous offender, and shall be provided with counsel if he lacks the means to employ counsel himself.
- (d) Where the diagnostic facility does not diagnose or assess the offender as a dangerous offender, or where there is a diagnosis of dangerousness but the court does not find the offender to be a dangerous offender, the court shall deal with the accused as an ordinary offender having due regard to all the relevant circumstances.
- (e) If the court finds that the offender is a dangerous offender, the court shall sentence the accused in accordance with the provisions of the Act relating to dangerous offenders.
- (f) The legislation should provide for a right of appeal on any ground of law or fact, or mixed law and fact, by a person found to be a dangerous offender.

A tentative list of offences, or offences when accompanied by certain circumstances, a conviction for which would enable the dangerous offender provisions to be invoked, is set out below:

- (a) Manslaughter (punishable by life imprisonment) when caused by deliberate violence.
- (b) Attempted murder (punishable by life imprisonment).<sup>17</sup>
- (c) Causing bodily harm with intent or shooting with intent under section 216 of the Code (punishable by fourteen years imprisonment).
- (d) Robbery (punishable by life imprisonment).
- (e) Arson committed under such circumstances as to endanger human life (punishable by fourteen years imprisonment).

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<sup>17</sup>The offence of murder is discussed later in this chapter.

- (f) Doing anything with intent to cause an explosion with an intent to cause death or serious bodily injury or which is likely to endanger life (punishable by life imprisonment).
- (g) Kidnapping or forcible confinement under s. 233 (1) of the Criminal Code (punishable by life imprisonment).
- (h) Rape (punishable by imprisonment for life).
- (i) Attempted Rape (punishable by imprisonment for ten years).
- (j) Carnal knowledge of a girl under the age of fourteen (punishable by life imprisonment).
- (k) Indecent assault on a female (punishable by five years imprisonment).
- (l) Buggery (punishable by fourteen years imprisonment) when committed against a person under a stated age.
- (m) Indecent assault on a male person (punishable by ten years imprisonment) when committed against a person under a stated age.
- (n) Gross indecency (punishable by five years imprisonment) when committed with or against a person under a stated age.
- (o) Breaking and entering a dwelling house (punishable by life imprisonment) when accompanied by violence against any person therein.

The above is not intended to be a complete list of offences, but is sufficient to indicate the thinking of the Committee.

It will be noted that, with few exceptions, the maximum sentences which may be imposed under the present provisions of the Criminal Code upon a person convicted of any of the enumerated offences are lengthy and range up to life imprisonment. The question naturally arises as to the necessity for specific legislation dealing with the dangerous offender.

However, the majority of those who commit the offences which would permit the proposed dangerous offender legislation to be invoked are not dangerous in the sense that they are likely to continue to commit violent crimes. The sentences that are normally imposed are, therefore, well below the maximum limits and rightly so. In some situations probation might even be an appropriate disposition. A small percentage of those convicted of such offences are, however, a source of continuing danger. While this group is small in terms of percentage of total offenders, it is this small group which poses the most serious threat to public safety.

It is the purpose of the proposed dangerous offender legislation to identify this chronically dangerous group so that they may be dealt with in the most effective way, both from the point of view of the protection of the public and from the point of view of their treatment. Moreover, it is considered that although a finding of dangerousness is not made, the assessment will be of great assistance to the court in making an appropriate disposition and to correctional personnel.

The Committee has not included the offence of murder in the list of offences contemplated by the proposed dangerous offender legislation for obvious reasons. Section 656 (3) of the Criminal Code provides:—

656. (3) Notwithstanding any other law or authority, a person in respect of whom a sentence of death has been commuted to imprisonment for life or a term of imprisonment or a person upon whom a sentence of imprisonment for life has been imposed as a minimum punishment, shall not be released during his life or such term, as the case may be, without the prior approval of the Governor in Council. 1960-61, c. 44, s. 15; 1967-68, c. 15, s. 2.

Some persons convicted of murder would undoubtedly constitute a source of continuing danger if at large.

However, in view of the fact that the Criminal Code contains special provisions restricting the release of persons convicted of murder, we do not consider that it is either necessary or appropriate to include this class of offence within the proposed dangerous offender legislation.

#### *The Type of Sentence to Be Imposed upon a Person Found to Be a Dangerous Offender*

If legislation is enacted specifically related to the dangerous offender, one of the questions that will require to be resolved is the nature of the sentence which should be imposed by the court on a finding of dangerousness.

The choices are:

- (i) An indeterminate sentence, or
- (ii) A long definite sentence.

In either case, the sentence should be subject to provisions for release on parole if the offender is suitable for parole and eventual discharge from the sentence if justified.

The objection to an indeterminate sentence has been clearly stated by Professor Mewett:

The present indeterminate sentence by preventive detention means that the habitual criminal is either in prison or on parole for life. Any hope of reform may well be defeated if the prisoner is confronted with the fact that he is never to be a completely free person again. The depressing realization that he will either live and die in prison, or that he will live with the threat of prison, hanging over him if he violates his parole, without necessarily committing any further criminal offence, must militate against genuine reform.<sup>18</sup>

A similar point of view is reflected in *The Model Sentencing Act*.

<sup>18</sup> Mewett, Alan W. "Habitual Criminal Legislation Under the Criminal Code". 39 *Can. Bar Rev.* 42 pp. 55-56 (1961).

The objection to an indeterminate sentence from a correctional standpoint, can, however, be obviated by empowering the court to discharge a person, upon whom an indeterminate sentence has been passed, from such sentence after a certain period of time, in suitable cases.

The advantage of an indeterminate sentence is that a person who has received a very long definite sentence, say 20 years, may in fact be more dangerous at the expiration of his sentence and return to freedom than when he was sentenced. An indeterminate sentence permits the offender's release when, and only when, he is safe. Moreover, the indeterminate sentence has the merit that it emphasizes that the sentence is not imposed as a punishment, but to protect society by segregating the offender until it is safe to release him. The test for release should be whether it is safe to release the offender, rather than he has been suitably punished.

**The Committee, therefore, recommends the passing of an indeterminate sentence upon persons found to be dangerous offenders, subject to the safeguards hereinafter discussed.**

#### *Safeguards: The Right to Review*

Under the legislation proposed by the Committee, a longer sentence may be imposed on persons found to be dangerous than could otherwise be imposed. Consequently, those against whom it is invoked must be protected by adequate safeguards.

It is to be noted that the legislation proposed by the Committee can not be invoked against an offender, unless he has been convicted of one of the serious offences enumerated. Furthermore, such legislation is not automatically invoked by a conviction for one of the enumerated offences.

The effect of the proposed legislation would be to empower the court to remand a person convicted of one of the enumerated offences to a diagnostic facility for an assessment as to continuing dangerousness where the circumstances of the offence, evidence of character disorder, emotional disorder, mental disorder or defect, or the previous criminal record of the offender are indicative of a condition of continuing dangerousness in terms of the physical safety of the public.

The responsibility for adjudging an offender to be a dangerous offender would continue to remain with the court. Such an adjudication could only be made after the issue of dangerousness has been tried upon proper notice to the accused, who would be entitled to make full answer and defence.

The Committee has recommended, in an earlier part of this report, that an accused be provided with counsel in such proceedings as a jurisdictional requirement if he is unable to employ counsel for himself.

**The Committee recommends that the proposed dangerous offender legislation, if enacted, provide in addition to an automatic yearly assessment and review by the Parole Board, that a person sentenced to preventive detention as a dangerous offender be entitled to have a hearing every three years before a superior, county or district court judge or judge of the court of sessions**

**of the peace, for the purpose of determining whether he should be further detained or his sentence should be terminated if he has been released on parole.**

The report and recommendation of the Parole Board should be available to the court.

On such hearing, the offender should have the right to be present, to present evidence, to cross-examine witnesses, and to be represented by counsel, to be provided for him if necessary.

The court on any such hearing should be empowered to:

- (a) Terminate the sentence, when the offender has prior to such hearing for a suitable period been released on parole.
- (b) Remand the applicant to a diagnostic facility for further assessment and make such further order as he deems appropriate.
- (c) Refuse to make any order at that time.

### *Diagnostic, Custodial and Treatment Facilities*

The ten year plan of the Federal Penitentiary Service contemplates a medical-psychiatric centre within each regional complex. The Commissioner of Penitentiaries has informed the Committee that three major centres will be located at Ste. Anne des Plaines, Quebec, Millhaven, Ontario, and in Saskatoon, Saskatchewan. Present plans call for the completion of the centres at Ste. Anne des Plaines and Millhaven by 1972 and completion of the centre in Saskatoon by 1973. Smaller centres are to be established at Mission, British Columbia, and Dorchester, New Brunswick by 1974.

Such medical-psychiatric centres might be used not only for custody and treatment, but for diagnosis and assessment. Mental hospitals, and psychiatric institutes with secure wings such as the Ontario Hospital at Penetanguishene, the Clarke Institute of Psychiatry, and l'Institut Phillippe Pinel might also be used as diagnostic facilities.

The Committee wishes to emphasize that the dangerous offender legislation which we have proposed is predicated upon the existence of necessary custodial and treatment facilities appropriate for this class of offender.

The greatest hope for effective treatment of the dangerous disturbed offender lies in the creation of a distinctive type of correctional institution, one which is therapeutically oriented and employs specialized methods. . . . At present, only the beginnings of such efforts to rehabilitate this type of offender have been made. Intensive experimentation and fundamental research are needed. The dangerous offender group comprises the most difficult treatment cases. Without treatment, the vast majority of them would continue their criminal activity. Salvaging even only 30 to 40 percent would be a triumph and would prevent an incalculable amount of pain and misery to society.<sup>10</sup>

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<sup>10</sup> Guttmacher, Manfred S., M.D. "Dangerous Offenders". 9 *Crime and Delinquency* 381 at p. 390 (1963).

Such facilities are, of course, required and should be available for the treatment of offenders other than those classified as dangerous within the meaning of this chapter.

### *Research*

The Committee is of the view that in the foreseeable future the criminal law will be able to draw upon the resources not only of the behavioural sciences, but on those of other sciences such as biology and chemistry in the development of methods for identifying and treating the dangerous offender.

**The Committee recommends that Government grants be made for research devoted to the development of new and improved methods for identifying and treating the dangerous offender.**

### *The Persistent Non-Dangerous Offender*

Although preventive detention in England for habitual offenders was abolished by s. 37 of The Criminal Justice Act, 1967, the principle that a persistent recidivist should be detained for a longer period than his most recent crime would justify is retained.

The court is empowered by section 37 of The Criminal Justice Act 1967 to pass a sentence of imprisonment in excess of the statutory maximum for the particular offences, provided that the offender satisfied certain conditions.

Given these conditions, the court may pass an extended sentence on the offender if it is satisfied that by reason of his previous conduct and of the likelihood of his committing further offences, that it is expedient to protect the public from him for a substantial time.

Where the offence committed is punishable with a maximum sentence of less than five years imprisonment, the extended term may be up to five years imprisonment; where the maximum sentence for the offence is five years, but less than ten, the extended term may be up to ten years.<sup>20</sup>

The necessity for the provision for an extended sentence has been questioned by Dr. Radzinowicz in a recent lecture on the dangerous offender given at the Police College, Bramshill.<sup>21</sup>

It is the view of the Committee that the maximum penalties under the Criminal Code are such that no special provisions are required to deal with the habitual recidivist; for example, theft is punishable by ten years imprisonment if the value of the thing stolen exceeds \$50. (s. 280).

Everyone who obtains anything by a false pretence, where the value of the thing obtained by the false pretence exceeds \$50, is liable to imprisonment for five years. (s. 304 (2)).

Fraud is punishable by ten years imprisonment. (s. 323).

Possession of stolen property, knowing the same to have been stolen where the value of the thing stolen exceeds \$50 is punishable by ten years imprisonment (s. 297).

<sup>20</sup> Thomas, D. A. "New Issues in Sentencing Policy". [1967] *Crim. Law Rev.* 277.

<sup>21</sup> Radzinowicz, Leon. "The Dangerous Offender". 41 *The Police J.* 411 (1968).

Forgery is punishable by 14 years imprisonment. (s. 310).

Breaking and entering a place other than a dwelling house is punishable by 14 years imprisonment; breaking and entering a dwelling house is punishable by life imprisonment (s. 292); being in possession of burglar's tools is punishable by 14 years imprisonment (s. 295).

Within this group of offenders are a number of sub-groups, one of which is the persistent petty offender.

**The Committee recommends that further research be undertaken to determine the most appropriate way in which to deal with the persistent petty offender.**

#### *Organized Crime: Professional Criminals*

*The Model Sentencing Act*, previously referred to, includes within the category of dangerous offenders not only the defendant who is suffering from "a severe personality disorder indicating a propensity toward criminal activity," but also the defendant "sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as a part of a continuing criminal activity in concert with one or more persons."

It is the view of the Committee that the offender who is suffering from a severe personality disorder which causes him to be dangerous in terms of the physical safety of others, falls into an entirely different category to the professional criminal who is engaged in a continuing course of criminal conduct as a business for profit.

The punitive or deterrent aspect of sentencing is absent in the case of the offender who is dangerous because of a character or personality disorder.

The emphasis is on the protection of the public by segregation and treatment.

On the other hand, there is the case of the person convicted of participating in organized crime, which pre-supposes a rationally motivated crime carried out with a degree of organization and discipline, as distinct from an irrational and impulsive crime related to character disorder. It would appear to the Committee that in this case the deterrent aspects of sentencing become paramount, although the protection of the public is also achieved by the removal of the offender from society by the imposition of long terms of imprisonment. Rehabilitation is, of course, not to be ignored or considered unimportant.

No special statutory provisions are required to deal with the offender who has committed an offence involving organized crime.

For example, a person convicted of being in possession of narcotics for the purpose of trafficking can be sentenced to life imprisonment under existing legislation, and the extortionist to 14 years. Robbery is punishable by life imprisonment.

Procuring or living on the avails of prostitution is punishable by 10 years imprisonment.

Fines may be imposed *in addition* to maximum sentences.

## Annex

All offences committed by the Eighty Detainees under the Habitual Offender  
Legislation in Canadian penitentiaries on February 26, 1968

### OFFENCES—NOT AGAINST THE PERSON

	All Offences including Juvenile Offences	Adult Offences Only
<i>Theft, B. &amp; E., and Related Offences</i>		
Theft.....	542	512
Theft and receiving.....	4	4
Theft from the person.....	2	2
Possession of stolen goods.....	152	151
—receive stolen goods		
—possess property obtained by crime		
—retain stolen goods		
—bring stolen goods into Canada		
Take auto without consent.....	15	15
B. & E. and theft.....	343	341
—theft from dwelling house		
—shopbreaking and theft		
—housebreaking and theft		
Conspiracy to commit B. & E. and theft.....	1	1
B. & E. with intent.....	132	132
—B. & E. and commit		
B. & E.....	31	22
Petty larceny*.....	1	1
Simple Larceny.....	1	1
Grand larceny.....	2	2
Burglary.....	3	3
Burglary 2nd degree.....	1	1
Burglary 3rd degree.....	2	2
Burglary 4th degree.....	1	1
Possess burglar's tools.....	31	31
—possess housebreaking instruments		
—possess safebreaking instruments		
Possess explosives.....	7	7
	1,271	1,229
<i>Fraud and Related Offences</i>		
False pretences.....	101	101
—obtain money or property by f.p.		
Defraud.....	9	9
Conspiracy to defraud.....	2	2
Accommodation fraud.....	7	7
Obtain food by false pretences.....	2	2
Forgery.....	32	32
Conspiracy to forge.....	1	1
Possess materials to commit forgery.....	1	1
Transport forged cheque across state lines.....	1	1
Uttering.....	114	114
	270	270

\*Offences committed in the United States have been included and all offences are listed by the description of the offence in the finger-print serial record.

**Annex—Continued**

**OFFENCES—NOT AGAINST THE PERSON (Continued)**

	All Offences including Juvenile Offences	Adult Offences Only
<i>Vagrancy and Related Offences</i>		
Vagrancy.....	124	124
Steal ride on C.N.R. train.....	1	1
Breach of Railway Act.....	8	8
Trespass.....	5	5
Begging.....	1	1
	<hr/> 139	<hr/> 139
<i>Narcotics</i>		
Illegal possession of narcotics.....	84	84
Conspire to possess narcotics illegally.....	1	1
Traffic in narcotics.....	18	18
—illegal possession of narcotics for purpose of trafficking		
Conspire to traffick.....	4	4
—conspire to possess for the purpose of trafficking		
	<hr/> 107	<hr/> 107
<i>Liquor Offences</i>		
Drunk.....	28	28
Drunk and disorderly.....	7	7
Possession in a place other than his own residence.....	5	5
Sell.....	4	4
Give to minor.....	2	2
Consume under age.....	1	1
Unclassified breach of Liquor Act.....	14	14
	<hr/> 61	<hr/> 61
<i>Escapes</i>		
Escape lawful custody.....	41	40
Unlawfully at large.....	4	4
Attempt to break prison.....	3	3
Break prison with force.....	4	4
Conspiracy to escape.....	1	1
Aid and abet Juvenile to escape custody.....	1	1
	<hr/> 54	<hr/> 53
<i>Driving Offences</i>		
No operator's licence.....	6	6
Failure to carry licence.....	2	2
Driving while suspended or disqualified.....	3	3
Drive without licence plates.....	1	1
Litter highway.....	1	1
Careless driving—city bylaw.....	1	1
Drive to the common danger.....	1	1
Careless driving.....	2	2
Speeding.....	2	2

**Annex—Continued**

**OFFENCES—NOT AGAINST THE PERSON (Continued)**

	All Offences including Juvenile Offences	Adult Offences Only
<i>Driving Offences (Concluded)</i>		
Impaired driving.....	3	3
Drunk driving.....	1	1
Reckless driving.....	1	1
Dangerous driving.....	1	1
Failure to remain.....	4	4
Unclassified breaches of highway legislation.....	7	7
	<hr/> 36	<hr/> 36
<i>Bail-Jumping</i>		
Jump bail.....	8	8
	<hr/> 8	<hr/> 8
<i>Weapons</i>		
Firearm without permit.....	13	13
Carry revolver illegally.....	1	1
Firearm in motor vehicle without permit.....	1	1
Concealed weapon.....	3	3
Weapon for purpose dangerous to public peace.....	15	15
	<hr/> 33	<hr/> 33
<i>Disturbance</i>		
Cause disturbance.....	19	19
	<hr/> 19	<hr/> 19
<i>Damage</i>		
Damage to property.....	17	17
B. & E. and damage.....	2	2
	<hr/> 19	<hr/> 19
<i>Immigration Offences</i>		
Breach of U.S. Immigration laws—deported.....	13	13
—(includes those deported for other offences)		
	<hr/> 13	<hr/> 13
<i>Offences of a Regulatory Nature</i>		
Breach of National Selective Service Act.....	1	1
Breach city bylaw—unclassified.....	2	2
Standard Hotel Guest Register Act.....	1	1
Fail to produce registration card.....	1	1
False statement in registration of birth.....	1	1
Possess gasoline coupons.....	1	1
Defence of Canada Regulations s. 39.....	1	1
	<hr/> 8	<hr/> 8

**Annex—Continued**

**OFFENCES—NOT AGAINST THE PERSON (Continued)**

	All Offences including Juvenile Offences	Adult Offences Only
<i>Conspiracies, Counselling, etc.</i>		
Unclassified conspiracies.....	10	10
Counsel other person to commit offence.....	1	1
Accessory after the fact.....	1	1
	<hr/> 12	<hr/> 12
<i>Counterfeiting and Revenue Offences</i>		
Excise Act.....	2	2
Customs Act.....	1	1
Possession of Revenue Papers.....	1	1
Possess goods unlawfully imported.....	1	1
Possess counterfeit moulds.....	1	1
Make counterfeit coins.....	1	1
Possess counterfeit.....	1	1
	<hr/> 8	<hr/> 8
<i>Interference with Police</i>		
Obstruct peace officer.....	6	6
Resist arrest.....	1	1
Impersonate peace officer.....	1	1
	<hr/> 8	<hr/> 8
<i>Offences Against the Administration of Justice</i>		
Contempt of court.....	2	2
Mischief.....	2	2
Perjury.....	2	2
	<hr/> 6	<hr/> 6
<i>Miscellaneous</i>		
Bookmaking.....	1	1
Being in disguise with intent.....	1	1
Being in disguise at night.....	1	1
Unlawfully wear army uniform.....	1	1
"Breach of Nat. Stolen Property" (U.S.A.).....	1	1
Arson.....	1	1
Keep bawdy house.....	1	1
Keep disorderly house.....	1	1
Canada Shipping Act.....	1	1
Bigamy.....	1	1
Gross indecency.....	1	1
Extortion.....	1	1
Threatening.....	1	1
Bribery.....	1	1
Attempted suicide.....	1	1
Negligently cause fire.....	1	1
Loiter by night.....	1	1
Attempt to procure woman to become a prostitute.....	1	1

**Annex—Continued**

**OFFENCES—NOT AGAINST THE PERSON (Concluded)**

	All Offences including Juvenile Offences	Adult Offences Only
<i>Miscellaneous (Concluded)</i>		
Breach Juvenile Delinquent Act.....	1	1
Contribute to juvenile delinquency.....	1	1
“Prison breach”.....	1	1
“Incorrigible”.....	1	1
	<hr/>	<hr/>
	22	22
GRAND TOTAL.....	2,094	2,051
	<hr/> <hr/>	<hr/> <hr/>

**OFFENCES AGAINST THE PERSON**

*Assault and Related Offences*

Affray.....	3	3
Assault.....	28	28
Assault police officer.....	14	14
Assault bodily harm.....	27	27
Assault and beat.....	1	1
Cause grievous bodily harm.....	2	2
Point firearm.....	1	1
Break prison with violence.....	1	1
	<hr/>	<hr/>
	77	77

*Robberies*

Robbery.....	14	14
Armed robbery.....	34	34
Conspiracy to commit armed robbery.....	1	1
Robbery with violence.....	18	18
Attempted robbery with violence.....	1	1
Robbery from person.....	1	1
Robbery by assault with intent to steal.....	1	1
Assault with intent to rob.....	4	4
Theft with intent to violently steal.....	3	3
Assault with intent to violently steal.....	1	1
Armed assault with intent to rob.....	1	1
	<hr/>	<hr/>
	79	79

*Wounding*

Wounding with intent.....	1	1
Assault and wounding.....	1	1
Cause bodily harm with intent to wound.....	1	1
Discharge firearm with intent to wound.....	2	2
	<hr/>	<hr/>
	5	5

**Annex—Concluded**

OFFENCES AGAINST THE PERSON (Concluded)

	All Offences including Juvenile Offences	Adult Offences Only
<i>Indecent Assault</i>		
Indecent assault female.....	7	7
Indecent assault.....	3	2
	<hr/> 10	<hr/> 9
<i>Rape</i>		
Rape.....	3	3
Attempted rape.....	1	1
	<hr/> 4	<hr/> 4
<i>Kidnapping</i>		
Kidnap.....	1	1
Abduction.....	1	1
	<hr/> 2	<hr/> 2
<i>Homicide</i>		
Manslaughter.....	1	1
	<hr/> 1	<hr/> 1
GRAND TOTAL.....	178	177
	<hr/> <hr/> 2,272	<hr/> <hr/> 2,228



# 14

## PURPOSES AND ORGANIZATION OF THE ADULT CORRECTIONAL SERVICES

### *Definition*

In this chapter, the term "adult correctional service" is limited to mean jails, probation, prisons, parole, after-care and such directly-related services as forensic clinics, as they apply to adult offenders.

Those aspects of police work and those court functions, such as sentencing, that directly affect the offender's rehabilitation are excluded. Services for juvenile delinquents and those family court cases that are dealt with by separate staff after conviction are also excluded because they are beyond the scope of our terms of reference. This arbitrarily limits the scope of some of the recommendations in this chapter.

Consideration of the special needs of the female offender is limited in this chapter because the subject is dealt with in Chapter 22.

There are difficulties in defining "adult" as it is used in the classification of offenders in Canada. Section 2 of the Juvenile Delinquents Act defines a child as "any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection (2)". Subsection (2) provides that the Governor in Council may direct that in any province the expression 'child' "means boy or girl apparently or actually under the age of eighteen years, and any such proclamation may apply either to boys only or to girls only or to both boys and girls". In British Columbia, Manitoba and Quebec the age has been set at 18; in Alberta at 18 for girls but 16 for boys; in Saskatchewan, Ontario, New Brunswick, Prince Edward Island and Nova Scotia at 16. It has been set at 16 in the Yukon and Northwest Territories.

The Juvenile Delinquents Act does not apply in Newfoundland. Provincial legislation sets the age at 17.

Under Section 9 of the Juvenile Delinquents Act, juveniles of 14 or older may be transferred for trial to adult court, under certain circumstances.

In that event, they are subject to the same laws and procedures as adults and, if convicted, become the responsibility of the adult correctional services.

In September 1967, following the report of the Departmental Committee on Juvenile Delinquency, the Government of Canada released a Discussion Draft of new legislation entitled *The Children and Young Persons Act* which would replace the *Juvenile Delinquents Act*. This Discussion Draft contains proposals regarding new age definitions of "juvenile delinquent".

The lack of uniformity in defining "adult" offenders makes it difficult to maintain accurate, comprehensive and comparable statistics. The Dominion Bureau of Statistics uses 16 as the dividing age in some of its statistics. This means that an offender may be included in juvenile statistics in his own province but in adult statistics by the Bureau.

### *The Present Situation: Aims and Purposes*

One of the problems facing the corrections field in Canada today is the conflict as to the aims in dealing with convicted offenders. This is paralleled by a disagreement over the purpose of the criminal law itself.

To a large extent the functioning of the correctional services is determined by the provisions of the law. Who becomes liable to correctional treatment depends largely on the law since the offender is the person who breaks the provisions of the criminal law. If the law contains unwise provisions it can identify as criminals people who are in no sense dangerous or anti-social. This not only runs the risk of starting the individual on a real criminal career but unwise identification of some groups as criminals burdens the correctional services with a task they are not designed to handle. The result is failure with these individuals and the withholding of services from those who require them.

The law also establishes the limits of discretion allowed the correctional services in the development of treatment plans. For instance, the *Penitentiaries Act* sets out the extent of the warden's authority to release an inmate for a temporary period. The Act does not give the warden authority to permit the inmate to attend classes in the community or take employment in a work-release program; that requires a day-parole granted by the National Parole Board. The *Prisons and Reformatories Act* and the appropriate legislation in the provinces sets out what discretion rests with the provincial services.

The sentencing practices of the courts are another vital element affecting the correctional services. If sentences are unrelated to treatment the correctional services are seriously handicapped in rehabilitation, unless they have wide discretion.

There is no plan for corrections in Canada that embraces all the services, nor can there be one until there is agreement with respect to its aim and function, in the Committee's opinion.

The situation is aggravated by geography. Services are spread over such vast distances that extensive communication of ideas is difficult. The isolated

location of so many of Canada's penal institutions, including some of the newest, further insulates the staff from ready access to modern developments and thinking.

Staff shortages, particularly in professional categories, are another handicap faced by the corrections field. Staff development is dealt with in Chapter 24 of this report.

There is also a great deal to learn about most effective ways of dealing with certain kinds of offenders, although practice is still largely behind knowledge. Only greater application of present knowledge and further research will ensure progress. Research is discussed in detail in Chapter 25 of this report.

The corrections field is further fragmented by the division of responsibility<sup>1</sup> between federal and provincial governments and by different administrative patterns in various jurisdictions.

Nor is the field left entirely to government. Canada has a long tradition of citizen participation in welfare services of all kinds. This tradition is manifested in the major correctional services under private auspices, which form an important part of the total picture.

### *The Present Situation: Key Services*

#### *Adult Detention*

Most police departments have local lock-ups for holding prisoners for short periods. Prisoners awaiting trial for longer periods are usually transferred to a jail. Ontario is the only province with a jail system specifically for accused awaiting first appearance in court, committed for trial, or pending the hearing of an appeal when bail has not been granted, and those serving very short sentences. Quebec recently made a beginning with the opening of such an institution in Montreal. In all other provinces those awaiting trial and those serving very short sentences are held in the same institutions as those serving sentences up to two years. The extent of segregation of those awaiting trial varies.

#### *Probation*

All provinces now maintain adult probation services, supplemented in some provinces by private agencies. In seven provinces the Department of the Attorney General or the Department of Justice is responsible for adult probation; in Saskatchewan, Manitoba and Newfoundland, it is the responsibility of the Department of Welfare or Health and Social Services.

#### *Prisons*

In general, the federal government is responsible for adults sentenced to two years or more, the provinces for adults sentenced to less than two years. However, there are exceptions to that rule. If an offender is given consecutive sentences, each under two years but which total more than two years, he is a

<sup>1</sup> In the Yukon and Northwest Territories the federal government exercises the responsibilities, including probation, that apply to the provinces, through the Department of Indian Affairs and Northern Development.

provincial responsibility. Mentally ill prisoners and those suffering from tuberculosis are a provincial responsibility regardless of the length of sentence and "the officer in charge of a penitentiary" may refuse to accept them. Federal penitentiary inmates who become mentally ill may be transferred to the custody of the provincial authorities.<sup>2</sup> Inmates awaiting disposition of appeals from sentences longer than two years remain in provincial institutions. Those arrested for violation of parole from the federal penitentiaries are held in provincial institutions until the National Board decides the matter. Escapees from provincial institutions may be transferred to federal penitentiaries even if their sentences are less than two years. Inmates awaiting execution are a provincial responsibility. Two private institutions for selected women offenders in the Maritimes—at Coverdale, New Brunswick, for Protestants, and at Halifax, Nova Scotia, for Roman Catholics—operate under special provisions permitting them to hold inmates up to four years.

The type and quality of provincial prisons vary considerably. Within some provinces there is a wide diversity of institutions, in others there is relatively little.

The government department responsible for prisons also varies from province to province; in Saskatchewan the Department of Welfare, in Ontario the Department of Correctional Services, and in Manitoba the Department of Health and Social Service; in the other provinces the Department of the Attorney-General or the Minister of Justice. In Nova Scotia male prisoners sentenced to less than two years are held in municipal institutions. Under a recent agreement with the federal government, however, some of them will be held in the new federal institution at Springhill, Nova Scotia.

### *Parole*

The parole of inmates sentenced for offences against the Criminal Code and other federal legislation is a federal matter, whether the inmates are in federal or provincial custody. The five member National Parole Board in Ottawa grants or rejects parole on the basis of written documentation, not personal appearances by inmates.

Parole applications are processed in regional offices of the National Parole Service and submitted to the Board.

Private after-care agencies, provincial probation or rehabilitation services, or National Parole Service personnel supervise inmates paroled by the Board.

Five provinces, British Columbia, New Brunswick, Ontario, Prince Edward Island and Saskatchewan, have provisions for their own parole boards to deal with parole applications from inmates sentenced for offences against provincial legislation. Courts in Ontario and British Columbia are authorized to impose indeterminate sentences for offences against federal or provincial legislation. Under this system the maximum indeterminate sentence may be up to two years less a day, which can be added to a definite sentence of up to two years less a day. Parole boards in the two provinces decide whether inmates serve

<sup>2</sup> R.S. c.53 sections 18 and 19 (Penitentiary Act)

all or part of their indeterminate sentences in the community or in institutions. The National Parole Board deals with the definite portion of a sentence, if it resulted from an offence under federal statutes. Those provinces that have their own parole boards maintain parole services to supervise inmates released by the boards.

#### *After-Care*

In most of Canada services are available to adults who have completed prison terms and who want help in getting established in the community. This may take the form of casework assistance with personal or family problems, assistance in finding employment, or financial help. Living facilities for newly-released prisoners, although still relatively scarce, are increasing.

Most after-care is undertaken by private agencies. However, the Department of Correctional Services in Ontario maintains an after-care service for inmates released from provincial institutions.

#### *Correctional Principles*

The correctional services must be seen as an integral part of the total system of criminal justice and their aims should be consistent with and supportive of the aims of the law enforcement agencies and courts. Obviously, the role is different since the correctional services apply to a different phase of the total process, but the aims of all phases should be complementary.

The aim of the correctional services is twofold:

1. To carry out the sentence of the court.
2. To take whatever course of action, within the scope permitted by the sentence of the court, the discretion allowed by law, and the demands of good professional practice is calculated to return the individual offender permanently to the normal community as a contributing member of society. In the Committee's view, the following guides should apply:

- (a) Unless there are valid reasons to the contrary, the correction of the offender should take place in the community,<sup>3</sup> where the acceptance of a treatment relationship is more natural, where family and social relationship can be maintained, where resources can be most effectively marshalled, and where the offender can productively discharge his responsibilities as a citizen. These responsibilities include supporting himself and family, as well as making reasonable reparation to the victim of his crime.

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<sup>3</sup> See, for instance, Klare, Hugh J. and Haxby, David. *Frontiers of Criminology*. London: Pergamon Press, 1967.

Correction in the community avoids the danger inherent in prolonged exposure to the criminal value system of the prison. The expulsion from society implied by imprisonment is also avoided.

There is a lesser stigma attached to correction in the community and therefore a lesser barrier to reacceptance into the normal community.

Treatment in the community is also much less expensive than in prison, representing a substantial saving of public funds.

- (b) Nevertheless, the Committee fully recognizes that for the purposes of correction, a prison sentence is warranted where the safety and security of the community is seriously threatened by the presence of the offender, where the offender himself needs help to control dangerous impulses, or where sanctions are needed to support the community treatment services such as probation or parole.

The knowledge gained from social and behavioural sciences as well as accumulated correctional experience should be fully utilized in attempting to rehabilitate offenders. This requires a team approach allowing all disciplines to make their most effective contributions. It also requires a grasp of correctional practices in Canada and abroad. Moreover, all correctional programs should be under constant study and review to assess effectiveness and seek improvement. A spirit of adventure and a readiness to try new things should always accompany the findings of research. An organized search for better ways of discharging its responsibilities should be recognized as one of the priorities of every correctional service.

Furthermore, the public has an important role to play in developing treatment services. Public involvement in corrections also increases understanding of crime and those who commit crimes and readies the community for the return of offenders. The final step in rehabilitation is the assimilation of offenders back into the community. Without that step everything that has gone before is lost. The professional cannot substitute for the community, although he has the responsibility of preparing both offender and community for the offender's return.

Perhaps most significantly, the offender himself should be encouraged to participate in the development of a treatment plan. Unless he can learn to take responsibility for his own decisions, he will never be ready to take his place in society. Practice in self-determination should begin immediately with this participation in developing the treatment process itself.

A consideration that is growing in importance is the development of new treatment processes that do not require the patient's consent. In the past, it was a requirement of most treatment processes that the cooperation of the patient was necessary. Exceptions to that rule existed in surgical techniques and in the use of electric shock. However, in recent years several forms of

treatment have been developed that do not require the cooperation of the patient. Among them are narcotherapy, conditioning and behaviour therapy. These techniques may be justified in dealing with some types of offender but where are lines to be drawn and what protections are need for the individual against unwarranted use of these devices? This problem will increase rapidly in the future since most of these therapies are just reaching a stage of development that permits their wide-spread application and experiments in their use are in progress.

### *Federal-Provincial Responsibility*

The major administrative problem underlying all others in the corrections field in Canada is the appropriate division of responsibility between the federal and provincial governments for prisons, parole and after-care. The core of the issue seems to be the division of responsibility for prisons. Presumably, a solution for prisons will apply equally to parole and after-care.

The present situation is that the federal government is responsible for prisoners sentenced to a period of incarceration of two years or more, while the provinces are responsible for those receiving a sentence of less than two years. There are exceptions to that rule and they are set out above.

The British North America Act places responsibility for all services that have a treatment connotation with the provinces. Involved are medical services (including mental health), welfare and education. This may explain what prompted the present division of responsibility between the levels of government. Those prisoners who received a sentence of less than two years were probably regarded as ordinary people who needed a lesson while those who received longer sentences were seen as criminals whom it was necessary to separate from ordinary people. This assumption is supported by the terminology used in the British North America Act where the federal institutions are called "penitentiaries" while the provincial institutions are called "reformatory prisons".

Correctional officials have frequently expressed reasons for doubt about the efficiency of this divided responsibility. The court should have open to it as many choices as possible in determining the sentence given any offender. When the length of sentence restricts the choices available to the court, it raises an artificial barrier to good sentencing. Under the situation prevailing in Canada, the court may think in a particular case that the seriousness of an offence demands a sentence longer than two years, but the personality of the offender suggests that he be grouped with minor offenders at the provincial level. The court faces this dilemma—either to ignore the potential deterrent effect of the longer sentence and give the shorter sentence the personality of the offender suggests, or risk the future of the offender by sending him to penitentiary where his fellow-inmates will include more difficult criminals. Furthermore, the chance of moving a pris-

oner to another institution as he responds to treatment is limited. The foregoing suggests that length of sentence should not be the only basis for classifying prisoners, nor is it the best one.

It may be psychologically harmful to send a young or first offender sentenced to two years or more to an institution where he feels identified with the worst criminals. If all prisoners went to the same prison system the importance of length of sentence in terms of self-image might lessen.

In October 1958 the federal government offered to assume responsibility for a greater proportion of prisoners. The offer was made at a federal-provincial conference held to consider recommendations in the Fauteux Report, formally titled the Report of A Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada. That offer has not been implemented. But the anticipated shift in responsibility has made many provincial governments reluctant to build expensive prisons that might soon come under federal control. This has delayed not only the building of additional institutional facilities but the kind of reassessment of programs that might accompany major building plans.

There appear to be three possible choices in the search for a solution to this problem.

The *first* is to leave the present arrangement unchanged except for minor adjustments. Arguments *in favour* of this choice are these:

- There are practical difficulties accompanying any major shift of federal-provincial responsibility in the light of tradition and such heavy commitments in buildings and personnel. Any suggested major realignment in responsibility might result in another long delay similar to the one following the Fauteux Report.
- There is no uniformity of opinion among correctional officials and others across Canada with whom the Committee has discussed this problem. Such a wide difference of opinion would tend to foster delay before action is taken.
- Despite the objection to it, the present arrangement has strengths as well as weaknesses. On the whole, the provinces are relieved of responsibility for the more difficult inmates and are freer to adapt some concepts of prison treatment, making the institutions community-centred in the real sense of the term.
- No matter where the dividing line is drawn, some division of responsibility is necessary, unless the provinces assume responsibility for all prisoners. Any other dividing line presents as many difficulties as the one now in effect.
- Federal-provincial agreements could provide for regional services to meet the requirements of the smaller provinces and for the sharing of services.

The *second* choice is for the federal government to assume greater responsibility. The specific offer made by the federal government some ten years ago but not implemented was for the federal government to assume responsibility for prisoners who receive a sentence of one year or more. Sentences between six months and a year would be abolished, leaving the provinces with responsibility only for those who receive a sentence of six months or less. Some variation on this is presumably possible but this seems the most likely formula if the federal government is to increase its responsibility in this matter.

There are several arguments *in favour* of this choice:

- The provinces would be relieved of the need for such long-term prison programs as trades training. At present, many such programs are duplicated in federal and provincial prisons.
- The provinces would be freed to concentrate on finding more effective ways of dealing with short-term prisoners, a group who are numerically very large. Among them are some beginning criminals whose careers in crime should be stopped early.
- Placing more responsibility with the federal government would tend to greater uniformity in prison services across the country, in particular lessening the gap between the richer and the poorer provinces.
- A federal system would recognize the mobility of criminals and provide equal treatment for them across the country.
- Regional administration within the federal Penitentiary Service permits the grouping of the smaller provinces into regions for prison services.

*Arguments against:*

- If the Penitentiary Service becomes responsible for those sentenced to one year which, with remission means about eight months actually spent in the institution, the federal institution would have to duplicate short-term services offered by the provinces.
- The suggestion that prison services should be uniform across the country may not be viable when police services, court services, welfare services and health services are not.

The *third* possible choice is to eliminate the federal Penitentiary Service and turn responsibility for all prisoners over to the provinces. There are several arguments that *favour* this possibility:

- Once all prisoners are seen as fit subjects for treatment, the logic of grouping all prisons at the provincial level with the other treatment services become stronger. It may be, too, that prisons need the stimulation towards treatment that comes from these other provincial services. Practical administrative relationships between prisons and these other services might be simpler if all prisons were provincial. Scholastic education and trade training, for instance, must meet pro-

vincial requirements. A provincial institution can call on the appropriate provincial department directly for help. The same kind of consideration arises in relation to provincial mental health services and their usefulness to the prisons.

- Two parallel prison systems within a province sometimes mean that neither is large enough to provide a sufficiently wide range of institutional services. A more viable service might result if all prisoners were a provincial responsibility.
- The need to make prisons community-centred is becoming increasingly recognized. This may be easier to accomplish in a provincial system in which closer relationships with community health and welfare services are implied.
- There are language and cultural differences between the various provinces that must be recognized in prison services as well as in other things. These differences are more readily accommodated in a provincial system.

*Arguments against:*

- There may be a constitutional difficulty in the federal government's completely abdicating responsibility with respect to a matter which has been assigned to it by the British North America Act without a constitutional amendment.
- This possibility of placing responsibility for all prisoners with the provinces would apply best in the case of the larger provinces. The federal government would probably have to assist the smaller provinces by operating regional institutions.

The Fauteux Report contains this recommendation:

The provincial governments should be responsible for the care and treatment in penal institutions of persons sentenced to imprisonment for maximum terms of six months or less, and persons sentenced to imprisonment for periods longer than six months should be confined in penal institutions operated by the federal government.

However, considerable time has elapsed since the Fauteux Committee completed its work and there has been considerable growth in provincial correctional services, including prisons. These developments, along with those in the federal system, have increased the problems associated with a major transfer of responsibility.

These difficulties have impressed the Committee as has the lack of consensus among the many people across the country with whom the Committee has discussed this problem. The Committee has therefore concluded that insufficient reasons exist to recommend any major transfer of responsibility for prisons.

**The Committee recommends that the federal government retain responsibility for prisoners sentenced to incarceration for a period of two years or**

**longer and that the provinces retain responsibility for those receiving a sentence of less than two years; that anomalies that run counter to this provision be removed; and that there be provision for the federal government to contract for prison service from a province and for a province to contract for prison service from the federal government.**

These anomalies that run counter to this recommendation and which the Committee thinks should be removed include individuals who receive a number of consecutive sentences each of which is under two years but which total more than two years, insane prisoners and those suffering from tuberculosis who receive a sentence of two years or more and those who are awaiting an appeal from a sentence of two years or longer.

Parole should be seen as an integral part of the correctional process. Treatment demands continuity and flexibility, including flexibility in determining whether a particular individual should spend all or part of his sentence in the community or in an institution. Treatment also demands a coordination of knowledge about the individual offender. It is inefficient for an inmate to be the responsibility of one government until the question of parole arises and for him then to pass under the control of another level of government.

**The Committee recommends that the federal government retain responsibility for parole as it affects all inmates of federal penitentiaries and that the provinces assume responsibility for parole as it affects all inmates of provincial institutions.**

The Provinces of Ontario and British Columbia have a system of indeterminate sentences which can involve a sentence of up to two years less a day indeterminate added to a sentence of two years less a day definite—a total of four years less two days all of which could be spent in a provincial institution.

This system provides a means of introducing provincial control over parole for at least a portion of those sentenced for offences against federal statutes. If the recommendation set out above, which would place control over parole of all inmates of provincial institutions with the province, is adopted, this alternative device will no longer be required.

Furthermore, these provisions, which make it possible for an inmate to spend almost four years in a provincial institution, are contrary to our recommendation set out above that the province should be responsible only for those inmates sentenced to two years less a day, and that anomalies that run counter to that principle should be abolished.

**The Committee recommends that the system of indeterminate sentences now in effect in Ontario and British Columbia be abolished.**

#### *A Coordinating and Leadership Role*

However, although the Committee recommends a continuing division of responsibility for corrections between the federal and provincial governments, it recognizes the need for basic standards across the country. To promote

high-level standards, the federal government should assume a leadership and stimulation role. Such a role might include:

- Offering an incentive-grants program related to standards.
- Co-ordinating and developing research. What this would involve is set out in Chapter 25 of this report.
- Supporting experimental programs initiated by provincial governments, private agencies or universities.
- Developing staff on a Canada-wide scale, including promotion and financial support of developments within the universities and the operation of a Canadian correctional staff college.
- Offering technical consultation to the provincial and private services on the operation of programs and on research.
- Serving as a national information centre and clearing house on all matters connected with corrections. This would include maintaining contacts with international centres.

**The Committee recommends that the federal government assume a leadership, stimulation and coordinating role in relation to the adult correctional services along the lines set out above.**

#### *Comprehensive Legislation*

The correctional responsibilities carried by the Government of Canada are very wide and are set out in several pieces of legislation. To ensure these responsibilities are carried out in a coordinated way through services based on common principles, it is suggested a Canadian Corrections Act is required.

Consideration might be given to still more comprehensive legislation in the form of a Canadian Criminal Justice Act which would include the provisions now set out in such legislation as the Criminal Code as well as the legislation relating to the correctional services. This would ensure that common principles apply throughout the whole process of criminal justice.

**The Committee recommends that consideration be given to comprehensive legislation to ensure that common principles guide all aspects of the correctional responsibilities carried by the Government of Canada.**

#### *Administrative Organization*

The need for a coordinated service from the admission of the offender to penitentiary to final release from parole or statutory conditional release should also be expressed in the administrative organization of the correctional services that are the responsibility of the Government of Canada. At present, the Canadian Penitentiary Service and the National Parole Service are administratively distinct, although both come within the Department of the Solicitor General.

Many aspects of these two services could be coordinated. Staff training could be carried on jointly. The pre-release hostels being opened by the Penitentiary Service might also serve parolees. Joint plans for citizen participation are indicated.

It is suggested that a Director of Corrections within the Department of the Solicitor General should be appointed to administer both these services.

**The Committee recommends that the Canadian Penitentiary Service and the National Parole Service be drawn together administratively under a Director of Corrections.**



# 15

## PRE-TRIAL, REMAND AND SHORT-TERM DETENTION CENTRES

These services are generally a provincial responsibility and are, in one sense, outside the terms of reference of a committee established by the federal government. However, it is impossible to give adequate coverage to corrections in Canada without including some comments on provincial services. It is hoped that suggestions contained in this chapter and elsewhere in this report will be useful to the provincial authorities.

### *Definitions*

For the purposes of this report, the following definitions apply:

A "lockup" is defined as an institution intended to hold adult prisoners on a temporary basis for a few hours. If a longer period of detention is required, the prisoner is transferred to a jail.

A "jail" (sometimes spelled "gaol") is defined as an institution intended to hold adult prisoners awaiting trial, on remand, or awaiting hearing of an appeal and those sentenced to only a few days' imprisonment, not long enough to warrant transfer to an institution serving sentenced offenders.

Because of the repressive connotation which has become associated with the term "jail", some name such as Remand and Assessment Centres or Detention Centres should be used for the area jails recommended in this chapter, to emphasize their changed function. The term Detention Centres is preferred in this report.

### *Importance of the Jail*

The jail is the traditional facility through which many offenders go into the correctional system and it thus forms an important link between community law enforcement and the correctional services. It is important that the accommodation and program offered should enhance respect for the law

and its enforcement and should prevent further identification with the criminal element, particularly on the part of young and first offenders and those subsequently acquitted and discharged.

### *Situation in Canada*

The jail system varies greatly from province to province. Ontario has a separate jail system, apart from institutions that serve inmates who are sentenced to a period of imprisonment longer than a few days, and Quebec has made a beginning with the opening of such an institution in Montreal. In all other provinces the same institution serves both functions. In some provinces, certain institutions are set aside to serve longer-term prisoners exclusively so that only some institutions serve both functions.

In Nova Scotia the jails are administered by the municipalities, with supervision by the provincial authorities. In all other provinces they are administered by the provincial government. The federal government administers jails only in the Yukon and Northwest Territories.

TABLE 8  
Number of Jails in Canada, by Jurisdiction

Jurisdiction	Number of Jails
Newfoundland.....	1
Prince Edward Island.....	3
Nova Scotia.....	19
New Brunswick.....	13
Quebec.....	32
Ontario.....	46
Manitoba.....	6
Saskatchewan.....	3
Alberta.....	5
British Columbia.....	4
Yukon.....	3
Northwest Territories.....	4
Total.....	139

SOURCE: Canada. Dominion Bureau of Statistics, *Correctional Institution Statistics, 1967*.

Some of these institutions are very small. It must be kept in mind that many of them also hold prisoners sentenced up to two years imprisonment; these sentenced prisoners are included in the following statistics.

TABLE 9

Number of Prisoners Held in Canadian Jails as of March 31, 1967

Number of Prisoners	Number of Jails
None.....	9
1 to 5.....	18
6 to 10.....	20
11 to 15.....	24
16 to 20.....	13
21 to 30.....	17
31 to 40.....	5
41 to 50.....	9
Over 50.....	24
Total.....	139

SOURCE: Canada. Dominion Bureau of Statistics. *Correctional Institution Statistics, 1967.*

During 1966-67 there was a total of 162,438 admissions into these institutions. However, this figure in many cases includes more than one admission for the same person. The number of different individuals involved is not known but it is undoubtedly considerably less than this figure. Nevertheless, it is obvious that a great many people pass through our jails during a year.

If the recommendations made earlier in this report intended to reduce the number of people held in custody while awaiting trial are followed, the population of our jails would decline considerably.

Although the jails vary from province to province, many of them are old buildings that cannot be effectively modernized. Some are crowded, others almost, if not completely, empty. Within these old buildings it is difficult to separate those awaiting trial from those who have been convicted, and desirable segregation on other criteria is almost impossible. There is often no philosophy guiding the operation of the institution, no facilities for diagnosis, no treatment or training program, no employment or recreation. There is no general program of research, despite the large number of citizens whose lives are affected by these institutions. Custodial precautions and custodial costs are usually set to meet the requirements of the most dangerous inmates and are out of proportion to the varying degree of security and costs in institutions holding long-term prisoners. This costly and ineffective system has gained a poor public reputation which can be corrected only if major changes are made.

#### *Recommended Detention Centre System*

The importance of the detention centre system is obvious. At the same time, it is also clear that the system in Canada is haphazard. The following recommendations suggest essential steps if Canada is to develop a modern detention centre service.

The functions performed by a detention centre and by an institution housing longer-term prisoners are quite distinct. The prisoner awaiting trial has not been found guilty. He cannot be made to work or participate in training programs. He must be available to the court, to the police, to his own lawyer, to clinical personnel if the court has ordered an examination, and to his relatives.

Little consideration has been given in Canada to the problems faced by the individual in a detention centre awaiting legal process—to his personality reactions to arrest and trial, to his family and social relationships, to his education, employment and economic responsibilities. The danger of his identification with the criminal world, even if he is eventually proved innocent or if he is only a beginner in crime, has not been of sufficient concern, and measures have not been studied that might help prevent such identification. These problems call for concentrated study and this can be done best in institutions that specialize in serving this group of prisoners.

When one institution performs both functions the development of a proper program for the sentenced prisoners is also handicapped. The constant flow in and out of the institution of newly-arrested people, some of whom may be extremely dangerous, and their attendance at court, and visits by lawyers and family present a security and program problem to the administration that is not matched in an institution caring only for sentenced prisoners.

**The Committee recommends that the same institution should not perform the functions of both detention and institution for longer-term prisoners.**

The principle that adult correction services should be administered by one authority so that the work of one service can complement the work of the other services should extend to detention centres.

The detention centres could serve as forensic clinics to the courts, providing diagnostic assessment of individual offenders. The same diagnostic assessment could be used by the provincial prison classification board to help determine in which provincial institution a person sentenced to a term of imprisonment should serve his sentence.

Provision could be more readily made in larger institutions to separate those awaiting trial from convicted offenders serving a sentence of a few days, and to separate special groups such as women, young offenders, the mentally ill, suicide risks, drug addicts, alcoholics and sex deviates. Graded security could be provided to meet the varying security requirements of the different individuals. These arrangements are impossible in a small institution holding only a few prisoners.

The present, very small, local jails that exist in some provinces are uneconomical from both the financial and service views. Larger area detention centres each probably replacing a number of local jails would be cheaper to build and cheaper to operate.

Modern transportation removes the need for detention centre facilities in the immediate locality, as long as reasonable geographical considerations

are observed. A holding unit for day occupancy in connection with the court could care for prisoners awaiting their turn in court.

**The Committee recommends for the consideration of the provinces that the present local jails existing in some provinces be replaced by area detention centres, and that these area detention centres serve as forensic clinics to the courts and as classification centres for the provincial prison system.**

#### *Functions of Area Detention Centres*

These area detention centres would perform three main functions:

- (a) to hold prisoners awaiting trial, on remand, or awaiting hearing of an appeal, in dignified and decent quarters, and to provide visiting facilities for attorneys, social agency staff and family members.
- (b) to provide clinical services to the courts when a personality assessment is requested, and to supply the provincial classification board with information on a convicted prisoner to help determine in which prison he should serve his sentence. A central provincial repository of files would help in dealing with repeaters.
- (c) to hold prisoners sentenced to a term of imprisonment of only a few days (perhaps 30) in proper surroundings, and to provide them with a suitable activity program.

#### *Location of Area Detention Centres*

These institutions should be placed geographically in relation to the area they will serve. Although transportation is not much of a problem in most circumstances, it is obvious that judicious location can make transportation, as well as visiting, easier.

At the same time, the detention centre is better located in proximity to a population centre rather than in an isolated spot. Also, since clinical services will be part of its responsibilities, it should be sited in relation to provincial mental health services. Proximity to a university is also desirable where this is possible, and also the development of live-in, work-out programs.

#### *Design*

The design of the area detention centre should recognize the need to provide for several different groups of inmates, with different security and program requirements. Only a minority of the jail population require maximum security, but for some strong security is essential.

The most effective design provides for one security unit to hold security risks and to serve as a reception centre. Separate from it there should be one or more units with medium or minimum security. It is to be hoped that the need for minimum security will decrease and that more of the inmates who might use this facility will be left in the community while awaiting trial.

Interviewing rooms for lawyers, agency personnel, and clinical personnel should be provided, and visiting facilities for members of the family.

### *Program*

Too often correctional concepts conflict with welfare concepts in dealing with charged or convicted offenders. In our welfare programs we try, in working with the individual, to help him maintain a normal life and to maintain his personal, family and community contacts and responsibilities. Our correctional programs too often ignore these efforts and tear the individual away from his normal life, jeopardizing his personal, family and community commitments. These conflicts are unavoidable in some cases, but the dangers involved should be kept in mind as detention centre programs are developed, since these institutions are the ones where the newly-arrested, the beginner in crime, and the social misfit comes up against legal authority.

The different requirements of those awaiting court disposition and those serving short sentences should also be considered. With both groups the need for research should be emphasized, since very little thinking has been done in Canada on programs for either the newly-arrested or for those incarcerated for a short period.

Work programs, recreation, religious counselling and worship, education facilities and social services should be provided.

Inmates awaiting the hearing of an appeal sometimes present special difficulties, because they often spend many months in the detention centre awaiting the outcome of proceedings. They are in particular need of a progressive program in the centre. It is recommended elsewhere in this report that those awaiting appeal from a sentence of two years or more imprisonment should be held in penitentiary, not in a detention centre.

Programs that permit the sentenced prisoner to either attend an educational institution in the regular community or to work in the regular community, while spending his evenings and other non-working periods in the detention centre have much to recommend them.

### *Staffing*

Such developments will require a correctional, rather than a merely custodial staff. In addition to clinical personnel, staff for work and program supervision will be required. If the institutions are operated on a regional basis, the number of inmates in each institution should make practical the assignment of specialist personnel. A provincial program of staff recruitment, training and transfer should make possible the implementation of the changing philosophy and new objectives that will mark these centres.

The fact that so many beginning criminals make their first contact with correctional personnel in the detention centres emphasizes the need for high quality staff.

# 16

## PROBATION

### *Definition*

For the purposes of this report, "probation" is defined as a disposition of the court whereby an offender is released to the community on a tentative basis, subject to specified conditions, under the supervision of a probation officer (or someone serving as a probation officer) and liable to recall by the court for alternative disposition if he does not abide by the conditions of his probation.<sup>1</sup>

Another important part of the probation officer's work is the preparation of pre-disposition (pre-sentence) reports at the request of the court. Pre-disposition reports are dealt with in Chapter 11.

Provision for probation in Canada is set out in section 638 of the Criminal Code; section 638 reads:

- (1) Where an accused is convicted of an offence and no previous conviction is proved against him, and it appears to the court that convicts him or that hears an appeal that, having regard to his age, character and antecedents, to the nature of the offence and to any extenuating circumstances surrounding the commission of the offence, it is expedient that the accused be released on probation, the court may, except where a minimum punishment is prescribed by law, instead of sentencing him to punishment, suspend the passing of sentence and direct that he be released upon entering into a recognizance in Form 28, with or without sureties,
  - (a) to keep the peace and be of good behaviour during any period that is fixed by the court, and

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<sup>1</sup> Compare with:

United Nations. *Probation and Related Measures*.

New York; 1951, pages 3 to 11

Great Britain. *Report of the Departmental Committee on the Probation Service*.

London: Her Majesty's Stationery Office, 1962, page 1

United States. *Trends in the Administration of Justice and Correctional Programs in the United States*. (Prepared for the Third United Nations Congress on the Prevention of Crime and Treatment of Offenders). Washington: Bureau of Prisons, 1965, pages 16 and 17.

- (b) to appear and to receive sentence when called upon to do so during the period fixed under paragraph (a), upon breach of his recognizance.
- (2) A court that suspends the passing of sentence may prescribe as conditions of the recognizance that
    - (a) the accused shall make restitution and reparation to any person aggrieved or injured for the actual loss or damage caused by the commission of the offence, and
    - (b) the accused shall provide for the support of his wife and any other dependants whom he is liable to support, and the court may impose such further conditions as it considers desirable in the circumstances and may from time to time change the conditions and increase or decrease the period of the recognizance, but no such recognizance shall be kept in force for more than two years.
  - (3) A court that suspends the passing of sentence may require as a condition of the recognizance that the accused shall report from time to time, as it may prescribe, to a person designated by the court, and the accused shall be under the supervision of that person during the prescribed period.

The person designated by the court under subsection (3) shall report to the court if the accused does not carry out the terms on which the passing of sentence was suspended, and the court may order that the accused be brought before it to be sentenced.

Where one previous conviction and no more is proved against an accused who is convicted, but the previous conviction took place more than five years before the time of the commission of the offence of which he is convicted, or was for an offence that is not related in character to the offence of which he is convicted, the court may, notwithstanding subsection (1), suspend the passing of sentence and make the direction mentioned in subsection (1).

Section 637 of the Criminal Code is sometimes mistakenly interpreted as providing for probation in addition to a prison sentence. As pointed out in Chapter 11, the Committee considers that s. 637 of the Criminal Code provides for an entirely different form of control to that contemplated by probation. It had its origin in the power which existed at common law, in cases of conviction for a misdemeanor, to add to a sentence of imprisonment a requirement that the offender enter into a recognizance with sureties to keep the peace and be of good behaviour.

Where there has been a breach of a recognizance entered into pursuant to s. 637 of the Code the only remedy available to the crown is to apply to have the indebtedness created by the recognizance forfeited. The court has no power in such circumstances to impose a sentence. Recent draft legislation repeated these provisions in terms specifically providing for probation following a term in prison. The Committee considers that such provisions would not be consistent with good probation practice. A period

of controlled and supervised freedom following a period of imprisonment is of the nature of parole and should be left with the parole authority. A period of imprisonment may incur one of the dangers probation is intended to avoid, exposure to unsuitable influences in prison. The court cannot measure the effect of a period of imprisonment before it is served and, consequently, is not in a position to determine the length of time which should be allowed for supervised release. Confusion can arise if the inmate whose prison sentence is to be followed by probation is granted parole.<sup>2</sup>

**The Committee recommends that no provision for the imposition of probation in addition to a period of imprisonment appear in Canadian law.**

The exact legal status of probation in Canada is unclear and a comparable lack of clarity is evident in other countries. Many people maintain that probation is technically not a sentence and it is usually referred to in the literature as a "disposition of the court". It will be noted that section 638 provides that the court, in dealing with an offender, may "instead of sentencing him to punishment, suspend the passing of sentence" and place him on probation.

The status of probation has been considerably advanced in recent years and its nature has been sufficiently clarified to warrant more formal recognition.<sup>3</sup>

Section 638 also provides that an offender can be placed on probation without supervision. That is a contradiction in terms since the definition of probation includes supervision as an essential element.

**The Committee recommends that statutory provision be made for a distinct disposition of the court known as probation, defined as above.**

### *Advantages of Probation*

Probation provides one of the most effective means of giving expression to one of the fundamental principles on which this report is based—that, whenever feasible, efforts to rehabilitate an offender should take place in the community.<sup>4</sup> The advantages of community treatment are set out in Chapter 19. Probation should not be seen as leniency but as a form of treatment selected after an objective assessment of the situation. In fact, many offenders find probation more difficult than prison since responsibility for his own actions rests on him more heavily while he is on probation.

### *Utilization and Success of Probation in Canada*

The use of probation in Canada has increased over the past few years.

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<sup>2</sup> National Council on Crime and Delinquency. *Standard Probation and Parole Act*. New York, 1964, page 2

<sup>3</sup> Meeker, Ben S. "Probation as a Sentence". *Canadian Journal of Corrections*, 1967, 4, 281-305

<sup>4</sup> United States. *Trends in the Administration of Justice and Correctional Programs in the United States*. op. cit., pages 18 to 20.

TABLE 10

Number of Adults Placed on Probation in Canada, by Province and Territory, 1962-1966

Province	Year	Adults Placed on Probation	Province	Year	Adults Placed on Probation
Alberta.....	1962	1,067	Ontario.....	1962	5,700
	1963	1,191		1963	6,425
	1964	1,507		1964	5,939
	1965	1,453		1965	6,547
	1966	1,510		1966	6,454
British Columbia.....	1962	643	Prince Edward Island <sup>b</sup>	1962	
	1963	729		1963	
	1964	829		1964	
	1965	944		1965	
	1966	1,143		1966	
Manitoba.....	1962	368	Quebec <sup>c</sup> .....	1962	1,168
	1963	446		1963	1,225
	1964	548		1964	1,110
	1965	617		1965	1,044
	1966	551		1966	1,126
New Brunswick <sup>a</sup> .....	1962	570	Saskatchewan.....	1962	536
	1963	627		1963	627
	1964	629		1964	845
	1965	661		1965	904
	1966	816		1966	813
Newfoundland.....	1962		Yukon <sup>d</sup> .....	1962	
	1963			1963	
	1964			1964	12
	1965	1		1965	28
	1966	5		1966	35
Nova Scotia.....	1962	777	Northwest Territories <sup>e</sup>	1962	
	1963	1,156		1963	
	1964	1,484		1964	
	1965	1,551		1965	
	1966	1,547		1966	

<sup>a</sup>An unknown number of juveniles are included<sup>b</sup>Data are not available for Prince Edward Island<sup>c</sup>In Quebec during this period all supervision of adults placed on probation was done by private agencies. The figures here were supplied by those private agencies.<sup>d</sup>Adult probation services began in the Yukon in 1964<sup>e</sup>Adult probation services began in the Northwest Territories September 1, 1966. From September 1, 1966, to December 31, 1967, 62 adults were placed on probation.

SOURCE: Appropriate provincial departments and private agencies.

It should be kept in mind that the age used in defining adult varies from province to province. In some provinces individuals aged 16 and 17 are classed as juveniles and those placed on probation do not appear in the above Table. The statistics in the Table are influenced greatly since probation is used frequently with this age group.

TABLE 11  
Number of Adults Placed on Probation in Canada by Annual Totals, 1962-1966

Year	Number Placed on Probation
1962.....	10,829
1963.....	12,426
1964.....	12,891
1965.....	13,728
1966.....	13,965

SOURCE: Appropriate provincial departments and private agencies.

During the current fiscal year, the total cost of adult probation services in Canada approaches \$4,000,000.

Measuring the success of probation requires a definition of "success". One measure is the completion of the probation period by the probationer without a breach of conditions sufficiently serious to induce the court to terminate probation and impose a sentence. This is an important measure of success since it means that permitting the offender to spend the probation period in the community did not endanger the public while his successful efforts to abide by the probation conditions indicated progress on his part. Cost to the taxpayer is also reduced.

Information on the number of probationers who successfully completed probation is not available from all provinces. During 1966, Alberta reported that 89 per cent of adult probationers completed probation successfully, while Manitoba reported a success rate of 85 per cent, Ontario 85 per cent and Saskatchewan 84 per cent. This consistent high rate of success is most encouraging.

A study based on a more stringent definition of success was carried out by the Ontario Probation Officers' Association.<sup>5</sup> Success was defined as "those

<sup>5</sup> Ontario Probationers Officers' Association. "An Examination of the Results of Adult Probation". *Canadian Journal of Corrections*, 1967, 1, 80-86.

probationers who were terminated early because of good behaviour plus those who completed their original term who did not have a further indictable offence in Canada during the three years immediately following termination." The study showed that 68.3 per cent of the cases were successful.

Studies carried out in other countries show a substantial rate of success on probation.<sup>6</sup>

All provinces have public adult probation services although none have a sufficient number of probation officers to meet all requests for service from the courts. In some provinces the public service is supplemented by private agency service. The stage of development of probation and details of practice vary greatly from one province to another. Some of the provinces have probation acts setting out the conditions under which the service operates. Other provinces do not have such legislation and operate directly under the provisions of the Criminal Code.

### *Eligibility for Probation*

Under the provisions of section 638, probation may be granted only to a person who has no previous conviction or who has no more than one previous conviction if that previous conviction took place at least five years prior to the current offence or if the previous offence is not related in character to the current offence.

Such restrictions are not justified and raise a regrettable barrier to fulfilling the goal of dealing with as many offenders as possible in the community. The court should have full discretion to grant probation whenever the circumstances of the particular case warrant such action. Many cases involving a previous record are suitable for probation.

**The Committee recommends that such restrictions on eligibility for probation contained in the Criminal Code be removed.**

### *Procedures in Granting Probation*

The method by which probation is currently granted is through employing Form 28 of the Criminal Code, a recognizance that serves multiple purposes. Appendices (a) to (d) of Form 28 deal with matters pertaining to an accused awaiting trial. Appendix (g) applies to a convicted person awaiting appeal and Appendix (e) to cases where there is no supervision.

Appendix (f) of Form 28 suggests the wording to be used in a recognizance for probation. Appendix (f) reads:

The condition of the above written recognizance is that if A.B. appears and receives judgement when called upon during the term of

<sup>6</sup> See, for instance:

United Nations, *Practical Results and Financial Aspects of Adult Probation in Selected Countries*. New York, 1954

Cambridge Department of Criminal Science, *The Results of Probation*. London: Macmillan, 1958

commencing on \_\_\_\_\_, and during that term keeps the peace and is of good behaviour (add special conditions as authorized by section 638, where applicable) the said recognizance is void, otherwise it stands in full force and virtue.

Although the use of Appendix (f) for this purpose shares some common features with the other uses to which Form 28 is put, there are some special requirements not provided for.

Requirements that the offender obligate himself to pay a sum of money upon breach of the condition of the recognizance should not be continued. Although there may be some value in such an obligation under circumstances that apply to Appendices (a) to (d) and (g), the circumstances that apply to Appendices (e) and (f) are quite different and a bond has no value in such cases.

Further, probation is in itself such a necessary part of the whole correctional process that it should warrant a special procedure and specific rules attached to it.

**The Committee recommends that the method by which an offender is placed on probation be by a probation order and not through employing the recognizance set out in Form 28 of the Criminal Code.**

The court should be sure that the offender understands the provisions and nature of a probation order. This interpretation is better done in open court than by a probation officer because the offender is impressed with the fact that the order issues from the court and that failure to observe the terms of the order must be explained to the court. The offender should sign a copy of the probation order to indicate that he understands its provisions and that he is ready to commit himself to abide by those provisions.

There is some disagreement among correctional officials as to whether the consent of the offender should be required before a probation order is made. Offenders are not given a choice in relation to other dispositions by the court. It may be that some offenders who refuse probation would learn to accept it if it were imposed without their consent. However, the Committee is of the opinion that probation can be most effective if the offender understands and accepts what is involved. When he signs the order he commits himself to cooperation.<sup>7</sup>

**The Committee recommends that before issuing a probation order the judge or magistrate explain the implications and conditions of the order to the offender; that a copy of the probation order signed by the judge or magistrate be served on the offender; and that the offender be asked to endorse the original order to the effect that a copy has been served on him, that he understands its terms and conditions, and that he agrees to abide by them.**

<sup>7</sup>Great Britain. *Report of the Departmental Committee on the Probation Service.* op.cit., page 3

It should be incumbent upon the court to notify the probation officer when he is expected to undertake the supervision of an offender and to forward the necessary documents to him. This is especially important in some provinces where probation officers do not sit in court unless they are specifically required to be there to give evidence on a breach or to present a pre-disposition report. Also, many probation officers serve a number of different courts and are not always available to any one court.

### *Conditions Attached to a Probation Order*

The probation order should contain mandatory provisions setting out the essential elements that make up the probation contract. The requirement that the offender report to a probation officer should be specifically stated, making it clear that such reporting should be to a duly appointed probation officer. However, there should be provision for supervision by some other designated person to provide for those areas where there is no probation officer.

In addition to the mandatory provisions, discretionary provisions are necessary to fit the needs of the individual case. These might include the provision that the offender be required to reside in a place other than his own home, such as a probation hostel, where that is indicated and the provision that an offender who will benefit from psychiatric treatment, although not classifiable as mentally ill, be required to attend a psychiatric clinic until discharged by the clinic. Another provision might require the inmate to follow a prescribed course of study or vocational training.

Conditions in a probation order should be kept to a minimum. Particularly, conditions that interfere with aspects of the probationer's life that have nothing to do with his offence should be avoided. All situations cannot be anticipated at the time the order is made, and if unnecessary conditions are attached the court may face frequent requests for minor adjustments. More important, the probationer may be in violation of a condition that is not essential to his adjustment in the community.

**The Committee recommends:**

#### **(A) MANDATORY PROVISIONS**

**That every probation order include, in addition to the name of the court making the order, the following:**

- (1) The name of the court within whose territorial jurisdiction the offender resides or will reside;**
- (2) The requirement that the offender keep the peace and be of good behaviour;**
- (3) The provision for the appearance of the offender, when called upon during the period of the probation order, so that the order may be varied or judgment imposed;**

- (4) **The provision that the offender be under the supervision of a probation officer appointed or assigned to that territorial jurisdiction or a designated person;**
- (5) **The provision that the offender be required to report to the probation officer in accordance with instructions given by the court and receive visits at his home by the probation officer.**

#### **(B) DISCRETIONARY PROVISIONS**

**That the present discretionary powers available to the court under section 638 (2) be retained.**

The rehabilitation of the offender may be effected, among other things, through the interpersonal relationship developed between the probationer and his supervisor. Short terms of probation may not allow sufficient time for this process to function effectively.

The extension of the length of probation from two to three years is particularly valuable in cases where a youthful offender is involved. With offenders of this kind, who may be characterized by impulsive behaviour and lack of responsibility, a continuing relationship with a probation officer over an extended period of time may be effective.

However, in cases where the purpose of the probation order has been realized, the court should be empowered on application of either the probationer or of the probation officer to discharge the probation order at any time.

**The Committee recommends that the maximum length of probation be three years.**

Section 638 provides that the court may vary the terms of a probation order "from time to time". However, there is no uniform method for implementing this provision nor is there a standard procedure for compelling the attendance of the offender at a hearing to determine whether the conditions should be changed.

There should be access to the court by either the probation officer or the probationer to request a change in the conditions of the probation order. Such a provision would make it possible to keep the probation order flexible to meet the changing needs of the probationer as changed circumstances arise and as he responds to supervision.

**The Committee recommends that, upon application of either the probation officer or the probationer to vary the conditions of or terminate the probation order, the court be empowered to approve the variation upon notice to the probation officer or the probationer or to set a date for a hearing to consider the merits of the application and to act as it sees fit. Procedure should be provided for compelling appearance before the court either by summons or warrant.**

### *Failure to Abide by Conditions of a Probation Order*

The present legislation fails to distinguish between a breach of the recognizance which occurs as a result of a subsequent conviction and one which occurs as a result of a failure to abide by one of the conditions provided under section 638 (2). A breach obviously may vary in seriousness from a minor curfew violation to a serious crime. The power of the court to deal with the breach on its own merits should be recognized.

Under section 638 (4) the court has a discretionary power to order the accused brought before it "to be sentenced". Under section 639 (4) the court has discretionary power to "sentence" the accused for the offence of which he has been convicted. Section 638 (2) provides that the court "may from time to time change the conditions and increase or decrease the period of the recognizance".

These discretionary powers of the court should be brought under one section.

The Committee is of the opinion that a new offence of breach of probation should not be created but that a breach should be dealt with as part of the original charge. Breach does not automatically call for an end to probation and a sentence. The probation order could be renewed, perhaps with the conditions varied. If a new offence of breach of probation is created, the breach would be heard either by the court that heard the original charge who would find it as convenient to deal with the original charge, or by a court not originally involved in the case, handicapped by a lack of knowledge of the offender.

**The Committee recommends that the probation officer report to the court when a person under probation is convicted of a subsequent offence or wilfully fails to abide by any other condition of the probation order and that the court be empowered to compel the appearance of the probationer and to:**

- (a) continue the probation order,**
- (b) vary the probation order, or**
- (c) revoke the probation order and impose a sentence of fine or imprisonment.**

The court should take into consideration sincere efforts on the part of the probationer during probation when sentencing following a breach. If after sincere efforts on probation, the offender receives as long a prison sentence following a breach as he would had probation not been granted, he has, in effect, suffered a greater penalty in terms of restricted freedom than if he had been sentenced immediately after conviction.

### *Transfer of Supervision*

In our mobile society, requests for transfer of probation supervision are not uncommon, either because the offence was committed away from the jurisdiction within which the offender resides, or because the probationer

desires to change his place of residence subsequent to conviction for reasons of employment or family. Transfers of supervision are effected by the court amending the recognizance to allow the probationer to reside in another jurisdiction. Once the transfer has been approved the appropriate documents are sent to the distant probation officer, and supervision continues. However, the offender is still responsible to the court that made the order and reports of progress are sent to the probation officer of that court.

This procedure is cumbersome. Very real problems may arise if the transferred probationer violates the terms of his recognizance, either through being convicted of a subsequent criminal offence, or as a result of a breach of a special condition of the recognizance. If the court decides that the probationer should appear for judgment, it necessitates the transferred probationer's returning to the court of original jurisdiction.

The cost of the return of a violating probationer to the court may be considerable, especially when he has moved to another province. The cost may be so great that it, rather than the nature of his subsequent violation, tends to be the criterion upon which breach proceedings are instituted or not.

This results in inequity, because a probationer who stays within the jurisdiction of the originating court and subsequently violates his recognizance is liable to punishment, whereas a transferred probationer may escape the consequences of his broken promise to the court for economic reasons.

**The Committee recommends that a court be empowered to transfer an order relating to a person on probation to another court of equivalent jurisdiction anywhere in Canada and that the court that has assumed jurisdiction in the case have power to order supervision, to alter or discharge the probation order and to sentence upon breach of the conditions of the probation order in the same manner as the court of original jurisdiction.**

This procedure might also apply to cases where a probationer has absconded to another jurisdiction.

A form would be required setting out formally the transfer of jurisdiction from one court to another. It would also be necessary to ensure that the receiving court is supplied with full information about the case and about the probationer so it could deal intelligently with a breach or a request for termination.

One difficulty that is met frequently with probationers is that when a probationer who is being sought for breach is convicted in another jurisdiction of a new offence and neither court is aware of the situation. What is required to meet this situation is a communication system that would make the court hearing the new offence aware that the accused is on probation to another court. It should be the responsibility of the new court to notify the original court of what has occurred.

Such a communication system would also be useful with an offender who has completed a period on probation and is being charged with a new

offence in another jurisdiction. The records of the original court would be of great assistance to the court where the new charge is being heard.

### *New Probation Techniques and Facilities*

The use of probation should be expanded as widely as possible. To facilitate this and at the same time increase the percentage of success to the maximum, new techniques and new facilities should be developed. Some of these have already proved their usefulness in limited experiments; others should be tried on an experimental basis to test their effectiveness.

There are four areas where expansion seems indicated.

- (a) *Probation Hostels*—There are some individuals with special problems who will not respond readily to regular probation supervision but who could be placed on probation if living facilities were available. Some of them need the stronger controls possible in an institution. Some are faced with a home situation that cannot be tolerated. Others need some kind of special experience that requires a change to a new environment.

Living facilities of this nature are called probation hostels. A probation hostel should be located in a population centre, near schools and employment. The probationer goes out to school or employment but his evenings and week-ends are under some control. He can be given whatever counselling and similar help he needs. The hostel should be small to permit close relationships with the staff. These institutions can be graded so each one serves a different type of probationer.

The procedure is to make residence in a specified probation hostel and abiding by its rules a condition of probation. These institutions are not expensive to run because probationers who are working pay room and board. Some of those going to school will receive an allowance from the education authorities. Others, however, will not and public money should be available to remove any undue emphasis on the probationer's paying his way.

- (b) *Use of Volunteers*—The use of volunteers, not to replace, but to supplement the work of the probation officer should be considered. This device would probably apply best with younger probationers. It must be kept in mind that the final step in rehabilitation is acceptance of the offender into his own community. The volunteer represents that community in a way the professional probation officer never can. The corner grocer or the mechanic at the local service station might offer a kind of help that supplements what the probation officer can do.
- (c) *Attendance Centres*—In some situations probationers are required to spend their Saturdays or other free time in attendance centres,

while their regular education or employment is undisturbed. Specific and useful programs should be provided at these attendance centres. The opportunity can be taken for individual or group counselling. These centres are for day attendance only and do not contain sleeping quarters.

- (d) *Group Work Methods*—The use of group work methods with probationers is another new development that offers promise with some probationers. Some of the time spent at attendance centers could be used in this way. So could some of the time spent in probation hostels. Portions of this program might center around organized recreational activities.

### *Staff Requirements*

As in all areas of corrections, there is a serious shortage of qualified officers in probation. The danger in such a situation is that probation will be attempted with improperly prepared staff or that qualified staff will be given caseloads too large to permit effective work. The resulting failure is sometimes misinterpreted and probation itself is brought into undeserved disrepute.

The use of probation should be expanded only at the rate that permits effective service. It is difficult to set an exact number that constitutes an effective caseload for a probation officer. Briefs received by the Committee recommended a maximum caseload from a low of thirty-five to a high of sixty. If the probation officer also prepares pre-disposition reports the number he can supervise must be reduced accordingly. Distances to be travelled also affect the situation; rural caseloads usually involve greater travel and should therefore be lower.

Another factor that determines a suitable caseload is the seriousness of the cases under supervision. Often individuals are placed on probation who do not require supervision and who could be safely released without supervision. If a probation officer has any number of such cases under his supervision his total caseload can obviously be larger.

### *National Development of Probation<sup>8</sup>*

The development of probation has been uneven across the country and the extent of service and standards of practice vary from province to province. It is obviously desirable that high standards of practice exist in all provinces. To bring this about, it is essential that the federal government take responsibility for establishing national standards and for giving financial assistance

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<sup>8</sup> Canadian Corrections Association. *Proposals for Development of Probation in Canada*. Ottawa, 1967

to the provinces to help in meeting those standards. This requires a national probation act.

Such an act might provide for the appointment of a probation consultant within the federal correctional service, along with whatever staff is deemed necessary. It might set out the qualifications, duties and powers of a probation officer and training standards.

**The Committee recommends that a federal probation development act be designed to promote high standards of probation practice throughout Canada.<sup>9</sup>**

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<sup>9</sup> The Ontario Probation Officers' Association has submitted a draft National Probation Act to the Government of Canada.

# 17

## PRISONS

### *Definition*

For the purposes of this report, the term "prison" is defined as "any institution which holds adults committed by the courts for illegal behaviour for periods longer than a few days." These institutions are known by many names—penitentiaries, reformatories, industrial farms, farm camps, forestry camps, training or correctional centres and jails (or gaols). It is recognized that the term "prison" has many unfortunately negative connotations and its use here reflects the lack of an acceptable substitute.

### *Purposes*

A prison must not be viewed as a separate, and self-sufficient institution. Instead, each prison should be seen as an integral part of a broader system of services within an over-all correctional program. Each prison must, therefore, be planned not only to serve its peculiar and specific function but also to complement the work of the other services so that the common aim may be accomplished.

The prison should also be considered part of the community it serves, not as something apart leading an existence of its own.

A clear statement of purpose, understood fully by both staff and inmates, is essential for both the prison system as a whole and for each individual institution. The purposes of the system as a whole may be stated as particular adaptations of those for the general corrections field:

1. To hold the individual inmate in custody for the period of his sentence, subject to remission and/or parole.
2. To prepare the individual for permanent return to community living as a law-abiding and contributing citizen.

The individual institution has the same general purposes as the prison system of which it is a part, but its specific role in preparing the individual for a return to community living may be stated specifically in the light of the type of inmate it is intended to correct.

A primary aim of the prison is to re-educate people to live law-abiding lives in the community. This is society's best protection against a recurring sequence of criminal acts. The traditional prison tears the individual away from such family, community, education and employment responsibilities and isolates him in an abnormal society where he is exposed to a criminal value system. Opportunities to practice decision-making, so essential in rehabilitation, are extremely limited. It is difficult to conceive a device less suited to preparing people to live in the normal community than the traditional prison.

What is needed for a large proportion of inmates are small, specialized, community-centred, appropriately-staffed institutions resembling hostels or camps. Along with these open institutions others with stronger security are needed to control those inmates who cannot yet handle the freedom of the open setting. However, as in the open institutions, contact with the community should be maintained in every way possible in these more secure institutions.

Some of the implications of such a policy are set out in this chapter.

There are, of course, some individuals so dangerous that the protection of society from them must take precedence over their own rehabilitation and they must be held in secure custody. A concentrated effort should be made to treat these people while they are in custody, but it must be recognized that the primary aim is protection of society through their segregation. Fortunately, the number of such individuals is not large.

Custody is also necessary as a sanction to back up the demands of community treatment services such as probation and parole when the individual refuses to take advantage of the opportunities offered him.

### *Situation in Canada*

The federal government is responsible for adults given a prison sentence of two years or more. The prisons operated by the federal government are known as penitentiaries. The provinces are responsible for those adults sentenced to prison for less than two years. The prisons operated by the provinces typically bear such names as reformatories, industrial institutions, correctional centres, camps, or gaols. Some of the anomalies that pertain to the division of responsibility between the federal and provincial governments are set out in Chapter 14.

The territorial governments in the Yukon and Northwest Territories carry the same responsibilities towards prisoners as the provinces.

The federal Prisons and Reformatories Act<sup>1</sup> lays down in what seems unnecessary detail the conditions under which the provincial prisons operate. It would appear to be more logical if this legislation were permissive legislation phrased in general terms, leaving the provinces with responsibility to operate their prison systems with a minimum of direction from the federal government.

The report of the Fauteux Committee also contains a recommendation that this legislation be reviewed.<sup>2</sup>

**The Committee recommends that the Prisons and Reformatories Act be repealed and re-enacted after appropriate consultation with the provinces to remove unnecessary detail and leave the provinces with wide responsibility to operate their prison systems.**

### *Excessive Use of Prisons in Canada*

Throughout this report the Committee has stressed the importance of dealing with the offender in the community. We have suggested changes in sentencing policy to provide for the use of alternatives to prison as much as possible. To make this feasible, we have recommended increased probation facilities. In Chapter 18 we recommend an increased use of parole. We are of the opinion that through these measures a major decrease in Canada's prison population would prove possible, without increased danger to the public and with greater success in terms of rehabilitated offenders. A considerable saving in public money would also result.

Comparison with the use of prison sentences in other countries is difficult because of differing classifications of offences, differing definitions of what constitutes a prison, and differing ways of keeping statistics. A comparison with the committal rate for indictable offences in the United Kingdom may be acceptable since the applicable definitions seem equivalent. In Canada, almost 50 per cent of those convicted of indictable offences receive prison sentences. In the United Kingdom the corresponding figure is 35 per cent.<sup>3</sup>

The number and ratio to population of inmates in Canadian prisons showed an over-all increase from 1950 to 1964. During the last two years for which figures are available, there has been a noticeable and, in the opinion of the Committee, significant reversal in trends.

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<sup>1</sup> S.C., 1952-53, c.7

<sup>2</sup> 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

<sup>3</sup> Hogarth, John. "Towards the Improvement of Sentencing in Canada". *The Canadian Journal of Corrections*, 1967, 2, 122-136

TABLE 12

Adults in Custody in Federal Penitentiaries and Provincial Prisons in Canada  
as of March 31<sup>a</sup>, 1950-1966 and Rate per 100,000 Population

	1950	1951	1952	1953	1954	1955	1956	1957	1958
<b>Penitentiaries</b>									
Number.....	4,740	4,817	4,687	4,934	5,120	5,507	5,508	5,432	5,770
Rate.....	50	50	48	49	50	53	52	50	52
<b>Provincial Prisons</b>									
Number.....	8,915	8,009	8,605	8,757	9,337	9,546	8,995	9,739	11,192
Rate.....	95	84	88	88	91	92	85	89	101
Total Numbers.....	13,655	12,826	13,292	13,691	14,457	15,053	14,503	15,171	16,962
	1959	1960	1961	1962	1963	1964	1965	1966	
<b>Penitentiaries</b>									
Number.....	6,295	6,344	6,738	7,156	7,219	7,651	7,514	7,438	
Rate.....	55	55	57	60	59	62	59	57	
<b>Provincial Prisons</b>									
Number.....	11,166	10,896	11,821	12,066	12,755	12,559	12,627	12,257	
Rate.....	98	94	101	101	105	101	100	88	
Total Numbers....	17,461	17,240	18,559	19,222	19,974	20,210	20,141	19,695	

<sup>a</sup>Quebec figures are expressed as of December 31.

SOURCE: Dominion Bureau of Statistics.

Why this reversal in trend is occurring is not clear. The increased use of probation and parole is no doubt a factor, but there may be other factors. This trend also appears in the United States.<sup>4</sup>

**The Committee recommends that every effort be made to reduce the prison population of Canada through implementation of the appropriate measures suggested in this report.**

### *Cost of Prisons*

The cost of operating Canada's prison system during the fiscal year 1965-1966 was about \$80,000,000<sup>5</sup>. Of these operating costs, \$26,601,000 was spent by the federal Penitentiary Service, the remainder by the provinces.

<sup>4</sup>United States. Department of Justice. *National Prisoner Statistics. Prisoners in State and Federal Institutions for Adult Felons, 1966*. (NPS Bulletin Number 43, August 1968). Washington: Bureau of Prisons.

<sup>5</sup>Figures on provincial expenditures were supplied by the appropriate provincial government officials. Those related to the Penitentiary Service were taken from the annual report of the Commissioner of Penitentiaries.

Capital costs are not included in these operating costs. During 1965-66 the Penitentiary Service spent \$28,173,666 on construction and equipment. Capital expenditures to the end of 1968 in connection with Penitentiary Service's Ten-Year Plan (begun in 1963) amount to \$73,470,000 and an additional expenditure of \$122,614,000 is anticipated to complete the Ten-Year Plan.<sup>6</sup>

### *The Process of Classification*

A successful prison system requires efficient classification so that the inmate will be dealt with in the most productive way feasible. Classification is a continuous process through which diagnosis, treatment-planning and the execution of the treatment plan are coordinated to the end that the individual inmate may be rehabilitated.

There are various steps in an adequate classification process:

- (a) The analysis of the inmate and of his problem related to his involvement in crime through the use of every available technique: social histories; medical psychiatric and psychological examinations; and studies of religious, educational, vocational, and recreational attainments and interests.
- (b) Planning of a treatment program by the classification team meeting as a group.
- (c) Ensuring that the inmate and all staff who will be involved understand the treatment plan.
- (d) Evaluation of the inmate's progress and the suitability of the treatment plan, and changing of the treatment plan as this is warranted.

The inmate should actively participate as much as possible in each step in the process.

Classification is thus a process that should continue throughout the inmate's stay in the institution. It should be dynamic, extending to all phases of the inmate's experience, not something static confined to formal meetings of the classification committee.

If the diagnostic and remand centres recommended in Chapter 15 of this report are introduced, much of the diagnostic aspects of classification can be carried on there. Where these do not exist, the prison system requires a central reception unit located in a separate institution, where newly-committed inmates pass through the initial classification process. This unit should have among its staff fully-qualified people representing the various pertinent professions. The opportunity presented by the inmate's stay in this reception unit should be used to assist him in overcoming the shock of

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<sup>6</sup> Figures supplied by the Commissioner of Penitentiaries. Information on costs of construction being undertaken by the provinces is not at hand.

committal to prison. The program of this unit should be designed to prepare him to accept and benefit from the opportunities which should be presented through the program in the institution to which he is subsequently transferred.

Information collected by the staff of the reception unit about the inmates coming into the prison system can be most valuable in determining whether prison programs are realistic or whether they were designed to meet the requirements of types of inmates who are in the minority. Such information may lead to the conclusion that the program offered by some institutions is no longer effective and that these institutions should be converted to serve a different type of inmate.

Within the individual institution there must also be a classification team to implement the recommendations of the central reception unit. The classification team within the individual institution executes and supervises the inmate's program and modifies it as required, as well as coordinating pre-release and parole procedures.

**The Committee recommends that the fundamental importance of classification within a prison system as a basis for**

**(a) grouping inmates for treatment purposes and**

**(b) planning and, when indicated, adapting the program of the individual inmate**

**be recognized and that the provision of adequate classification facilities be given top priority in all Canadian prison systems.**

### *Custodial Classification*

One of the important issues to be decided through classification is the degree of custody required by the inmate. This decision often determines the treatment program as well, since those forms of treatment that involve contact with the public are usually not as readily available to inmates in security institutions. Such a limitation is unfortunate because the advance of institutional corrections depends on the improvement of treatment programs. Improvement in control will reduce escapes but will do little to reduce recidivism.

In weighing custodial considerations, a number of essential questions must be asked about each inmate:

(a) Is he a danger to himself or to others while incarcerated?

Is he likely to attack a member of the staff or another inmate?

Is there a risk of suicide?

Is he likely to introduce contraband into the institution?

(b) Will he attempt to escape and how much aggression will he show in such attempts?

(c) Will he be a danger to society or to any particular individual if he does escape?

There are no objective means now available for determining the degree of custodial risk and decisions are based on judgment. A research approach to custodial classification is needed. Out of this might develop prediction tables that would help in assessing custodial risk on more objective grounds than is now possible.

The number of inmates of Canadian prisons who fall into the dangerous category is unknown. Usually, the dangerous group are divided into two categories, those requiring super-security and those requiring maximum-security. The report of the Enquiry into Prison Escapes and Security in Great Britain<sup>7</sup> implies that about .36 per cent of inmates of British prisons require super-security. The American Correctional Association in its *Manual of Correctional Standards*<sup>8</sup> estimates about 2 per cent of inmates fall into the super-security category and about 15 per cent into the maximum security category.

Estimates made by the Canadian Penitentiary Service run markedly higher than these figures but there is no clear indication on what these estimates were based.

The Penitentiary Service operates under the following security categories:<sup>9</sup>

1. *Maximum Security*. "Inmates who are likely to make active efforts to escape and who, if they do escape, may very well be dangerous to persons whom they may encounter in the community."

Approximately 35 per cent of the Penitentiary population are considered to fall within this category. About 3 per cent require super-security.

2. *Medium Security*. "Inmates who are not likely to make active efforts to escape but who might very well run away if the opportunity presented itself."

Approximately 50 per cent of the inmates are considered to fall within this category.

3. *Minimum Security*. "Those inmates who require neither fence nor wall to keep them confined, who will respect the invisible boundary that surrounds them and who, in any event, are not likely to be dangerous in the community if they do walk away." The remaining 15 per cent of inmates are seen as falling within this category.

**The Committee recommends that the Government of Canada initiate research to:**

- (a) **seek objective criteria for determining which prison inmates should be classed as requiring super-security, maximum, medium and minimum security;**

<sup>7</sup> Great Britain. *Report of the Inquiry into Prison Escapes and Security (Mountbatten Report)*. London: Her Majesty's Stationery Office, 1966

<sup>8</sup> American Correctional Association. *Manual of Correctional Standards*. New York, 1964

<sup>9</sup> Commissioner of Penitentiaries. *Special Detention Units*. Ottawa: July 26, 1965

- (b) determine the percentage of inmates of Canadian prisons who fall into these categories; and
- (c) develop measurement techniques for rating the custody requirements of newly-committed inmates.

Although there are a small group of inmates who are determined to escape under any circumstances, most inmates will actively attempt to escape only as a result of tension created by special circumstances that exist at a specific time. It is therefore possible to reduce escape risks by means other than physical control. The following are considered essential.

- (1) There should be a social service attached to each prison system which has, along with its other duties, the responsibility to deal with the inmates' family problems. One of the greatest tension-producing aspects of committal to prison is worry about the family. A social service connected with the prison system can provide the inmate with information about his family's welfare and assist the family with its problems, generally through referral to a community agency.
- (2) Above all, good program that stresses joint staff-inmate participation and extends to all aspects of prison life will help build a positive atmosphere that gives the inmate a sense of hope and accomplishment. It will also help counteract the destructive effects of the prison society. Custody then becomes part of the continuing classification process and custody-rating can be subject to change on relatively short notice. The principle should be "control through involvement rather than through containment."

If such methods of exercising custodial responsibilities were realized, then in the Committee's opinion, more of those inmates who are serious custodial risks could be distributed throughout various institutions. Confining all such offenders in the same unit involves the danger of creating a completely negative society in which one has to be "bad" to gain acceptance and almost depraved to gain status.<sup>10</sup>

### *Inmate Subculture*

One of the serious anomalies in the use of traditional prisons to re-educate people to live in the normal community arises from the development and nature of the prison inmate subculture. This grouping of inmates around their own system of loyalties and values places them in direct conflict with the loyalties and values of the outside community. As a result, instead of reformed citizens society has been receiving from its prisons the human product of a form of anti-social organization which supports criminal behaviour. The genesis of this subculture can be traced to a number of factors.

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<sup>10</sup> Radziniwicz, Leon. *The Dangerous Offender* (The Fourth Frank Newsam Memorial Lecture). Chichester: The Police Journal, 1968

The convicted offender has generally experienced a history of failure in life. His apprehension, trial, conviction and imprisonment reinforce his feeling of failure with respect to socially acceptable norms. His adaptation to prison life follows a progression from "I am a failure" to "I don't care" to "I am a success on the basis of a new value system which I share with most of the others here who were also failures by the old standards." Thus the offender institutionalizes his socially unacceptable behaviour. He is no longer an isolated misfit in society but has become a part of his own society, the prison subculture, which in turn supports his resistance to the demands of conventional society.

The prison experience is characterized by deprivation of normal sexual opportunities. This situation is conducive to homosexual behaviour. A pattern of attitudes and practices developed around this situation becomes basic to the prison subculture. While the child molester is viewed with low regard or hostility, the passive homosexual is widely sought after and institutional homosexuality is not considered abnormal by many inmates. For the mature prisoner with a history of reasonably adequate heterosexual functioning outside prison, adaptation to the heterosexual deprivation of prison is generally reversible. On his release he usually finds opportunity for heterosexual relationships to which he can adjust. For the immature, or the sexually inadequate, however, the homosexual emphasis of prison life frequently integrates into his habit pattern a practice of deviance or sexual malfunction which is difficult to reverse when he is released.

The deprivation of freedom, with its attendant transfer of decision-making from the prisoner to the staff, enables the inmate of the traditional prison to avoid self-condemnation for his failures and his crimes by putting the blame on the authority figures who carry responsibility. The staff become the symbols of repression and the enemy against whom the members of the inmate subculture must defend themselves.

There are some inmates who, apart from the particular offence which brought them to prison, have been on the whole well-integrated members of conventional society and they tend to resist assimilation into the inmate subculture. However, it is only to other inmates that they can look for social acceptance since a relationship with other people is denied them. They gain that acceptance by falling in line with the mores of the inmate subculture.

To attempt to operate a treatment program in a prison without recognizing this socio-psychological situation is to attempt the impossible. Various experimental programs have been devised to turn these prison community pressures to positive use, such as shared staff-inmate program-planning, use of small-group activity, maintenance of family and community ties, community involvement in prison activities and minimizing custodial features. The dangers of the inmate subculture constitute the strongest argument against large prisons since there the inmate society becomes so massive and powerful it is almost impossible to reach individual inmates. It is the view of the Committee that emphasis should be placed on small and well-staffed institutions where this problem can be effectively handled.

## *Re-Education: Treatment and Training*

"Treatment" can be defined as a series of activities engaged in by staff and inmates and by citizens from the outside community for the purpose of enhancing the motivation and inclination of inmates to function as law-abiding persons. The use of the term treatment in this way is sometimes criticized on the grounds that it comes from the field of medicine and is used there with a somewhat different connotation. However, it is in common use. "Training" may be defined as a joint activity designed to develop in the inmate the social and vocational skills necessary to adequate functioning in modern society. Treatment and training are closely related and, together, they constitute a series of progressive re-educative experiences for the inmate which promote his identification with non-criminal society and with goals sanctioned by the community.

The above concept clearly implies that the community shares with the prison staff and inmates responsibility for promoting dynamic programs of treatment and training. The response of prisoners to opportunities afforded for rehabilitation will be enhanced when prison programs receive full community support. To assume this role is to the advantage of the community as a form of self-protection through the reduction of recidivism.<sup>11</sup>

This concept also implies that treatment and training operate as a continuum starting with the arrest of the offender and continuing through the prison program to post-release activities. It is important that each phase of learning be reinforced and developed in subsequent phases, and that gains made while in prison are supported by opportunities of the discharged offender to achieve success and satisfaction in legitimate post-release activities.

There are two aspects to the development of an effective treatment and training program in a prison:

- (a) The creation of a general atmosphere, felt by staff and inmates alike, that fosters both a belief that the inmates' attitudes and social habits can be changed and a determination to bring this about. This can be expanded into what is known as a therapeutic community, where authority is not exercised automatically from the top, but where staff at all levels and the inmates themselves work together in common decision-sharing.
- (b) The development of specific program details to accomplish this common aim of rehabilitation.

It is not the function of this Committee to set out in detail what constitutes a good prison treatment and training program. Indeed, there was considerable disagreement among the authorities we consulted as to both the appropriate theoretical base for prison programs and program details. However, certain experiments noted by the Committee appear worthy of special comment.

One such development is work-release programs. This means the inmate enters the regular community during the appropriate hours of the day to

<sup>11</sup> Korn, Richard, R. "Correctional Innovation and the Dilemma of Change-from-Within". *Canadian Journal of Corrections*, 1968, 3, 451

attend high school, trade training school, or university, or to work, but returns to the institution at night and weekends. This makes it possible for him to maintain or build activities in the community necessary for a normal career, while continuing to serve his sentence. Work release programs would probably be possible with a larger proportion of the provincial prison populations, although the Penitentiary Service should use such programs when possible. At present, their application to provincial institutions is limited because day parole granted by the National Parole Board is necessary for inmates incarcerated for offences under the Criminal Code and other federal statutes. If the province were given authority over parole for all inmate of provincial institutions, as recommended in Chapter 14, a simpler procedure would be possible.<sup>12</sup>

The similarity between a small community-centred work-release prison and a probation hostel is obvious. However, the work-release prison would be intended for those who require a greater degree of control in that they can be returned to custody.

Recent experiments in applying the new techniques developed in relation to adult education academic programs to the inmates of prisons appear to deserve greater attention. Changing an inmate's educational level from grade 4 or 5 to high school matriculation may frequently have more effect on his future than trade-training or similar programs.

Home leaves for selected prison inmates who are not a security risk form part of the program in some institutions and should be used more widely. Only a minority of prison inmates have a stable relationship with a wife and children and even for those who have such a relationship a brief visit home may be more upsetting than useful in terms of the rehabilitation program. Whether such visits are indicated has to be determined in the light of all circumstances surrounding the individual case. Home visits can be supplemented by family visits to the institution.

Conjugal visiting has been advocated in some submissions to the Committee but few Canadian prisons lend themselves to such a program and an attempt to introduce conjugal visiting might raise more problems than it would solve. In those cases where a stable family relationship exists, home visiting would accomplish the same end under far more favourable conditions.

The whole prison program, from the time the inmate first enters, should be seen as a preparation for his return to the normal community either on parole or on discharge. However, if he is facing a long sentence, the initial steps may seem far removed from this final goal. During the last months of his incarceration, an intensified program aimed to prepare him for release is necessary, and should be offered him even if he is among those with poor expectations. This should include discussion of employment opportunities, readying him to return to his family, readying his family to accept him and perhaps providing

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<sup>12</sup> See Grupp, Stanley and Bérin, Jacques. "Work Release for Short-Term Offenders in France and the United States". *Canadian Journal of Corrections*, Op. Cit., 490  
MacDonald, John A. "Towards Work Release Legislation in Canada". Op. Cit., 505  
Correctional Research Associates. *Community Work — An Alternative to Imprisonment*. Washington, 1967.

living accommodation. If he has been in a maximum security institution he may have to relearn the habits of ordinary social behaviour. The value of prerelease hostels in preparing the inmate for return to normal living is becoming increasingly recognized.

Another suggestion has to do with the involvement of rehabilitated ex-inmates in the institution program. These men are a living proof that successful rehabilitation is possible and their word as to relative benefits of the law-abiding life will carry weight with the inmates. They also have an advantage in understanding the problems and viewpoint of the inmates. There have been successful experiments in using carefully-selected ex-inmates on prison staff.<sup>18</sup>

The Committee was impressed with the work of prison chaplains in bringing a spiritual dimension into the lives of prison inmates. The Statement of Purpose and Policy of the Canadian Correctional Chaplains' Association is attached to this chapter as an annex.

The Committee visited many prisons throughout Canada and discussed prison programs with prison staffs and others closely associated with these institutions. A questionnaire was distributed to all prisons in Canada requesting information on, among other matters, prison programs. The Committee is of the opinion that in many prisons there is no clear theoretical position underlying program that would make it possible to develop an integrated program guided by clearly-enunciated goals. The exact purpose served by many aspects of program is uncertain and much program is based largely on tradition. Nor have clearly-defined techniques been developed that are understood and utilized by all members of staff. Research into the effectiveness of program is almost totally absent.

**The Committee recommends that the need for an integrated and comprehensive program, based on good classification and a clearly-stated theoretical position, and subject to routine testing through research, be recognized and that provision of adequate treatment facilities be given top priority in all Canadian prison systems.**

#### *Prison Labour and Prison Pay*

It is highly desirable that all inmates of a prison be fully occupied during a normal working day. In this context, "fully occupied" is defined to include scholastic education, vocational and trade training and maintenance work and therapy sessions as well as prison industrial production. The need for recreation activities during the non-working hours is recognized.

There are several reasons why it is desirable to keep prison inmates fully occupied:

- (a) Since the aim of the institution should be to prepare the inmate for his return to normal community living, it is important that as much time and effort as possible be spent on such preparation;

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<sup>18</sup> Joint Commission on Correctional Manpower and Training. *Offenders as a Correctional Manpower Resource*. Washington, 1968.

- (b) It is an unhealthful and incapacitating thing in itself to be left in long periods of idleness;
- (c) Prison discipline is more easily maintained when the inmate population is fully occupied;
- (d) Assuming that the inmate is being paid a substantial percentage of the prevailing minimum wage, the money he earns can be used to enable him to meet what would be considered ordinary financial responsibilities in the general community, such as defraying part of the costs of maintaining himself in the institution, helping to maintain his family in the community, building a fund to help him during the initial period after discharge, paying unemployment insurance and hospitalization premiums. The possibility of compensating the victim of his crime might also be considered. Some priorities would have to be established among these possible uses, depending on the wages he receives. A system of at least voluntary and perhaps compulsory savings from funds intended to help the inmate through the initial period after discharge would avoid the risk of the money's being squandered.

If any money is left over after these financial responsibilities are met, it should be left to the man to spend as he sees fit, within the security requirements of the institution. This would enable him to assume as much responsibility for his own affairs as possible.

- (e) The products and services contributed by prison occupations represent a financial saving on the costs of prison administration.

Prison and government officials, other correctional experts, the public and the inmates themselves agree in principle that it is important that prisoners be fully occupied, but there are serious difficulties in the way.

One difficulty has to do with the amount to be paid to the inmate for what he is doing in prison. It may be easier to accept the idea that the inmate should be paid for time spent in industrial production than for time spent undergoing therapy or involved in maintenance work. However, to accept this policy places the inmate undergoing therapy, scholastic education, or trade or vocational training at a disadvantage, and this in spite of the fact that these occupations may mean more in terms of the treatment goals of the institution than does industrial production.

It would appear both just and practical, then, to pay remuneration to all inmates who are fully occupied and who involve themselves conscientiously.

A second question arises whether all should be paid the same amount. If one inmate is working as a shoemaker and another as an electrician, should differentials in pay rates that exist in the normal community be reflected in the institution and how much should the person taking scholastic training be paid? In the outside community he might well have to pay for such training, although many adult education schemes pay an allowance to the students. There are also some inmates who, because of mental or physical health,

cannot come up to the occupation norm set for most inmates; those who are permanently incapacitated probably should be taken out of the correctional stream and where suitable cared for in sheltered workshops.

It is suggested that there be a basic wage that is paid to all inmates who involve themselves conscientiously, within the scope of their capabilities and treatment and training requirements. There should then be a series of steps in the remuneration scale, open as an incentive to all inmates, to reward diligence and ability. The decision as to when an inmate is ready to move up the remuneration scale is decided through the classification process.

Relating the level of prison pay to what is paid in the outside community is also a problem. It is suggested that prison pay should represent a substantial percentage of the prevailing minimum wage in the outside community, although it should never be greater.

**The Committee recommends that a system of prison pay be introduced in all Canadian prison systems, available to every inmate who involves himself conscientiously within the scope of his abilities and stage of development, whether or not his program includes industrial production; that there be a series of steps in the remuneration scale to serve as an incentive to all inmates; and that prison pay scales represent a substantial percentage of the minimum wage prevailing in the community.**

As far as prison industries are concerned, the restrictions placed on selling on the open market handicap the introduction of modern production methods. Most prisons are limited to production for use by government departments. Industrial production in prisons sometimes tends to be inefficient, and old machinery and old production methods are sometimes continued in order to keep a maximum number of inmates busy, even though this means production methods do not correspond with those in the outside community.

In our opinion industry production in a prison should be governed by the following rules:

- (a) Internal working conditions should, as far as possible, duplicate those on the outside. In particular, machinery and production methods should be modern, to facilitate the inmate's transfer to outside employment;
- (b) Instruction should be of top quality. We suggest that industrial production within the institution should be related to the vocational and trade training program, although the two should be left administratively separate.

This kind of prison industry can be maintained only if there is a market for the products. The following should be considered:

- (a) Expansion of use within government departments, including municipalities. The camp programs developed by various prison services in Canada in conjunction with the departments responsible for natural resources are an example of what can be accomplished;

- (b) Use of prison products in the international aid program. Presumably this is a market that would not normally be supplied by Canadian manufacturers, so the disposal of prison products at reduced prices would present no problem. Involving the inmate in an altruistic program of this nature might also have secondary salutary effects, if it could help instil a sense of worth;
- (c) Public information programs to make members of the public generally and members of industry and organized labour in particular knowledgeable about the issues involved.

The danger that industrial production can be given too much importance in a prison should be recognized. In the Committee's opinion, the treatment needs of the inmates should take precedence over maintenance requirements of the institution, or the financial gains to be had from industrial production.

The involvement of inmates of correctional institutions directly in community vocational and trade training programs should also be considered, as an alternative to providing duplicate training facilities in the institution. This proposal could have many advantages. The use of community facilities reduces capital and operating costs in the institution; high quality instruction is ensured; it affords an opportunity for specialized training; training levels reached are recognized by labour and industry; certificates do not give any suggestion that the individual has a prison record and participation in a normal community program might help improve the inmate's attitude towards society. Similar programs can be worked out for those taking academic education and for those who are employed in a job in the community.

Federal manpower programs intended to assist in adult trade-training programs should be expanded to include inmates of provincial prisons.

Another aspect of employment for regular workers in the community involves compensation for industrial accident. Similar provisions should apply in prison.

#### *Role and Working Relationship of Staff*

A prison should be an educational centre in the widest sense of the word, in which not only the inmates but the staff as well are being constantly re-educated. It is as necessary to re-examine the attitudes of experienced prison officers as to train new recruits.

If there is to be development of the therapeutic community approach to prison program, the role and importance of each individual staff member must be recognized. Each is expected to be competent in his own department and to have sufficient understanding of the roles of others to be appreciative. All staff members have an equal voice in discussion, although someone in authority must make the final decision.

In the present era of relative prosperity and better education candidates for a career on prison staff are more likely to be motivated by an interest in this kind of employment, than by considerations of personal financial security.

## *Community Involvement*

A few of our Canadian prisons are beginning to recognize the importance of maintaining close community ties. The aim is to teach the inmate to function socially and this is most difficult if he is kept isolated from members of the normal community. To encourage citizen involvement, the prison must be more clearly defined as an agency of the community and not as the private preserve of the correctional administrator. For the inmate to feel genuinely a part of the community and for the prison to be a dynamic and creative agency of community purpose, it is essential that citizen participation be a basic tenet of the system.

Significant elements in community life should be a normal feature of prison life. On the other hand, prison programs should permit the inmates to take part in outside community activities. Programs now in operation in some institutions in Canada include access to mass media such as radio, television, newspapers and magazines, with encouragement of discussion of current affairs; utilization by citizens of institutional facilities, such as auditoriums, gymnasiums, vocational shops and classrooms for night classes; participation by the police in efforts to increase the inmate's understanding of law enforcement; participation by inmates in search and rescue operations, sports community leagues, blood-donor clinics, such welfare programs as building of community recreational facilities and similar service club work projects; drama and musical groups, and discussion sessions with citizen involvement.

Participation by an inmate in community welfare projects would provide him with an opportunity to make amends to his victim through service to society generally. This can have a beneficial effect on his rehabilitation.

Such contacts between prison inmates and members of the community also serve to keep the public informed about what goes on in our prisons and what additional facilities are needed. This forestalls unwarranted criticism of the prison based on misinformation, while at the same time ensuring that the public is in a position to support good institutional service.

Such contacts also pave the way for public acceptance of the inmate back into the community after discharge. Better acquaintance with the inmates in prison may help the citizen to see them as individuals with a problem.

Another important function of keeping the inmate in touch with the community is to make him aware of the resources that exist in the community to help him following discharge.

Keeping the staff in contact with the community is probably as important as establishing these contacts for the inmates. Staff can become institutionalized too.

A special community group which should be brought into the institutional program are rehabilitated ex-inmates. This corrects the situation where the inmate sees only failures among ex-inmates. It does the same for staff and members of the public.

It is recognized that the public should be involved in prison programs in ways that will not lessen the authority of the staff or interfere with the

functioning of the institution. Careful selection of the members of the public who are to participate in prison programs is, of course, necessary. Certain voluntary agencies have already participated in such programs and may well be of continuing assistance.

### *Corporal Punishment*

Corporal punishment is still used by the Penitentiary Service as a disciplinary measure.

TABLE 13  
Use of Corporal Punishment in Canadian Penitentiaries  
as a Disciplinary Measure.

1957	—	15
1958	—	16
1959	—	24
1960	—	12
1961	—	67
1962	—	18
1963	—	96
1964	—	26
1965	—	7
1966	—	32
1967	—	19
1968 to 15 Oct.	—	1
TOTAL		333

SOURCE: Information supplied by the Penitentiary Service

Manitoba is the only province or territory that has used corporal punishment as a prison disciplinary measure in recent years. It still appears in prison regulations in British Columbia and Newfoundland but has not been used in those provinces for some decades.

Mr. A. J. MacLeod, Commissioner of Penitentiaries, gave evidence regarding corporal punishment as a prison disciplinary measure before the House of Commons Standing Committee on Legal Affairs on November 25, 1968. The following excerpt is taken from the Minutes of the Standing Committee.<sup>14</sup>

MR. GILBERT: Mr. Commissioner, I would like to direct other questions to you with regard to corporal punishment. . . .

MR. MACLEOD: . . . As far as institutional corporal punishment is concerned, it cannot now be imposed in an institution without the specific approval of the Commissioner of Penitentiaries. Of course, we have very elaborate regulations governing the manner in which it is to be imposed. No more than ten officers can be present.

<sup>14</sup> House of Commons. Standing Committee on Legal Affairs. *Minutes of Proceedings and Evidence No. 5 (November 25 and December 3, 1968)*. Ottawa: Queen's Printer

The prison psychiatrist or medical doctor must be there; the warden or deputy warden must be there. The punishment can be stopped at any time by the doctor or the psychiatrist or the warden or deputy warden. Of course, the only problem with making rules about corporal punishment is that the more humane you try to make them, the less humane the operation looks in the end result. My own feeling is that the tendency is for it to go into disuse as a possible prison punishment, and, of course, when that happens then presumably the Regulations in the Act will reflect the practice.

MR. GILBERT: In other words, you would not have any objection if I brought forth an amendment to repeal that particular section?

MR. MACLEOD: I would not, no. As a judicial punishment, it is remarkable that it is reserved under the Criminal Code for offences that involve the use of violence or the threat of violence by the offender. Our people seem to think that it may have a useful short-term benefit if it is imposed on an offender but ultimately, society reaps more violence from him than it inflicted upon him.

The Committee agrees with this view. We are of the opinion that corporal punishment is contrary to modern prison philosophy and practice and we recommend its abolition.

**The Committee recommends that the use of corporal punishment as a prison disciplinary measure be discontinued in Canada.**

The Committee has also recommended (Chapter 11) the abolition of corporal punishment as a sentence of the court.

### *Remission*

The same provisions for remission should apply in the provincial as in the federal institutions. This is discussed more fully in Chapter 18.

### *Location, Design and Size*

It is axiomatic that any building should be designed to serve the purpose for which it is intended. There are several steps which should precede the designing of a prison. First, a clear and comprehensive statement of function should be formulated. Second, a careful examination of the type of inmate the institution will house should be undertaken to determine what is required for successful rehabilitation. Third, the program that is considered the most effective in accomplishing the rehabilitation goals of the institution should be worked out in detail.

The Committee has seen many instances in Canada where this planning sequence has not been followed as new prisons were developed. As a result, classification criteria and program have had to be adjusted to fit an institution not designed to serve its purpose.

The following principles are, in the Committee's opinion, important ones that apply generally to all prison planning.

### *Location*

Prisons should be located within the limits or in the immediate vicinity of a major centre that has appropriate clinical facilities; it is an added advantage if the centre also has a university.

Such locations near major centres are desirable for these reasons:

1. Visiting by relatives of inmates is easier in the more accessible location. Many of the inmates will probably come from the city itself.
2. Community contacts, such as visiting in and out, employment interviews, sports, theatrical productions, and use of institutional facilities by the community, are facilitated.
3. Pre-release planning is easier near the large centre, because many of the inmates will probably come from that city, and because after-care placement and employment agencies are more accessible.
4. It is easier to attract and hold competent staff in this setting. Few senior people, or those with professional training, will choose to live in isolated locations.
5. The urban setting prevents the staff from becoming ingrown. There are opportunities for staff to get the stimulation of discussion with other experts in their own and related fields. Extension and similar courses can be arranged easily, through the university if there is one or through the use of specialist staffs available in the urban setting.
6. Part-time professional staff from the community can be utilized to supplement the work of the institutional staff.
7. Community facilities, such as clinics, hospitals, technical schools, universities and churches, may be used for the inmates. Such facilities are becoming increasingly available in most urban areas.
8. The prison can be used for field placement of university students. Included would be students in medicine, psychiatry, pedagogy, social work, psychology, law, sociology, theology, architecture and dietary science.
9. The institution and the university, if there is one, can work together conveniently in research.
10. Although land costs may be higher, operating costs are likely to be less. For example, cost of transportation of prisoners is less, since many of them will probably come from the city. Supply and repair services are also more readily available.

These comments do not apply, of course, to reforestation and similar camps which must be located at the place where the work is being done.

## *Design*

There should be flexibility in prison structure, with each institution designed to serve the program for which it is intended. The Committee believes these principles should serve as a guide:

1. Since the programs vary widely, it follows that no one design will serve for all prisons.
2. A lack of flexibility is evident in much prison design in Canada, both past and present. As a result, we are burdened with large stone and steel structures, that cannot be adapted readily to a modern treatment program.
3. There has been sufficient experience to show that many inmates have shown a capacity to adapt to open and medium security institutions, if the inmates are selected through a good classification system, and if the institution is well staffed and has a good treatment program. Such institutions can be built at relatively low cost. They can be moved to a new location, adapted to other use, or abandoned if that becomes necessary.
4. Inmates, like everyone, require reasonable privacy. A feeling of self-respect must be instilled in inmates if they are to be rehabilitated and this is impossible in regimes that deal with them in depersonalized ways. Non-security cubicles are better than dormitories for some inmates. Toilet and shower facilities and change rooms should be designed with privacy in mind.
5. At the same time, space should be provided where socialization programs that bring the inmates together can be operated.
6. Correctional treatment is still in the process of evolution. The design of a prison should therefore make provision for gradual adaptation to renovated and improved programs as they are developed.

## *Size*

The appropriate size for an institution should depend on the program and the type of inmate for which it is intended. However, since the major treatment device that can be used in prison is the relationship between staff and inmates, it should be as small as possible. The institution should be divided into separate units of a size to make it possible for each staff member to know each inmate personally, and for the staff to work as a team. An institution that consists of large units runs the risk of becoming a production-line operation, with all the problems of impersonalization and the development and perpetuation of inmate attitudes that work against a constructive program.

## Annex

### Canadian Correctional Chaplains' Association: Statement of Purpose and Policy

#### 1. *Philosophy*

The Canadian Correctional Chaplains' Association is integrally involved in the process of corrections and contributes the theological perspective. The theological understanding of man applies equally to all men, whether defined by law as offenders or not. Society has a right to deprive the offender of his physical freedom but not of his moral freedom. Man must not be subjected, by the correctional process, to any damaging influences which tend to dehumanize him. The offender, because of his human dignity, must always be treated with responsibility and as a person having a capacity for responsibility. The approach of theology to corrections is not only a matter of penitence but moves towards renewal and redemption.

We acknowledge the validity of the multi-disciplinary approach. We agree that there is a biological, psychological, and sociological dimension to human life, but there is also a theological dimension arising out of man's relationship to God. The adequate treatment of man as a whole, requires a recognition of this dimension.

#### 2. *Goals*

The specific contribution of pastoral ministration and counselling is directed towards instilling and nurturing a positive set of values based upon a theological concept of man. This applies to every offender and particularly to those in whom an anti-social value system has led to commission of criminal acts. We seek to lead each person into a wholesome, dynamic relationship with self, society, and God.

#### 3. *Methodology*

The chaplain must accept and understand the offender as he is; yet, must help him to find, through whatever positive values he has, his way to the stated goals.

It is recognized that the best professional techniques, in conjunction with the personality resources and theological training of the chaplain will be employed to effect the integration of these values.

Our correctional system must provide the chaplain with adequate opportunities and facilities to implement a specific training program for the development of the moral and religious sense of the offender.



## PAROLE AND STATUTORY CONDITIONAL RELEASE

### *Definitions*

For the purposes of this report, the Committee has adopted the following definitions:

*Parole* is a procedure whereby an inmate of a prison who is considered suitable may be released, at a time considered appropriate by a parole board, before the expiration of his sentence so he may serve the balance of his sentence at large in society but subject to stated conditions, under supervision, and subject to return to prison if he fails to comply with the conditions governing his release. <sup>1</sup>

<sup>1</sup> Compare with definitions:

United Nations. Department of Social Affairs. *Parole and After-Care*. New York, 1954, p. 1.

Parole "may be defined as the conditional release of a selected convicted person before completion of the term of imprisonment to which he has been sentenced. It implies that the person in question continues in the custody of the State or its agent and that he may be reincarcerated in the event of misbehaviour. It is a penological measure designed to facilitate the transition of the offender from the highly controlled life of the penal institution to the freedom of community living. It is not intended as a gesture of leniency or forgiveness.

United States. *Attorney General's Survey of Release Procedures, Vol. IV, Parole*. Washington: Government Printing Office, 1939, p. 4.

Parole is "the release of an offender from a penal or correctional institution, after he has served a portion of his sentence, under the continued custody of the state and under conditions that permit his reincarceration in the event of misbehaviour."

National Probation and Parole Association. *Standard Probation and Parole Act*. New York; 1955, p. 2.

Parole "is the release of a prisoner to the community by the Parole Board prior to the expiration of his term, subject to conditions imposed by the Board and to its supervision. Where a court or other authority has filed a warrant against the prisoner, the Board may release him on parole to answer the warrant of such court or authority."

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.

*(continued on following page)*

*Statutory Conditional Release* is a procedure whereby an inmate of a prison who has not been granted parole is released before the expiration of his sentence at a date set by statute so he may serve the balance of his sentence at large in society but under supervision and subject to return to prison if he fails to comply with the conditions governing his release.

### *Purpose and Value of Parole*

Parole is a treatment-oriented correctional measure, not a sentence-correcting method. It is in no way aimed at reviewing the sentence of the court. As part of the correctional process, its function is rather to determine the portion of the sentence which is to be spent in the community and the kind of control and supervision which will be needed.

Parole supervision should not be thought of primarily as surveillance. While certain restrictions and controls are involved, the emphasis should be on assisting the offender to work out the adjustments in living arrangements and employment, and in his own feelings, attitudes and human relationships, which are needed if parole is to accomplish its purpose.

Parole is designed as a logical step in the total correctional process and is designed particularly to assist the offender's re-integration into the community as a contributing and law-abiding citizen. The restrictions on his freedom, which have been imposed as a result of his offence, are not entirely removed. The conditions of his life, however, are closer to those he will again experience as a free citizen after expiration of his sentence, than are the conditions of life in prison.

At the same time, for the offender, parole is an opportunity and a test of his self-control and ability to get along in the community. For society, it offers immediate protection through a degree of surveillance and control over the offender's behaviour, and long-term protection through a reduced likelihood of recidivism.

The period of time immediately following release from prison is a period of great stress. Those who have worked closely with offenders, both within and outside prisons, hold the view that a substantial proportion leave prison with the desire and intention to live within the law, but many become discouraged and fail during the first crucial months. If, on the other hand, they can sustain a law-abiding manner of living during this period, the chances of avoiding relapse into criminal behaviour are greatly improved. It is clearly sensible,

*(continued from page 329)*

Parole "is a well recognized procedure which is designed to be a logical step in the reformation and rehabilitation of a person who has been convicted of an offence and as a result, is undergoing imprisonment. It is a procedure whereby an inmate in an institution may be released, before the expiration of his sentence, so that he may serve the balance of his sentence at large in society, but under appropriate social restraints designed to ensure, as far as possible, that he will live a law-abiding life in society. It is a transitional step between close confinement in an institution and absolute freedom in society. The sanction that is imposed for failure to live up to the conditions that govern the release is the return of the inmate to the institution."

then, for society, in its own interest, to concentrate attention and efforts to encourage and re-inforce changed behaviour during this period of time.

In the short run, it is obvious that parole, as compared with incarceration for the same period of time, involves certain risks to society, in that the control over the offender's behaviour is less direct and less complete than in prison.

As has been pointed out repeatedly, however, from many sources in many countries and jurisdictions, there are risks in any form of treatment of the offender. The short-term risks of parole are calculated risks and in the opinion of this Committee are less than the risks in the alternative of sudden and dramatic contrast between incarceration and total freedom.

One cannot learn to live in freedom without experiencing freedom, and even the most open institution provides a restricted, protected environment. The offender who is to succeed in becoming a law-abiding and, hopefully, contributing citizen, must do so in the outside community. It is here that he has previously failed, and he returns to the community usually feeling more isolated from whatever positive personal and social relationships he previously had, than when he went into prison. The Committee believes strongly that the emphasis in administration of parole should be on social re-education of the offender, to help him find ways of living a socially-satisfying life within the law. The ideal is to provide the controls necessary because of irresponsibility or instability but to permit steadily increasing freedom to enable him to develop the necessary self-control and responsibility which are the criteria of maturity. This is the attitude and approach which we believe best promote successful social re-adjustment by an offender, and parole represents a unique opportunity to do this within the outside community where the test of his adjustment must eventually take place.

The Committee believes that the most important aspect of parole is its efficacy, when well administered, in assisting the successful re-adjustment of the offender into community living. However, it should also be noted that parole represents a less costly form of treatment than does incarceration of the offender for a similar period of time. It cost approximately \$750.00 per year in the 1967-68 fiscal year to keep an inmate on parole; it cost approximately \$5,300.00 to keep him in a penitentiary.<sup>2</sup> When indirect costs such as loss of economic productivity and the cost of maintaining dependants are considered, the saving in public funds becomes even more marked.

A survey covering 232 parolees during a period of one month (November 1966) in the Montreal area revealed that 86 per cent were employed. The 201 employed parolees earned \$66,188.00 or an average of \$329.00 per parolee per month.<sup>3</sup>

<sup>2</sup>House of Commons, *Debates*, Vol. 113, No. 32, October 28, 1968, pp. 2077, 2078. The Committee has attempted to find out the overall cost of parole. It has found out, however, that it is impossible at this stage to evaluate the actual cost of parole generally or to know the exact cost of keeping an inmate on parole. There are costs which are not taken into account such as some operating expenditures which are out of the National Parole Board's hands, supervision of parolees by the various probation services, and grants that do not meet the full cost which are made to the voluntary agencies.

<sup>3</sup>Survey carried out by the Quebec Regional Office of the National Parole Service.

A more recent survey covering 342 parolees during a period of one month (June 1968) in the Toronto area revealed that 287 employed parolees earned \$109,323.00 and supported 408 dependants.<sup>4</sup>

A national survey conducted during that same month and covering 2,284 paroled inmates revealed that 1,949 (86 per cent) were employed, and these employed parolees earned a total of \$673,371.00 or an average of \$294.82 per parolee per month. The survey also reveals that 2,472 dependants were supported.<sup>5</sup>

The Committee points out that in choosing between a less and a more costly form of treatment the burden of demonstrating that it is more effective and necessary should rest upon the proponents of the more costly form.

### *Development of Parole in Canada<sup>6</sup>*

While the concept of parole held by this Committee as described above is not that of clemency, there is no question that the original parole practices were related to clemency. It was possible from early days in Canada for some prisoners to be released from custody through the royal prerogative of mercy which rested with the Governor General. Practice advanced in the direction of parole when the Ticket of Leave Act was introduced into parliament in 1898. It is interesting to note that the Prime Minister of the day, Sir Wilfrid Laurier, in speaking of the new bill, recognized the problem of readjustment to the free community which faces an inmate of a penal institution when he is discharged. Conditional liberation was viewed as a method of bridging the gap between the control and restraints of institutional life and the freedom and responsibilities of community life. Under the terms of this Act, the Governor General of Canada could, on the advice of a designated member of the government, grant a conditional release to *any* prisoner serving a term of imprisonment.

Other federal legislation passed several years later at the request of two provinces, Ontario in 1916 and British Columbia in 1948, made provisions for a restricted type of parole through a system of indeterminate sentence.<sup>7</sup> Provincial parole boards in these provinces were given jurisdiction to grant parole to an inmate who had completed the "definite" portion of his sentence, during the "indeterminate" portion.

Release under the Ticket of Leave Act was greatly facilitated by the Salvation Army Prison Gates Section, a voluntary organization, which undertook considerable work interviewing inmates of penal institutions, checking character references and prospective employment for prisoners applying for ticket of leave, and supervising some of the prisoners released. In 1905, one of their officers, Brigadier Archibald, was appointed the first Dominion Parole

<sup>4</sup> Survey carried out by the Central Ontario and Northern Ontario Regional Office of the National Parole Service.

<sup>5</sup> Inmates Earnings Survey, June 1968, National Parole Board, Ottawa, Canada.

<sup>6</sup> See Miller, F. P. *Parole*, in McGrath, W. T. (ed.). "Crime and Its Treatment in Canada". Toronto: MacMillan, 1965.

<sup>7</sup> R.S.C. Chapter 217, SS. 43 and 152. The Prisons and Reformatories Act.

Officer. The administration of the Act as well as the royal prerogative of mercy was the responsibility of officers in the Department of Justice; a separate Remission Branch was organized within the Department, which later became the Remission Service.

During the years 1929-1931 the service was reorganized. The office of Dominion Parole Officer was absorbed and rules of practice were formulated. This followed a period during which there had been criticism that paroles had been granted too liberally.

During the depression years both prison population and tickets of leave increased. During the second world war selected prisoners were released to join the armed forces or work in industry under the "special war purposes ticket of leave".

The immediate post-war years were characterized by a considerable development in social services generally, and new resources both within and outside institutions enabled greater use of ticket of leave. The John Howard and Elizabeth Fry Societies, as well as the Salvation Army, expanded and developed their services and an increasing number of after-care agencies were organized and became active in this field. The Province of Quebec saw the establishment of the "Société d'Orientation et de Réhabilitation Sociale" and others. Growth of probation services in several of the provinces made their assistance available also. Community recognition of the value of parole-type services grew. In 1957, the Remission Service opened four new regional offices to add to the existing two. Increasingly the Remission Service was looking on tickets of leave less as the exercise of clemency and more as means of providing a supervised period of readjustment in the community. In 1953 the Minister of Justice appointed a "Committee to Inquire Into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada." This Committee, under the chairmanship of Mr. Justice Gerald Fauteux of the Supreme Court of Canada, reported in 1956, recommending the enacting of legislation to create a National Parole Board.<sup>8</sup> These recommendations were implemented on February 15, 1959, with the proclamation of the Parole Act (Chapter 38 of the Statutes of Canada 1958) which provided for the federal system presently in operation in Canada.

#### *Utilization and Success of Parole in Canada*

During 1959, the first year of its existence, the National Parole Board granted 2,038 paroles. During 1967 the Board granted 3,088 paroles. During the nine years of its existence the Board has granted a total of 20,254 paroles. This information is set out in detail in Table 14.

Some of those applications for parole that were not successful were deferred. In many cases a later application the following year was successful and parole was granted.

<sup>8</sup> Fauteux Report. Op. Cit.

TABLE 14

Parole Applications and Paroles Granted by the National Parole Board, by Penitentiaries or Provincial Institutions, 1959-1967

Year	Penitentiaries			Provincial Prisons			Totals		
	Number of Applications	Number of Paroles Granted	Per Cent Granted Parole	Number of Applications	Number of Paroles Granted	Per Cent Granted Parole	Number of Applications	Number of Paroles Granted	Per Cent Granted Parole
1959.....	2,264	994	44	2,564	1,044	39	4,828	2,038	42
1960.....	3,514	1,192	34	2,605	1,333	51	6,119	2,525	41
1961.....	2,874	1,005	35	4,018	1,292	32	6,892	2,297	33
1962.....	2,774	885	32	3,272	987	30	6,046	1,872	31
1963.....	2,521	663	26	3,645	1,126	31	6,166	1,789	29
1964.....	2,604	751	29	2,734	1,101	40	5,338	1,852	35
1965.....	3,068	1,127	38	2,601	1,170	45	5,669	2,297	41
1966.....	2,733	1,114	41	2,173	1,382	64	4,906	2,496	51
1967.....	2,797	1,328	47	3,848	1,760	46	6,645	3,088	46
Totals.....	25,149	9,059	36	27,460	11,195	41	52,609	20,254	38

The Ontario Parole Board granted 1,296 paroles during 1967 out of 2,105 applications.<sup>9</sup> The British Columbia Parole Board granted 411 paroles out of 417 applications during the 1966-67 fiscal year.<sup>10</sup>

Measuring the success of parole requires a definition of "success". One measure is the completion of the parole period by the parolee without either forfeiture or revocation. This is an important measure of success since it means that permitting the inmate to spend the parole period in the community rather than in the institution did not endanger the public while at the same time his chances of later success were increased and the cost to the taxpayer reduced.

The National Parole Board reports that of the 20,254 paroles granted up to the end of 1967, 1,105 were forfeited, and 1,092 were revoked, a total of 2,201 cases in which parole was not completed successfully. This means that 89.2 per cent of parolees completed their parole period successfully or are still on parole.<sup>11</sup>

The British Columbia Parole Board reports a success rate of 61 per cent in 1967. This is somewhat lower than the previous two years when success rates of 69 per cent were reported.

The Ontario Parole Board presents its statistics in somewhat different form, basing them only on those paroles granted during the year. These statistics show 60.73 per cent of those released during 1967 had completed their parole period successfully before the end of the fiscal year, 16.51 per cent were listed as violators and 22.76 per cent had not yet completed their parole period.

Another measure of success is whether the inmate's total correctional experience, including parole, enabled him to avoid further convictions after the parole period was completed. A recent unpublished study financed by the Canadian Penitentiary Service and carried out in the St-Vincent-de-Paul Penitentiary complex under the direction of Professor Justin Ciale of the University of Montreal\*, provides information for appraising the success of parole on this basis. A group of 1677 inmates who were released from regional penitentiaries between May 1959 and May 1961 were followed up for a period of over five years after their release. This study yielded the following results. (It should be noted that release of these inmates occurred during the early period of the National Parole Board's existence.)

This indicated a success rate of 55 per cent for parolees out of federal penitentiaries after a five-year period. Those who were released on expiry of sentence had a success rate of only 35 per cent. While it cannot be concluded from these figures alone that the fact of parole explains this difference,

<sup>9</sup> Ontario. Department of Reform Institutions. *Report of the Minister, 1967*. Toronto: Queen's Printer.

<sup>10</sup> British Columbia. Department of the Attorney-General. *Annual Report of the Director of Corrections, 1967*. Victoria: Queen's Printer.

<sup>11</sup> Canada. National Parole Board. *Annual Report, 1967*. Ottawa: Queen's Printer.

\* Dr Ciale has since been appointed Chief, Correctional Research, Department of the Solicitor General.

TABLE 15

Number of Inmates Granted Parole and those Released on Expiration of Sentence: Success and Relapse (5-year follow-up)

	Mode of Release		Total
	Expiration of Sentence	Paroled	
Number who did not relapse into crime.....	325	405	730
Number who relapsed within five years.....	610	337	947
Totals.....	935	742	1,677

nevertheless, they tend to support the views previously expressed by the Committee as to the efficacy of parole as a correctional measure.

Since parole was granted on a highly selective basis there is no way of knowing what might have been the result if those who were released at expiration of sentence had been granted parole. It would be unsafe to interpret these figures as conclusive.

#### *Federal Parole Legislation*

The *Parole Act*<sup>12</sup> governs the operation of the national parole system in Canada. This Act does not deal with provincial parole systems except at section 5. The provisions of the Parole Act will be discussed in some detail at appropriate points throughout this chapter. For convenience, the full text is attached to this chapter as annex A.<sup>13</sup>

The *Prisons and Reformatories Act* provides for several different procedures for parole. Section 43 provides that the Lieutenant-Governor of Ontario may appoint a parole board for that province. Section 46 provides for indeterminate sentences in Ontario. The Ontario Parole Board has jurisdiction to grant parole to an inmate of an Ontario prison who is serving an indeterminate sentence after he has served the definite portion of the sentence.

Sections 151 and 152 make similar provisions for indeterminate sentences in British Columbia and for the establishment of a parole board for that province. One major difference is that the provisions relating to British Columbia apply only to young offenders sentenced to specific institutions while the provisions relating to Ontario apply to inmates of all ages.

Sections 99, 107 and 166A establish special sentencing and parole procedures for women sentenced to the Good Shepherd Reformatory in Halifax,

<sup>12</sup> An Act to Provide for the Conditional Liberation of Persons Undergoing Sentences of Imprisonment, Chapter 38, 1958.

<sup>13</sup> See Annex A to this chapter.

Nova Scotia, and the Interprovincial Home for Young Women at Coverdale, New Brunswick. Parole may be granted by the Minister of Justice on the joint advice of the superintendent of the institution and the magistrate of the City of Halifax or of Albert County respectively. As far as the Committee can learn, these provisions have never been acted upon. Parole from these institutions has been governed by the provisions of the Parole Act and, formerly, by the provisions of the Ticket of Leave Act.<sup>14</sup>

There is an over-lap of jurisdiction between the National Parole Board and the Ontario and British Columbia Parole Boards. The provincial boards have jurisdiction over the indeterminate portion of an inmate's sentence. The National Parole Board has jurisdiction over the definite portion of a sentence imposed for an offence created by federal legislation. If the National Parole Board grants parole affecting the definite portion of his sentence, the inmate is already on parole when the time comes for the provincial board to consider parole affecting the indeterminate portion of his sentence. These difficulties have been overcome in practice through cooperative planning by the boards and services involved.

#### *Federal-Provincial Responsibility in Parole*

In Chapter 14 it is recommended that the federal government retain responsibility for parole as it affects inmates of federal penitentiaries and that the provinces assume jurisdiction over parole as it affects all inmates of provincial prisons.

Parole is seen as an integral part of the correctional process. Rehabilitation demands continuity and flexibility, including flexibility in determining whether an inmate should serve all of his sentence in the institution or whether he should serve part of it in the community. It also demands coordination of knowledge about the offender. It seems inefficient to the Committee for an offender to be under the jurisdiction of one government throughout his institutional career but for another government to be responsible for deciding whether he should be granted parole and for supervising him if he is granted parole. It is for these reasons that the Committee recommends that the provinces assume responsibility for parole as it affects all inmates of provincial prisons.

The system of indeterminate sentences in effect in Ontario and British Columbia provides a means of introducing provincial control over parole for at least a portion of those sentenced for offences against federal statutes. If the provinces assume responsibility for parole as it affects all inmates of provincial prisons, this alternative device of the indeterminate sentence would not be required.

These indeterminate sentences also make it possible for an inmate to be sentenced to a total of four years less two days—a combination of two years less a day indeterminate—all of which could be spent in a provincial prison.

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<sup>14</sup> See Annex B to this chapter.

This is contrary to the general principle that the provinces be responsible for institutional care for only those sentenced to less than two years.

For these reasons, it is also recommended in Chapter 14 that the system of indeterminate sentences now in effect in Ontario and British Columbia be abolished.

Table 14 indicates that a substantial number of persons are paroled from existing institutions by the National Parole Board under existing practice. Thus the recommendation that jurisdiction for parole as related to this group of offenders be transferred to the provinces involves a substantial shift in responsibility. Five provinces do not now have a parole service and would require a period of time to develop a service adequate to the responsibilities involved. This might imply in certain instances a gradual transfer of responsibility. In any case, the National Parole Board should continue to carry this responsibility until alternative provisions are made.

### *The National Parole System*

The administration of parole involves two major types of functions. One is a function of adjudication vested in the National Parole Board. Part of this responsibility is to determine whether an individual inmate is to be granted parole and at what point. Another part is to reach decisions regarding suspension and revocation of parole.

The National Parole Service has responsibility for collecting and collating the material required in a particular case by the National Parole Board in order to reach a decision regarding the granting, suspension or revocation of parole. The National Parole Board does not interview parole applicants but depends on the written material prepared by the National Parole Service.

The other function is the supervision of parolees, representing a combination of assistance to the parolee in meeting his problems of re-establishment in the community and direct guidance and control over his activities. This function is carried primarily by the National Parole Service but with the assistance of other agencies.

Section 4 (3) of the Parole Act, as part of the provisions governing the establishment of the National Parole Board, reads:

The Chairman is the chief executive officer of the Board and has supervision over and direction of the work and the staff of the Board.

This makes the Chairman of the National Parole Board responsible for the work of the National Parole Service.

The Committee is of the opinion that the quasi-judicial nature of the National Parole Board's functions should be emphasized. The provision that the Chairman of the National Parole Board is responsible for the operation of the National Parole Service derogates from the quasi-judicial status of the Board.

The National Parole Board is an independent statutory body not answerable for its operation or decisions to any department or minister; the National

Parole Service operates on the other hand as a departmental service subject to direction and control by the Solicitor General. To provide that the Chairman shall in one capacity be free from, and in another capacity be subject to, ministerial direction and control seriously weakens the guarantees of independence upon which the impartiality of the National Parole Board must depend. Further, as has been pointed out, the National Parole Service performs all investigative functions for the National Parole Board, and in this respect also the impartiality of the Board is predicated upon its freedom to accept or reject information and advice tendered by the National Parole Service.

It appears to the Committee that the same principles apply as have been applied earlier in this report to the separation of functions between magistrates and police officers. Justice must not only be done but must be seen to be done.

**Accordingly, the Committee recommends that:**

- 1. The independence of the National Parole Board be formally acknowledged by legislation freeing it from the possibility of ministerial direction in any aspect of the function of the Board or any member of the Board.**
- 2. The National Parole Service should be by legislation directed to supply services as required by the National Parole Board and be made directly accountable to the Department of the Solicitor General.**

#### *Structure of the National Parole Board*

The Parole Act provides for the appointment by the Governor in Council of a National Parole Board consisting of not less than three and not more than five members to hold office during good behaviour for a period not to exceed ten years. The present Board is made up of five members. A majority of the members of the Board constitutes a quorum.

The Committee later in this chapter recommends that the Parole Board be enlarged. Until January 1969 the Parole Board membership was exclusively made up of people drawn from the judiciary and the legal profession. The Committee is of the opinion that the enlarged Parole Board envisaged by this Committee should contain representatives from various disciplines such as the judiciary, the police, the correctional services, psychiatry, psychology and social work.

**The Committee, therefore, recommends that the Parole Board be composed of representatives from different disciplines appropriate to its functions.**

#### *National Parole Board Procedures*

The Board is required to review the case of every inmate serving a sentence of imprisonment of two years or more, whether or not an application for such review has been made, and to review shorter sentences upon application by or

on behalf of the inmate. The powers of the Parole Board are set out in section 8 of the Parole Act:

The Board may

- (a) grant parole to an inmate if the Board considers that the inmate has derived the maximum benefit from imprisonment and that the reform and rehabilitation of the inmate will be aided by the grant of parole;
- (b) grant parole subject to any terms or conditions it considers desirable;
- (c) provide for the guidance and supervision of paroled inmates for such period as the Board considers desirable; and
- (d) revoke parole in its discretion.

The Parole Board is not required to grant a personal interview to the applicant. Information concerning the inmate is collected by the Parole Service and submitted for review by individual Board members. Such information includes:

- (a) The pre-sentence report which the trial judge or magistrate took into consideration before imposing sentence;
- (b) The report of the investigating police force concerning the circumstances that surrounded the commission of the offence;
- (c) The previous criminal record of the inmate, if any;
- (d) The information collected by prison authorities upon admission to the institution, (better known as "the newcomer's sheet") as well as the initial report of the classification officer;
- (e) Progress reports of the inmate's adjustment and progress in the institution and any special medical, psychological and psychiatric reports;
- (f) The inmate's plans for the future;
- (g) An investigation of home conditions and the possible reaction of the community to his release;
- (h) Special reports from after-care agencies dealing both with the inmate in the institution and his family conditions in the community.

The Parole Board's decisions, therefore, are based upon a number of factors. The nature and circumstances of the offence itself, the record of other criminal activity by the inmate, the inmate's progress and adjustment during his present term of imprisonment, home and community conditions, are all considered. Effective functioning of the Board is greatly dependent upon the effectiveness of the Parole Service, which in turn depends upon reports from the institutions and from community agencies. Direct discussions with the inmate concerning his suitability for parole and of his work and living plans if parole is granted are within the jurisdiction of the Parole Service.

In certain kinds of cases it is the practice of the Board to hold formal meetings in adjudicating on parole applications. Frequently, however, deci-

sions are made by an examination of material by individual members of the Board. Not all members of the Board are necessarily involved in the consideration of a case and a decision made by two or more concurring members is deemed to be an adjudication of the Board.

As noted above, a parole applicant does not have an opportunity to present his case in person to the National Parole Board. This procedure follows the recommendation of the Fauteux Committee. Besides commenting on the time and expense involved in travelling to institutions for personal appearances, in a country the size of Canada, it appears that the Fauteux Committee had in mind that a short personal appearance could not provide as adequate a review of the relevant information as could a study and analysis of written material carefully collected from various sources.

The increased use of such written material is, of course, in keeping with trends in correctional practice; it involves a principle parallel to that which has brought about the increased use of pre-disposition reports by the courts. As long as the number of members of the Parole Board is limited to five, it stands to reason that they can review more cases on the basis of the analysis of written material than if they were to visit the different institutions. However, there are serious limitations to this method of operation.

From the viewpoint of the inmate, the decision-making body is far away and invisible. Further, the lack of a specific time known to him when his case will be reviewed and a decision made creates a state of uncertainty and strain. Inmates themselves and those working closely with them have brought to the Committee's attention the difficult situation thus created from the viewpoint of inmate morale. These considerations, plus opportunities to observe or discuss similar procedures in other jurisdictions, including the State of California, Canadian provinces where a parole system operates and certain European countries have led the Committee to the view that the occasion for personal appearance on pre-set dates is of considerable significance and value to the inmate. Where such a practice is followed, the content and orientation of the personal interview give the inmate a sense of "having been heard" or in legal colloquial parlance of having had "his day in court". The fact that he knows in advance that a definite date has been fixed, at which his case will come up leading to a quicker decision than through the present procedure, tends to reduce the restlessness and frustration which the indefiniteness of the waiting period under present procedures certainly magnifies.

The weight of expert opinion both in Canada and abroad is toward having "quasi-judicial hearings" in the institution. The body conducting this inquiry should be authorized to render a decision without delay after having seen the applicant.

Visits to the institution by members of the Parole Board for the purpose of these interviews would permit closer contact between the parole authority and the staffs of the institutions, the community services, the after-care agencies, the Regional Office of the Parole Service; with the inmates; and

with the public. The decision process would be accelerated and preparation for release facilitated, thus helping to develop a treatment policy in the institution.

The Committee is of the view that panels should be composed of no less than three so that in the event of disagreement a decision may be arrived at by a majority.

It will be necessary to increase the number of members of the Board to permit them to operate in panels if they are to take on the added work entailed in regular visits to the institutions and personal appearances by the parole applicants.

**The Committee recommends that legislation be enacted to provide for sittings of the National Parole Board in panels of not less than three members within the institution where the parole applicant is imprisoned and to provide that the parole applicant shall have the right to appear before such a panel and make representations in person.**

While the Committee is of the opinion that applicants should have the right to appear and make representations, the Committee is also of the opinion that the decisions of the Board should be final and not subject to judicial review.

Under existing procedures, when an application for parole is refused, the applicant is notified by the Board in writing, but the reasons for the refusal are not given. There are difficulties in giving reasons in written form, but they can be given verbally and interpreted if the applicant appears before a panel of the Board. There are many correctional advantages in giving the applicant the reason for the refusal. He knows what he must do to prepare himself for later applications. He knows that it is the final authority, the Board itself, that has decided which factors are important in relation to his application and he is less likely to assume that an adverse decision is due to institution staff or staff of the Parole Service having presented his case unfairly. Both the staff and the inmate now have an objective goal towards which they can work together. This will provide the staff with an opportunity to interpret further for the benefit of the applicant the full significance of the Board's reasons.

There are occasions when the reasons for refusal cannot be disclosed to the inmate directly. For instance, if there are reasons to suspect serious psychological malfunctions of which the inmate is not aware, this cannot be told to him bluntly in the interview and perhaps should be interpreted in an appropriate way by a psychiatrist involved in his treatment. There may be some development related to the applicant's family of which he is unaware. The Board must, therefore, have discretion not to disclose fully its reasons for refusal in special circumstances.

The most effective procedure is for the panel of the Board to hear the application and then adjourn to reach a decision. The applicant should then be brought back and the decision and the reasons for it given to him.

**The Committee recommends that the panel of the National Parole Board who hear a parole application communicate its decision verbally to the applicant as soon after the decision is made as possible and that the panel give and interpret to the applicant the reasons for its decision.**

### *Eligibility*

Section 8 of the Parole Act (quoted above) sets out the powers of the Board to grant parole. These powers are very wide, much wider than in most countries. In some jurisdictions parole is restricted by legislation to certain classes of offenders; in other jurisdictions to a certain portion of a sentence. This is true even in countries which have generally progressive penal legislation. For instance, in Norway the general rule is that an inmate may be paroled when he has served two-thirds of his sentence, with a minimum of four months or, if sentenced to imprisonment for three or more years, after one half of his sentence.<sup>15</sup> In Sweden an offender undergoing imprisonment for a fixed term may be paroled when two-thirds of the term, but at least four months, have been served. Sweden also has a provision for mandatory parole after five-sixths of the term, with a minimum of six months.<sup>16</sup>

The major legislative restriction placed on the powers of the Board relates to the parole of those sentenced to death whose sentence was commuted to life imprisonment. Section 656 of the Criminal Code reads as follows:

(1) The Governor in Council may commute a sentence of death to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in a prison other than a penitentiary for a period of less than two years.

(2) A copy of an instrument duly certified by the Clerk of the Privy Council or a writing under the hand of the Minister of Justice or Deputy Minister of Justice declaring that a sentence of death is commuted is sufficient notice to and authority for all persons having control over the prisoner to do all things necessary to give effect to the commutation.

(3) Notwithstanding any other law or authority, a person in respect of whom a sentence of death has been commuted to imprisonment for life or a term of imprisonment or a person upon whom a sentence of imprisonment for life has been imposed as a minimum punishment, shall not be released during his life or such term, as the case may be, without the prior approval of the Governor in Council.

An amendment to the Criminal Code, assented to on December 21 and proclaimed on December 29, 1967, for a period of 5 years, abolished the death penalty except for capital murder. It also contains a provision to the effect that no person convicted of either capital or non-capital murder may be released on parole without the consent of the Governor-General in Council. In practice the Parole Board reviews such cases, and if it is of the

<sup>15</sup> Evensen, Arne. *Social Defense in Norway*, pp. 87-89.

<sup>16</sup> See Penal Code of Sweden effective January 1, 1965, p. 62.

opinion that an inmate convicted of murder should be released on parole, it submits this recommendation to Cabinet for consideration and final decision. Cases where the Parole Board does not think parole should be granted are not submitted to Cabinet.

The Parole Regulations, as amended by P.C. 1968-48, effective from January 4, 1968, provide that no person convicted of either capital or non-capital murder can be recommended for parole before a period of 10 years has elapsed from the date of conviction.

The opinion has been expressed to the Committee by correctional officials that since the introduction of these amendments, a number of offenders, who otherwise would have been charged with and convicted of manslaughter, are now being charged with and convicted of non-capital murder, there being less reluctance on the part of juries all across Canada to render such a verdict. This means an automatic life sentence and a bar to parole before the offender has spent 10 years in prison.

We have been advised that many of those convicted under such conditions can prove to be satisfactory parole risks, and the Committee is of the opinion that the requirement that they spend 10 years in prison before parole can be recommended is too restrictive under the circumstances.

**The Committee recommends that this procedure be reviewed so as to introduce sufficient flexibility to allow the earlier parole of inmates convicted of non-capital murder where that is indicated and subject to the circumstances of each individual case.**

In the opinion of the Committee, wide and flexible provisions are preferable to rigid legislative limits on the powers of the Parole Board. Undoubtedly, some guides are necessary and in Canada these guides are set out in the Regulations. For convenience, the complete text of the Parole Regulations are set out as part of Annex A to this chapter. Regulation 2 (1) reads:

(1) The portion of the term of imprisonment that an inmate shall ordinarily serve, in the cases mentioned in this subsection, before parole may be granted, is as follows:

- (a) where the sentence of imprisonment is not a sentence of imprisonment for life or a sentence of preventive detention, one-third of the term of imprisonment imposed or four years, whichever is the lesser, but in the case of a sentence of imprisonment of two years or more to a federal penal institution, at least nine months;
- (b) where the sentence of imprisonment is for life but not a sentence of preventive detention or a sentence of life imprisonment to which a sentence of death has been commuted, seven years.

(2) Notwithstanding subsection (1), where in the opinion of the Board special circumstances exist, the Board may grant parole to an inmate before he has served the portion of his sentence of imprisonment required under subsection (1) to have been served before a parole may be granted.

(3) A person who is serving a sentence of imprisonment to which a sentence of death has been commuted, shall serve the entire term of the sentence of imprisonment unless, upon the recommendation of the Board, the Governor in Council otherwise directs.

(4) The Board shall not recommend a parole, in a case coming within subsection (3), until at least ten years of the term of the imprisonment have been served.

Since experience indicates that parole can be of maximum effectiveness, correctionally, if it is flexibly related to the circumstances, personality and progress of the individual offender, the Committee supports this use of flexible regulatory powers. It suggests, however, that there is value in Parole Regulations being examined and reviewed periodically. The Advisory Council on Criminal Justice suggested in Chapter 25 would, in the view of this Committee, be a suitable body to undertake such review.

### *Parole Conditions*

Before parole is granted, the conditions under which it is granted are explained to the applicant. His acceptance of parole under these conditions therefore constitutes an agreement on his part to abide by these conditions.

He is required to avoid further offences. In fact, if he is convicted of an indictable offence during the period of his parole which is punishable by imprisonment for a period of two years or more, his parole is automatically forfeited. If, after he has completed his parole period, he is convicted of an indictable offence committed while he was on parole, parole is deemed to be forfeited on the date the offence was committed.

Certain other conditions apply automatically to all parolees. The parolee must:

- (a) Obtain permission before changing job and residence;
- (b) Obtain permission before leaving the jurisdiction;
- (c) Obtain advice before marrying;
- (d) Obtain permission before assuming substantial indebtedness;
- (e) Endeavour to maintain steady employment;
- (f) Avoid use of intoxicants to excess;
- (g) Avoid disreputable places and associates;
- (h) Keep reasonable hours as defined by the parole supervisor;
- (i) Obtain permission before buying or operating an automobile;
- (j) Submit written reports and keep appointments for interviews as instructed by his parole supervisor;
- (k) Comply with all reasonable instructions of his parole supervisor.

These conditions appear to this Committee to be reasonable.

The Board also has authority to attach special conditions in the individual case where that is considered desirable.

## *Suspension*

The term "suspension" means a procedure whereby parole is temporarily suspended pending a permanent decision whether the parole should be continued or revoked. Under the terms of the Parole Act, suspension occurs through the issuing of a warrant of suspension and apprehension by a Regional Representative of the Parole Service under authority delegated to him by the Board. Such action may be taken only if the Regional Representative is of the opinion that it is "necessary or desirable in order to prevent a breach of any term or condition of parole" (Section 12 of the Parole Act). Such suspension must be followed by a review by the Board which may either cancel the suspension or revoke the parole, returning the parolee to the institution from which he had been paroled.

Section 12 (2) of the Act provides that the paroled inmate apprehended under a warrant of suspension shall be brought before a magistrate and "the magistrate shall remand the inmate in custody until the Board cancels the suspension or revokes the parole." There have been some objections raised as to the role of the magistrate in this procedure since he seems to have little discretion. However, the Committee is of the opinion that he has an important function to perform in this regard and that his function should be continued and stated more fully in the Act.

**The Committee recommends that the Parole Act define the jurisdiction of the magistrate in relation to suspension of parole as follows:**

**That the magistrate, upon being satisfied:**

- (a) that the person brought before him is the person named in warrant;
- (b) that the warrant has been issued by a person lawfully authorized to do so;
- (c) that the sentence, including the period of parole, has not expired or been terminated;

**shall remand the parolee in custody.**

Recently proposed legislation envisages a broader concept of the usefulness of suspension. At present, suspension may be used only to prevent an anticipated breach of conditions. Such proposed legislation would permit its use as an aid in rehabilitation to help the parolee through a particularly difficult period or as a warning that action will be taken if he does not make a more serious effort. To implement this broader concept, the Regional Representative would have authority to suspend parole for a period of up to fourteen days and would have authority anytime during that period to cancel the suspension and return the parolee to the community. If he does not cancel the suspension before the end of the period of fourteen days, he must refer the matter to the Board.

The Committee expresses concern that the decision to cancel the suspension or revoke the parole should be taken within a reasonable period of

time after the parolee is brought before the magistrate. That an offender should not be left in prolonged uncertainty as to his future is a matter of important correctional principle.

#### *Forfeiture and Revocation*

The term "forfeiture" applies to the procedure whereby a person who, while on parole, is convicted of an indictable offence punishable by imprisonment for a term of two years or more automatically loses his privilege and is returned to the institution. Under the provisions of section 13 of the Parole Act, parole is automatically forfeited and the Board has no discretion in the matter.

The term "revocation" applies to the procedure whereby a parolee who violated one or more of the conditions of his parole may be returned to prison to serve the remainder of his sentence. Parole may also be revoked if the parolee is convicted of a summary conviction offence or of an indictable offence that does not involve automatic forfeiture. When parole is revoked, the Board issues a warrant of apprehension and the parolee is returned to custody to serve the remainder of his sentence. The Board has discretion in all cases and is under no compulsion to revoke parole in any case.

The Committee is of the opinion that automatic forfeiture on conviction for an indictable offence constitutes an unnecessary restriction of the authority of the Board and feels that the Board should have the power in exceptional cases to reach a decision on the merits of the individual case. For example, an offender serving a sentence of twenty years for armed robbery might have been released on parole having served say twelve years. If, for example, he is convicted on indictment for dangerous driving while on parole, it does not seem to the Committee that his parole should be automatically forfeited and that he be returned to the penitentiary to serve the outstanding balance of his twenty year term.

**The Committee recommends that the Parole Act be amended so as to provide that automatic forfeiture of parole be made subject to a condition that the National Parole Board may exempt a parolee from the operation of forfeiture when extraordinary circumstances justify such exemption.**

#### *Termination and Discharge of the Parolee from his Sentence*

The Committee expresses the view that parole could be terminated in exceptional cases after a long period of successful readjustment. Termination would have its principle application to parole from sentences of preventive detention and imprisonment for life. The possibility of termination of parole with consequent re-admission to society as a fully free member would provide motivation and support for those who presently face the prospect of a lifetime under supervision, however nominal. However, as termination of parole would amount to a modification of sentence, the Committee feels that it is an appropriate function for a court.

**The Committee recommends:**

- (a) that the Parole Act be amended to provide for termination of parole in appropriate cases;
- (b) that jurisdiction to order such termination be conferred upon a judge or magistrate having jurisdiction (but not necessarily territorial jurisdiction) to impose the original sentence for which parole has been granted;
- (c) that such termination be ordered only after a hearing held on application by the Parole Board or the parolee.

*Statutory Conditional Release*

Canada's experience, like that in most other countries, has been that during the early development of parole releases were made cautiously and were granted to the better risks among prison inmates. This is a necessary stage in development, particularly in view of the fact that the occasional dramatic incident whereby a parolee commits some violent crime tends to create strong public reaction against parole as a whole. Increasingly, however, it is being pointed out that the practice of parolling only the better risks means that those inmates who are potentially the most dangerous to society are still, as a rule, being released directly into full freedom in the community without the intermediate step represented by parole.

At present, about 25 per cent of inmates coming out of the federal penitentiaries do go on parole. The other 75 per cent come out without any formal supervision, although many of them do apply voluntarily for assistance to the private after-care agencies. Since there are about 3,500 releases from the penitentiaries each year, the number who are being released without supervision is considerable. Among them are many of the most dangerous who could not meet the requirements for parole.

Only about 60 per cent of penitentiary inmates who are eligible to be considered for parole do apply. There are many reasons why some do not apply but a major factor is the remission provisions in effect in the penitentiaries. Each inmate is credited on admission with statutory remission amounting to one-quarter of his sentence. He can lose this through misbehaviour but, barring such loss, he is eligible for release as a free man after serving three-quarters of his sentence.<sup>17</sup> In addition to this, he may earn three days' remission each month if he applies himself industriously. Earned remission cannot be lost through misbehaviour or any other reason.<sup>18</sup>

<sup>17</sup> *Section 22(1) of the Penitentiaries Act 1961 reads as follows:*

Every person who is sentenced or committed to penitentiary for a fixed term shall, upon being received into a penitentiary, be credited with statutory remission amounting to one-quarter of the period for which he has been sentenced or committed as time off subject to good conduct.

<sup>18</sup> *Section 24 of the same Act states that:*

Every inmate may, in accordance with the regulations, be credited with three days' remission of his sentence in respect of each calendar month during which he has applied himself industriously to his work, and any remission so earned is not subject to forfeiture for any reason.

If the inmate is granted parole, the statutory remission period becomes part of the parole period and if his parole is forfeited or revoked he loses the credit for statutory remission and must serve the full sentence less whatever earned remission he has to his credit. Many inmates come to the conclusion that they prefer to complete their sentence in the institution rather than place their statutory remission period in jeopardy.

The Committee has seriously considered the possibility of allowing the parolee to be credited with the period of time which has been successfully served in the community while he was on parole. The arguments in favour and those against follow.

Present legislation might be interpreted as an interference with the sentence of the court which provides that when parole is forfeited or revoked the parolee returns to serve the full remaining portion of his sentence. The time spent in the prison plus the time spent under control in the community on parole will then total more than the original sentence.

Parole is a procedure whereby an inmate may be released "so he may serve the balance of his *sentence* at large . . .". If he is serving his sentence, should he not be given credit for successful time on parole even if the parole is forfeited or revoked? If he completes the parole period successfully he does get credit.

There are reasons to believe the parolee would be increasingly anxious to avoid revocations as the end draws near and he sees his credit building up.

If forfeiture is involved, the courts will most likely take the situation into consideration when sentencing.

Under present practice the National Parole Board is most reluctant to revoke towards the end of the parole period except in most serious circumstances.

#### *Arguments Against:*

The parolee was released under conditions he accepted, namely, that the whole period is in jeopardy when he risks forfeiture or revocation. He cannot claim that being in the community constitutes serving a *prison* sentence.

Towards the end of his parole period control would taper off if all that could be done on revocation were to return him to serve the remainder of the parole period.

Administration would be most difficult, trying to keep track of each individual's time served as he goes in and out.

The present practice not only reduces the number applying for parole but it creates a paradoxical situation in that in some cases inmates who constitute the greatest danger and are not paroled are under control for a shorter period than the good risks who are paroled, since the parolee is under supervision for the remission periods. Another danger that appears in a system of giving credit is that there would be less willingness to take risks and there may be more early revocations.

The Committee has reached the conclusion that in order to be consistent with the overall philosophy underlying the correctional process expressed in its report, the parolee should be credited with the period of time which he has already successfully served in the community whenever parole is forfeited or revoked. However, it is of the opinion that the parolee should not be credited with the amount of time equal to that of statutory and earned remission since these apply and are granted to inmates for reasons essentially based on good behaviour.

**The Committee recommends that when parole is forfeited or revoked the parolee be credited with the period of time which he has already successfully served in the community but that he be not credited with the period of time which is equivalent to the 25 per cent statutory remission or with any earned remission that he might have had to his credit before he was paroled.**

The aim should be to develop a system under which almost everyone would be released under some form of supervision. It is best if he is released at the point at which the chances for his successful reintroduction to community life would be highest. This means the extension of parole as we now know it to every case possible.

However, there will be many who will not qualify for parole and they should also be subject to supervision. This can be accomplished by making the period of statutory remission a period of supervision in the community, subject to the same procedures that apply to parole. This means the releasee would be subject to conditions and to return to complete his sentence in the institution if he violates those provisions. He should also receive the same kind of assistance and control through supervision that applies to parolees.

For practical reasons, there would be little purpose in supervising an inmate whose statutory remission period is only a few days in length. Perhaps a period of sixty days should be seen as the minimum when supervision could be effective.

Since the success rate among these inmates is apt to be less than among those who qualify for parole, some name for this program other than parole should be used so that there will be no confusion between the success rates of parole and the success rates of this new program.

**The Committee recommends that a system called Statutory Conditional Release be introduced through appropriate legislation to make any period of statutory release longer than sixty days subject to the same rules and conditions that govern parole.**

Such legislation should increase the number of inmates applying for parole instead of waiting for conditional release since either form of release will imply supervision. It will prevent the unconditional release of so many inmates who need supervision but do not receive it because it cannot be imposed under present circumstances.

The Committee recognizes that as a result of loss of statutory remission through misbehaviour some of the worst risks may still be released at full expiration of sentence without the period of statutory supervision. However, just as it is rare now for the total period of statutory remission to be cancelled, it can be assumed that this will apply to few offenders under the proposed provisions.

The remission provisions in force in the penitentiaries differ from those in force in the provincial prisons. This makes for difficulties, including the fact that an inmate sentenced to penitentiary for two years serves a shorter period than one sentenced to a provincial prison for twenty months, unless he loses his statutory remission through misbehaviour. The Committee is of the opinion that the remission provisions should be the same for inmates of federal and provincial prisons and that statutory conditional release should apply to inmates of provincial, as well as the inmates of federal prisons. This is also provided for in proposed legislation now before Parliament. Supervision of those released from provincial prisons should be the responsibility of the provincial parole boards recommended earlier in this report.

**The Committee recommends that the same remission provisions apply to inmates of federal and provincial prisons and that provision for Statutory Conditional Release as outlined above apply equally to all.**

Since 1964 the National Parole Board has been experimenting with a new form of release which is referred to as minimum parole. This type of release consists essentially in releasing those inmates who had not been released on regular parole and who applied for this special form of parole some months prior to the expiration date of their sentence. Minimum parole consists of one month per year of sentence being granted to the applicant; it includes the same general conditions and supervision as does regular parole. As this form of release mostly applies to the difficult cases the failure rate has, since the beginning of the experiment, been in the order of 50 per cent.

If Statutory Conditional Release is introduced, the need for this program of minimum parole will disappear.

### *Supervision*

Good parole supervision depends on the experience and quality of the supervisor. Essentially, parole supervision consists of harmonizing a treatment counsellor's role with authoritarian responsibility as specified by the parole agreement. The accent rests on guidance and treatment with the interview used as a basic tool for developing a personal relationship between the supervisor and the parolee.

Each of the two provinces that have major parole systems—Ontario and British Columbia—have public services responsible for supervising parolees. In Ontario, this responsibility rests with the Rehabilitation Service within the Department of Correctional Services. In British Columbia, it rests with the British Columbia Probation Service.

Supervision of parolees under the jurisdiction of the National Parole Board is generally provided by private agencies, provincial public services (usually the provincial probation service) or directly by the staff within the Regional Office of the National Parole Service, although a few cases, particularly in out-lying areas, are supervised by private individuals. The extent to which these various facilities are used is shown in the following table.

TABLE 16  
Supervision of National Parolees by Type of Agency  
1959-1967

Year	Private Agency		Provincial Public Service		Regional Offices		Other		Total
	Number	%	Number	%	Number	%	Number	%	
1959.....	991	56	341	19	441	25	—	—	1,773
1960.....	1,217	55	434	19	400	18	174	8	2,225
1961.....	1,091	54	526	26	248	12	148	8	2,013
1962.....	955	55	421	24	270	16	78	5	1,724
1963.....	812	48	451	27	329	19	95	6	1,687
1964.....	741	44	453	27	380	22	120	7	1,684
1965.....	1,062	52	555	27	361	17	80	4	2,058
1966.....	1,089	44	751	31	553	23	56	2	2,449
1967.....	1,111	39	872	31	822	29	41	1	2,846

The implementation of Statutory Conditional Release will increase sharply the burden on available supervisory facilities. Not only will the caseload increase greatly, but the type of inmate coming out of the institution on that program will represent a greater problem for the supervisor.

If this emergency situation is to be met successfully, it will be necessary to utilize every available resource. This will require careful planning carried out well in advance of the implementation of Statutory Conditional Release.

The role the Committee sees for the private after-care agencies in providing supervision is set out in Chapter 20.

At present, the federal government does not reimburse the provinces for the costs involved in supervising federal parolees by the provincial public services, chiefly the provincial probation services. The effect is to reduce the probation service available within the province to the extent that probation officers devote their time to parole supervision. In the Committee's opinion, the federal government should reimburse the provinces for this service so that probation services will not be curtailed.

#### *Administrative Procedures*

The National Parole Service functions through a series of Regional Offices across the country. Each of these Regional Offices is under the direction of

an official who bears the title of Regional Representative. This official exercises delegated authority in relation to various matters, such as the suspension of parole.

The Regional Representative arranges the collection of the material on the individual parole applicant that is compiled in the local area. This material is then sent to the head office in Ottawa where material collected from other sources is added and the case prepared for presentation to the Board.

Since it is recommended in this report that the National Parole Board operate through panels that would hold sittings within the penitentiaries and hear parole applicants, if and when this recommendation is implemented, it will become more feasible for the Regional Office to complete the case preparation for presentation to the panel, reducing the need for material to be sent to head office in Ottawa. This would speed the decision-making process.

The Regional Representative also carries responsibility in relation to the supervision of parolees. It has been suggested earlier in this report that his authority in this matter be increased by giving him the right to suspend parole for a period of up to fourteen days and the right to use this procedure for treatment purposes, as well as to prevent the anticipated violation of one of the parole conditions.

In the light of the proposed division of work, the regional representative's relationship to the travelling panel with decision-making authority would be analogous to the relationship of the Executive Director of the National Parole Service to the National Parole Board. He would be a resource person to the travelling panel, acting as secretary and liaison person between the latter and the Service. The regional director would be responsible for all clinical, administrative and supervisory services dealing with parole, while the travelling panel would exercise the decision-making authority in the granting of parole.

**The Committee recommends that the responsibilities of the Regional Representative be clearly stated and defined.**

Annex A

PAROLE ACT

Proclaimed in force February 15, 1959

P. KERWIN,  
*Deputy Governor General.*  
(L.S.)

CANADA

ELIZABETH THE SECOND, by the Grace of God of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, Defender of the Faith.

TO ALL TO WHOM these Presents shall come or whom the same may in anywise concern,—GREETINGS:

A PROCLAMATION

W. R. JACKETT,  
*Deputy Attorney General,*  
CANADA } WHEREAS in and by section twenty-five of an Act of the Parliament of Canada, assented to on the 6th day of September 1958, and entitled "An Act to provide for the Conditional Liberation of Persons Undergoing Sentences of Imprisonment", being chapter thirty-eight of the Statutes of 1958, it is provided that the said Act shall come into force on a day to be fixed by Proclamation of Our Governor in Council.

AND WHEREAS it is expedient that the said Act should come into force and have effect upon, from and after the fifteenth day of February, in the year of Our Lord one thousand nine hundred and fifty-nine.

NOW KNOW YE that We, by and with the advice of our Privy Council for Canada, do by this Our Proclamation declare and direct that the said Act shall come into force and have effect upon, from and after the fifteenth day of February, in the year of Our Lord one thousand nine hundred and fifty-nine.

OF ALL WHICH Our Loving Subjects and all others whom these Presents may concern are hereby required to take notice and to govern themselves accordingly.

IN TESTIMONY WHEREOF We have caused these Our Letters to be made Patent and the Great Seal of Canada to be hereunto affixed. WITNESS: The Honourable PATRICK KERWIN, Chief Justice of Canada and Deputy of Our Right Trusty and Well-beloved Counsellor. VINCENT MASSEY, Member of Our Order of the Companions of Honour, Governor General and Commander-in-Chief of Canada.

AT OTTAWA, this thirteenth day of February in the year of Our Lord one thousand nine hundred and fifty-nine and in the eighth year of Our Reign.

By Command,

C. STEIN  
*Under Secretary of State*

## CHAPTER 38

### An Act to provide for the Conditional Liberation of Persons Undergoing Sentences of Imprisonment

(Assented to 6th September, 1958)

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

#### SHORT TITLE

1. This Act may be cited as the *Parole Act*. Short title.

#### INTERPRETATION

2. In this Act, Definitions.
- (a) "Board" means the National Parole Board established by this "Board." Act;
- (b) "inmate" means a person who has been convicted of an offence "Inmate." under an Act of the Parliament of Canada and is under sentence of imprisonment for that offence, but does not include a child within the meaning of the *Juvenile Delinquents Act* who is under sentence of imprisonment for an offence known as a delinquency;
- (c) "magistrate" means a justice or a magistrate as defined in the "Magistrate." *Criminal Code*;
- (d) "parole" means authority granted under this Act to an inmate "Parole." to be at large during his term of imprisonment;
- (e) "paroled inmate" means a person to whom parole has been "Paroled inmate." granted;
- (f) "parole supervisor" means a person appointed by the Board "Parole supervisor." to guide and supervise a paroled inmate; and
- (g) "regulations" means regulations made by order of the Govern- "Regulations." nor in Council.

#### BOARD ESTABLISHED

3. (1) There shall be a board, to be known as the National Parole Board Board, consisting of not less than three and not more than five <sup>established.</sup> members to be appointed by the Governor in Council to hold office during good behaviour for a period not exceeding ten years.

(2) The Governor in Council shall designate one of the <sup>Chairman and Vice-Chairman.</sup> members to be Chairman and one to be Vice-Chairman.

(3) The Governor in Council may appoint a temporary sub- <sup>Temporary members.</sup> stitute member to act as a member in the event that a member is absent or unable to act.

(4) A majority of the members constitutes a quorum, and <sup>Quorum.</sup> a vacancy on the Board does not impair the right of the remaining members to act.

(5) The Board may, with the approval of the Governor in <sup>Rules of procedure.</sup> Council, make rules for the conduct of its proceedings and the performance of its duties and functions under this Act.

- Head office.** (6) The head office of the Board shall be at Ottawa, but meetings of the Board may be held at such other places as the Board determines.
- Seal.** (7) The Board shall have an official seal.
- Remuneration.** 4. (1) Each member of the Board shall be paid such remuneration for his services as is fixed by the Governor in Council, and is entitled to be paid reasonable travelling and living expenses incurred by him while absent from his ordinary place of residence in the course of his duties.
- Staff.** (2) The officers, clerks and employees necessary for the proper conduct of the business of the Board shall be appointed in accordance with the provisions of the *Civil Service Act*.
- Chief executive officer.** (3) The Chairman is the chief executive officer of the Board and has supervision over and direction of the work and the staff of the Board.

#### POWERS AND DUTIES OF THE BOARD

- Jurisdiction of Board.** 5. Subject to this Act and the *Prisons and Reformatories Act*, the Board has exclusive jurisdiction and absolute discretion to grant, refuse to grant or revoke parole.
- Review of cases.** 6. (1) The Board shall at the times prescribed by the regulations
- (a) review the case of every inmate serving a sentence of imprisonment of two years or more, whether or not an application has been made by or on behalf of the inmate, and
  - (b) review such case of inmates serving a sentence of imprisonment of less than two years as are prescribed by the regulations, upon application by or on behalf of the inmate.
- Decisions.** (2) Upon reviewing the case of an inmate as required by subsection (1) the Board shall decide whether or not to grant parole.
- Regulations.** 7. The Governor in Council may make regulations prescribing
- (a) the portion of the terms of imprisonment that inmates shall serve before parole may be granted,
  - (b) the times when the Board shall review cases of inmates serving sentences of imprisonment, and
  - (c) the class of cases of inmates serving a sentence of imprisonment of less than two years that shall be reviewed by the Board upon application.
- Powers of Board.** 8. The Board may
- (a) grant parole to an inmate if the Board considers that the inmate has derived the maximum benefit from imprisonment and that the reform and rehabilitation of the inmate will be aided by the grant of parole;
  - (b) grant parole subject to any terms or conditions it considers desirable;
  - (c) provide for the guidance and supervision of paroled inmates for such period as the Board considers desirable; and
  - (d) revoke parole in its discretion.

9. The Board, in considering whether parole should be granted or revoked, is not required to grant a personal interview to the inmate or to any person on his behalf. <sup>Personal interview.</sup>

10. Where the Board grants parole it shall issue a parole certificate, under the seal of the Board, in such form as the Board prescribes, and shall deliver it or cause it to be delivered to the inmate and a copy to the parole supervisor, if any. <sup>Parole certificate.</sup>

11. (1) The sentence of a paroled inmate shall, while the parole remains unrevoked and unforfeited, be deemed to continue in force until the expiration thereof according to law. <sup>Effect of parole.</sup>

(2) Until a parole is revoked, forfeited or suspended the inmate is not liable to be imprisoned by reason of his sentence, and he shall be allowed to go and remain at large according to the terms and conditions of the parole and subject to the provisions of this Act. <sup>Idem.</sup>

#### SUSPENSION OF PAROLE

12. (1) A member of the Board or any person designated by the Board may, by a warrant in writing signed by him, suspend any parole and authorize the apprehension of a paroled inmate whenever he is satisfied that the arrest of the inmate is necessary or desirable in order to prevent a breach of any term or condition of the parole. <sup>Suspension of parole.</sup>

(2) A paroled inmate apprehended under a warrant issued under this section shall be brought as soon as conveniently may be before a magistrate, and the magistrate shall remand the inmate in custody until the Board cancels the suspension or revokes the parole. <sup>Apprehension. "Paroled inmate."</sup>

(3) The Board shall forthwith after a remand by a magistrate under subsection (2) review the case and shall either cancel the suspension or revoke the parole. <sup>Review by Board.</sup>

(4) An inmate who is in custody by virtue of this section shall be deemed to be serving his sentence. <sup>Effect of suspension.</sup>

#### FORFEITURE OF PAROLE

13. If a paroled inmate is convicted of an indictable offence, committed after the grant of parole and punishable by imprisonment for a term of two years or more, his parole is thereby forthwith forfeited. <sup>"Regulations."</sup>

#### APPREHENSION UPON REVOCATION OR FORFEITURE OF PAROLE

14. (1) If any parole is revoked or forfeited, the Board may, by warrant under the seal of the Board, authorize the apprehension of the paroled inmate. <sup>Apprehension.</sup>

(2) A paroled inmate apprehended under a warrant issued under this section, shall be brought as soon as conveniently may be before a magistrate, and the magistrate shall thereupon make out his warrant under his hand and seal for the recommitment of the inmate as provided in this Act. <sup>Recommitment.</sup>

## EXECUTION OF WARRANT

Warrants for apprehension. **15.** A warrant issued under section 12 or 14 shall be executed by any peace officer to whom it is given in any part of Canada, and has the same force and effect in all parts of Canada as if it had been originally issued or subsequently endorsed by a magistrate or other lawful authority having jurisdiction in the place where it is executed.

## RECOMMITMENT OF INMATE

Place of recommitment. **16.** (1) Where the parole granted to an inmate has been revoked, he shall be recommitted to the place of confinement to which he was originally committed to serve the sentence in respect of which he was granted parole, to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted.

Idem. (2) Where a paroled inmate, upon revocation of his parole, is apprehended at a place not within the territorial division to which he was originally committed, he shall be committed to the corresponding place of confinement for the territorial division within which he was apprehended, to serve the portion of his original term of imprisonment that remained unexpired at the time his parole was granted.

Effect of forfeiture. **17.** (1) When any parole is forfeited by conviction of an indictable offence the paroled inmate shall undergo a term of imprisonment equal to the portion of the term to which he was originally sentenced that remained unexpired at the time his parole was granted plus the term, if any, to which he is sentenced upon conviction for the offence.

Term to be served. (2) The term of imprisonment prescribed by subsection (1) shall be served as follows:

- (a) in a penitentiary, if the original sentence in respect of which he was granted parole was to a penitentiary;
- (b) in a penitentiary, if the total term of imprisonment prescribed by subsection (1) is for a period of two years or more; and
- (c) in the place of confinement to which he was originally committed to serve the sentence in respect of which he was granted parole, if that place of confinement was not a penitentiary and the term of imprisonment prescribed by subsection (1) is less than two years.

Conviction for offence committed during parole. (3) Where a paroled inmate is, after the expiration of his parole, convicted of an indictable offence committed during the period when his parole was in effect, the parole shall be deemed to have been forfeited on the day on which the offence was committed, and the provisions of this Act respecting imprisonment upon forfeiture of parole apply *mutatis mutandis*.

## ADDITIONAL JURISDICTION

Revocation or suspension of certain punishments. **18.** (1) The Board may, upon application therefor and subject to regulations, revoke or suspend any sentence of whipping or any order made under the *Criminal Code* prohibiting any person from operating a motor vehicle.

(2) The Board shall, when so directed by the Minister of Clemency. Justice, make any investigation or inquiry desired by the Minister in connection with any request made to the Minister for the exercise of the royal prerogative of mercy.

19. An order, warrant or decision made or issued under this Act Order, etc. is not subject to appeal or review to or by any court or other final. authority.

#### MISCELLANEOUS

20. Any order, decision or warrant purporting to be sealed with Evidence. the seal of the Board or to be signed by a person purporting to be a member of the Board or to have been designated by the Board to suspend parole is admissible in evidence in any proceedings in any court.

21. All expenditures under or for the purposes of this Act shall Expenditures. be paid out of money appropriated by Parliament therefor.

22. The members and staff of the Board shall be deemed to be Super- employed in the Public Service for the purpose of the *Public Service* annuati-  
*Superannuation Act*. on.

23. Notwithstanding subsection (2) of section 4, the Governor in Transfer of staff. Council may by order transfer persons who prior to the commence- ment of this Act were members of the staff of the Department of Justice to the staff of the Board.

24. (1) The *Ticket of Leave Act* is repealed.

Repeal.  
R.S. 1952,  
c. 264.

(2) Every person who at the coming into force of this Act is the holder of a licence issued under the *Ticket of Leave Act* to be at large shall be deemed to have been granted parole under this Act under the same terms and conditions as those under which the licence was issued or such further or other conditions as the Board may prescribe.

Licence under  
former Act  
deemed  
parole.

(3) Every person who was issued a licence to be at large under the *Ticket of Leave Act*, whose licence was revoked or forfeited and who at the coming into force of this Act is unlawfully at large may be dealt with under this Act as though he were a paroled inmate whose parole had been revoked or forfeited.

Revoke or  
forfeited  
licence.

(4) A reference in any Act, regulation or document to a con- Reference. ditional liberation or ticket of leave under the *Ticket of Leave Act* shall be deemed to be a reference to parole granted under this Act.

(5) The powers, functions and duties of the Minister of Justice under section 666 of the *Criminal Code* are hereby transferred to the Board, and a reference in that section to permission to be at large on licence shall be deemed to be a reference to parole granted under this Act.

Habitual  
criminals.

\*25. This Act shall come into force on a day to be fixed by proc- Coming into lamation of the Governor in Council. force.

\* Note—Proclaimed in force as of February 15, 1959.

## Parole Regulations, as amended

### REGULATIONS MADE UNDER THE PAROLE ACT

1. These Regulations may be cited as the *Parole Regulations*.

2. (1) The portion of the term of imprisonment that an inmate shall ordinarily serve, in the cases mentioned in this subsection, before parole may be granted, is as follows:

- (a) where the sentence of imprisonment is not a sentence of imprisonment for life or a sentence of preventive detention, one-third of the term of imprisonment imposed or four years, whichever is the lesser, but in the case of a sentence of imprisonment of two years or more to a federal penal institution, at least nine months;
- (b) where the sentence of imprisonment is for life but not a sentence of preventive detention or a sentence of life imprisonment to which a sentence of death has been commuted, seven years.

(2) Notwithstanding subsection (1), where in the opinion of the Board special circumstances exist, the Board may grant parole to an inmate before he has served the portion of his sentence of imprisonment required under subsection (1) to have been served before a parole may be granted.

(3) A person who is serving a sentence of imprisonment to which a sentence of death has been commuted, shall serve the entire term of the sentence of imprisonment unless, upon the recommendation of the Board, the Governor in Council otherwise directs.

(4) The Board shall not recommend a parole, in a case coming within subsection (3), until at least ten years of the term of imprisonment have been served.

3. (1) In the case of every inmate serving a sentence of imprisonment of two years or more, the Board shall:

- (a) consider the case of the inmate as soon as possible after the inmate has been admitted to a prison, and in any event within six months thereof, and fix a date for his parole review;
- (b) review the case of the inmate in order to decide whether or not to grant or recommend parole and, if parole is to be granted, the date upon which the parole is to commence, on or before
  - (i) the date fixed for the parole review pursuant to paragraph (a), or
  - (ii) the last day of the relevant portion of the term of imprisonment referred to in subsection (1) of section 2,whichever is the earlier; and
- (c) where the Board, upon reviewing the case of an inmate pursuant to paragraph (b) does not at that time grant or recommend parole to the inmate, continue to review the case of the inmate at least once during every two years following the date the case was previously reviewed until parole is granted or the sentence of the inmate is satisfied.

(2) Where an application for parole is made by or on behalf of an inmate who is serving a sentence of imprisonment of less than two years, the case shall be reviewed upon the completion of all inquiries that the Board considers neces-

sary but, in any event, not later than four months after the application is received by the Board.

(3) Nothing in this section shall be construed as limiting the authority of the Board to review the case of an inmate at any time during his term of imprisonment.

4. (1) Where the Board receives an application to suspend or revoke a sentence of whipping, the Board shall

- (a) determine forthwith if the sentence should be suspended pending further investigation and, if it was so determined issue an order accordingly;
- (b) conduct such investigation as appears to be warranted in the circumstances; and
- (c) as soon as possible after completing the investigation, if any, referred to in paragraph (b)
  - (i) revoke the sentence,
  - (ii) refuse to revoke the sentence,
  - (iii) suspend the sentence for any period the Board may deem applicable,
  - (iv) refuse to suspend the sentence, or
  - (v) cancel the order of suspension, if any, made pursuant to paragraph (a).

(2) An order of suspension made pursuant to subsection (1) expires ten days before the expiration of any term of imprisonment to which the convicted person, to whom the sentence of whipping relates, has been sentenced unless, before that day, the Board revokes the sentence of whipping.

5. Where the Board receives an application to suspend or revoke an order made under the *Criminal Code* prohibiting a person from operating a motor vehicle, the Board shall

- (a) conduct as quickly as possible such investigation as appears to be warranted in the circumstances; and
- (b) determine as soon as possible if the order should be suspended or revoked and, if it so decides, issue an order accordingly.

6. Where the Board suspends or revokes an order made under the *Criminal Code* prohibiting a person from operating a motor vehicle, the suspension or revocation may be made upon such terms and conditions as the Board considers necessary or desirable.

## AMENDMENT TO PAROLE REGULATIONS

Under authority of His Excellency the Governor General in Council, (P.C. 1968-48 dated January 4, 1968), the Parole Regulations have been amended in accordance with the schedule listed hereunder.

### Schedule

1. (1) Paragraph (b) of subsection (1) of section 2 of the Parole Regulations is revoked and the following substituted therefor:

“(b) where the sentence of imprisonment is for life but is not

- (i) a sentence of preventive detention,
- (ii) a sentence of life imprisonment to which a sentence of death has been commuted either before or after the coming into force of this paragraph, or
- (iii) a sentence of imprisonment for life which has been imposed as a minimum punishment after the coming into force of this paragraph, seven years.”

(2) Subsection (3) of section 2 of the said Regulations is revoked and the following substituted therefor:

“(3) A person who is serving a sentence of imprisonment to which a sentence of death has been commuted either before or after the coming into force of this subsection, or a person upon whom a sentence of imprisonment for life has been imposed as a minimum punishment after the coming into force of this subsection shall serve the entire term of the sentence of imprisonment unless, upon the recommendation of the Board, the Governor in Council otherwise directs.”

## Annex B

### TICKET OF LEAVE ACT

#### CHAPTER 264

An Act to provide for the Conditional Liberation of Convicts

#### SHORT TITLE

1. This Act may be cited as the *Ticket of Leave Act*. R.S., Short title. c. 197, s. 1.

#### ADMINISTRATION

2. It is the duty of the Minister of Justice, or of such other Administration member of the Government as may be designated by the Governor in Council, to advise the Governor General upon all matters connected with or affecting the administration of this Act. 1931, c. 13, s. 1.

#### TICKET OF LEAVE

3. (1) The Governor General by an order in writing under the hand and seal of the Secretary of State may grant to any convict, under sentence of imprisonment in a penitentiary, gaol or other public or reformatory prison, a licence to be at large in Canada, or in such part thereof as is mentioned in such licence, during such portion of his term of imprisonment, and upon such conditions in all respects as to the Governor General may seem fit. Granting of licence to convicts.

(2) The Governor General may from time to time revoke or alter such licence by a like order in writing. R.S., c. 197, s. 3. Revocation or alteration of same.

4. The conviction and sentence of any convict to whom a licence is granted under this Act shall be deemed to continue in force while such licence remains unforfeited and unrevoked, although execution thereof is suspended; but, so long as such licence continues in force and unrevoked or unforfeited, such convict is not liable to be imprisoned by reason of his sentence, but shall be allowed to go and remain at large according to the terms of such licence. R.S., c. 197, s. 4. Sentence deemed to continue although execution is suspended.

5. (1) A licence under this Act may be in the Form A in the Schedule, or to the like effect, or may, if the Governor General thinks proper, be in any other form different from that given in the Schedule that he may think it expedient to adopt, and contain other and different conditions. Form of licence.

(2) A copy of any conditions annexed to any such licence, other than the conditions contained in Form A shall be laid before both Houses of Parliament within twenty-one days after the making thereof, if Parliament be then in session, or if not, then within fourteen days after the commencement of the next session of Parliament. R.S., c. 197, s. 5. Deposit of conditions before Parliament.

REVOCATION AND FORFEITURE

Forfeiture of licence.

6. If any holder of a licence under this Act is convicted of any indictable offence his licence shall be forthwith forfeited. R.S., c. 197, s. 6.

Convicting justice to forward certificate in Form B to Secretary of State.

7. When any holder of a licence under this Act is convicted of an offence punishable on summary conviction under this or any other Act, the justice or justices convicting the prisoner shall forthwith forward by post a certificate in the Form B in the Schedule to the Secretary of State, and thereupon the licence of the said holder may be revoked in manner aforesaid R.S., c. 197, s. 7.

Action upon forfeiture.

8. (1) If any such licence is revoked or forfeited, it is lawful for the Governor General by warrant under the hand and seal of the Secretary of State to signify to the Commissioner of the Royal Canadian Mounted Police at Ottawa that such licence has been revoked or forfeited, and to require the Commissioner to issue his warrant under his hand and seal for the apprehension of the convict, to whom such licence was granted, and the Commissioner shall issue his warrant accordingly.

Execution of warrant of police commissioner.

(2) Such warrant shall and may be executed by the constable to whom the same is given for that purpose in any part of Canada, and has the same force and effect in all parts of Canada as if the same had been originally issued or subsequently endorsed by a justice or other lawful authority having jurisdiction in the place where the same is executed.

Bringing of licensed convict before justice of the peace.

(3) Any holder of a licence apprehended under such warrant, shall be brought as soon as conveniently may be before a justice of the peace of the county in which the warrant is executed and such justice shall thereupon make out his warrant under his hand and seal for the recommitment of such convict to the penitentiary, gaol or other public or reformatory prison from which he was released by virtue of the said licence, and such convict shall be so recommitted accordingly, and shall thereupon be remitted to his original sentence, and shall undergo the residue of such sentence that remained unexpired at the time his licence was granted; but if the place where such convict is apprehended is not within the province, territory or district to which such penitentiary, gaol or other public or reformatory prison belongs, such convict shall be committed to the penitentiary, gaol, or other public or reformatory prison for the province, territory or district, within which he is so apprehended, and shall there undergo the residue of his sentence as aforesaid. R.S., c. 197, s. 8.

Convict whose licence is forfeited to undergo term of imprisonment for the time of sentence unexpired.

9. (1) When any such licence is forfeited by a conviction of an indictable offence or other conviction, or is revoked in pursuance of a summary conviction or otherwise, the person whose licence is forfeited or revoked, shall after undergoing any other punishment to which he may be sentenced for any offence in consequence of which his licence is forfeited or revoked, further undergo a term of imprisonment equal to the portion of the term to which he was originally

sentenced and which remained unexpired at the time his licence was granted.

(2) If the original sentence in respect of which the licence was granted was to a penitentiary, the convict shall for the purpose of serving the term equal to the residue of such original sentence be removed from the gaol or other place of confinement in which he is, if it is not a penitentiary, to a penitentiary by warrant under the hand and seal of any justice having jurisdiction at the place where he is confined.

Confinement  
in a peni-  
tentiary.

(3) If he is confined in a penitentiary, he shall undergo a term of imprisonment in that penitentiary equal to the residue of the original sentence.

Term of im-  
prisonment.

(4) In every case such convict is liable to be dealt with in all respects as if such term of imprisonment had formed part of his original sentence. R.S., c. 197, s. 9.

In all re-  
spects same  
as original.

#### REPORTING TO POLICE

10. (1) Every holder of a licence who is at large in Canada shall notify the place of his residence to the chief officer of police, or the sheriff of the city, town, county or district in which he resides, and shall, whenever he changes such residence within the same city, town, county or district, notify such change to the said chief officer of police or sheriff, and, whenever he is about to leave a city, town, county or district, he shall notify such his intention to the chief officer of police or sheriff of that city, town, county or district, stating the place to which he is going, also, if required, and so far as is practicable, his address at that place, and whenever he arrives in any city, town, county or district he shall forthwith notify his place of residence to the chief officer of police or the sheriff of such last-mentioned city, town, county or district.

Notice by  
holder of  
licence to  
police  
authorities  
as to place  
of abode.

(2) Every male holder of such a licence shall, once in each month, report himself at such time as may be prescribed by the chief officer of police or sheriff of the city, town, county or district in which such holder may be, either to such chief officer or sheriff himself, or to such other person as he may direct, and such report may, according as such chief officer or sheriff directs, be required to be made personally or by letter.

Report of  
male holder  
of licence to  
police  
authorities.

(3) The Governor General may, by order under the hand of the Secretary of State, remit any of the requirements of this section either generally or in the case of any particular holder of a licence. R.S., c. 197, s. 10.

Remittance  
of require-  
ments.

#### OFFENCES AND PENALTIES

11. (1) If any person to whom section 10 applies fails to comply with any of the requirements thereof, he is in any such case guilty of an offence against this Act, unless he proves to the satisfaction of the court before which he is tried, either that, being on a journey he

Failing to  
comply with  
section 10.

tarrred no longer in the place in respect of which he is charged with failing to notify his place of residence than was reasonably necessary, or that, otherwise, he did his best to act in conformity with the law.

Penalty on summary conviction.

(2) On summary conviction of any such offence the offender is liable, in the discretion of the justice, either to forfeit his licence, or to imprisonment with or without hard labour for a term not exceeding one year. R.S., c. 197, s. 11.

Failing to produce licence.

**12. Any holder of a licence who**

(a) fails to produce the same whenever required so to do by any judge, police or other magistrate, or justice of the peace, before whom he may be brought charged with any offence, or by any peace officer in whose custody he may be, and fails to make any reasonable excuse for not producing the same; or

On breaking conditions of licence.

(b) breaks any of the other conditions of his licence by an act which is not of itself punishable either upon indictment or upon summary conviction;

Penalty.

is guilty of an offence upon summary conviction of which he is liable to imprisonment for three months with or without hard labour. R.S., c. 197, s. 12.

Arrest of licensed convict without a warrant.

**13. (1) Any peace officer may take into custody without warrant any convict who is the holder of such a licence**

(a) whom he reasonably suspects of having committed any offence; or

(b) if it appears to such peace officer that such convict is getting his livelihood by dishonest means;

and may take him before a justice to be dealt with according to law.

Forfeiture of licence.

(2) If it appears from the facts proved before the justice that there are reasonable grounds for believing that the convict so brought before him is getting his livelihood by dishonest means such convict shall be deemed guilty of an offence against this Act, and his licence shall be forfeited.

Conviction of convict brought before justice of the peace.

(3) Any convict so brought before a justice of the peace may be convicted of getting his livelihood by dishonest means although he has been brought before the justice on some other charge, or not in the manner provided for in this section. R.S., c. 197, s. 13.



FORM B

FORM OF CERTIFICATE OF CONVICTION

I do hereby certify that A.B., the holder of a licence under the  
*Ticket of Leave Act* was on the \_\_\_\_\_ day  
of \_\_\_\_\_ in the year \_\_\_\_\_  
duly convicted by and before \_\_\_\_\_ of the offence  
of \_\_\_\_\_ and sentenced to

J.P. Co.

R.S., c. 197, Sch.

# 19

## GRADUAL RELEASE AND AFTER-CARE

### *Definition*

The term "after-care" applies to programs intended to help the prison inmate bridge the gap between life in prison and life in the community. In a wider connotation, after-care includes parole and statutory conditional release. However, the term "after-care" is often used in a sense that excludes parole and statutory conditional release. In this chapter, the term is used in its wider connotation.

### *Changing Concepts*

In the past, a clear distinction was drawn between institutional and such non-institutional care as absolute discharge with or without conditions, probation, parole and statutory conditional release. This distinction was based on practice. A prison was a place of confinement and punishment and could hardly be confused with any other form of correctional treatment. These distinctions have been fading, particularly since the last world war, and are not so clear-cut today.

It is customary to-day to classify the treatment of offenders into two broad categories: institutional and non-institutional. Indeed, it is common to divide personnel who work with offenders according to this same classification and there has emerged a concept that the penological orientation of the two groups is significantly different, their training correctly based on different principles and even that there should be a natural antagonism between the two groups. If one were to catalogue the many causes that have slowed up the evolution of comprehensive progressive social defence policies and practice, this schism would probably have to be ranked high among them. . . . non-institutional treatment measures today. . . . not being based exclusively on a desire to avoid institutionalization, have embraced certain elements of institutional services and conversely, institutional programs, no longer preoccupied with the removal of the offender from society, have incorporated features clearly identifiable with treatment in freedom. . . . Thus the line between institutional

and non-institutional treatment has become so blurred in a number of countries that the identifying distinction can be made only on the basis of the nature of the agency or authority under which the treatment takes place.<sup>1</sup>

It is significant that these ameliorations of prison regimes are not based solely on humanitarian considerations or used just as a reward for good behaviour. They are recognized and used as correctional techniques. The offender must learn to live in society and he can do this only if he can practice community living.

This changes the traditional concept of a prison. The institution is not seen any more as an end in itself but as part of an entire process that includes after-care.

### *Value of After-Care*

The period of the inmate's adjustment to the community after a period in prison is crucial. He has been living in a restricted setting under a special set of rules. Now he must change his outlook and activities to meet a different environment. This involves many things. He may have learned dependency in the institution and may find it difficult to assume responsibility for many decisions that were formerly made for him. He may miss the security of the institution and fear competition in the community. If he has a family he has to work out his relationships with them and resume his place as husband and father. This is not always easy for a man with a prison record. He has to find employment and he may find that his criminal record bars him from legitimate employment. If so, he may be under strong pressure to resume illegal ways of making a living. He has to establish relationships with his fellow-workers and his neighbours, old and new. Again his record may prove an obstacle.<sup>2</sup>

The difficulties faced by a woman coming out of prison may be even greater than those faced by a man. Society may be even more unforgiving towards her.

The Committee is convinced that no aspect of prison planning ought to be more important than preparation for release. The consolidation of whatever progress the inmate may have made in the institution depends on his finding a solution to the problems he faces during the period of transition back to the community. If no solution is found, all that has been accomplished will be lost. Without assistance during this crucial period the inmate may become discouraged and recidivism will be the result.

**The Committee recommends that after-care services be recognized as an essential part of every prison system and that treatment within the prison and treatment on after-care be recognized as aspects of a continuing process.**

<sup>1</sup>United Nations. *Probation and Other Non-Institutional Measures* (Working Paper Prepared for the Third United Nations Congress on the Prevention of Crime and Treatment of Offenders). New York: 1965

<sup>2</sup>Kirkpatrick, A.M. "After-Care and the Prisoners' Aid Societies" in McGrath, W.T. (ed.) *Crime and Its Treatment in Canada*. Toronto: Macmillan, 1965

### *Steps leading towards Release*

The inmate's readiness for return to the community depends, at least in part, on what has happened to him in the institution. If he has been incarcerated in the traditional prison with undue stress on security his readiness for return to the community will be less than if he has served his sentence in an institution with a progressive program.

In a sense, the whole prison program should be a preparation for release, but obviously parts of it have more direct relevance to after-care adjustment. The steps being taken in more progressive institutions to maintain a close contact with the community are particularly important.

The use of intermittent sentences, which permit the inmate to serve his sentence on a part-time basis while continuing his employment in the community, represents an effort to reduce the inmate's separation from the community to a minimum, thus reducing his need for after-care.

For those serving a full-time sentence, the presence of members of the community in the institution represents an initial step in readying the inmate for discharge. Members of the community can be involved with the inmates through sports, social, religious or recreational programs. They can participate in discussion groups on such topics as current affairs. They can be directly involved in after-care planning with individual inmates.

Visits by the inmate to the community may be the next step. These visits may begin as short periods out of the institution for athletic or social occasions, or, for those interested, attendance at church. The inmate may then become involved in such outside activities as those connected with service clubs or church community groups. Eventually, he may attend a regular community school or work in the community on a full-time basis, returning to the institution at night.

Home visits are important if there are positive elements in the family relationship that can be built on. Such visits provide an opportunity to maintain normal family relationships in appropriate surroundings. Visits by the family to the inmate are also important.

When the inmate is ready to leave the institution, it is best if he is released on parole. If he cannot be released on parole, then a period on statutory conditional release is desirable. Such procedures are designed to ensure that he will receive the maximum of assistance coupled with control.

Hostel facilities are needed during this period for some inmates. Some of these hostels can be part of the prison system where the inmate spends the last few days in custody. The federal Penitentiary Service is opening such hostels in Vancouver, Winnipeg, Toronto and Montreal and some of the provinces also have such hostels. Other hostels are required for some inmates for longer periods after they are free of custody. These are generally operated under private auspices and many exist across Canada.

At present, the majority of inmates come out of Canadian prisons on expiry of sentence rather than on parole, and statutory conditional release is not now in operation. If the recommendations contained in this report are adopted, more inmates will come out of prison under either parole or statutory conditional release. However, there will still be many short-term inmates who come out on expiry of sentence and some of those released on parole or statutory conditional release will desire further assistance after the period of formal control has expired.

These requirements may be met through services where the inmate can voluntarily seek assistance.

### *Services in Canada*

Canada has a voluntary after-care service that is well-developed in comparison with many other countries. For the most part, this service is provided by private agencies. These agencies exist in all provinces. They are discussed more fully in Chapter 20.

The Department of Correctional Services of Ontario, a public department, offers a voluntary after-care service to inmates coming out of institutions in that province.

## CITIZEN PARTICIPATION AND THE ROLE OF THE VOLUNTARY AGENCY

### *Citizen Participation in Corrections*

Use of exile and banishment is found in the history of many penal systems. The sentence of transportation from the country can also be found in the early history of Canada.<sup>1</sup> Even after such a specific sentencing device was abandoned, however, the attitude of banishing the offender from society remained; he was banished behind the walls of prisons. Vestigial remnants of this attitude to the offender remain, and are heard in such declarations as, "We should lock them up and throw away the key!"

The point of view which has been expressed throughout this report is that the offender is and remains a member of society, and the aim of the correctional process is that he become a law-abiding and contributing member, rather than an outsider who is at war with society. Thus our report emphasizes the need for correctional treatment to take place within the community whenever possible, making use of the community's general health, welfare and educational resources, and of community-based correctional methods such as probation, parole and part-time imprisonment. When the protection of the community requires greater physical control through full imprisonment this should be used, but correctional aims will be forwarded if imprisonment does not represent complete banishment from society. We have pointed out elsewhere the importance we attach to program within the prison which involves the inmate in ways which reflect the role of a contributing citizen on the outside—work, education and leisure time activities. We have pointed out the importance of his having contact not only with staff but also with persons from the outside community.

This concept of corrections makes imperative a much wider community understanding of the offender and of correctional methods than presently exists. If recommendations in this report concerning more extensive use of probation, part-time imprisonment and parole are adopted, members of the

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<sup>1</sup> Edmison, J. Alex. "Some Aspects of Nineteenth-Century Canadian Prisons" in McGrath, W.T. (ed). *Crime and Its Treatment in Canada*. Toronto: Macmillan, 1965.

general public will be in more frequent contact with the offender who is still serving his sentence, as well as with the offender who has completed his sentence. Such contact will be as employers, fellow employees, fellow members of unions, family, neighbours and, hopefully, friends. It is important that the public understand that there is more to any individual offender than the fact that he has committed an offence. We have pointed out elsewhere that offenders are not a homogeneous group. Each offender is an individual and like all individuals has varying attributes of character and personality, positive and negative, good and bad. One of the most effective ways of accomplishing the aims of corrections is to give recognition and encouragement to the healthier and more desirable aspects of the offender's personality and behaviour.

Citizen participation in corrections has already begun in Canada. Several provinces have established correctional advisory committees to government, some to advise on correctional matters in general, others to advise on specific aspects of program, such as trade training and prison industries. The Commissioner of Penitentiaries issued an instruction on November 29, 1968, that provides for the establishment of a Citizen Advisory Committee in connection with each penitentiary. Citizens are also active in providing such direct services as parole and after-care and in programs within prisons, both federal and provincial.

The Committee welcomes these developments and is of the opinion that citizen participation should be widely encouraged.

**It is recommended that it be a matter of policy in the appropriate government departments to encourage citizen participation in the field of corrections.**

### *The Voluntary Agencies*

The voluntary agencies constitute one of the most effective channels for citizen participation in the corrections field. It is probably valid to say that Canada has made more extensive use of voluntary agencies than most other countries.

The earliest record of organized voluntary prisoners' aid work in Canada goes back to 1867 when a group of church workers in Toronto began to conduct Sunday School classes in the Toronto Gaol. This led to the formation of the first Prisoners' Aid Association in Canada in 1874.<sup>2</sup>

Since then, voluntary agencies have developed in all provinces and they have assumed many new functions. The Directory of Correctional Services in Canada, published by the Canadian Corrections Association, lists twenty-three voluntary agencies that offer correctional services as their primary function, excluding those offering only hostel facilities.

<sup>2</sup>Edmison, J. Alex. "First Steps in Canadian After-Care". *Canadian Journal of Corrections*, 1968, 10, 272-281.

The Salvation Army is organized nationally and is active in all provinces. The other agencies serve either a whole province or part of it. Many of those that serve men offenders carry the name John Howard Society while those serving women bear the name Elizabeth Fry Society. In some instances there is a combined John Howard and Elizabeth Fry Society. In addition to a John Howard Society, there are four agencies in the Province of Quebec which bear different names: la Société d'Orientation et de Réhabilitation Sociale and the Catholic Rehabilitation Service in Montreal, le Service de Réadaptation Sociale in Quebec City and la Société Saguenéenne de Réhabilitation Sociale in Chicoutimi. The Catholic Welfare Bureau operates in Winnipeg. The British Columbia Borstal Association provides a parole service to young men coming out of the New Haven institution.

Several of these agencies operate through branch offices.

Two bodies provide these agencies with a channel of communication for joint discussion and action in some matters. The John Howard Society of Canada coordinates the work of the agencies that bear the name John Howard, although not all such agencies are members of the coordinating body. The Association of Social Rehabilitation Agencies (Quebec Division) coordinates the work of the agencies in the Province of Quebec.

The Provincial Council of Elizabeth Fry Societies performs the same function for the three local Elizabeth Fry Societies in the Province of Ontario, in Kingston, Ottawa and Toronto.

Living accommodation for offenders at various stages of the correctional process has been offered by volunteer agencies for many years. However, there has been a rapid increase in such facilities in recent years. This expansion has helped fill a serious gap in correctional services and the variety of organizations involved has permitted useful experimentation. These facilities have, in many instances, developed in isolation without reference to the general correctional movement in the related area. Greater joint effort in planning and operating these facilities in relation to the general correctional field would, in the opinion of the Committee, be desirable.

In addition to these agencies offering correctional services as their primary function, many others serve offenders as part of their work in the general welfare area.

Fifty-three voluntary agencies received grants from the Canadian Government during the current fiscal year to assist their work in parole and after-care.

Another group of voluntary agencies do not offer direct service but act as coordinating and information centres for advanced correctional planning. The Canadian Corrections Association serves the whole of Canada. Four other agencies serve specific regions or provinces. They are, the Atlantic Provinces Corrections Associations, the British Columbia Corrections Association, the Ontario Association of Corrections and Criminology and the Quebec Society of Criminology.

## *The Role of the Voluntary Agencies*

The functions performed by the voluntary agencies may be grouped under four headings: Public Education, Citizen Involvement, Social Action and Direct Service. Some agencies perform only one or two of these functions; others perform all four. It will help clarify the role of these agencies if their work is examined under each of these headings separately.

### *Public Education*

A majority of these agencies devote considerable attention to developing an interest on the part of the public in correctional matters and to ensuring that the members of the public who are interested are properly informed. These agencies recognize that one of the most effective ways for citizens to learn about corrections is to become directly involved in the agency's program whether in planning or in direct service to offenders. Public education programs also involve use of the media and work-shops open to the public.

### *Citizen Involvement*

Citizens become involved in corrections through the agencies in many ways. Some serve on boards, helping to plan, operate and finance the agency's total program. Others become involved in public education programs designed to interest other citizens in corrections. Others participate in study groups to examine specific problems related to corrections, perhaps in the process of preparing a brief addressed to government. Others become involved in direct service to offenders, within the prison or on parole or after-care. Still others become involved as employers of ex-offenders.

### *Social Action*

Many of these agencies serve as critics of the public correctional services, suggesting to governments ways in which the services can be improved. There can be no doubt that a great deal of the impetus towards penal reform in this country in the past came from the voluntary agencies.

A difficulty sometimes arises for those agencies that are involved in social action and at the same time offer a direct service. The social action function sometimes creates friction with the staffs of the public correctional services, the people with whom the voluntary agency must have a cordial working relationship if it is to perform the direct service function effectively.

A change has occurred in that while the voluntary agencies were practically the only spokesmen for penal reform at one time, this is no longer true. Today, the staffs of the public services constitute a parallel source of influence for reform.

What is required is a procedure whereby the voluntary agencies can participate in the planning of public correctional services as partners rather than as critics.

## *Direct Service*

Direct service to offenders is provided by voluntary agencies at almost every step in the judicial and correctional process, although these services are frequently not sufficient to fully meet the need.

1. *The Court Hearing.* The Salvation Army has traditionally provided a social (as contrasted to a legal) service to the accused while he is in custody awaiting trial and during the trial itself. This includes helping the accused with family problems and speaking on his behalf if the court requests it. The Indian and Métis Friendship Centres in many parts of the country provide this service to Indian and Métis accused. Voluntary agencies also provide probation services to the courts in some areas. An additional service needed at the court hearing stage now generally lacking is a referral service so those accused who have social problems can be referred to the appropriate social or medical service in his community. Legal aid is becoming increasingly available, but its availability does not meet the need of the accused with a social problem.
2. *Prison Services.* These services take many forms. Some supply visitors on a friendship basis; others supply reading or recreational material, bring entertainment groups into the institutions, lead discussion groups, or teach art and handicrafts. Others are involved in treatment programs, including group therapy. Alcoholics Anonymous is active in many institutions. Chaplaincy services are supplied in some situations. So-called inmate-outmate programs establish friendships that continue after the inmate's discharge. The formulation of a plan for the period after discharge is carried out by voluntary agencies with inmates requesting such assistance. Pre-release visiting by the inmate to the community is sometimes supervised by the voluntary agency.
3. *Parole Supervision.* The voluntary agencies supervise a substantial portion of the parolees released by the National Parole Board. The percentage dropped from 56 in 1959 to 39 in 1967, but the numbers increased from 991 to 1,111.<sup>3</sup> The British Columbia Borstal Association supervises parolees from the New Haven institution.
4. *Voluntary After-Care.* Most of these agencies offer an after-care service to ex-inmates who are not on parole and who request assistance in getting re-established. This may take the form of casework help with personal problems, help with family or community problems, help in finding work, or financial assistance.
5. *Work with the Offender's Family.* Preparing the offender's family for his return, particularly if he has been in prison, constitutes another service offered by voluntary agencies. Some of these agencies organize

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<sup>3</sup> See Table 16, Chapter 18.

group discussions with wives of offenders, helping them understand their husbands and the problems the family faces as a result of his crime and separation from them.

6. *Living Accommodation.* Hostel services are available to an offender at various stages of the correctional process. Remand homes for women offer an alternative to committal to jail awaiting trial. Probation hostels supplement traditional probation service. Half-way houses serve those coming out of prison.

### *The Voluntary Agencies and the Public Correctional Services*

Every government has responsibility to ensure that adequate services are available to those offenders coming under that government's care, including such community services as after-care. However, ensuring that good services are available does not mean that the government must operate these services itself. Instead, where appropriate, it may utilize services of acceptable standard provided by voluntary agencies or other governments.

In the Committee's view, it is highly important that the voluntary agencies continue to serve as a channel for citizen participation in the corrections field and to provide a second voice in government correctional planning.

To perform these two functions well, it is essential that the voluntary agencies continue a major direct service function in relation to the government correctional services. This is essential if they are to maintain the realism that can come only from experience.

The Committee came to the conclusion that nothing is accomplished by pursuing arguments as to whether public or private workers can do the best job. Each has advantages and each has disadvantages. It is true that the demands for qualified workers created by the expanding correctional services will require the utilization of every available staff resource, but that situation may change. What does not change is the importance of the voluntary agencies in providing a channel for citizen participation and a second voice in government correctional planning.

Any administrative problems created for the government correctional services by the utilization of the resources of a rather large number of voluntary agencies will be more than compensated for by the stimulation and variety of experience that result.<sup>4</sup>

### *A Partnership*

What is required is a partnership between the government correctional services and the voluntary agencies. Once such a partnership is established, the problem of conflict between the social action and direct service functions of the voluntary agencies will lessen. Joint planning that takes into consideration all points of view will then be possible.

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<sup>4</sup> Titmuss, R.M. *Essays on the Welfare State*. London: Unwin University Press, 1958.

This ideal was set out by the former Minister of Justice, that late Hon. Guy Favreau:<sup>5</sup>

How, in practice, can the private agencies and the Government redefine their functions realistically? I suggest that we agree first on certain basic principles; then, in trust and fundamental harmony, we can hammer out working arrangements that will allow Government and agencies to complement each other in every way for the common good.

The first principle I suggest proposes a natural division of labour. I believe that both agencies and Government could solve their problems of re-adaptation if they first agreed that they are not rivals, but essentially different, and naturally complementary, colleagues. In practice, this means that each should be allowed to do whatever it does best. I think there is no question that private agencies are remarkably qualified, for instance, to provide counselling, help with housing and employment, and man-to-man fellowship; you are also admirably equipped to advise the Government on correctional problems with a detachment and wisdom that derive only from a long history of independent experience.

The Committee supports this view and suggests it provides a valid basis for a workable division of labour between the public and voluntary agencies.

**It is recommended that government recognize the need for a partnership with the voluntary agencies; that this partnership involve a major direct service function on the part of the voluntary agencies in relation to the government correctional services; and that negotiations on a continuing basis be undertaken between government and the voluntary agencies with a view to formulating a policy as to the nature and extent of the direct service function the voluntary agencies are to perform.**

What share of parole supervision can be properly carried by the voluntary agencies should be the subject of discussion between them and the parole authorities. The situation will change considerably when statutory conditional release is introduced since this will increase the number requiring supervision substantially. There is a risk to the voluntary agencies if too great a proportion of their resources is devoted to parole supervision. They may become too closely identified with the public parole service and their independence and flexibility may be lost.

The determination of the basis on which cases for supervision by the voluntary agencies are to be selected also presents difficulties. Several briefs received by the Committee from voluntary agencies contained suggested criteria. The following seem to have general support among the majority. The Committee does not suggest these criteria are necessarily the best but they might provide a basis for discussions between the government parole services and the voluntary agencies. The proposal was that a parolee should be supervised by a voluntary agency:

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<sup>5</sup> Favreau, Guy. *Parole Supervision and After-Care: The Evolving Partnership of Government and Private Agencies*. (Address to the John Howard Society of Nova Scotia, Halifax, February 4, 1965)

1. Where there has been an involvement of the voluntary agency in the inmate's situation by the inmate himself or by his family or some other interested agency or person.
2. Where there is a need for involving a variety of community resources.
3. Where there are major inter-personal or inter-family relationships which the voluntary agency can approach through its casework or group work service.
4. Where there is evidence of personality disturbance or deterioration that requires collateral psychiatric service.

### *Financing the Voluntary Agencies*

The voluntary agencies require substantial financial support from government, particularly in so far as they undertake direct service in relation to government correctional services. Such grants should reimburse them for the direct services they provide. However, that in itself may not be sufficient. Their advisory function to government should be taken into consideration. So should their need for financial resources to permit experimentation.

An approach which takes into account all aspects of the agencies' contribution, its effectiveness and its relevance is necessary. Efforts have been made in recent years to work out measurement criteria, often referred to as "social indicators".<sup>6</sup> Further examination of what would be involved in a grant system based on this more sophisticated approach is indicated.

On the other hand, the independence of a voluntary agency may be jeopardized if too large a proportion of its budget comes from government sources. This aspect of the problem requires examination. The terms under which the grant is made has an obvious bearing.

### *Selection of Voluntary Agencies to Perform Specific Tasks*

Growth of government support gives rise, of course, to questions as to the basis on which such support should be granted, and as to the selection of agencies to be used for specific purposes. These problems have come to the fore particularly in relation to parole supervision. It appears evident to the Committee that a responsible government service must satisfy itself as to the adequacy of standards under which any basic service, particularly one financed largely from government sources, is performed. At the same time, if government establishes a close supervision and attempts to enforce uniform standards, the autonomy and flexibility of the private agency, its freedom to meet those needs which seem particularly pressing in relation to the particular time and particular community in which the agency operates, disappear. In the Committee's opinion, the situation is confused and a more appropriate ongoing method needs to be worked out to provide a basis for such decisions.

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<sup>6</sup> Gross, Bertram M. "Social Goals and Indicators for American Society". *Annals of the American Academy for Political and Social Science*, 1 and 2, 1967.

**It is recommended that an advisory body, which includes representatives of voluntary service agencies, be set up to advise the government concerning the qualifications and suitability of specific voluntary service agencies for financial support from government, and to review and advise concerning the formulae on which such financial support is based.**

*New Roles for the Voluntary Agencies*

Although the Committee sees as basic a continuing direct service role similar to that now being carried by the voluntary agencies, it recognizes the danger that the voluntary agencies may lose their readiness, incentive and capacity to seek new solutions. Voluntary agencies are not immune to stagnation.

Some of the recommendations in the report will, if adopted, mean substantial changes in the operations of the voluntary agencies. The introduction of statutory conditional release will not only increase substantially those requiring supervision in the community while still under formal control but it will reduce accordingly the number of ex-inmates seeking voluntary after-care. The transfer of responsibility for parole of all inmates of provincial prisons to the provinces will require a reassessment of the relationship between the voluntary agencies and the provincial services. At present, many of the voluntary agencies see their relationship with the federal government services as more important than their relationship with the provincial services.

The Committee suggests a deliberate re-examination of programs and policies by the voluntary agencies, to ensure they are effective, progressive and creative and that new programs and new approaches to old programs in the corrections field are not neglected. The capacity of the voluntary agencies for leadership in innovation must continue to develop.



**THE YOUNG ADULT OFFENDER***Definition*

The term "young adult offender" is used internationally to identify the age group immediately above the juvenile delinquent group. These individuals can no longer be considered children but they are not fully mature and their personality and their social habits are still flexible.

The exact definition in terms of age is arbitrary and varies from country to country.<sup>1</sup> No age definition is fully satisfactory because individuals mature at different rates.

The lower age limit is set by the definition of juvenile delinquent, and for this reason the Committee feels impelled to recommend age limits to be used in the definition of juvenile. The Committee is of the opinion that children who have not reached the age of 16 should be subject to the jurisdiction of the juvenile court only and that transfer to the adult court should not be possible for this age group. Those who have attained the age of 16 but have not reached the age of 18 should appear first in the juvenile court. The juvenile court should assess the accused individual's maturity. If the juvenile court is of the opinion that the maturity of the accused properly permits the case to be heard in the juvenile court the hearing should be held in that court. If the juvenile court is of the opinion that the accused is sufficiently mature to indicate the case should be transferred to adult court, that should be ordered.<sup>2</sup>

Those who have reached the age of 18 would fall within the young adult group who are the subject of this chapter.

The Committee has come to the conclusion that the upper age in defining the young adult group should be set at 21. Twenty-one seems

<sup>1</sup> United Nations. Department of Economic and Social Affairs. *The Young Adult Offender*. New York: 1965

<sup>2</sup> Canadian Corrections Association. *The Child Offender and the Law*. Ottawa: 1963

to be a recognized division point and is the age when the individual assumes many of the legal rights and duties of adulthood. The international trend seems to be towards raising this age (as high as 26 as set out in the Federal Youth Correction Act of the United States of America) and it may well be that the age will be raised in Canada in later years. In the meantime, this seems like a practical point to make a start.

**The Committee recommends that a young adult be defined as one who has attained the age of 18 but has not reached the age of 21.**

When an accused between the ages of 16 and 18 is transferred from the juvenile court to the adult court, he should be considered a young adult and the special provisions for that age group should apply to him.

### *Importance of the Young Adult Group*

As in most countries, the young adult group forces itself on our attention because of its high crime rate.

TABLE 17  
Number of Young Adults Convicted of Indictable Offences by Age Group  
and Sex in Canada  
1957-1966

	Male			Female		
	16-17	18-19	20-24	16-17	18-19	20-24
1957.....	4,484	3,838	6,190	178	169	336
1958.....	4,911	4,300	6,888	211	192	401
1959.....	5,099	4,179	6,272	236	220	416
1960.....	5,760	4,686	7,203	255	269	534
1961.....	5,498	5,081	7,846	289	310	635
1962.....	5,752	4,940	7,929	300	345	575
1963.....	7,170	5,495	8,570	412	379	727
1964.....	7,469	5,342	8,253	429	417	834
1965.....	6,849	5,539	8,110	548	514	832
1966.....	7,250	6,224	8,669	642	606	1,006

SOURCE: Dominion Bureau of Statistics

It is clearly in society's interests to pay particular attention to the correction of young offenders since if their beginning criminal careers continue society will be victimized for many years to come. It is important to avoid the escalation of what might have been a brief phase of juvenile rebellion into a fixed criminal career by prematurely labelling the young offender as criminal and promoting his acquaintance with more confirmed offenders.

TABLE 18

Rates of Conviction for Indictable Offences Per 100,000 Population of  
Each Age Group by Sex  
1957-1966

	16-17	18-19	20-24	25-29	30-34	35-39	40-44	45-49	50-59	60 and over	Total
	Males										
1957	1,817	1,629	1,053	690	505	428	331	245	170	53	545
1958	1,902	1,759	1,148	734	516	433	345	255	174	51	579
1959	1,887	1,652	1,035	614	434	366	257	196	150	44	506
1960	2,024	1,811	1,226	676	508	365	302	237	154	50	566
1961	1,844	1,899	1,336	759	523	411	311	239	169	55	603
1962	1,818	1,747	1,319	738	519	390	310	238	160	59	594
1963	2,136	1,845	1,370	792	546	433	328	250	175	59	644
1964	2,100	1,689	1,256	730	501	399	308	234	148	54	612
1965	1,863	1,674	1,175	699	467	364	283	211	145	49	584
1966	1,861	1,746	1,173	739	480	367	299	223	146	59	615
	Females										
1957	74	73	58	45	37	30	22	19	14	4	33
1958	84	80	68	51	39	34	30	26	16	3	37
1959	90	89	70	51	40	37	26	25	15	4	38
1960	93	106	90	60	48	39	31	26	19	5	44
1961	101	118	106	72	57	46	42	35	27	7	54
1962	99	125	94	70	60	46	42	33	25	9	53
1963	128	132	115	86	68	53	48	34	26	9	61
1964	126	137	128	93	72	53	49	37	28	8	67
1965	153	158	120	101	75	71	53	41	36	9	76
1966	172	177	140	116	95	71	58	46	34	11	88

SOURCE: Dominion Bureau of Statistics.

It is also important that the offender's unlawful behaviour not be reinforced either by material advantage resulting from his offence or psychologically by an inflated sense of power. Because the young adult's behaviour pattern may not be as firmly set as that of the older adult, it is of particular importance that he be treated in a way that will earn his respect for the correctional process.

### *Court Jurisdiction*

The suggestion that a special youth court be created to deal with this age group was considered and rejected by the Committee. There seems to be little virtue in a separate court and it would be difficult to staff. Also, the young adult has the same right of election of trial before a county court or a judge and jury that older adults possess.

In urban centres there might be an advantage in giving a restricted number of magistrates the task of dealing with the young adult offender. This would give the advantage of special experience on the part of the court without changing the legal arrangements.

The possibility of placing the young adult group under the jurisdiction of the juvenile court was also considered and rejected. It was thought the young adult would not be impressed by the atmosphere of the juvenile court and that adding this group to the responsibility of the juvenile court would overtax those facilities.

**The Committee recommends that the adult court continue to have jurisdiction over the young adult group.**

### *Special Legislative Provisions*

The arrangement whereby the young adult appears before the adult court, and has his case heard under normal court procedures but is subject to special sentencing provisions, is in force in a number of jurisdictions.

The only special legislative provisions relating to young adults in Canada are sections 151, 152 and 153 of the Prisons and Reformatories Act. This applies to British Columbia only, and covers male offenders up to the age of twenty-three years. The court may sentence the young adult to a term of imprisonment of not less than three months followed by an indeterminate period of not more than two years less one day. Whether the young adult serves all or part of the indeterminate portion in prison or on parole depends on the British Columbia Parole Board.

Generally speaking, legislative provisions and court practices desirable for young adult offenders are simply those that ideally should apply to all accused and all offenders. However, while facilities are in short supply it seems wise to concentrate those facilities on the young adult.

Strong representations were made to the Committee to recommend statutory provisions for indeterminate sentences of up to two years for the young adult group. It was argued that in the case of many young adults the court is dealing with an individual without social or employment roots and if he is to be under supervision for a sufficiently long period for him to settle down a sentence of two years less a day is required. This period would not, hopefully, all be spent in the institution. Most of it might be spent on parole.

A sentence of this length might be indicated even if he was convicted of an offence that might otherwise call for a sentence of only a few months. This, it was maintained, is necessary if his criminal career is to be stopped before he gets into serious trouble. Comparisons were drawn with the procedures used with juveniles. The court, it was maintained, might not feel justified in giving a definite sentence of two years less a day in such a case

when it might give a shorter sentence in a case of a similar offence involving an older offender. An indeterminate sentence would be identified as an attempt to provide treatment and would therefore be more acceptable to the courts and perhaps to the public.

However, the Committee has already recommended the repeal of the provisions for indeterminate sentences now in force in Ontario and British Columbia, coupled with a transfer of authority over parole of all inmates in provincial institutions to the provinces. The effect of this would be to make all sentences subject to provincial parole and therefore adaptable to suit the demands of treatment for the young adult as well as the older offender.

The Committee was impressed by the arguments in favour of indeterminate sentences for the young adult offender but, on balance, decided against making such a recommendation.

It is important that the courts have pre-disposition (pre-sentence) reports to help in sentencing in cases involving a serious charge. Shortage of staff makes it impossible to prepare such reports in all cases where they would be desirable. However, in cases involving young adults they should be mandatory.

**The Committee recommends a pre-disposition report should be mandatory in any case involving a young adult where a prison sentence is being considered by the court.**

The advantages of avoiding a prison sentence with any offender, if feasible, have been stressed elsewhere in this report. These arguments apply with particular force to young adult offenders. The fact that these young people are so impressionable emphasizes the need in their case. The Criminal Justice Act of Great Britain contains a provision that gives legislative expression to this principle.

**The Committee recommends that the legislation should state that the court shall not send a young adult to prison unless all other courses have been considered and rejected for specific reasons. The court's reasons for believing that a prison sentence is required should be reported verbatim in the court records.**

#### *Special Correctional Services*

As with legislative provisions, what is required in the way of correctional services for young adult offenders parallels what is required for all offenders, although the need is particularly urgent with the young adult. Treatment in the community rather than in an institution, supervision by competent staff and clinical facilities should be priorities.

One special problem arises in connection with pre-trial detention of young adults. It is particularly important that young offenders be kept apart

from older, more experienced prisoners to avoid contamination, and it is during pre-trial detention that segregation is most apt to be neglected.

**The Committee recommends that the police and the courts should whenever possible avoid holding a young adult in a lock-up or jail pending initial appearance or during remand or appeal. When it is necessary to hold a young adult in a lock-up or jail, he should be kept separate from older prisoners.**

The development of prison facilities for the young adult offender also presents many difficulties. Since they are in the learning stage of life, it is particularly important that work-release and similar programs be available to them.

One mistake often made is to separate young adult prisoners from the general prison population and place them all in one special institution. It is as much of an error to assume that all young adult offenders are alike as it is to make that assumption about any other age group. Among the young adult group are the emotionally disturbed, the confirmed recidivists, the beginner and various other classifications. Age alone is not a sufficient criteria for classification.

The conclusion to be drawn is that a number of institutions, each designed for a different kind of inmate, should be planned to serve the young adult group.

The involvement of youth from the community in programs planned for the young adult offender is vital. Among them should be rehabilitated ex-offenders.

#### *Juveniles in Institutions for Adults*

The Committee was disturbed at seeing juveniles held in jails and prisons intended for adults in many parts of the country. This practice is not common but was called to the Committee's attention in a number of instances. Although the incarceration of juveniles is outside the Committee's terms of reference, the Committee feels justified in commenting on the situation since the adult correctional institutions are handicapped in trying to care for these children. The Committee is of the opinion that in no instance should juveniles be incarcerated in the same institutions as adults.

**THE WOMAN OFFENDER***Differences in Male and Female Criminality*

There are certain differences in the criminality of women, as compared with that of men, which have implications for correctional planning. The most outstanding single difference is that of numbers. In Canada, as in other jurisdictions that keep official statistics, many more men than women are dealt with by the police and the courts. The ratio varies according to the country and jurisdiction, but a marked disparity appears in all available statistics.

Problems of making accurate statistical comparisons have been discussed elsewhere in this report; they apply here also. Nevertheless, certain striking facts appear in the statistics which are available. In Canada during the 1950's, the ratio of male to female offenders fluctuated between 13 to 1 and 17 to 1. Recent statistics, however, show a ratio which, while still reflecting a marked difference between the two groups, indicate that the difference is reducing. From 1960 to 1966 the male-female ratio decreased steadily until in 1966, the last year for which figures are available, the ratio was 7 to 1.<sup>1</sup> This convergence has been brought about by a marked increase in the number of women convicted for indictable offences, particularly theft, which accounted for 80 per cent of the rise in the female rate. For summary convictions the male-female ratio was between 14 and 15 to 1 in both 1950 and 1966.

There is some indication that the difference in numbers between men and women offenders tends to be lower in highly industrialized societies than in less developed ones.

The second major difference is that offences committed by women tend to concentrate in fewer categories than those committed by men. Crimes involving violence are rare. The types of offence for which women are con-

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<sup>1</sup> Dominion Bureau of Statistics. *Statistics of Criminal and Other Offences 1966*.

victed in significant numbers consist of theft, and to a lesser degree, fraud; of a group of offences which may be categorized as "offences without a direct victim" (vagrancy, public intoxication, drug addiction) and of a group of offences discernibly related to women's sexual or maternal roles (such as offences related to prostitution, neglect in child birth or concealing the body of a child, abortion\*, infanticide, child neglect).

It will be noted that some statistics quoted in this chapter refer to rates of charges and others to convictions. Among indictable offences, the largest category of charges against women is that of theft, where the value of the thing stolen does not exceed \$50. For these offences, the rate of females charged is 69 per 100,000 of adult population and the male-female ratio is 3 to 1. Of property offences, fraud is next in frequency, being 18 per 100,000 with the male-female ratio 8 to 1. Theft over \$50 has a rate of 12 per 100,000 and a male-female ratio of 10 to 1. Some of the differences between offences committed by men and women may be seen by comparing certain other property offences which have more aggressive or violent connotations. For instance, break and enter has a male-female ratio of 49 to 1, robbery 32 to 1. It is also interesting to note that car theft, which seems to have particular significance for the male, shows a ratio of 50 to 1.

In 1966 only four types of indictable offences were committed by women more often than by men. These were: abortion or attempted abortion, neglect in childbirth and concealing the body of a child, infanticide, and keeping a bawdy house.<sup>2</sup> Offences related to prostitution formed the second highest number of indictable offence charges against females in Canada in 1966 (24 per 100,000 as compared to 7 per 100,000 for males).

The conviction rate for women in intoxication offences was 199 per 100,000 in Canada in 1966, with a male-female ratio of 10 to 1. While both charges and convictions under the Narcotic Control Act are much fewer, it is significant that charges against women are markedly higher proportionately to charges against men than for most other offences. The rate of charges against women under the Narcotic Control Act in 1966 was 3 per 100,000 population, with a male-female ratio of 3 to 1.

Figures available on charges of vagrancy are only for convictions, not persons, but the Dominion Bureau of Statistics reports that 1,811 convictions of females for vagrancy were recorded in 1966 in Canada.

We have been unable to obtain Canada-wide figures concerning charges of child neglect and abuse against women.

Table 21, attached as an annex to this chapter, shows the rate of charges per 100,000 of the population over 16 and the ratio of male to female rates for certain specific offences in Canada in 1966.

The third area of difference in considering women offenders as a group compared to men offenders as a group, appears to lie in the attitude of society towards the female offender. There is a considerable body of opinion among those experienced with law enforcement and corrections that women

\* The general practice in Canada is not to prosecute the woman upon whom abortion has been performed but to prosecute the abortionist.

<sup>2</sup> Dominion Bureau of Statistics. *Statistics of Criminal and Other Offences 1966*.

are less likely than men to be formally charged and brought to trial, even though there is evidence that offences have been committed, and that there are discernible differences also in the disposition of convicted offenders. A brief prepared by the Canadian Corrections Association for the Royal Commission on the Status of Women in Canada, states:

It is not rare for law enforcement officers to see a complainant drop charges when he finds out the person who victimized him is a woman. The police official may himself be less than zealous to pursue investigation in a minor matter when a woman offender is involved. He may use his discretion and give a warning rather than ask the prosecuting attorney to take the matter to the court. Should the case get to the prosecuting attorney level, the same hesitation about applying the full force of the law against a woman is present. Charges are often dropped, Courts are often more favourably disposed towards women offenders and usually do not send them to jail until they have offended several times or very seriously.

There is evidence, however, to indicate that some of these differences in treatment also are undergoing change. A striking statistic is that in 1901 the probability of a charge against a woman leading to conviction was 60.5 per cent but in 1948, the last year in which outcome of charge was specified by sex, it had reached 88.7 per cent, higher than the probability for males. In 1949 a change in method for statistical reporting by the Dominion Bureau of Statistics shifted from outcome of convictions (which might be several per person at one hearing) to conviction of persons charged. In 1949 we find that proportion of females charged who were convicted was 79.4 per cent but that in 1966 it had risen to 90.26 per cent.

It remains true, however, that there are marked differences in court disposition of men and women offenders. It has been noted in Chapter 11 that the sentence of whipping is still retained in Canada for men but not for women. Women are much less likely than men to receive lengthy prison sentences; this is apparent from an examination of the population of federal penitentiaries, where the proportion of men to women incarcerated is approximately 60 to 1.

Differences between women offenders and men offenders can hardly be discussed adequately without relating them to differences in male and female roles in society generally. The lower incidence of crimes involving violence may, to some degree, represent constitutional differences between male and female in terms of physical strength, but appears likely to be still more closely related to differences in social roles and expectations. Directly aggressive behaviour is more characteristic of the male, while the female tends to express aggression in more indirect ways.

### *Implications for Treatment*

The fact that women are involved mainly in a restricted number of offences has implications for treatment.

## *Theft and Fraud*

It will be noted from statistics already quoted that the large majority of theft charges against women involve small amounts of money or articles of minor value (theft, \$50 and under). A significant proportion of these involve shop-lifting. Fraud charges against women, while considerably lower than charges for theft under \$50 (18 per 100,000 population as against 69 per 100,000), are higher than the category of theft over \$50 (12 per 100,000 population). Correctional workers with the woman offender have informed us that there appears to be an increasing number of women in the larger cities who persistently engage in the fraudulent use of cheques.

We have suggested elsewhere that offences of this nature, which do not endanger the physical security and safety of others, are the type which we consider frequently appropriate for treatment through such devices as fines, restitution and probation rather than through imprisonment. If a woman is not economically independent this, of course, affects the appropriateness of a fine or a requirement for restitution.

In some instances which are not considered suitable for fine or probation, use of day release sentences would appear to have potential effectiveness for preventing further offences, while helping offenders accept responsibility for repaying money fraudulently obtained.

## *Offences without a Direct Victim*

Such offences as vagrancy, abuse of drugs and alcohol, and attempted suicide, may be categorized as "offences without a direct victim". This description recognizes that while the behaviour so categorized is of concern to society and likely to have harmful effects on society, it differs from offences which are directed against a specific victim or victims, such as murder or robbery and calls for different treatment.

The inappropriateness of most of our present methods of handling such behaviour is a matter for concern in relation to both men and women offenders. In this more general context it has been commented on elsewhere in this report, but it is discussed in more detail here because of the high proportion of such behaviour among women who are the subject of correctional treatment.

Section 31 of the Prisons and Reformatories Act provides that "Where provision therefor is made by the laws of the province in which a conviction takes place, any person convicted of being a loose, idle or disorderly person may, instead of being committed to the common jail or other public prison, be committed to any house of industry or correction, alms house, work house, or reformatory prison". In spite of its archaic language, this section appears to recognize what seems evident to this Committee, that lack of apparent means of support, wandering and begging, do not form part of those seriously harmful kinds of behaviour which the Committee has defined in Chapter 2 as the appropriate concern of the Criminal Code and of the processes of criminal justice. The fact that there has been little use in Canada of shelters other

than a jail can be assumed to be related to our failure to provide the appropriate alternate resources, rather than to a conscious decision that the treatment of vagrancy should be equated with the treatment of other "crimes". The alternate disposition provided in the Criminal Code, a fine, seems singularly inappropriate in view of the definition of the "offence" itself, and it is not surprising that the common practice is to give short jail sentences.

According to 1966 figures supplied by the Dominion Bureau of Statistics, 42 per cent of males and 48 per cent of females convicted of vagrancy were imprisoned. There is evidence to indicate that use of jails for vagrancy, besides being highly inappropriate, is also highly ineffective.

Canadian vagrancy laws, as they relate to women, define two major types. Section 164(1) (a) of the Canadian Criminal Code provides that:

Every one commits vagrancy who

- (a) not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place where he is found.

One of the major uses of this section of the Code is for young girls who are away from home and found wandering on the streets. It is stated that the purpose is their own protection. However, while the intention may well be a protective one, the effect is frequently that of exposure to harm more serious than that against which it was intended to protect. We have found persons working with women offenders to be practically unanimous in underlining the harmful effects of incarcerating such young women with more confirmed offenders among them prostitutes, drug addicts and lesbians. It seems clear that the emphasis here should be on developing alternate social resources for women, and particularly for young women who are without lodging or visible means of support under health or welfare, rather than correctional, auspices. We are aware that this is an area under provincial jurisdiction, but we would point out that the correctional institutions to which such young women are presently committed for frequent short sentences are also under provincial jurisdiction.

It should also be noted that vagrancy provisions in relation to women are sometimes used in the control of venereal disease. That is, women who have no apparent means of support and are suspected of engaging in prostitution are arrested under these provisions, and if after physical examination they are found to be infected, they are committed to a correctional institution where they receive medical treatment. Control of venereal disease is, of course, a legitimate public concern. However, it seems clear to the Committee that the proper procedure for this purpose is through public health legislation.

Many women offenders have been convicted of a different type of vagrancy. Section 164(1) (c) provides that:

Every one commits vagrancy who

- (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself.

It is to be noted that this section does not define prostitution itself as a crime but rather defines the crime as that of being unable, if a "prostitute or night walker" found in a public place, to "give a good account of herself". The law in Canada, as in many other countries, appears to recognize the difficulties in either defining prostitution or eliminating it, and to aim rather at establishing control over public soliciting for purposes of prostitution, and at reducing exploitation. It may be noted that these are the aims which the report of the Wolfenden Committee in Great Britain suggests as the appropriate area of concern of criminal law in relation to this social problem.<sup>3</sup>

It is to be noted that there are certain types of provisions in the Criminal Code, such as those directed against keeping a bawdy house or living off the avails of prostitution, which attempt to prevent the exploitation of others.

It appears to the Committee, however, that section 164(1) (c) should be re-examined, both as to its clarity and appropriateness in defining the prohibited behaviour and as to its susceptibility of application in discriminatory fashion.<sup>4</sup>

Deciding on an appropriate disposition for those convicted of soliciting or of other offences related to prostitution is not easy. Women convicted under section 164(1) (c) are frequently fined but not dealt with constructively and consequently the imposition of a fine may have the appearance of amounting to payment of a periodic licensing fee. Jail commitments have similarly been less than effective as a deterrent. Combinations of brief sentences followed by periods of control in the community, or part-time imprisonment for evenings and week-ends with opportunities for approved daytime employment, may well prove more effective.

While more men than women are convicted of drinking offences, nevertheless, very similar considerations to those outlined in relation to vagrancy apply to charges of drunkenness, or "being intoxicated in a public place", in that these offences form a major group among the offences for which women are committed to jails. These charges arise from provincial legislation rather than under the Criminal Code, but are enforced through criminal procedures. Commitments under these legislative provisions are typically for terms of one or two months or less, and again typically are repetitive. This is particularly striking in the prairie provinces where the Committee was informed that commitments on vagrancy or intoxication run as high as ninety per cent or more of the incarcerated female population. An additional striking factor in the situation on the prairies is the extremely high proportion of women incarcerated in provincial jails who are of Indian

<sup>3</sup> Great Britain. Committee on Homosexuality and Prostitution. *Report* (Wolfenden Report). London: Her Majesty's Stationery Office, 1957.

<sup>4</sup> The brief on "The Woman Offender", presented by the Canadian Corrections Association to the Royal Commission on the Status of Women in Canada, suggests that: "*being a prostitute found in a public place is...to be rejected as a punishable offence but...soliciting in a public place for the purpose of prostitution is a more reasonable manner of describing the behaviour which is socially unacceptable.*" The same brief recommends (recommendation 3, p.11):

*"That the present Criminal Code provisions regarding prostitution in Section 164(1) (c) be amended to prohibit only 'a male or female from soliciting a male or female in a public place for purposes of prostitution'."*

or Métis origin. These factors, taken together, underline the close relationship between a position of social deprivation and disadvantage and the likelihood of conviction for this type of "criminal" activity.

The Committee's criticism of present practice in relation to control of public drunkenness does not imply lack of recognition that there is need for social concern and social intervention in relation to it. Consumption of alcohol plays a significant part in contributing to assaults and other, often serious, offences which are the proper concern of law enforcement and criminal justice. Even beyond this fact, however, it is necessary for the police to have power to intervene in many instances, both in the interest of public order and in the protection of the individuals concerned, such as the intoxicated person who wanders in traffic or falls asleep on the street in winter. The point we wish to make, however, is that after such protective intervention has been made, alternative procedures and resources should be available. We state our view that reduced harm and increased possibility of effective help to the vagrant or the publicly intoxicated person can be achieved through developing procedures and resources more appropriate than are as yet widely available in Canada.

It has been noted earlier in this chapter that women, in relation to men, are represented in much higher proportion in drug charges than in most other types of indictable offence.

As with other types of offence in the category of offences without a direct victim, the major sufferer from drug abuse is the user and correctional disposition should be related to this factor.

Attempted suicide is another offence for which charges against women are higher in proportion than the ratio of offences generally. While the numbers involved here are not as large as in the other categories discussed, and practice in many areas has been for crown prosecutors to refrain from laying charges under this section, nevertheless the section remains and is used. In 1966, 275 men and 139 women were convicted for this offence.<sup>5</sup> There is no statistical indication as to how many of these received mental health treatment but 59 men and 15 women were sent to jail.

An examination of the Criminal Code in relation to specific offences does not come within the Committee's terms of reference, but we have recommended in Chapter 2 that such a review be undertaken. We wish to record our opinion that particular attention should be given in such a review to offences which are without a direct victim. However, even more crucial than legislative change is the development of alternative methods and resources to deal with the social problems presented by these forms of behaviour.

**The Committee recommends that early discussions between the federal government and the provinces give attention to developing across Canada services which could be used as alternatives to criminal proceedings in dealing with offences without a direct victim.**

<sup>5</sup> Dominion Bureau of Statistics. *Statistics of Criminal and other offences 1966.*

### *Offences Related to Childbirth and Maternity*

The third general grouping of offences prominent among those committed by women are offences related to childbirth and maternity, i.e. infanticide, concealing the body of a child, child neglect and abuse. This group of offences differs from the preceding group in that the harm done is mainly directed at someone other than the offender. The exception to this is the offence of concealing the body of a child, which in practice tends to be treated more leniently than the others, perhaps because the suffering caused to the offender by publicity in this type of case is not disregarded.

In relation to infanticide, child neglect and abuse, it is obvious that the harm done may be of a most serious nature, and is particularly repugnant in view of the helplessness of the victim. It is nevertheless demonstrable and is well known to persons most familiar with such situations that these offences are frequently associated with a condition of serious mental disorder, or at the least with a high degree of emotional stress which overwhelms the normal ability of the individual to control her behaviour. Thus, comments made in Chapter 12 on the mentally disordered person under the criminal law have application to a high proportion of offenders in this category.

The serious harm which may be done to the child victims makes this a necessary area of concern for law enforcement and criminal justice. In our view, however, major emphasis should be placed on providing preventive social resources such as child protection and family services and on treatment which is primarily under the auspices of mental health and social welfare authorities rather than the unrealistic and ineffectual use of imprisonment in relation to these offences.

### *Differences in Sentencing Practices in relation to Women and Men Offenders*

We have noted that, on the whole, there seems to be greater readiness in society to avoid the use of incarceration or severe forms of punishment for women than for men. Some considerations contributing to this appear to arise from logical causes, such as the lower proportion of violent offences committed by women. Sometimes, also, courts appear to recognize that incarceration of the mother of young children would, in certain situations, penalize their children even more directly and severely than does, in other situations, the incarceration of a father. Apart from such instances, it is difficult to defend this discrimination in favour of women on grounds of logic. General recommendations concerning sentencing made elsewhere in this report should make clear that we are not suggesting that practice be changed in the direction of sentencing women as men are presently sentenced; for the most part we believe that greater equality in treatment between the sexes should be reached by modifying sentencing practices in relation to men offenders.

Chapter 11 of this report suggests that special considerations should apply in relation to sentencing where there is grave public risk from rationally

motivated but illegal activity such as professional crime. Statements have been made to us by law enforcement and correctional personnel that there appears to be an increased involvement of women in such kinds of crime as passing forged cheques and counterfeit money.

We have also been informed that women involved in organized criminal activity frequently, though not exclusively, become so involved through their personal relationships with men who initiate and organize such activity. It is asserted too that in instances where a man and woman have been involved together in a planned offence, it is not uncommon for the woman to assume before the court the major responsibility, even where the man was in fact the main instigator and planner. It is stated that this is done on the assumption that she will receive a lighter sentence than would the man. We consider it appropriate that women who have carried out minor roles because of emotional attachment and economic dependence on the men involved should have these considerations taken into account by the courts. We see no sound reason however why women who deliberately involve themselves in organized "professional" criminal activity should be given preferential treatment solely because they are women.

#### *Correctional Services for the Woman Offender*

The correctional principles that apply to offenders in general apply to women offenders as well. These principles are set out in earlier chapters of this report.

One of these principles is that treatment of the offender involves the total sequence of events which is experienced in connection with the criminal justice process—in the words of our Committee's terms of reference "from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole". Everything which happens to the offender during this process has its effect either in the direction of correction or in the opposite direction.

We wish to emphasize the importance, throughout this entire process, of this treatment being such as to enhance rather than degrade the offender's human dignity and sense of worth as a person. It is recognized that many of our traditional correctional procedures are based upon the opposite assumption, namely, that if treatment emphasizes society's abhorrence of the offending behaviour through dramatizing the offender's difference from, and inferiority to, the "normal" citizen, the consequences of such behaviour will be feared and the behaviour avoided. Contrary experience, to the effect that the offender all too readily accepts society's opinion that he or she is a degraded and inferior person, and is driven more firmly to identification and continuing association with others similarly labelled, is only slowly creating change in our methods of treating offenders, both men and women.<sup>6</sup>

If the offender is to be encouraged in the hope and belief that he or she can attain an accepted status in the wider society, rather than solely in the

<sup>6</sup> Bertrand, Marie-Andrée. "Self-Image and Delinquency: a Contribution to the Study of Female Criminality and Woman's Image". *Acta Criminologica*, 1969, II, 71-138.

criminal sub-culture, the many small repetitive procedures which carry the opposite message must be changed.

Examination of the kinds of offences most frequently committed by women has revealed a number of factors which require to be taken into account in planning for the woman offender. Additional factors have been drawn to our attention by a number of experienced correctional workers and which appear also in literature concerning the women offender; these also deserve examination.

One such factor is the particular importance for the woman offender of personal appearance, clothing, and physical surroundings. This is perhaps only an aspect of the more general principle that human beings have a marked tendency to respond with the type of behaviour which others appear to expect of them. Thus, good personal grooming and reasonably pleasant physical surroundings are important in enhancing a feeling of self-respect in both men and women. The difference appears to lie in the fact that they seem to be of somewhat more central importance to the woman, who tends more typically to use clothing and personal surroundings as a significant expression of her personality. Thus, any correctional institution for either short-term or long-term custody, or any program which is part of an endeavour to change the attitudes and behaviour of women offenders for the better, must pay special attention to these things.

A second factor which has been drawn to our attention is an apparent tendency of women offenders to need and use specialized medical, psychiatric and social treatment resources in higher proportion than is true of the same number from an undifferentiated group of men offenders. This may simply be an aspect of the marked difference in numbers between men and women offenders proportionate to the general population. That is, since fewer women out of the total population are sentenced by the courts than is true of men, the sentenced group may represent overall a more socially aberrant and emotionally disturbed group than do the sentenced men. Also, the difference may reflect a general difference in attitude towards the use of such treatment resources as between women and men in the general community. In any case, administrators and correctional workers in many jurisdictions have pointed out the high proportionate requirement in women's institutions for these special services. It is the practice in many jurisdictions also that a probation or parole caseload of women offenders is normally smaller than a comparable caseload of men.

During discussion sessions concerning the woman offender at the Canadian Congress of Corrections in Halifax in June, 1967, it was agreed that in women's institutions there is a stronger factor of "emotional contagion", through the more readily expressed emotionality of the women, than with a comparable group of men. This was asserted not only by correctional workers whose experience had been with women offenders only, but the male administrators of a federal and provincial institution respectively, who in both instances were experienced in institutions for men as well as institutions for women. This suggests special problems in institutional management which

add to the other factors discussed in Chapter 17 of this report in underlining the importance of small, well-staffed living units in planning correctional institutions for women.

### *Community Services*

Another principle stressed in this report is that, unless there are strong reasons against it, the offender should be dealt with in the community rather than being sentenced to prison. Problems sometimes arise in providing community correctional services to women because of small numbers. For instance, in some areas there may be only two or three women on probation or parole and it is difficult to provide supervision. This points up the need to coordinate services to women offenders.

Hostel facilities are urgently needed for women offenders, particularly the younger women, because of the need for additional protection.

The need for voluntary agencies to serve women offenders is also urgent in some parts of the country. Such services for women are not as widespread in Canada as those for men, although the agencies serving men will often assist women as well.

### *Prison Services*

The number of women sentenced to prison in Canada, in comparison to the number of men, is so small it is difficult to plan prison services for them.

TABLE 19  
Population Movement in and out of Canadian Prisons for Women, 1967-1968

Jurisdiction	Movement In During Year	Movement Out During Year	Population as of March 31, 1968
Newfoundland.....	41	41	4
Prince Edward Island.....	14	14	—
Nova Scotia.....	179	180	16
New Brunswick.....	215	219	19
Quebec.....	2,376	2,407	68
Ontario.....	4,851	4,841	214
Manitoba.....	1,016	1,017	43
Saskatchewan.....	564	572	20
Alberta.....	1,162	1,169	54
British Columbia.....	1,117	1,122	106
Yukon.....	226	229	1
Northwest Territories.....	212	212	7
Penitentiaries.....	76	78	111
Kingston.....			(75)
Matsqui.....			(36)
Totals.....	12,649	12,101	663

SOURCE: Dominion Bureau of Statistics. *Correctional Institution Statistics 1967-68*.

This Table includes all admissions to these institutions, including those awaiting trial or on remand. This means that the same individual may be admitted to more than one institution during proceedings related to the same offence. For instance, she may be admitted to a jail awaiting trial and then admitted to another institution after conviction and sentence. It is therefore impossible to determine the number of individual women who were incarcerated in Canadian prisons during the year under consideration.

The Committee notes the existence of marked differences in the number of women committed to prison between provinces with comparable population. These differences obviously call for further study.

Another factor to be considered in planning prison services for women is the "social" nature of the offences for which most women are sentenced to prison, in contrast to the more aggressive crimes committed by some men. Relatively few women inmates present a custodial problem in prison. This makes it possible to reduce the limitations otherwise imposed by the necessity for security on the establishment of a more effective correctional environment.

In the past, the Government of Canada operated one Prison for Women in Kingston, Ontario. This institution has a capacity for one hundred inmates. Recently, an institution was opened at Matsqui, British Columbia, to serve female inmates who are drug addicts from the Western provinces. Those from the Eastern provinces are still committed to the Prison for Women in Kingston.

This arrangement whereby all women in Canada receiving a prison sentence of two years or more (except the drug addicts from the Western provinces) are sent to one central institution creates many problems.

1. Women from communities far from Kingston are separated from their families and other community contacts. This causes hardships while the inmate is in the institution and makes pre-release planning most difficult.
2. There is no French-language program at the Federal Prison for Women in Kingston. Because of this, Quebec courts are reluctant to impose sentences of two years or more on women. This is illustrated by the fact that on December 14, 1967, there were forty-five inmates from Ontario in the Prison for Women and only twelve from Quebec. To operate two programs, one in English and one in French, in an institution as small as the Prison for Women does not seem practicable.
3. Segregation presents problems. The population of the Prison for Women in Kingston is made up of a wide range of inmates in terms of age, degree of criminal sophistication and emotional stability. Ideally, if numbers justified it, these inmates should be segregated in a number of institutions.

The institution for female drug addicts at Matsqui in British Columbia has a capacity of one hundred and fifty. Less than a third of that capacity is in use at present.

The Committee has stressed the advantages of relatively small institutions over large institutions in another part of this report. Practical considerations, however, do not permit this principle to be carried to extremes. Adequate correctional services can be provided only where the group for whom the services are intended is sufficiently large to utilize those services. This means the services must be provided by administrative units of reasonable size.

The most effective way of accomplishing this, in the opinion of the Committee, would be for the Government of Canada to purchase service in respect to women sentenced to two years or more from the larger provinces—Ontario, Quebec, British Columbia and, probably, Alberta—so that women from those provinces serving a sentence of over two years would be held in provincial institutions. In the Atlantic provinces it is suggested the Government of Canada offer to establish a prison service for all women with a sentence of over thirty days. The Atlantic provinces could then purchase service from the Government of Canada for their women serving sentences over thirty days and under two years. This seems more feasible than the proposal that the Atlantic provinces supply prison service for all women inmates since the numbers in each province are too small.

Manitoba and Saskatchewan present a special problem. One possible solution is for the Government of Canada to provide a regional service to these two provinces for all women inmates serving more than thirty days, similar to the arrangement suggested above for the Atlantic provinces. An alternative would be for these two provinces to purchase service from one of the larger provinces with suitable facilities for those inmates requiring security, with each province operating its own prison services for the remaining inmates.

Physical segregation of the inmates on the basis of acceptable classification criteria could be accomplished by appropriate architecture.

In all cases, the jurisdiction purchasing service would reimburse the jurisdiction providing the service. Help with capital cost would have to be considered too so the jurisdiction providing the service could build additional facilities to serve the additional inmates.

**It is recommended that arrangements for purchase of prison services for women be made between the Government of Canada and the various provinces so that a unified service could be provided in each area and that the Government of Canada offer to purchase service from the larger provinces and to provide regional services that could be purchased by smaller provinces.**

These arrangements would not solve all problems related to prison services for women offenders in Canada. Area prisons would still require the removal of some inmates some distance from home. Purchasing service by one province from another for those inmates who require security would also mean

some inmates would be transferred some distance from home. However, the number separated any great distance from home and community would be greatly reduced.

Not all French-speaking inmates come from Quebec and French-language institutions or parts of institutions would be required in other areas. However, those French-speaking inmates who receive a sentence of less than two years are already being cared for in these areas. If all inmates from the Province of Quebec, regardless of length of sentence, were cared for in institutions within the province, the judges would feel less inhibited in arriving at an appropriate sentence.

Segregation would still be a problem in those areas where the female inmate population is small. There would be a problem if one or two long-term inmates were held among a group of short-term inmates, even if security were no problem. It would be disturbing for the long-term inmates to watch the short-term inmates come and go. However, an aggressive work-release and parole program, backed by an active local voluntary agency with hostel facilities available to it, should ensure that few women offenders spend a long period in prison.

#### *Continuing Jurisdictional Responsibility*

These provisions would leave the jurisdictional responsibility of each level of government undisturbed. The Government of Canada would retain primary responsibility for women who receive sentences of imprisonment of two years or more, the provinces for those who receive sentences of less than two years.

The inmate for whom service is purchased from another government should be subject to all rules and regulations of the prison in which she is placed. This would include such matters as rates of pay and home-visiting privileges.

However, the Committee is of the opinion that the government with primary responsibility should retain responsibility for parole. That is, the National Parole Board would retain responsibility for parole as it applies to any woman serving a sentence of two years or more for whom the Government of Canada has purchased service from a province, and the province would assume responsibility for parole as it applies to an inmate serving a sentence of less than two years for whom service has been purchased from the Government of Canada or from another province. Parole supervision might, of course, be purchased to retain continuity of staff-inmate relationship where that seems desirable.

**It is recommended that the government with primary responsibility retain responsibility for parole as it applies to any woman inmate for whom prison service has been purchased from another government.**

#### *A Leadership Role*

The training and exchange of experience among correctional workers has tended to neglect the particular problems of those who deal with women

offenders. It would appear to the Committee that progress in treatment of women offenders throughout Canada and the development of appropriate services would be advanced by appointment of a senior officer within the Department of the Solicitor General who would not only be responsible for developing appropriate program, staff recruitment and staff training in relation to women in federal institutions, but would also be responsible for facilitating exchange of information and experience among others carrying similar responsibilities in provincial services throughout Canada.

We have suggested elsewhere that in a country such as Canada, which has marked regional differences and a federal form of government, the role of the central government in ensuring an effective system of corrections requires exercise of leadership through stimulation of experiment, exchange of information and experience, and mutual planning among the various government jurisdictions and voluntary agencies which contribute to the whole. The fact that women offenders form a comparatively small and readily identifiable group offers an opportunity to pioneer in developing this type of leadership. The sense of isolation which was communicated to the Committee by staff members working with women offenders should be substantially reduced if they could feel an identity with a larger group engaged in a common task.

**The Committee recommends that the Government of Canada appoint a suitably qualified woman to a position of senior responsibility and leadership in relation to correctional treatment of the woman offender in Canada.**

#### *Indian and Métis Women Offenders*

The number of Indian and Métis women sentenced to prison in Canada is shown in the following Table.

Although detailed information is not available, it appears that the great majority of these women were convicted of offences, such as drunkenness, that are social rather than criminal in nature.

The fact that in many prisons for women, particularly in the Western provinces, the majority of the inmates are Indian or Métis calls for special programs in these institutions designed to meet the particular needs of these Indian or Métis women. The importance of involving the general community in corrections has been stressed throughout this report. The need to involve members of the Indian and Métis communities in programs designed to help these Indian and Métis women offenders seems particularly acute.<sup>7</sup>

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<sup>7</sup> Alberta, Executive Council. *Report of the Alberta Penology Study* (McGrath Report). Edmonton: Queen's Printer, 1968.

TABLE 20

Number of Indian and Métis Women in Selected Prisons for Women in Canada for Certain Periods in 1965 or 1966

Institution	Period	Total Admitted <sup>a</sup>	Total in Detention <sup>b</sup>	Indian or Métis	Per cent Indian or Métis
Kenora District Jail, Ontario..	Jan- June 66	281		266	95
The Pas Correctional Institution for Women, Manitoba.....	August 66		17	17	100
Portage La Prairie Correctional Institution for Women, Manitoba.....	August 66		63	44	69
Riverside Correctional Centre, Saskatchewan.....	August 66	30		24	80
Fort Saskatchewan Provincial Gaol (Women's Section), Alberta.....	August 66	109		81	74
Oakalla Prison Farm (Women's Gaol), British Columbia.....	April 66	76		35	46

<sup>a</sup>Total number admitted during period of time indicated

<sup>b</sup>Retained in jail at the time of the collection of data

SOURCE: Canadian Corrections Association. *Indians and the Law*, Ottawa: Queen's Printer, 1967

## Annex

TABLE 21

Rate of Charges per 100,000 Population over 16 and Ratio of Male to Female Rates for Specific Offences in Canada in 1966

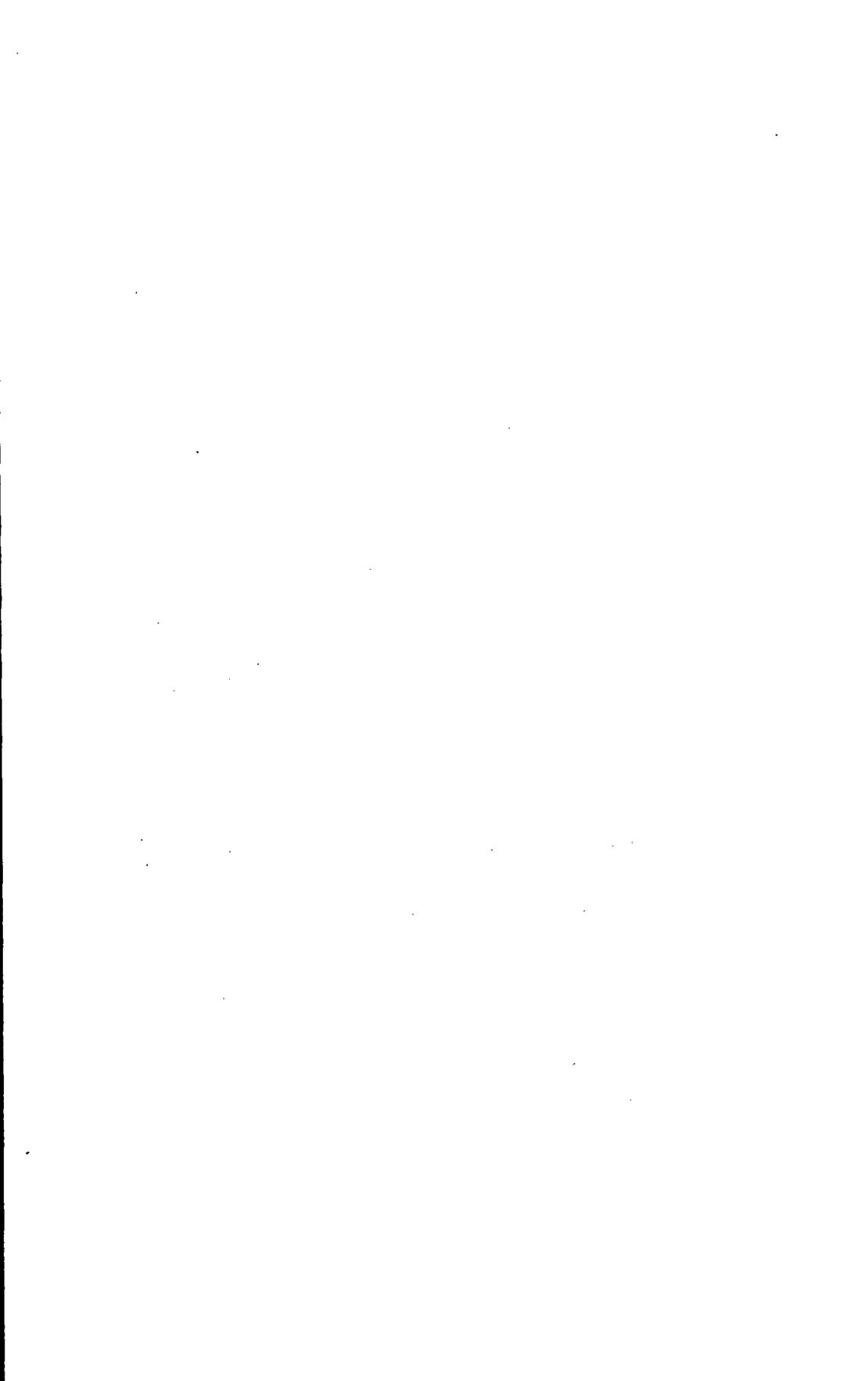
Offence <sup>a</sup>	Rate per 100,000 Population in Canada <sup>b</sup>		Ratio of Rates
	Male	Female	Male—Female
Theft \$50 and under.....	240	69	3:1
Offences related to prostitution.....	7	24	1:3
Assaults (not indecent).....	293	18	16:1
Fraud.....	138	18	8:1
Theft over \$50.....	118	12	10:1
Break and enter.....	197	4	49:1
Having stolen goods.....	56	4	14:1
Gaming and betting.....	43	3	14:1
Narcotic Control Act.....	9	3	3:1
Car theft.....	99	2	50:1
Offensive weapons.....	35	1	35:1
Robbery.....	32	1	32:1
Wounding.....	6	1	6:1
Sex Offences (excluding rape).....	40	0.5	80:1
Murder <sup>c</sup> .....	2	0.4	5:1
Attempted murder.....	2	0.1	20:1
Manslaughter.....	0.3	0.1	3:1

<sup>a</sup>Listed in order of frequency of female charges.

<sup>b</sup>Rates based on the population of men and of women in Canada over the age of 16. 1966 Census data.

<sup>c</sup>Includes capital murder and non-capital murder.

SOURCE: Adapted from material of M. Benson. Based on Table 1B in *Dominion Bureau of Statistics, Crime Statistics (Police) 1966*.



## SIGNIFICANCE OF CRIMINAL RECORDS AND RECOGNITION OF REHABILITATION

### *Criminal Records*

When they become public knowledge, records of criminal conviction greatly handicap rehabilitation and thus threaten to destroy the correctional process. In the Committee's view, it follows, then, that convictions should be recorded only for offences dangerous enough to society to override the harm they do to the offender. Accordingly, a way should be open to the courts to deal with minor offenders without registering a formal conviction. There is no federal provision for this in Canada at present. Other countries have introduced such reforms as discharge without conviction and probation without conviction. The Committee evaluated and made recommendations on these procedures in Chapter 11 of this report.

### *Availability*

The public has relatively little trouble learning that a man has been convicted of a criminal offence. Among other organizations, credit firms, bonding companies and employment agencies have such information, and it is available to a wider public through court records.

The Committee deplors this widespread dissemination, which can be needlessly harmful to an offender, whether he is just out of prison or has abided by the law for many years. It is our opinion that official criminal records should be available only to organizations requiring them for court, police or correctional purposes. We are aware, however, that there are methods, apart from access to official records, of finding out if a man has been convicted of a criminal offence. Legislation, therefore, is likely to be an incomplete safeguard in this area. Continuing public education is necessary to discourage such methods as questioning a man's neighbors about his past.

In the Committee's view, society's right to be protected against crime and the threat of crime demands that an offender demonstrate his rehabilitation by leading a crime-free life in the community for an appropriate number of years. Only when society is satisfied that he is worthy of the risk would it be prepared to annul his conviction. But what of the intervening years? An offender who is sincerely trying to rehabilitate himself ought not to be demoralized by running into his record at practically every turn. There are many other aspects of rehabilitation which this Committee has dealt with in other parts of this report.

### *Recognition of Rehabilitation*

When an offender has shown over an appropriate number of years that he wants to lead a crime-free life and is capable of it, there should be a procedure to ease, as much as possible, the legal disabilities and social stigma of a criminal record. In such cases legislation should provide for nullifying his record, granting him a certificate of good behaviour and recommending him for a pardon which would vacate his conviction. The chance, thus given, to start again with a clean record would provide additional and strong motivation to earn this new status and, once earned, not to risk it by further crime.

All three parts of this provision need not apply to minor convictions. Consider, for example, the man who once made a mistake—say, taking a car without the owner's consent (joyriding) as a teen-age prank—and finds himself years later embarrassed publicly and professionally and perhaps unable to be bonded or transferred to another country. The hardship in such cases is obvious, but it would be effectively alleviated by nullifying the record alone. There would be no necessity further to recognize rehabilitation by a certificate of good behaviour and a pardon.

By nullifying, the Committee does not mean physical destruction. It would be both impractical and unwise to attempt, in effect, to erase all trace of a criminal record. Such information is widely disseminated and kept on file by governmental and private agencies, some of which—news-papers, for example—could not be expected to destroy their records. Nor, of course, could the police be expected, in cases of public necessity, to do without the proper and indispensable intelligence that criminal records provide. Further, a criminal conviction will be remembered and memory cannot be obliterated.

By nullifying, the Committee means that official criminal records should not be available to the court, where they affect sentence, or the public, where they affect many aspects of an ex-offender's life, including employment. The record of an offender whose rehabilitation has been recognized should be placed in past records and sealed. The effect should be that, for the purposes of the court and the public, the conviction never occurred. The Committee also feels there should be an onus on the police to show cause that an annulled record they require is of sufficient public importance

to justify releasing it to them. Such cause should be shown to the satisfaction of the Solicitor General or the appropriate provincial minister of justice or attorney general.

To indicate more precisely the Committee's views as to the effect of the annulment or vacating of a criminal conviction,

**The Committee recommends that, save as provided in this report with respect to the investigation of crime and subject to the safeguards and restrictions specified, a conviction which has been annulled or vacated shall be deemed never to have taken place in respect of all matters over which Parliament has jurisdiction and in particular and without limiting the generality of the foregoing shall be deemed never to have taken place:**

- (i) for the purpose of any criminal proceeding or other proceeding over which Parliament has jurisdiction;**
- (ii) in relation to the cross-examination of a witness in any proceeding over which Parliament has jurisdiction;**
- (iii) in relation to any provision in an act of Parliament by virtue of which a person who has been convicted is disqualified from holding any office or performing any public function;**
- (iv) for the purpose of employment in any branch of the public service of Canada.**

#### *Summary Conviction Offences*

The Committee considers it feasible for the purposes of nullifying to separate offences into minor and major on the basis of their danger to society. We define a minor offence as one punishable on summary conviction. Because the consequences of a criminal record for such convictions are out of proportion to the gravity of the offence, nullifying should be automatic after an appropriate crime-free period. In the Committee's opinion, neither a hearing nor a document recognizing rehabilitation nor a pardon is necessary.

**The Committee, therefore, recommends:**

- (a) that criminal records resulting from summary conviction be annulled automatically after a crime-free period of two years from the end a sentence;**
- (b) that "end of a sentence" be taken to mean, in the case of a fine or other punishment not involving probation or prison, from the date of conviction; in the case of probation, from the end of the probation period; in the case of prison, from the end of the prison sentence; in the case of parole, from the end of the parole period;**
- (c) that an annulled record of summary conviction not be activated in the event of any later conviction, which would be dealt with as a first offence.**

The Committee feels that, as experience is accumulated, consideration might be given to broadening this category to include certain other offences.

## *Indictable Offences*

Different considerations apply to major offences, which the Committee, for practical purposes, defines as those classified by the criminal law as indictable. Because some of the criminals most dangerous to society are among those convicted of indictable offences, care must be taken to ensure that recognition of rehabilitation is not granted prematurely. Yet if, as this Committee believes, society's best long-term protection is rehabilitation, the need for such recognition is most urgent for those who must overcome the stigma of conviction for a major offence.

The Committee's view is that the most effective safeguard against an unjustified recognition of rehabilitation is a full hearing with the onus of proof placed on the applicant. We have considered suggesting that a court conduct this hearing, but the judiciary is already carrying a heavy workload, and furthermore, does not have adequate resources to assist it in making the necessary assessment of the offender. The National Parole Board, as this Committee sees it reconstituted, would seem the more practical choice. It would have the field staff and the experience.

**The Committee, therefore, recommends:**

- (a) that criminal records resulting from conviction for indictable offences be annulled after a successful hearing before the National Parole Board, the hearing to take place on application of the offender at any time following a crime-free period of five years from the end of sentence;**
- (b) that "end of sentence" be taken to mean the same for nullifying records resulting from conviction for indictable offences as for records resulting from summary conviction.**

## *Employment*

One of the most debilitating social consequences of a criminal record is the difficulty of finding employment. An ex-offender, to have any chance at all, must be able to make a legitimate living for himself and his family. This can revive his self-respect and give him a feeling of belonging to the law-abiding community. It also gives him an opportunity to make friends—most likely fellow workers—who have no connection with his past life.

Yet society must have the right to protect itself against the threat of recidivism. An employer's reluctance, for example, to entrust funds to someone who has been convicted of embezzlement is a fact that must be recognized. This further underscores the need for a five-year wait and a full hearing before the National Parole Board before nullifying records for indictable offences.

Even so, nullifying alone is not enough for an ex-offender confronted with a job application form which asks: "Have you ever been convicted of a crimi-

nal offence?" What is needed is legislation that would be of practical assistance in getting him past this first stage in the employment process and into a personal interview. This legislation should provide that the National Parole Board, once satisfied that the applicant is worthy of the risk, issue him a certificate of good behaviour and recommend to the Executive that he is a proper person to be granted a pardon. The pardon should state that "the conviction shall be deemed to have been vacated". An ex-offender, faced with the question, "Have you ever been convicted of a criminal offence?" could then reply: "Yes, but I hold a certificate of good behavior from the National Parole Board." If pardoned, he could reply: "Yes, but I hold a pardon which vacates my conviction."

**The Committee, therefore, recommends that a person, who has applied to the National Parole Board at any time after five crime-free years from the end of sentence for an indictable offence and who has satisfied the Parole Board after a full hearing that he has been of good behavior, be granted a certificate of good behavior;**

**that the National Parole Board issue this certificate and accompany it with a recommendation to the Executive that the holder is a proper person to be granted a pardon, which shall state that the conviction shall be deemed to have been vacated;**

**that, in the case of indictable offences, the two above steps be taken in addition to nullifying the record;**

**that "end of sentence" be taken to mean the same for a certificate of good behaviour and a recommendation for pardon as for nullifying.**

The Committee makes this recommendation after carefully considering an alternate procedure: that the National Parole Board issue successful applicants a certificate of rehabilitation which would provide that "the conviction shall be deemed to have been vacated". It was suggested that an ex-offender could then reply, "No", to the question, "Have you ever been convicted of a criminal offence?" and be asserting a legal fact.

After strong representations from consultants, the Committee has rejected this alternative on at least three grounds. First, that the term "certificate of rehabilitation" suggests a guarantee by the Government that the holder is rehabilitated and will commit no further crime. Second, that to reply, "No", to the question, "Have you ever been convicted of a criminal offence?" would be legally correct but morally ambiguous. Third, that the question could be rephrased in such a way as to induce an ex-offender to disclose a vacated conviction.

The Committee realizes that legislation cannot solve all the problems an ex-offender encounters in his efforts to find employment. For example, job applications present particular difficulties for those who have served a prison term. Blanks in insurance stamps, social security and hospitalization payments and lack of references all suggest time spent in prison. Continuing public education would be necessary to supplement legislative change.

### *Provincial Jurisdiction*

The Committee is aware that many of the legal disabilities arising from a criminal record relate to property and civil rights, and are therefore under the jurisdiction of the provinces. It is also evident that there are far more records of convictions for offences created by provincial legislation than for offences created by federal legislation. We urge the initiation of discussions between the federal government and the provinces to consider the effect of our recommendations dealing with recognition of rehabilitation on matters under provincial control.

### *International Travel and Immigration*

To allow rehabilitated former offenders normal freedom of movement from country to country would, of course, require international agreement. A Canadian tourist with a criminal record may find his record little handicap in travelling to a country where a visa is not required, but immigration is almost certain to be barred. The United States Government, for example, is not prepared to accept for immigration purposes an ordinary pardon granted under the Criminal Code.

This problem can only be solved by reciprocal agreements between nations establishing international standards for rehabilitation and ensuring their recognition.

## DEVELOPMENT OF HUMAN RESOURCES IN THE FIELD OF CORRECTIONS

People constitute the most important element in any correctional system. It follows that staff development should be assigned maximum priority by every correctional administrator. However, if offenders who are not yet committed to a career of criminal activity are to be prevented from becoming so and if corrections in Canada is to operate as a cohesive system, then staff of high caliber are required in all jurisdictions and in all services related to corrections. We submit, therefore, that staff development should not be left only to the individual correctional system but that it should be planned on a Canada-wide and long-term basis under the leadership and stimulation of the federal government.

### *The Police*

This report deals with only a segment of the policeman's functions, that which is most directly related to corrections, consisting of the way in which persons who have either committed an offence or are suspected of having committed an offence are dealt with.

### *A Sense of Accomplishment*

Staff in any field will operate at a much higher efficiency level, if they feel that they are part of a progressive service with positive ideals. They must know that they have sufficient facilities to accomplish their work effectively and that no illogical or arbitrary obstacles will hinder their action. For them to realize that their profession stands high in public regard helps raise their morale.

These principles apply to the police. Those who belong to an efficient and forward-looking force on the whole react accordingly. Unfortunately, so may those who belong to forces where standards are low, and the results often bring the whole police system into undeserved disrepute.

One of the pre-requisites for good staff development is to offer both the recruit and the long-term staff member an opportunity to participate in a service of which he can be proud.

Public relations present a special problem in police work. Tradition and authority are under attack in many spheres and the police frequently bear the brunt. However, poor police practices have contributed to these difficulties. The police must concentrate on building better public relations if the service is to attract and hold the kind of men and women needed.

### *Recruitment*

Great care is required in selecting police recruits. Not only are a minimum level of education<sup>1</sup> and good character essential, but the motivation that leads the recruit to seek a police career should be examined. Written aptitude tests will help in selection, although no test has yet been devised that will give fully reliable information on which to determine whether a recruit will become a good policeman.

Since no pre-employment test will itself ensure good selection, each police force should have an apprenticeship system so that the final assessment of the recruit's suitability can be made on the basis of performance on the job, as it now is in many larger forces.

### *Training*

The policeman's proper role is not confined to narrowly-conceived enforcement, and his training should reflect that fact. He should be trained so he can take his place along with the other appropriate services in broad programs designed to meet the crime problem.

The police know that their work forms only a segment of the fight against crime. It is essential that all agencies engaged in the work of prevention and rehabilitation cooperate closely, and that, wherever possible, the full support of the public is obtained. The aim is not just to catch the criminal; it is to rehabilitate the offender so that he will never again become a police problem.<sup>2</sup>

Some aspects of criminology should form part of the training of all police, with emphasis on knowledge of the sciences of human behaviour and a better acquaintance with the operation of the courts and of the correctional services.

Each recruit should work under the direction of an experienced supervisor and opportunities to work alone should be expanded only as his performance shows he is ready. This kind of on-the-job training should be considered part of his over-all training program and should be carefully and deliberately planned.

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<sup>1</sup> The minimum educational requirement in most Canadian police services is Grade 10. See Kelly, W. H. "The Police", in McGrath, W. T. (ed.). *Crime and Its Treatment in Canada*. Toronto: Macmillan, 1965.

<sup>2</sup> *Ibid.*

Each step in the policeman's progress towards increased competence should be clearly defined and achieved on the basis of barrier examinations, and his successful completion of each step should be recognized in an increased salary scale. Up-grading training should continue to be available to him throughout his career to avoid stagnation and to keep him up-to-date on new techniques. Such training might be available within the service itself or at some outside police school.

To make it possible for a number of personnel to be on training at any given time, each police force should maintain a training cadre over and above the regular establishment.

Canadian universities should be encouraged to increase their training facilities for police personnel.

Because of the mobility of the Canadian population generally and in particular of persons engaged in serious and highly-organized criminal activity, uniformly good standards of detection and law enforcement throughout the country are of great importance, if this kind of crime is to be effectively controlled. It follows, therefore, in our opinion, that the federal government, in co-operation with the provinces should provide leadership in the development of police training facilities. Some of this is already being done in the Royal Canadian Mounted Police Colleges which train limited numbers of municipal police. The Committee notes with approval the federal government's recent decision to set up a national police college, made at the request of the provinces. It is suggested that the federal government support the extension of university facilities in this field by whatever means are available, including financial assistance.

#### *Working Conditions*

Police work makes great demands on personnel. Long hours, often during the night and under difficult and even dangerous conditions are routine. Relationships with the public are sometimes strained and the policeman is frequently exposed to undeserved abuse. The policeman is limited in his social life.

If the police services are to attract and hold their quota of good recruits in competition with other employment careers, it is essential that a sense of pride and accomplishment be developed. But that is not enough. Good wages, proper pension plans and holiday provisions, decent quarters and the other standard requirements of good working conditions must be provided.

Efficient police administration units are also essential. Proper standards cannot be maintained in a small police force and the small forces should be absorbed into units large enough to stimulate the building of a tradition of accomplishment, with the resulting transmission of ethical principles. Proper supervision and on-the-job training can also be provided only in the larger unit, along with opportunities for transfer and promotion. Disciplinary boards that can deal effectively with complaints about improper actions by the police are also easier to develop in the larger units.

The Committee believes that each province should have a police act to ensure high standards of police service.

### *Lawyers*

That lawyers should be competent to participate in the criminal process has traditionally been regarded as axiomatic. Recently, has come an awareness that they should be competent to extend their function to participation in the whole correctional process. When the judge's function was merely to award punishment, counsel addressed the Bench on the extent and nature of punishment to be awarded and there was little or no need for special training or skills in this regard. Now that the function of a sentence is understood to extend beyond the imposition of punishment, to ensuring the protection of the public in a wider sense, new skills are necessary in order that a lawyer may participate in an adequate fashion by advising and informing the court as to appropriate dispositions. The Committee is of the opinion that all law schools should introduce courses in criminology to give law students and lawyers a knowledge of criminological theory and of the sciences of human behaviour, and to produce a better understanding of their own role in relation to the whole correctional process. This view has been supported in discussions the Committee has held with members of law faculties throughout Canada.

The matter of further specialist education for members of the judiciary is dealt with in Chapter 11.

### *Correctional Services Personnel*

#### *Training for What?*

Part of the difficulty in staff development for the correctional services is the lack of a clear-cut statement of the aims and purposes of many of these services. This is particularly apt to occur in prisons, where the conflict between custody and treatment is often unresolved.

The problem is compounded by the failure of some services to live up to stated aims. For instance, most prisons list treatment as one of the aims; however, it is upsetting for the inmates to examine critically their own motives and attitudes and the result of a treatment program may be tension and discord in the institution. The attractions of a smooth-running institution are many. Such an institution looks efficient and may win praise from both government authorities and the press. The institution that suffers the stress of a treatment program may be more efficient in terms of the stated aims of the prison, but this may not be readily appreciated.

The aim of each correctional service must be clearly and unequivocally stated if staff training is to have any real direction. This report is based on the belief that behavioural modification is one of the prime aims of all correctional services including prisons and that emphasis on methods other than

punitive are necessary to achieve this aim. Further, and most important in catalyzing a staff training program, it is based on a sincere belief in the efficacy of the program. It is only in a correctional service based on such concepts that the staff member can feel he is part of a positive and worthwhile endeavour and that he can take pride in his work.

#### *Where to Begin*

Training of staff should start at the senior levels, not at the lower levels of staff. Unless the senior staff are devoted to a program of corrections, that program and the training of staff to carry it out will have little success. A belief in and an understanding of correctional methods must be communicated to junior staff by their superiors if progress is to be assured. This need exists for professionally-trained staff as well as for staff who are not professionally trained. Without active support for a positive program from senior staff, professionally-trained staff will become discouraged and will either resign or confine themselves to professional routines.

It follows that the sequence of training should be from the most senior staff down through the managerial and supervisory staff to junior levels.

#### *Who Should be Responsible for Recruitment and Training*

It is important that those who are responsible for recruiting, training and supervising new staff be orientated favourably towards the positive aims of the service. Recruitment will then be based on those characteristics in the recruit that provide a reasonable expectation that he can identify with the rehabilitative aims of the service. Also the training and supervision he gets will support and promote those aims.

#### *Different Settings*

Correctional services are of many kinds, from maximum security prisons to probation and parole, and staff personality and skills most suited to each vary. However, the dividing lines between the different services are becoming less distinct and increasing emphasis is being put on co-ordination between them. These changed conditions make changed demands on staff who increasingly need experience in several different areas of service.

As far as possible a correctional staff member should be selected with the intention of giving him experience in a number of settings and, as part of his training, he should be prepared to fit into these different situations. Over the first few years of his experience, he should work in different services—in prisons of varying security, in probation hostels, in probation and parole. In this way a body of correctional officials with the broadest approach will be developed.

#### *Recruitment*

As with police recruitment, written tests can be of value in determining whether an applicant has the desired motivation as well as the desired

qualifications. However, none of the tests developed to-date are fully reliable for staff selection and final selection is best made on the basis of performance on the job. Each correctional service should provide for a short probationary period of apprenticeship or internship that applies to all staff, professional and non-professional.

#### *Training—Administrative Staff*

Special courses should be developed within the universities to prepare staff for administrative positions within the correctional services. Administration requires special techniques and the staff member who has been successful in a non-administrative position may not be qualified to become an administrator.

The correctional administrator requires knowledge of the usual techniques that apply generally to administration. In addition, he must be fully familiar with the special aspects of administration in a correctional setting. He must know the problems presented by each class of inmate and the special contributions that can be made by staff members from each of the various disciplines. It is not necessary that he know how to apply the special techniques of each staff member but he must know what each staff member has to contribute and how the techniques and requirements of all can be blended in a way that will produce a real team approach.

In addition to university courses in correctional administration, more limited courses at the community college and the in-service levels are required.

#### *Training—Professionally-Trained Staff*

The term "professional" is used in two ways in the corrections field. In one sense it refers to any staff member, whatever his academic background, who is employed full-time in the corrections field and who brings to his work an obvious degree of competence, open-mindedness and commitment. In the other sense it refers to the person who is a member of a recognized profession. In this section the term "professionally-trained staff" is used to refer to those who are members of a recognized profession and who are employed in the corrections field in positions where they practice the techniques of their respective professions.

With the exception of university departments directly concerned with criminology or corrections, few professional schools in Canada provide specific training for the corrections field. Most professional schools take the view that their responsibility ends with the provision of generic training in their specialty in that their graduates should have enough knowledge of the specialty to be able to practise it in any setting in which it is proper for these professionals to practise.

This is quite likely so in some cases. Dentists might logically assume that there are no differences in dental needs between law-abiding citizens and offenders which would suggest differential diagnoses and treatments. On the other hand, those professions concerned with learning, relearning or

therapy should possess a fairly wide theoretical knowledge of criminology and corrections in addition to general training. These professions will include, in the main, psychiatry, social work, applied psychology, applied sociology, pedagogy and theology. In practice, members of these professions are exposed to very little of the correctional field before they may enter it and therefore their knowledge about it is acquired "on the job" and through off-hours reading. Some of these professionals, notably from psychiatry and social work, and in a few cases applied psychology, had pre-graduation contacts with correctional agencies but in most cases these contacts do not appear to be systematic.

Departments of criminology provide, in the main, excellent background in criminology and in the theoretical aspect of corrections but generally do not provide training at the professional level in the skills and techniques of behavioural modification.

There is no sound reason why social service personnel or applied social scientists would be provided with specific training in corrections by the professional schools since most of these students will not practise in corrections. Training of all to the required degree would not be practical. Therefore, it is incumbent upon the correctional agency hiring such personnel to provide the necessary training.

To date, the training of such professionals in most correctional settings has been either non-existent at the formal level or inadequate. Most administrators have assumed that professionals coming into the setting either know all they need to know at the academic level or have the academic wit to learn it by themselves. If they have not, no course will provide it, it is claimed. It is assumed that their practical knowledge of prisoners in the correctional field will come through experience in the setting without any formal guidance from either administration or other professionals. In the view of the Committee this is a mistake and has been one of the factors contributing to the high turnover of professional staff in corrections—particularly correctional institutions. In the not too distant past some of these professionals have found themselves floundering in a hostile environment with little or no knowledge of the environment and many times with little or no real knowledge of the significant behavioural traits of the inmate population. In many cases they came in at salaries in excess of other correctional personnel who had little formal education but considerable experience in dealing with the prison population.

It is suggested that for the first few months of employment professionals operating on a full-time basis and who are concerned with behavioural modification at whatever level be freed from the demands of a full workload and be given every opportunity to become familiar with the setting. During the induction period they should be closely associated with experienced professional and competent correctional colleagues who could be relied upon to provide them with proper guidance.

In addition to technical material related to the practice of the specialty in corrections, the professional should be made acquainted with the function and organization of the service of which he has become a part and the responsibilities and authority of all staff members.

After an appropriate probationary period, the new professional staff member and his supervisors should reach a mutually-acceptable decision as to his future in the correctional setting. Some professionally-trained persons find it impossible to adjust to the demands of an authoritarian nature made by the correctional setting. This is not to their discredit, but the fact should be recognized both for their future satisfaction and for the welfare of the service.

#### *Training—Staff Who Are not Professionally-Trained*

Most non-professional staff in the corrections field work in prisons. The community services—probation, parole and after-care—ideally call for staff who are professionally trained.

Non-professional staff working in prisons may be divided into three groups:

- (1) those who spend almost their entire working hours with the inmates,
- (2) those whose contacts with the inmates are part-time or occasional,
- (3) those who have little or no direct contact with the inmates.

It is the view of many correctional experts that the personnel who fall within the *first of these groups* are the most influential people, next to the inmates themselves, in shaping inmate attitudes. Their opportunities to influence inmate attitudes are much greater than the professional's who may meet with a particular inmate for only an hour at a time at wide intervals. This puts the non-professional staff in the position of being the key people in carrying out the institution's rehabilitation aims.

Two different types of employees make up this group. The shop instructors, industrial personnel and maintenance supervisors make up one type. The custodial staff make up the other.

These two types of staff are apt to have different relationships with the inmates. The instructors and maintenance supervisors have the status that goes with their special knowledge and their usefulness to the inmate in teaching him a skill. The custodian staff have traditionally lacked this advantage.

The handicap faced by the custodial officer can be alleviated only if he is trained to a level where he carries the same competence, status and self-confidence in discharging his responsibilities as the instructor or maintenance supervisor does in discharging responsibilities related to his specialty.

Personnel who fall in the *second group*—those with occasional contact with the inmates—may well require the same kind of training as those in full-time contact with the inmates. The inmates' training in relationships

with others can be furthered in informal as well as formal situations. For example, clerks of record in some institutions are required to collect certain data from inmates or to care for inmates' personal property. How these clerks conduct themselves while dealing with the inmates can foster either positive or negative attitudes towards those in authority.

Personnel in the *third group*—those who normally have no direct contact with the inmates—are often neglected in correctional staff training except for courses, usually outside the service, in their specialty. While staff in this group do not require the same intensity of training in correctional work, some problem situations can be avoided if they know something of the aims and purposes of the institution and if they are made to feel they are part of the over-all design.

Staff training for non-professional staff should be continuous throughout the staff member's career, and progress towards increasing competence should be recognized in salary scales. Each institution should have a training cadre to make this possible. Supervision of new and junior staff should be carefully planned and organized so they will have maximum opportunity to learn and so they will not be placed in situations beyond their competence.

Working conditions should be at a level that will permit the prison service to compete for competent staff with other career opportunities. The special nature of prison employment involving supervision of confined persons and an element of danger is such that many potential staff members choose not to apply, and further disadvantages caused by uncompetitive working conditions can place the prison service at a serious disadvantage in seeking staff.

Professionally-trained staff should be used as instructors in in-service staff training. This, along with a consultant role to all staff may be the most profitable way to employ the scarce professionally-trained staff who are available.

Great improvements in the scope and quality of staff training, of both community college and in-service nature, have occurred in Canada in recent years. Community college training of a kind that is related to work in the corrections field is now available in a number of provinces. The Canadian Penitentiary Service has three full-time in-service training colleges and almost all provinces offer organized in-service training to all correctional staff including both those employed in institutions and those employed in community-centered services such as probation and parole.

### *Shortage of Professional Staff*

Although it is desirable for certain positions in the corrections field to be staffed by professionally-trained personnel, including probation, parole, after-care and such institutional services as classification, the shortage of trained people is such that most of these positions are now and will continue for many years to be filled by non-professional personnel. This situation should be recognized and training facilities developed to prepare staff with undergraduate university education and similar qualifications to assume this kind of

responsibility. Some facilities of this nature do exist in Canada and staff prepared by them, working under adequate supervision, are performing at a high level of success.

### *Role of the Canadian Government*

Although all correctional administrators should give maximum priority to staff development, Canada-wide leadership by the Canadian Government, similar to that being provided in such fields as health and welfare, is required if success is to be assured. This leadership should extend to recruitment, the encouragement of expansion of university facilities for the training of professional staff and of facilities to prepare non-professional personnel who will be staffing service positions that ideally call for professionally-trained staff, open to provinces that wish to use them.

The Committee welcomes the announcement of a bursary scheme under the Department of the Solicitor General to encourage post-graduate training in the corrections field. A number of provinces also have similar provisions.

**The Committee recommends that the Government of Canada, jointly with the provinces:**

- (a) prepare an occupations monograph dealing with the corrections field to inform high-school and university students and others of the potential of a career in this field;**
- (b) encourage the expansion of university teaching facilities in this field; encourage the expansion of community college and other facilities for the training of non-professional staff;**
- (c) offer financial assistance in the form of administrative grants to stimulate the development of training facilities and in the form of bursaries.**

## RESEARCH, PLANNING AND ADVISORY COMMITTEES

### *Need for Organized Planning*

The corrections field in Canada as in most countries has suffered from a lack of comprehensive, continuous and long-term planning based, as far as possible, on empirical information. Planning has tended to be sporadic or limited in scope and little use has been made of research.

The development of a truly professional service must be preceded by long and careful preparation, and planning must provide for adjustment as experience establishes the success or failure of operating programs.

Planning should proceed on the broadest base possible so that plans for individual services can be coordinated. The division of responsibility for corrections between the federal and provincial governments and the division of responsibility in some instances among several departments present special problems not met with in a unitary system. Whatever planning organization is set up will have to make provision to deal with these special problems.

### *Need for Research*

Research answers to many criminological problems are not available, nor have research techniques or facilities been developed that could supply all the answers. This is comparable to the situation in other areas of human behaviour. It is true that the research material now available is not being used as it should be, but even with the best intentions the correctional administrator finds many blanks in objective knowledge. He obviously cannot wait for research to provide the answers and, in the meantime, must proceed on the basis of a collation of informed opinion.

The primary need in relation to criminological research is a conviction on the part of both government authorities and the public that research findings are essential in determining policy and in operating the law enforcement,

judicial and correctional services. Until recently, policy-making has been based exclusively on common sense and on the impressions picked up by individuals in the course of their work. This is in sharp contrast to what is done in matters involving the physical and biological sciences.

This has contributed to the failure to meet the challenge of crime successfully. Common sense is fallible and we have had ample demonstration that no matter how intelligent or how experienced an individual may be, his opinions are not fully reliable unless the "facts" on which he bases his opinions are reliable.

When this principle is accepted, the demand for accurate knowledge will grow and so will readiness to subject favourite biases to the test of research.

### *Need for Canadian Research*

While Canada should, of course, make full use of research findings from other countries, the need for criminological research the world over is great and Canada cannot afford to wait until some other country provides the required knowledge.<sup>1</sup> At the same time, there are reasons why specific Canadian research is needed.

Crime is a social problem and our Canadian crime problem can be understood and overcome only in terms of the peculiar society that is ours. Much research has to do with Canada's unique political and legal systems. This calls for research tailored to the specific problem and what has been discovered in other countries cannot be applied to Canada without re-examination.

Also, a research program is essential in any effective educational program to produce staff for the law enforcement, judicial and correctional services. Such research is needed as a supplement to class instruction for the students and to keep the teaching staff from becoming stale. Research also helps keep the staffs of the operating services in touch with modern thinking.

### *Scope of Criminological Research*

To be effective, research must be considered an integral part of the whole system of justice, not just an appendix. This means that every phase of the system should be under constant review to assess its effectiveness, and that procedures should be established to provide for the incorporation of research findings as research points the way to more effective procedures.

It is also important that research findings be published. In this way Canada can contribute to a world pooling of knowledge to the mutual benefit of all. Publication makes research findings available to other workers for checking. Also, publication of research material enables the public to judge effectiveness of the services.

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<sup>1</sup>Grygier, T. "Current Correctional and Criminological Research in Canada." *Canadian Journal of Corrections*, 1961, 3, 423-444.

Research can be applied in many areas of the criminological field:

1. *Understanding and Defining Crime.* Much more understanding of crime as a social phenomenon is needed. Those acts now defined as crime should be examined to decide whether they should continue to be so defined. (In this connection, it should be recognized that "crime" is not a unified activity but consists of a series of quite different activities. Sexual perversion, assault and embezzlement have nothing in common except that they are all illegal.) Further understanding is needed of precipitating factors.
2. *Planning and Policy-Making.* Policies and planning should be based on accurate knowledge of the effectiveness of present policies and services, and on a careful prediction as to the effectiveness of alternatives.
3. *Administration.* There are many questions to be answered here related to the best administrative pattern for Canada's police, court and correctional services.
4. *Influencing Human Behaviour.* A great deal of information is needed on the best ways to influence human behaviour through the legal process. Does the process of criminal justice deter, and under what conditions? What is the most effective treatment method to be employed with each type of offender? How can offenders best be grouped for treatment purposes? How can the techniques developed by the various professions—law, medicine, psychiatry, psychology, social work, sociology, theology, pedagogy—be most effectively used in the corrections field? Research is also needed to develop better measurement tools related to treatment success.

#### *Some Implications of Criminological Research*

Criminology extends over a wide range of human behaviour, covering a large part of the fields of the various social and psychological sciences, as well as criminal law and judicial proceedings. It is difficult to lay down principles covering such a wide range of research.

A problem of coordination evidently exists. Research techniques developed by any one of the sciences involved may be used as circumstances warrant, backed by the professional knowledge of the particular discipline. All these different approaches must be blended if there is to be comprehensive consideration of the problem under study.

One serious handicap faced in criminological research is that the human beings who make up the material to be used in research cannot be dealt with in the way the physical sciences deal with their material. There are limitations to permissible experimental manipulation. For instance the most direct way to measure the effectiveness of sentencing policies would be through a research project wherein the sentence given a particular offender is determined

by a pre-established schedule. However, this runs contrary to our concepts of justice. The consent of the offender seldom solves the problem because his knowledge that he is part of a research project will influence his reactions.<sup>2</sup>

Another problem involves the definition of success or failure in relation to any particular aspect of the law enforcement, judicial or correctional process. Recidivism—the commission of a further offence by the individual—is often interpreted as failure. However, it may not be sufficient to define recidivism only in terms of absolute avoidance of another offence. Differences in the nature of the two offences and an increasing period of crime-free behaviour between offences may be acceptable measures of success.<sup>3</sup> Clearer and more precise definitions of success and the development of measurements of success not based on simple follow-up studies are needed.<sup>4</sup>

Changes related to the field of criminology are rapid and the researcher is sometimes faced with a time problem. If he takes sufficient time to complete a comprehensive and scientifically sound piece of research, he may learn that his findings are out of date before they are published. To be of practical help to the administrator, he may have to supply provisional or less than perfect information quickly.<sup>5</sup>

The most obvious effect of criminological research to date has been its tendency to disprove long-standing assumptions regarding the effectiveness of traditional approaches to the problem of crime. It has not been as successful in developing useful clinical techniques to replace what it has discredited. However, what it has accomplished is important. If two methods are equally effective, the one that imposes less hardship on the offender and on the taxpayer is to be preferred. Policies cannot be settled on the basis of empirical data alone, but require a balancing of research data and concepts of freedom, fairness, and privacy.<sup>6</sup>

Science, by its very nature, can give only limited answers expressed in terms of probability rather than certainty, and applicable only in the clearly defined circumstances in which the research data was secured. We must be wary of abandoning legal safeguards and interfering unduly with the lives of people simply on the basis of objectively established probability. Legal and scientific safeguards should not constitute alternatives but should work in harmony, each recognizing the other's contribution to the common cause.

Finally, if research is to have its maximum effect, there should be organized and continuous procedures to ensure that the findings of research will be implemented.

<sup>2</sup> Geis, Gilbert. *Ethical and Legal Issues in Experimentation with Offender Populations*, in "Research and Correctional Rehabilitation". Washington: Joint Commission on Correctional Manpower and Training, 1967.

<sup>3</sup> Sherwood, Clarence C. *The Testability of Correctional Goals*. Ibid.

<sup>4</sup> United Nations. *Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders*. New York: 1967. P. 9.

<sup>5</sup> Lodge, T. S. *Research and Research Methods*, in Klare, Hugh J. and Haxby, David. "Frontiers of Criminology". op. cit.

<sup>6</sup> 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. 273.

### *Where Responsibility Lies*

All law enforcement, judicial and correctional services have a responsibility to support research and to subject their own work to research evaluation whenever possible. However, the major responsibility should be divided between the governments and the universities.

The *governments* have a particular stake in sponsoring an increased flow of factual information since they carry the burden of operating most of the services. They have the advantage of greater financial resources and of having much of the research material available within their own services. However, there are limits on the kind and scope of research a public service can conduct. Government research workers are not normally free to publish research findings that are in conflict with government policy. There is often a split in jurisdiction between departments. This makes comprehensive study of a problem difficult. A third handicap suffered by the government research worker is the need to keep up with day-to-day problems faced by the present operating services. This does not leave much time or many facilities for basic research.

It should be noted that the kind of research that can be carried out within the operating services is limited because only part of the crime problem is represented by the individuals who are convicted. Basic issues related to understanding and defining crime must be sought within the general population of society.

The special advantages enjoyed by the governments—greater financial resources and research material readily available—can be passed on to the universities. The governments can sponsor research that they cannot undertake themselves by supplying funds to non-governmental research workers and by making the research material available.

The *universities* can best serve as the centres of what might be termed fundamental research. The universities have a number of advantages. They have the facilities—libraries, informed staff and research knowledge. They are more independent and are not committed to the implementation of any particular point of view.

It is also essential that universities carry on a research program to supplement classroom instruction. This is necessary for the students if they are to develop a fuller understanding of the problems to be faced and if they are to understand fully the results of research done elsewhere. It is also necessary if the staff are to keep up with new ideas and avoid falling into a routine.

Consideration should be given to relating correctional facilities more closely to universities in somewhat the same manner that teaching hospitals are related to universities with medical schools. Such a development would promote research as well as providing a training facility. It would also help narrow the gap between the academic and the service orientation.

To discharge its research responsibilities, each government department involved in criminological work should have a research unit, whose function would be to keep researchers and administrators in communication, to set up

research projects and procedures for the utilization of research findings, to serve as liaison with research activities in other government departments and in the universities, to arrange for contracted research with the universities, and to administer any research-grant program the government sponsors.

**The Committee recommends that the Department of the Solicitor General and the Department of Justice maintain research units to discharge the responsibilities of those Departments in research.**

It is suggested that provincial departments responsible for correctional services might consider the establishment of similar units at the provincial level.

Another research function that should be performed is that of national coordination, to ensure that research is not duplicated and that some priority is established. The organization set up to carry this function could do other things as well, such as serving as an information and library centre on research and as a source of technical research advice. The National Social Science Research Council might serve as an example of a desirable administrative pattern.

**The Committee recommends that a Canadian criminological research council be set up under independent auspices but financed by the federal government to serve the national coordinating function.**

### *Financing*

No progressive industry would consider spending the large sums this country spends on its system of justice<sup>7</sup> without allocating a definite percentage of the budget to research to ensure that the money was being well spent.<sup>8</sup> We suggest that every government allocate two per cent<sup>9</sup> of its total law enforcement, judicial and correctional budget to research. Such expenditures on research will not only contribute to greater success but may well bring about a financial saving through greater efficiency.

Not all of this money would be spent by the government itself. Some of it would go to the universities in the form of contracted research projects and as training grants to help train research workers. Some of it would go to research students in the form of bursaries. There should also be a criminological-research-grants program similar in general terms to the medical-grants

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<sup>7</sup> As indicated elsewhere in this report, during 1966 Canada spent \$80,000,000 in operating its prisons, \$4,000,000 on probation services and an unknown amount on its parole services. In addition, large amounts were spent on the construction of prisons, which in the Penitentiary Service alone ran to \$28,173,666. Figures on the cost of the police services and the courts are not contained in this report.

<sup>8</sup> For an indication of trends see "Science spending increase to hit 4% of GNP: Solandt". *Canadian Research and Development*, 2, March-April, 1968.

<sup>9</sup> Morris, Norval R. "Some Problems in the Evaluation of Prisons" in Edwards, J. L.J. *Modern advances in Criminology*. Toronto: Centre of Criminology, University of Toronto, 1964-1965. p. 19.

program and the welfare-grants program now operated by the federal government to assist researchers with projects they are undertaking on their own initiative.

It is also to be hoped that more foundations can be persuaded to allocate funds to this field.

### *Development of Research Staff*

Since research requires a core of highly qualified specialist staff, deliberate planning to produce such staff is essential. This will require training grants to universities and bursaries to research students.

However, as with all services in the corrections field that require professional staff, it is unrealistic to expect a sufficient supply of fully-trained research workers to meet the requirements. As with the other services, it will be necessary to provide partial training to less qualified staff so that they can, under direction, do much of the work connected with the research program.

### *Statistics*

Planning and research both require accurate and comprehensive statistics. This is necessary in determining national and local crime trends, in measuring the success of treatment programs, and in developing a good organizational structure.<sup>10</sup>

It is the Committee's opinion that every effort should be made to increase the quality of criminal statistics prepared by the Dominion Bureau of Statistics. Action should also be taken to ensure that Dominion Bureau of Statistics publications containing criminal statistics are brought to the attention of those people who could make use of them. It appears to the Committee that these publications are not as well known as they should be.

The Judicial Statistics Section of the Dominion Bureau of Statistics forms part of the Health and Welfare Division. Despite its name, the Health and Welfare Division deals only with health statistics. There is no obvious reason why criminal statistics should be grouped with health statistics. It would be as logical to group them with educational statistics within the Education Division or to group health and education statistics. The Committee is of the opinion that the unit responsible for criminal statistics should be raised to the status of a Division within the Dominion Bureau of Statistics and that it should deal only with criminal statistics. This Division could have three Sections: Law Enforcement, Judicial and Corrections.

**The Committee recommends that the unit responsible for criminal statistics be raised to the status of a Division within the Dominion Bureau of Statistics and that it deal only with criminal statistics.**

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<sup>10</sup> Gottfredson, Don. M. *Current Information Bases for Evaluating Correctional Programs*, in "Research in Correctional Rehabilitation". Op. Cit.

The operating services, however, require certain kinds of information on which to base short-term planning. To be useful, this information is often required on too short notice to be supplied by the Dominion Bureau of Statistics which is a more long-term operation. Each major correctional service requires an information-gathering service of its own and ready access to computer facilities.

### *Records*

Another requirement is for facilities to permit rapid exchange of records on individual offenders. For instance, if an offender completes a period on probation and then moves to another province where he is convicted of a new offence, the probation service in the new province may not be aware that the offender has a previous probation record. It is important that the new probation service have the previous pre-disposition report and that they know the offender's reaction to the earlier probation experience.

The Identification Branch of the Royal Canadian Mounted Police seems the logical facility to provide this service as far as offenders convicted of indictable offences are concerned. The lack of finger-prints would make it more difficult for the Branch to serve this function in relation to those found guilty on summary conviction.

### *Advisory Committees*

Crime prevention and control is the responsibility of the whole community. It follows that major groups in the community should be directly involved in planning the government's criminal justice programs, including the criminal law and its enforcement and the correctional services. Also, there are individuals in the community who possess special knowledge of particular value in such planning.

**The Committee recommends that advisory committees to federal government be set up to provide for planning criminal justice programs on a wide basis.**

Such advisory committees already exist in many foreign countries, including Great Britain, France, Belgium and the Netherlands.

### *At the Government Level*

A committee or council advisory to the executive branch of government—rather than to any one department—should be established. It is essential that this committee be related to the Government as a whole because a number of departments—among them Justice, Solicitor General, Indian Affairs and Northern Development, National Health and Welfare, Manpower and Immigration, Public Works and the Dominion Bureau of Statistics—have a relationship to the appropriate services. Only an advisory committee at the government level could plan comprehensively.

This advisory body could carry some such title as "Advisory Council on Criminal Justice".

The Council could be made up of a chairman and some members appointed by Governor-in-Council and some members appointed by Canada-wide organizations. For instance, The Canadian Bar Association, The Canadian Association of Chiefs of Police, and the Canadian Corrections Association, might each appoint a number of members. It would be expected that in addition to lawyers, police officers and correction experts, representatives of other disciplines, particularly from the criminology departments and centres in Canadian universities, and representatives of the Canadian public, would be included. No government employee would be a member, although if these discussions and recommendations are to have maximum effect, advice is needed and appropriate government employees should be invited to attend.

The Council could operate through three Committees: Continuing Criminal Law Reform, Law Enforcement, and Corrections. These Committees should be inter-disciplinary in make-up. The members should be selected by the Council and all Committees would be responsible to the Council.

It is suggested that the Council (sometimes through its Committees) be responsible for:

- (1) reviewing matters related to criminal justice that fall within the federal government's sphere of activity and recommending changes to the government. It might initiate studies itself, or recommend studies to the government. It would have authority to examine any aspect of the government's services in these areas, and to request cooperation from government officials;
- (2) advising the federal government on matters on which the government requests advice.

It is essential that the Council be served by a competent and permanent secretariat who would perform regular administrative functions and undertake studies at the direction of the Council. This staff would also be available to the Council's Committees. The Council should have a budget to spend on such studies and on such matters as travel by Council members or staff.

The existence of the Council would not rule out special studies being undertaken by the government. In fact, the Council might recommend such studies to the government.

#### *At the Departmental Level*

Further advisory committees to the Departments of the Solicitor General and Justice are suggested.

#### *Department of the Solicitor General:*

- (1) JOINT COMMITTEE ON CORRECTIONS. Because of the federal nature of Canada's governmental structure, a committee in the corrections field, similar in purpose and function to the Dominion Council of Health and the National Council of Welfare, is required. Its chief function would be to provide the senior federal and provincial

correctional administrators with an opportunity to meet at regular intervals to discuss matters of common concern. Opportunities for such meetings are now lacking and with the close relationships required between the federal and provincial correctional services, opportunities for such regular discussions are important. It might consist of the Deputy Solicitor General, the chief executive officer responsible for the correctional services in each province and representatives from the public, particularly the private after-care agencies, and representatives of the Advisory Council on Criminal Justice. Other senior federal and provincial officials could attend committee meetings when material related to their responsibilities is on the agenda. This committee should be provided with a secretariat. Close liaison between this Committee and the Advisory Council on Criminal Justice is essential. The representatives of the Council on this Committee would help provide this. Occasional joint meetings of the two groups might be arranged. Liaison could also be maintained at the staff level.

- (2) RESEARCH ADVISORY COMMITTEE. It is suggested that a small Committee made up of perhaps from three (3) to five (5) non-government people, appointed by Governor-in-Council be set up to advise the Department's Director of Research in matters pertaining to the Department's research responsibilities. This would be a technical group. Not only would the members bring useful technical knowledge, but their independence and prestige would ensure relative freedom for the Department's research program and would protect the Department from undeserved criticism around research activities. This Committee's interests would be confined to the Department's research responsibilities while the wider functions related to research in Canada would be performed by the criminological research council recommended earlier in this chapter.

*Department of Justice.* Similar committees should be set up by the Department of Justice. It should be noted that while some of the functions of the proposed Joint Committee to bring federal and provincial administrators together, are already performed by the conference of Commissioners on the Uniformity of Legislation, the same considerations apply to the Department of Justice as have been suggested in relation to the Department of the Solicitor General.

#### *Within the Provinces*

Advisory committees of various forms and with varying functions are now in existence in several provinces. All provinces might like to consider the advantages of such committees.

## Appendix A

### VISITS BY MEMBERS OF THE COMMITTEE

*Meetings and consultations were held in the following Canadian cities*

<i>Alberta</i>	<i>Nova Scotia</i>
Calgary	Halifax
Edmonton	<i>Ontario</i>
<i>British Columbia</i>	Ottawa
Vancouver	Toronto
Victoria	<i>Prince Edward Island</i>
<i>Manitoba</i>	Charlottetown
St. Boniface	<i>Quebec</i>
Winnipeg	Hull
<i>New Brunswick</i>	Montreal
Fredericton	Quebec
Moncton	<i>Saskatchewan</i>
<i>Newfoundland</i>	Prince Albert
St. John's	Regina

*Federal correctional institutions visited by one or more members of the Committee*

<i>Minimum security institutions</i>	William Head Correctional Camp (British Columbia)
Blue Mountain Correctional Camp (New Brunswick)	<i>Medium security institutions</i>
Collins Bay Farm Annex (Ontario)	Collin's Bay (Ontario)
Dorchester Farm Annex (New Brunswick)	Cowansville (Quebec)
Gatineau Correctional Camp (Quebec)	Federal Training Centre (Quebec)
Joyceville Farm Annex (Ontario)	Joyceville (Ontario)
Manitoba Farm Annex (Manitoba)	Leclerc Institution (Quebec)
St. Vincent de Paul Farm Annex (Quebec)	Matsqui (Men and Women) (British Columbia)
St. Vincent de Paul Industrial Annex (Quebec)	Springhill (Nova Scotia)
Saskatchewan Farm Annex (Saskatchewan)	Manitoba Penitentiary (Manitoba)
Springhill Correctional Camp (Nova Scotia)	<i>Maximum security institutions</i>
Valleyfield Correctional Camp (Quebec)	Archambault (Quebec)
	British Columbia Penitentiary (British Columbia)
	Dorchester (New Brunswick)

Kingston (Ontario)	<i>Correctional staff colleges</i>
Kingston Prison for Women (Ontario)	Correctional Staff College at Kingston (Ontario)
Saskatchewan Penitentiary (Saskatchewan)	Correctional Staff College at St. Vincent de Paul (Quebec)
St. Vincent de Paul (Quebec)	Correctional Staff College at New Westminster (British Columbia)
Special Correctional Unit (Quebec)	

*Provincial correctional institutions visited by one or more members of the Committee*

Alouette River Unit (British Columbia)	Ontario Mental Hospital, Oakridge Unit (Penetanguishene, Ontario)
Andrew Mercer Reformatory for Women (Toronto, Ontario)	Ontario Women's Guidance Centre (Ingleside, Ontario)
Bordeaux Provincial Gaol (Montreal, Quebec)	Ottawa City Lock-up (Ottawa, Ontario)
Boscoville (Montreal, Quebec)	Prince County Gaol (Summerside, Prince Edward Island)
Calgary Provincial Gaol (Calgary, Alberta)	Provincial Correctional Centre (Regina, Saskatchewan)
Central Reformatory (Fredericton, New Brunswick)	Provincial Correctional Centre (Prince Albert, Saskatchewan)
Correctional Institution (Women) (Portage La Prairie, Manitoba)	Riverside Correctional Centre (Women) (Prince Albert, Saskatchewan)
Correctional Institution for Women (The Pas, Manitoba)	Quebec City Provincial Gaol (Quebec, Quebec)
Craig Street Detention Centre (Montreal, Quebec)	Quebec City Provincial Gaol (Quebec, Quebec) (Women)
Elizabeth Fry House (Toronto, Ontario)	Queen's County Gaol (Charlottetown, Prince Edward Island)
Halifax City Gaol, (Halifax, Nova Scotia)	Salmonier Correctional Camp (Salmonier, Newfoundland)
Halifax County Gaol, (Halifax, Nova Scotia)	St. Boniface Lock-up (St. Boniface, Manitoba)
Haney Correctional Institution (Haney, British Columbia)	St. Lawrence Halfway House (Montreal, Quebec)
Headingley Correctional Institution (Headingley, Manitoba)	St. Leonard's Halfway House (Windsor, Ontario)
Her Majesty's Penitentiary (St. John's, Newfoundland)	Tanguay Provincial Prison for Women (Montreal, Quebec)
Home of the Good Shepherd (Girls) (Halifax, Nova Scotia)	Vanier Correctional Institution for Women (Ingleside, Ontario)
Metropolitan Toronto Gaol (Women Section) (Toronto, Ontario)	Victoria City Gaol (Victoria, British Columbia)
New Haven (Burnaby, British Columbia)	Winnipeg City Lock-up (Winnipeg, Manitoba)
Oakalla Prison Farms (Men and Women) (S. Burnaby, British Columbia)	York County Gaol (Fredericton, New Brunswick)

*Meetings and consultations took place in the following cities outside Canada*

<i>Belgium</i>	Rotterdam
Brussels	The Hague
Liège	Utrecht
Malines	
<i>Denmark</i>	<i>Sweden</i>
Copenhagen	Stockholm
<i>England</i>	<i>United States of America</i>
London	Berkeley
	Los Angeles
<i>France</i>	Sacramento
Paris	San Francisco
	Chicago
<i>The Netherlands</i>	New York
Amsterdam	Washington

*Institutions visited*

<i>Belgium</i>	Complexe pénitentiaire de Fleury-Mérogis
Centre pénitentiaire école de Marneffe	École d'Administration Pénitentiaire à Plessis-le-Comte
Etablissement pénitentiaire de Merksplas	
Prison à Nivelles	Maison Centrale de Fresnes
<i>Denmark</i>	Maison Centrale de Melun
Brøndbyhus Ungdomspension	Pavillon Psychiatrique, La Santé
Herstedvester Detention Centre	<i>The Netherlands</i>
Holger Nielsen Youth College	Van der Hoeven Klinick
Kofoed Skole	
<i>England</i>	<i>Sweden</i>
Broadmoor Hospital	Astpuna
H.M. Prison Grendon	Kumla
H.M. Detention Centre for Senior Boys, Latchmere House	<i>United States of America</i>
H.M. Prison Wormwood Scrubs	California Institution for Men, Chino
Institute of Psychiatry, Maudsley Hospital	California Institution for Women, Frontera
Springhill Camp	California Rehabilitation Center, Corona
<i>France</i>	California State Prison at Folsom
Centre de Formation et de Recherche de l'Éducation Suveillée à Vaucresson	California State Prison at San Quentin
Centre National d'Orientation, Prison des Fresnes	California Medical Facility at Vacaville
Centre d'Observation de Chateau-Thierry	Central Narcotics Testing Unit at Los Angeles
	Community Delinquency Control Program at Sacramento

Community Delinquency Control Program at Watts	<i>Illinois</i>
Federal Correctional Institution, Terminal Island (men and women)	United States Penitentiary at Marion
Oakland Halfway House	<i>New York</i>
Pre-release Guidance Center at Los Angeles	Clinton Prison at Dannemora
Southern Conservation Centre at Chino	<i>Washington, D.C.</i>
	Pre-release Hostel

## Appendix B

### CONFERENCES ATTENDED BY ONE OR MORE MEMBERS OF THE COMMITTEE

During the course of its mandate the members of the Committee have attended the following congresses, meetings and conferences:

National Conference on the Prevention of Crime, Centre of Criminology, Toronto, Ontario	31st May-3rd June, 1965
Third United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Stockholm, Sweden	9th-18th August, 1965
5th International Criminological Congress, Montreal, Quebec	29th August-3rd September, 1965
60th Annual Conference of the Canadian Association of Chiefs of Police, Niagara Falls, Ontario	13th-16th September, 1965
Institute on the Operation of Pretrial Release Projects, Vera Foundation, New York, N.Y., U.S.A.	14th-15th October, 1965
Conference on Juvenile Delinquency, St. John's, Newfoundland	15th-16th November, 1965
Annual Meeting of the Canadian Bar Association (Criminal Justice and Civil Liberty Section Meetings) Winnipeg, Manitoba	31st August-1st September, 1966
61st Annual Conference of the Canadian Association of Chiefs of Police Vancouver, British Columbia	5th-8th September, 1966
British Columbia Corrections Association Institute, Vancouver, British Columbia	18th June, 1966
Canadian Conference on Social Welfare, Vancouver, British Columbia	20th-25th June, 1966
International Halfway House Convention, Windsor, Ontario	22nd-24th April, 1966

Annual Conference of Ontario Magistrates, Niagara Falls, Ontario	5th-7th May, 1966
First Quebec Congress of Criminology, Montreal, Quebec	15th-16th April, 1966
International Conference in honour of the 100th Anniversary of the Belgian Penal Code, Liège, Belgium	1st-3rd June, 1967
Canadian Congress of Corrections, Halifax, Nova Scotia	25th-30th June, 1967
International Course in Criminology, Montreal, Quebec	19th August-2nd September, 1967
Quebec Superior Court Judges' Conference, Quebec, Quebec	18th-19th November, 1967
Second Quebec Congress of Criminology, Sherbrooke, Quebec	29th-30th March, 1968
Ontario County Court Judge's Seminar on Sentencing, Toronto, Ontario	24th April, 1968
Canadian Conference on Social Welfare, Ottawa, Ontario	17th-20th June, 1968
Annual Meeting of the Association of Chiefs of Police, Granby, Quebec	1st-6th September, 1968

## Appendix C

### BRIEFS AND SUBMISSIONS RECEIVED BY THE COMMITTEE

#### *From associations or groups*

1. L'Association des Aumôniers du Québec qui œuvrent dans la champ de la Criminologie.
2. L'Association des chefs de groupes de détenus de l'Institution Leclerc (Québec).
3. L'Association des chefs de Police et de Pompiers de la province de Québec (District Saguenay, Lac St-Jean).
4. The Add-Can Group, Prince Albert Penitentiary (Saskatchewan).
5. The Alberta Association of Social Workers.
6. Alcoholism and Drug Addiction Research Foundation of Ontario.
7. The Anglican Church of Canada—Christian Social Service, Corrections Committee (Toronto).
8. The Baptist Convention of Ontario and Quebec—Social Action Committee, Department of Canadian Missions.
9. Canadian Association of Chiefs of Police.
10. Canadian Corrections Association.
11. City Prosecutor's Office (Vancouver).
12. Le Comité des détenus de langue Française du Pénitencier St-Vincent-de-Paul (Québec).
13. Le Conseil des œuvres et du bien-être de Québec.
14. The Canadian Bar Association.
15. The Canadian Correctional Chaplains' Association.
16. The Canadian Psychiatric Association—Committee on Psychiatry and the Law.
17. The Clarke Institute of Psychiatry—Section of Social Pathology (Toronto).
18. The Confrères (Toronto).
19. The Corrections Committee—Diocese of Toronto.
20. The Elizabeth Fry Society of British Columbia.
21. The Elizabeth Fry Society of Kingston.
22. The Elizabeth Fry Society of Ottawa.
23. The Elizabeth Fry Society of Toronto.
24. The English Speaking Inmates of St-Vincent-de-Paul Penitentiary (Quebec).
25. The Family Service Association of Edmonton.
26. Groupe des alcooliques anonymes de l'Institution Leclerc (Québec).
27. A Group of Ex-Inmates of Canadian Prisons under the Auspices of the Anglican Church of Canada, Corrections Committee—Diocese of Toronto.
28. A Group of Inmates of the Beavercreek Correctional Camp (Ontario).
29. The Inter-Church Committee for Community Service (Ottawa).
30. The John Howard Society of Canada.

31. The John Howard Society of Newfoundland.
32. The John Howard Society of Ontario.
33. The John Howard Society of Québec.
34. The John Howard Society of Saskatchewan.
35. The John Howard Society of Vancouver Island, the Cowichan Family and Children's Court Committee.
36. The JOHOSO Club of Hamilton.
37. The Manitoba Association of Social Workers.
38. The Manitoba Provincial Council of Women.
39. The Manitoba Teachers' Society.
40. Metropolitan Toronto Police Service.
41. The Montreal Transition Houses Inc., St. Lawrence House.
42. The National Council of Women of Canada.
43. New Brunswick Probation Service.
44. L'Office de la Prévention et du Traitement de l'alcoolisme et des Toxicomanies du Québec.
45. The Ontario Association of Corrections and Criminology.
46. The Ontario Magistrates' Association Corrections Committee.
47. Les Préposés au classement, Service Pénitentiaire Canadien, Institution Leclerc (Québec).
48. The Presbyterian Church in Canada—Board of Evangelism and Social Action (Don Mills, Ontario).
49. The Presbyterian Church in Canada—The Synod of British Columbia.
50. Probation Officers' Association (Ontario).
51. Probation Officers' Association—Public Relations Committee (Ontario).
52. The Royal Canadian Mounted Police.
53. The Salvation Army Correctional Services (Toronto).
54. The Saskatchewan Provincial Council of Women.
55. Service de la Police—Cité de Ste-Thérèse (Québec).
56. Service de la Police de Montreal.
57. Société de Recherches Économiques et Scientifiques (Montréal).
58. Town and Township, Thorold Police Department (Ontario).

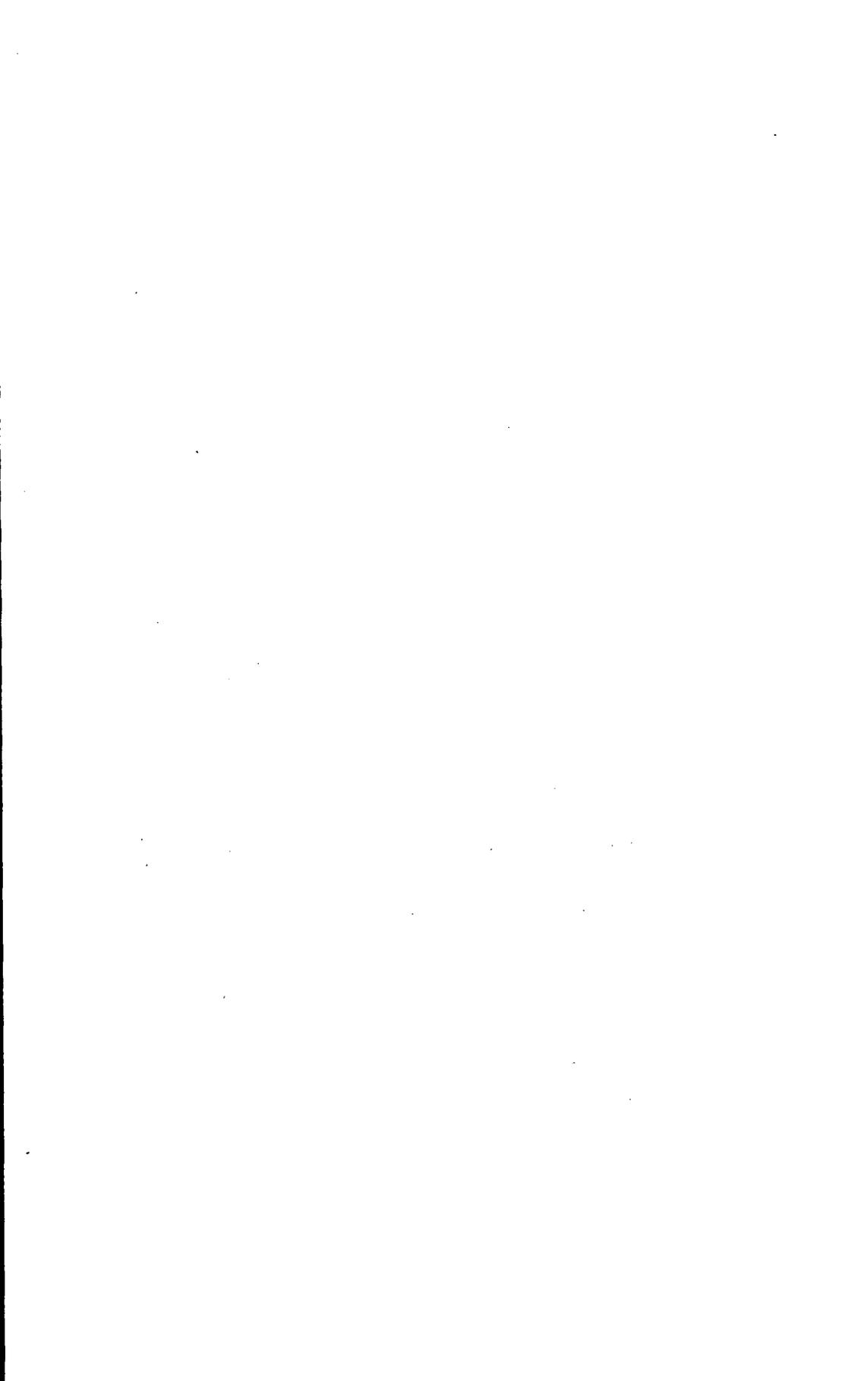
*From individual inmates of Canadian correctional institutions*

59. Agassiz Correctional Work Camp (British Columbia).
60. Cowansville Medium Security Institution (Quebec).
61. Dorchester Penitentiary (New Brunswick).
62. Kingston Penitentiary (Ontario).
63. Leclerc Institution (Quebec).
64. Manitoba Penitentiary (Manitoba).
65. Matsqui Institution (British Columbia).
66. Prince Albert Penitentiary (Saskatchewan).

*From Individuals*

67. Anonymous.
68. Batstone, Mrs. Marion E. (Ontario).

69. Bedford, H. J. (Manitoba).
70. Benson, Miss Margaret (Ontario).
71. Campbell, I. L. (Quebec).
72. Carpenter, David J. (British Columbia).
73. Carter, Judge A. M. (Ontario).
74. Casey, Honourable Mr. Justice P. C. (Quebec).
75. Cassells, John (Ontario).
76. Clewes, J. (Alberta).
77. DeBruyne, John L. (Saskatchewan).
78. Doraty, Harvey McGuire (Ontario).
79. Dunlap, Angus D. (Ontario).
80. Dupliessie, Allen J. (British Columbia).
81. Edwards, J. L. J. (Ontario).
82. Elliott, Magistrate E. L. (Saskatchewan).
83. Gendreau, Gilles (Quebec).
84. Goettling, Edward (Ontario).
85. Grossman, Brian A. (Quebec).
86. Haines, Honourable Mr. Justice E. L. (Ontario).
87. Hart, Peter J. (Ontario).
88. Heggie, Miss Judith (Ontario).
89. Jobson, K. B. (Nova Scotia).
90. Kyle, Henry H. (Ontario).
91. McCaldon, Dr. R. J. (Ontario).
92. McCutcheon, Magistrate G. R. (New Brunswick).
93. Macneill, Miss Isabel (Ontario).
94. Morton, Prof. J. D. (Ontario).
95. Panaccio, Dr. Lucien (Quebec).
96. Price, Ronald R. (Ontario).
97. Richards, H. J. (Alberta).
98. Russon, Dr. G. W. (Saskatchewan).
99. Ryan, Stuart (Ontario).
100. Schrag, A. A. (Ontario).
101. Shannon, J. O. (Manitoba).
102. Selk, Eric (Ontario).
103. Smith, Magistrate Lloyd B. (New Brunswick).
104. Stenger, Miss K. (Quebec).
105. Street, T. G. (Ontario).
106. Tataryn, W. V. (Manitoba).
107. Williams, B. M. and Miss C. C. (Nova Scotia).
108. Zeitoun, Louis (Ontario).

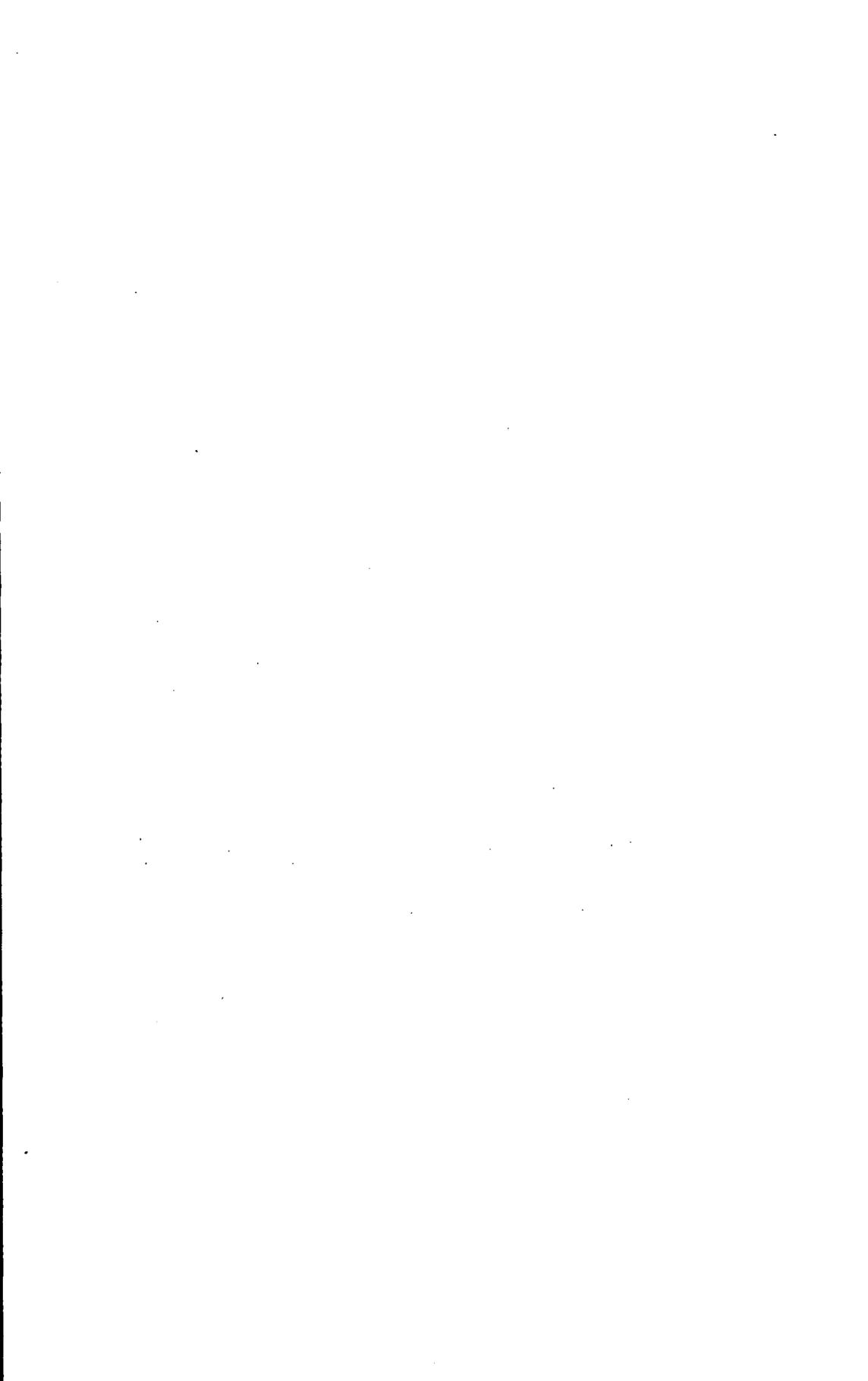


## Appendix D

### SPECIAL STUDIES UNDERTAKEN AT THE REQUEST OF THE COMMITTEE

The following studies were made by various workgroups or individuals at the request of the Committee:

Aspects of Russian Criminal Justice	Dr. J. M. Sangowicz
Care of Insane Persons Under the Criminal Law	Canadian Mental Health Association
Confidentiality of Professional Information	Professor Jean-Louis Beaudoin
Correctional Philosophy	Dr. Tadeusz Grygier
Criminal Statistics	Professor P. J. Giffen
Dangerous and Habitual Offenders	Professor Peter J. Letkemann
Magistrate's Courtroom Facilities	Professor Martin L. Friedland
Mentally Disordered Persons Under the Criminal Law	Mr. B. B. Swadron
Parole	Professor Justin Ciale, Mr. S. Cumas, Mr. Emmanuel Grégoire, Inspector Donat Tardif, Judge Gérard Tourangeau
Plans of Maximum Security Penitentiaries Prisons	Mr. Harry B. Kohl, Architect Mr. John Braithwaite, Mr. Mervyn Davis, Prof. John A. MacDonald, Dr. Peter Middleton
Probation	Mr. Daniel Coughlan, Mr. A. M. Kirkpatrick, Chief Constable James Mackey, Magistrate Johnstone Roberts, Professor John Spencer
Resources for Education and Research in Criminology and Criminal Justice in Canadian Universities	Dr. Denis Szabo
Staff Development in Corrections	Mr. Douglas Penfold
Synthesis of the Written Briefs	Dr. Denis Szabo
Use of Various Sentencing Alternatives	Dr. Denis Szabo
Voluntary After-Care	Professor John Fornataro



## Appendix E

### REPORT TO THE HONOURABLE THE SOLICITOR GENERAL

#### *Evaluation of Design for Maximum Security Prisons Developed by the Canadian Penitentiary Service*

As indicated in our preliminary letter of June 9th, and reiterated verbally when we met on July 21st, our examination of the plans for new maximum security institutions reveals a number of commendable features. Indeed, the plans generally represent a marked advance over the out-dated and condemned facilities presently in use, particularly at the St. Vincent de Paul institution.

#### *Commendable Features*

Some of the features which the Committee particularly commends are:

- (1) The size of the individual institution has been substantially reduced and provision has been made for subdivision of population into comparatively small living units;
- (2) All cells have outside windows;
- (3) Individual privacy and dignity are enhanced for the inmate through replacement of cell-front bars, by doors containing small windows;
- (4) Provision is made for adequate plumbing, furnishings, etc.;
- (5) Provision also has been made for such necessary and healthful activities as work, trades training, education, worship, out-door sports, recreation, visiting, medical attention, individual counselling;
- (6) Advantage has been taken of recent technological developments such as electronic locking and unlocking devices and means of effective and rapid communication among staff.

#### *Necessity for Security and Types of Security*

In planning a maximum security institution the security precautions used are obviously of considerable importance. A good deal of thought has evidently been devoted to these factors in planning the institution, and similarly our Committee has given considerable attention to the examining and evaluating, to the best of its ability, the various security measures used.

There are a number of different aspects to the security which is desired in such an institution.

For the protection of society through preventing the escape of the inmate from custody, security on the perimeter appears to be the major factor. However, for the prevention or control of organized group disturbances, for the protection of staff from attack by inmates, and the protection of inmates from attack by other inmates, additional internal security measures are required. In relation to each of these, it is important that attention first be given to prevention, and then to the problems of isolating and bringing under control, as quickly and

effectively as possible, any disturbance which may arise. It is also of great importance that, in addition to these problems of immediate security, the long-term security interests of society be kept constantly in mind. Since nearly all of the inmates will eventually be released into society, these long-term interests obviously are best served by a reduction in the hostility which is so marked a feature in these men, and by inducing to the greatest extent possible, positive attitude and behavioral changes in them. It is here, of course, that the importance of program and treatment, particularly through the relationship of inmates with staff, emerges. While total success cannot be expected in either the short-term or the long-term aspects of security, achieving a proper balance in attention to both is, we believe, a central problem in the effective operation of a maximum security institution.

In some instances, fortunately, factors desirable for direct security and factors desirable for treatment program, agree. An outstanding instance of this lies in limitation of the size of the institution and subdivision of the total population into comparatively small living units. As already noted, provision has been made for this in the existing plans. However, certain limitations to the effectiveness of these provisions are apparent, and we believe that they could be developed further, in ways which would bring Canada truly into the vanguard of progressive penal planning.

There are other types of security precautions which might be described either as neutral in relation to treatment or as having some positive value in addition to their security aspects. For instance, in the opinions of Committee members and of those persons experienced in working with prison inmates whom we have consulted, there appears to be unanimous acceptance of the need for and the value of providing for removal and special treatment of some psychiatrically disturbed inmates, providing for immediate removal and temporary segregation of any inmate who becomes extremely hostile or disruptive, and providing for closing off individual sections of the prison so as to isolate any disturbance which may arise.

In assessing total security measures, particularly those of a preventive nature, we suggest that recognition should be given to the important part played by certain aspects of program. Sport activities, for instance, may have security advantages in providing relief for tension and aggression. Certain other forms of program activity, such as guided group discussions and individual counselling also have desirable long-term effects in increasing security because they provide verbal outlets for pent-up feelings which may otherwise be discharged in physical attack, and because they provide indications to staff of dissatisfaction and tension, both group and individual, which may be building up, so that action can be taken to deflect or control these.

#### *Principles of Correctional Philosophy*

The following excerpt from a Report on Penal Facilities and Master Plan for The Commonwealth of Puerto Rico, dated April 15, 1965 (and which appears to have been drafted by Mr. Frank Loveland who is described as a Consultant), contains, in essence, the principles of a correctional philosophy which no member of this Committee would repudiate, namely:

The evaluation of a correctional system and its needs must be based upon a sound modern philosophy and upon established principles and standards.

The philosophy of corrections upon which this report is based is that generally accepted by the progressive penologists and correctional administrators of the Western World. It assumes that the major purpose of corrections is the protection of the public welfare. It recognizes that more than 98 percent of the offenders committed to custody are sooner or later released to the community.

It rejects the philosophy of retribution—of an eye for an eye and a tooth for a tooth. It rejects punishment *alone*, as non-productive as far as public protection is concerned.

It accepts as fundamental the concept that the treatment of the offender at the hands of the court and of the correctional authorities should be individualized and directed toward his needs and requirements, to the end that he become a law-abiding, productive member of the community, to the extent that is possible within the limits of present knowledge. It is based on the assumption that delinquents and criminals are made, not born, that anti-social behaviour is learned, and what can be learned, can be unlearned. It is necessary to apply principles of unlearning and re-education in its broadest sense to correctional programs designed to change the individual, thereby protecting the public. It accepts the principle that only through utilization of scientific knowledge of human behavior, through thorough diagnosis, and through treatment and training related to the needs of individual offenders, can society be protected to the fullest possible degree. (pp. 6 and 7).

These principles have been substantially reproduced in a brochure entitled "Correctional Facilities" published by the State of Wisconsin, Department of Resource Development and of Public Welfare, Division of Corrections, in 1965.

Capped by the statement that "The Corrections Philosophy of the State of Wisconsin recognizes the needs of all its citizens", it adds: (p. 7)

It is well recognized that people differ in attitudes, aptitudes, emotional tone, social and cultural background and the sum total of life's experience that characterize an individual personality. Treatment must therefore be individualized and tailored to meet the needs of each offender, whether adult or juvenile, male or female. . . . .

Presence of an individualized treatment oriented process in all phases of correctional work does not negate the importance of sound security measures. To the contrary, security—exercising consistent and impartial care to all offenders—is a necessary ingredient of the total program.

. . . . Successful programs must be based on respect of the essential dignity of man aimed at increasing the offender's understanding of himself and his problems. It must improve his ability to form more satisfactory interpersonal relationships, and must inculcate within the individual the ability to live with increasing self-control and self-confidence.

(State Department of Public Welfare, Division of Corrections. "Corrections in the Wisconsin Tradition". July 1965.)

Incidentally, it is a known scientific fact that a treatment program can have disruptive effects on the short-term custodial aims of a security prison. The best way to develop a "quiet" prison might consist in leaving the inmate as undisturbed as possible, as long as he obeys the rules and keeps out of trouble. This is sometimes called "easy time" in the inmates' parlance. The resulting trouble-free institution may keep out of the headlines, but it will hardly accomplish anything towards influencing the inmate to become a law abiding citizen. The introduction of a treatment program may tend temporarily to upset this tranquillity and make for uncomfortable and dissatisfied inmates, as an initial consequence.

However, when the treatment program has reached the successful stage, the inmate's attitude and condition usually should become relaxed as a result of decreased tension and improved motivation.

### *Staff-Inmate Relationship, Size and Design of Institutions*

Personal relationships between staff and inmate appears to be the major tool available in a prison for changing inmate motivation and bringing about eventual social adaptation.

To quote again from the Puerto Rico Report: (pp. 9 and 10)

The architectural facilities of an institution must be reflective of its program. Whether prisoners come out better suited to accept their responsibilities as law-abiding citizens, or worse, depends largely upon their experience while confined. That experience can be influenced to a considerable degree by the physical environment in which the program takes place.

In more specific terms, the Committee would make the following comments:

A prison should be small enough to permit two things:

- (a) All staff to work together as a team, to share information each has about an individual inmate, and to plan a treatment program for the individual inmate in which all pertinent staff participate;
- (b) All staff, and particularly the correctional officers, to know each inmate personally.

An institution of 460 inmates such as the proposed maximum security penitentiary, operated as a unit, would hardly allow for this kind of intimacy and teamwork. To be truly effective, segregation into groups will necessitate dividing the prison into several institutions sharing certain facilities.

We believe that a prison should be designated to encourage staff-inmate relationships. Overly rigid security controls certainly do hinder the development of such relationships, with the following results:

- (a) Reinforcement of the inmate sub-culture since the individual inmate has only other inmates to relate to;
- (b) Reinforcement of the inmates' belief that they are rejected by society;
- (c) Reinforcement of the inmates' belief that society, in the person of its representatives, the staff, is afraid of them (as shown by undue emphasis on security measures likely to increase rather than reduce their hostilities.)

In our opinion, there are three things in the proposed design that will tend to hinder the development of good staff-inmate relationship:

- (a) Movement along corridors will be very time-consuming, thus detracting from the time available for program and consequently for contact between inmate and staff;
- (b) Corridors are divided by a screen that will keep staff and inmate apart;
- (c) Program space is grouped around the control towers; logically, this will give the program a custodial connotation in the inmates' minds and block their participation.

There is also some apparent inconsistency since in work areas, auditorium, recreation grounds and chapel, staff will be facing inmates directly. Thus only

part of the staff (security) will be protected. This will have the effect of raising a barrier between *custodial* and *treatment staff*, an undesirable development and one that will imperil staff teamwork.

### *Grouping of Services*

To permit teamwork among staff and permit exchange of information, it is important that services be grouped functionally so that treatment staff are in close proximity to each other. This principle does not appear to be followed in the proposed design. For instance, the classification officers, chief vocational officer and the education supervisor are in the administration building while the psychiatrist and medical services are in the special services building. The chaplains, on the other hand, have offices in both administration and special services.

### *Segregation*

Prison inmates need training in social interaction. This is best fostered by the development of small inmate groups whose members feel a strong sense of "belonging" to the group. Under staff guidance, these groups seek to understand the reasons for anti-social behaviour in the individual members and then help reinforce socially-acceptable attitudes in each other. If this is not done, the mass inmate sub-culture takes over and reinforces anti-social attitudes, and a situation arises where staff are pitted against inmates in mass, with no hope of developing self-help techniques among inmate groups.

The proposed design does not seem to provide for group formation beyond mere physical separation. Although there is provision for separating the inmates by cell-blocks at night, this breaks down in work areas, exercise yards, gymnasium and day-rooms. Also, with 460 inmates in a "big-house" of this nature, a security atmosphere tuned to the most difficult inmates will likely dominate all parts of the institution and different regimes for different groups will be next to impossible. Staff psychology alone would make any real differences extremely difficult. Indeed, the individual staff member could hardly work one day under certain rules with one group and under different rules with another group the following day.

### *Program Space*

Program space in a prison should be generous enough and be so arranged as to contribute to group segregation. It seems to us that possible and probable changes in the use of some of the space should be contemplated, in keeping with foreseeable evolution and progress in the devising and application of future programs.

Moreover, when program space is to be used at different times for different purposes, care should be taken that no conflict among the various uses arises.

In the proposed design, although we are informed that inmates will not be permitted to congregate in groups larger than sixty (60), the facilities for congregating in larger groups, for instance in the auditorium and recreation grounds, appear better than those provided for smaller groups. These latter consist only of the "day-rooms" clustered around the control centre in each living unit. These facilities are to be used at different times as class-rooms, dining-rooms, for

group-therapy sessions, for such groups as Alcoholics Anonymous and public affairs talks, and for informal recreational activities such as television or card-playing.

Now, for all these purposes and activities, the plans provide for six (6) odd shaped rooms which, if translated into rectangles, works out as follows:

- (a) Two rooms on the ground floor, of an approximate area of 300 square feet (the equivalent of  $20' \times 15'$ );
- (b) A third room on the ground floor with an area of 370 sq. ft. (equivalent of  $20' \times 19'$ );
- (c) Two rooms on the second floor of an area of 470 sq. ft. (equivalent of  $20' \times 24'$ ); and
- (d) One room of an area approximately 370 sq. ft. (equivalent of  $20' \times 19'$ ).

None of these rooms would be sufficiently large to hold thirty (30) inmates for classes, discussion group or recreation, so at any given time some inmates will have to be left in their cells or be in some other part of the building. Further, the day-rooms on the lower floor have no windows for light and air.

In relation to the above, the Committee would like to draw attention to the following factors:

- (a) No other space in the institution has such heavy multi-purpose demands made on it. The Committee is concerned that the practical difficulties of conversion from class-room, to meal time, to evening use may in fact mean that some of these anticipated activities will be crowded out, and thus, in effect, not be provided at all.
- (b) In our discussions with Commissioner MacLeod and members of his staff, we were told, in answer to questions regarding adequacy of program space, that originally somewhat more space had been envisaged but that it had been reduced for reasons of economy. We are informed that, in relation to costs of such items as electronic controls and individual plumbing, treatment space is probably the cheapest space, in construction terms, within the institution.

May we repeat that we understand the difficulties with which the Penitentiary Service has been faced, especially in view of the urgency of the situation both in Ontario and in Quebec. And we would be remiss in not recognizing the genuine efforts they have made in order to correct, in a relatively short period of time, mistakes that were made many, many years ago because of an inadequate correctional philosophy, coupled with stereotyped architectural concepts.

However, it seems that every effort should now be made to try to reconsider whether such economies will not be conducive to increased spending in the more or less distant future.

The location of the day-rooms immediately around the cell-block control tower has security advantages but the psychological effect, in relation to the use of the rooms for group therapy or informal relaxation, would appear to be the opposite to any contemplated treatment. The Committee suggests that program could be enhanced considerably if at least some additional space under less obvious and direct security vigilance were available.

### *School Facilities*

The importance of scholastic education in prisons is becoming increasingly recognized, as a preparation for trade-training, as a preparation for other occupations and as a preparation for living in the normal community.

In the proposed design, the only classrooms provided are the multi-purpose rooms clustered around the control tower. This could mean either that all classes will be duplicated in each living unit, or that segregation will be abandoned by permitting inmates from one living unit to enter another living unit to attend classes, all of which would tend to clip the wings of a progressive educational program.

The Committee suggests that a separate school building and proper audio-visual aids ought to be provided.

### *Hospital Facilities*

The Committee is not clear as to the function the hospital in the proposed design is intended to serve. Provision for psychiatric treatment appears inadequate, with no space, for instance, for EEG facilities. In contrast, the medical facilities seem rather large, if this hospital is intended to serve only 460 inmates. At St. Vincent de Paul Penitentiary, for example, with 880 inmates, there are never more than six (6) in hospital and usually only three (3) or four (4). If, on the other hand, this hospital is intended to serve as the medico-psychiatric centre for the complex, it may not be large enough.

The Committee would recommend that a study in depth be done of hospital requirements, both psychiatric and medical, in the light of past experience and in consultation with the psychiatric and medical staffs of the present institutions, and that the collective findings be used as the basis for re-planning these facilities.

### *Movement Control*

In the proposed design, all movement outside the individual cell-block must pass one (1) control point. This will require careful scheduling. Involved is the movement of men from their cell-block to work in the morning, back at noon, back to work after lunch and back to the cell-block for dinner; bringing food in and along the corridors three (3) times each day; sick parade and individuals moving to interviews. Just granting a half-hour statutory fresh-air exercise period will present a major movement problem. Even more difficult to schedule is the frequent unplanned for movement of individual inmates and staff throughout the day, movement that will require clear corridors. Any small disturbance, the finding of contraband or moving a violent prisoner to segregation would result in disruption of the schedule ending in confusion or chaos.

All this cannot help to be very time-consuming and to decrease the amount of time available for program, that is, in effect, the length of time during which staff and inmates are in contact with each other. Estimates of the proportion of the program-day that will be taken up in movement, which were furnished to the Committee by experts, run as high as fifty (50%) per cent.

### *Behaviour Expectation*

Prison inmates, like other people, tend to behave as they are expected to behave. The proposed design, as expressed in the "Ten Year Plan of Institutional Development" and the 1965 Interim Paper, assumes that every inmate of this institution is "likely to make active efforts to escape, would not hesitate to use violence in so doing, and is likely to use violence outside, after he has escaped". We suggest that many inmates who might not otherwise be necessarily inclined to do so will react accordingly.

In more specific terms, we would comment that the fact that an inmate is aggressive and potentially dangerous and therefore has been classified as a maximum security risk does not mean that he necessarily has low potential for change. He may have much greater potential than the more passive, possibly less intelligent, perhaps generally inadequate person who may be a docile prisoner. Since almost all these inmates will be released into society eventually, society stands to suffer most if they are released as hostile or more hostile than when they were incarcerated.

It is also important that expectations for the inmate, as far as humanly possible, should be consistent in all places and at all times. The proposed design does not seem to provide for this consistency. During the day—in works-shops, exercise area, or other occupation—emphasis is put on seeking the inmate's cooperation and giving him a chance to prove himself. During the night and during movement, he is looked upon as thoroughly dangerous.

### *Flexibility and Research*

The Committee wishes to emphasize again that correctional treatment is still in the process of evolution. Considerable research has been going on for a number of years and will undoubtedly proceed more and more in depth as new discoveries are made. It would appear, therefore, quite essential that the maximum security institutions should present possibilities for gradual adaptation to renovated and improved program and treatment. The proposed design does not appear to provide for enough flexibility in this respect.

### *Two-storey Construction*

The consensus of opinion expressed before us, both by representatives of the Penitentiary Service and other experts was that a two-story construction presents a real challenge because of the danger of violence during movement up and downstairs. Moreover, two-story living units offer a big ventilation problem.

However, it is felt that these difficulties could be minimized after a re-assessment of the plans and designs.

Subject to the foregoing comments and without limiting their extent and scope, the Canadian Committee on Corrections, fully recognizing the urgency of the situation and the pressure brought forth by the population explosion in our largest maximum security institutions, nevertheless, feels it is its duty to advise and recommend as follows:

- (1) The design for the new maximum security institution should be such as not to appear to be conducive to repression.

- (2) Treatment and program facilities should be emphasized and proper space provided for present and future flexibility.
- (3) Staff and inmates should not be so separated through screening as would prevent social interaction between the two groups.
- (4) Control should be devised in such a manner that movement of inmates will not too severely tax the ability of the staff to cope with it.
- (5) An assessment and study in depth of each program operation should be undertaken with a view to determining the factual requirements of sound inmate training and treatment programs susceptible of changes and improvements in the future.

In conclusion, the Committee feels that, in spite of the remarkable advances which are incorporated in the proposed design for maximum security institutions, the constructive criticisms expressed in the present report would justify the delay involved in drawing up a new design. It is to be remembered that once built these institutions will likely be in use for the greater part of a century.

As this new design is developed, it would seem appropriate that extensive discussions be held, bringing together all the different types of penitentiary staff: security, medicine, psychiatry, psychology, education, trade training, recreation, administration, building maintenance, etc.—so that the final design may represent a blending of the opinions of every discipline.

Our Committee has been working in conjunction with Mr. Harry B. Kohl with a view to having comprehensive sketches, which will reflect, in architectural terms, the Committee's thinking in relation to maximum security institutions, which is to provide adequate security in a physical environment conducive to the rehabilitation of the offender and thus offering suitable facilities for treatment and program. These sketches should be available in the early Fall. It is not the intention of the Committee to submit them as detailed plans for an alternative design for maximum security institutions, as we consider this to be outside our terms of reference, but rather as a visual supplement to this report.

The whole respectfully submitted.

Ottawa August 15, 1966.

The Canadian Committee on Corrections.

*Per: ROGER OUIMET, J.S.C.*

*Chairman.*

**LETTER TO THE HONOURABLE MR. JUSTICE ROGER  
OUMET FROM MR. HARRY B. KOHL**

October 13, 1966.

MR. JUSTICE ROGER OUMET,  
Chairman of the Canadian Committee  
on Corrections,  
251, Bank Street,  
Ottawa 4, Ontario.

Dear Sir:

*Re: Maximum Security Institution  
Our File # 66/28*

Enclosed please find drawing dated October 13th of Study K (A-B-C-D-E-F-G-H-I-J-K) our eleventh sketch of a maximum security institution, titled Federal Prisons Maximum Security Institution—Job # 66/28. This drawing represents a synthesis of studies of existing institutions, interviews with experts in the field (architectural, correctional, treatment, religious, administrative, educational, industrial, recreational, etc.) and opinions expressed and conclusions arrived at by the Committee:

In all instances the experts in the field had many years of experience. For example, one of them was the firm of LaPierre/Litchfield & Partners/Architects, New York who have done 32 correctional institutions in the last 34 years, 16 of which were built since 1960. This firm originally was the firm of Alfred Hopkins, who are considered one of the oldest reliable authorities in this field by many, including the United States Bureau of Prisons. For example see—Handbook of Correctional Institution Design and Construction, 1949 and Supplement published in 1960 produced by the United States Bureau of Prisons.

Further, among those contacted were:

Warden G. V. Richardson of U.S. Federal Penitentiary in Marion, Illinois.	Warden Lt. Gen. F. Reincke of the State of Connecticut Penitentiary in Somers, Connecticut.
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as well as their Deputy Wardens and other senior staff.

Also:

Warden Hazen Smith,  
of the Kingston Penitentiary,  
Kingston, Ontario.

Mr. Vic Richmond,  
Regional Director,  
Canadian Penitentiary Service,  
P.O. Box 1174,  
Kingston, Ontario.

Dr. Maurice Gauthier,  
Director of Prison Services,  
Department of Justice,  
Government Building,  
Quebec, P.Q.

Mr. Ray Slough,  
Director of Corrections and  
Inspector of Gaols,  
Legislative Building,  
Room 130,  
Winnipeg, Manitoba.

Warden John Braithwaite,  
Haney Correctional Institution,  
Box 1000, Haney, B.C.

Mr. Leo Hackl,  
Deputy Minister of Reform Institu-  
tions,  
Province of Ontario.

Warden Michel LeCorre,  
St. Vincent de Paul Penitentiary,  
St. Vincent de Paul, P.Q.

Mr. I. B. Simpson,  
Facilities Planning Officer,  
Canadian Penitentiary Service.

In all instances, the opinions of the above-mentioned authorities were fully considered but were not necessarily binding to the formulation of the concept shown on the drawing.

The concept shown on the Drawing attempts to resolve custodial and rehabilitative issues by embodying them in a building related to the following principles:

1. Zoning—(Grouping of facilities for related functions and activities identified with specific times of the day).
2. Compactness.
3. Security.
4. Flexibility—(Modification and variation of the use of the facilities to accommodate modification and variation in the programme).
5. State of Mind—(The result of the above on inmates—hopefully good).

The following are brief comments of the above topics as they are related to the design of the building.

### *Zoning*

A successful design of an institution is one whose various related areas and facilities are grouped in zones. These zones are such that when they are not in use they can be shut off from the balance of the project. This is done in order to reduce the area of the building occupied by the inmates and therefore, reducing the area of the building requiring supervision.

You will note that the facilities are so arranged that industry, dining, treatment, education, recreation and housing are in precisely this order and sequence. All these facilities may be in use at the beginning of the day but as the day progresses some of these functions are terminated and their areas should be able to be shut off accordingly. For example, usually the industry area zone is not in use after approximately 4 o'clock whereas the dining area zone naturally has to be open until the end of the evening meal at approximately 6 o'clock. If the design is such that these can be cut off from the educational, recreational and housing zones, then these remaining zones can function in a compact evening pattern.

### *Compactness*

The above-mentioned zones are made compact so that there is the shortest possible distance for inmates and staff to travel between each zone. This is done in order to allow for minimum time for travel, and maximum time for programme facilitating good security. When the zoning is organized in a compact form it permits fewer conveniently located control points, which in turn creates good visibility of movement which produces a strong security potential without the repressiveness, caused by more frequent control points. Security doors and devices activated at the control points permits for the immediate, individual, or multiple cutting off of zones, to isolate trouble when it occurs. Further, proper zoning and compactness permits efficient security resulting from the short distances that personnel must travel to reach any point in a compact plan. On the other hand, devices and doors can be left open for what is frequently, extensive periods, when there is no trouble. During these periods, movement throughout the institution can occur with a sense of ease and speed because the short distances reduce the trouble potential which arises from the time lag identified with long corridors containing frequent locked gates.

### *Flexibility*

With the above-mentioned zoning, compactness, and security, the facilities are further arranged so as to permit a flexibility in programme. This in turn permits versatility in the degree of security applied to suit the inmate population state of mind (gates open or closed as mentioned above) resulting in an improved state of mind of both inmates and staff without the slightest reduction of security, e.g. this might be compared to a calm judo expert, known for power, speed and precision which he is disciplined not to use except when necessary. The respect of this authority can create a state of mind which deters violence and encourages by its calmness a sense of co-operation producing a state of relaxed participation in programme and is conducive to proper motivation.

The design incorporates the following accommodation:

1. Housing
  - a) Normal association
  - b) Abnormal disassociation.
2. Recreational and educational facilities.
3. Special treatment facilities.
4. Dining facilities.
5. Industry facilities.
6. Administrative facilities.
7. Ancillary facilities.

A brief explanation of the above-mentioned facilities and their content, location, and a few of the reasons for same, are hereinafter described:

#### 1. *Housing*

- a) The normal housing for co-operative and reasonably trouble-free inmates who are permitted to associate in groups is at one end of the zone series.

It consists of individual rooms in individual wings accommodating 18 to 30. These wings are arranged in a "T" shape and are stacked two storeys in height. These two storey wings have a solid floor between them and are not open cell ranges. These wings meet at a point of control where there are small assembly rooms (called day rooms) which are available for casual free time use or specific organized use by the small groups living in the adjacent wings. This layout permits a minimum of staff to have a maximum of observation and control with great ease and apparent casualness without a reduction of security. The housing shown in the drawing contemplates the accommodation of from 216 in 12 wings at 18 per wing to 360 in 12 wings at 30 per wing. If absolutely necessary (for economics) and a larger population is necessary an additional "T" shape can be added with 108 to 180 more, bringing the total to 540.

- b) The housing for the non-co-operative and troublesome inmates who are required to be disassociated from the group is separate and apart from them and located on the second floor. These inmates are accommodated in individual cells with indoor and outdoor (walled in roof area) activity space, preferably including small work area.

These facilities permit the difficult inmate to be handled as follows:

1. Removed from the general population.
2. Under careful supervision and observation.
3. Have facilities adjacent to them that will permit testing to determine whether and when they are ready to be returned and associate with the general population. You will note that this facility is closely related to the hospital rooms which are really cells that frequently house the troublesome inmate who needs medical or psychiatric treatment and therefore should have their accommodation conveniently located to the treatment specialist.

## *2. Educational and Recreational*

The facilities in this zone you will note are located close to the housing and between the housing and the dining and industry zones. The facilities of this zone are distributed around the control point at the inter-section of two wide corridors. You will note this permits for easy movement, short wide corridors and ease of observation by minimum staff with consequent maximum control. The accommodation provided for this purpose consists of classroom for the normal academic and specialized training such as drafting, music and art. These classrooms are grouped in a zone with the library and chapel as extensions of the educational process. The recreation facility of auditorium and gymnasium are similarly centrally located under a minimum staff, maximum observation control point and integrally related to the educational purpose so that as a zone it is convenient to inmates and housing, treatment staff facilities (for observation). This zone is located so that it is able to be used at a time of day while the other zones (industry, dining, treatment) are cut off.

The location of the zone in relationship to the housing is chosen in order to reduce inmate travel, distance and time, and to make evening educational and recreational activities simple for custodial control and, therefore, more likely to be viable in progressive programming.

### 3. *Special Treatment Facilities*

This zone includes the facilities for medical, psychiatric, psychological and case work. The specific numbers of rooms is not final, and the drawing is not to be taken as a conclusion. This zone is located so that it is convenient for the classification of new inmates and the treatment of mind, body and attitude of the inmate population. This zone is centrally located so that it has easy access for observation and visiting by and for inmates. Further it is centrally located for the convenience of the senior administrative personnel.

This zone is located so that it can be cut off in order to reduce the supervisory area without interrupting the balance of the zones and programmes.

The compactness of the facilities in this zone is intended to create a comprehensive integration of the various treatment facilities for the rehabilitative purpose and for custodial benefits of observation by these experts.

### 4. *Dining Facilities*

This zone is located between the route of travel from housing to industry. The dining and kitchen facility is included in this plan for the following reasons:

- (a) Reduction of contraband traffic routes arising from food preparation beyond the wall and delivery into the institution.
- (b) Activity and training for those suitable or desiring culinary education and training.
- (c) Economics and food production.
- (d) Opportunity for assembly in the rehabilitative process and a potential pleasant break in the work or educational programme.

The food preparation and dining zone are centrally located so as to permit for the delivery of food in hot wagons to special areas (disassociation, hospital or for special programme reasons in the day rooms).

### 5. *Industry Facility*

This zone is located at the extremity, opposite the housing in order to facilitate the cut off of this zone and reduction of supervisory area.

Programming hours for industry, whose activity ends earlier in the day than any other activity, makes the location of the zone desirable as set out. This location is also selected to provide for easy delivery from the stores building beyond the wall, and ease of expansion without interfering with the existing building. The need of inspection regarding store house of the institution located within the wall, creates difficulty and delay in the careful examination that has to be made of commercial vehicles from private companies whose vehicles might be hiding contraband in the most remote and obsolete portions of the vehicle.

With the store house under the institution's control but beyond the wall, nothing is brought through the wall except by staff and personnel in vehicles belonging to the institution, thus reducing the potential contraband traffic.

### 6. *Administration Facilities*

This zone is the front of the building and may be beyond the wall or within the wall. This zone accommodates the Warden and his related staff and the main reception of visitors and other than inmates and personnel.

The drawing indicates that the corridor connecting the administration to the balance of the institution with a broken line can be increased or decreased to suit the specific building project.

#### 7. *Ancillary Facilities*

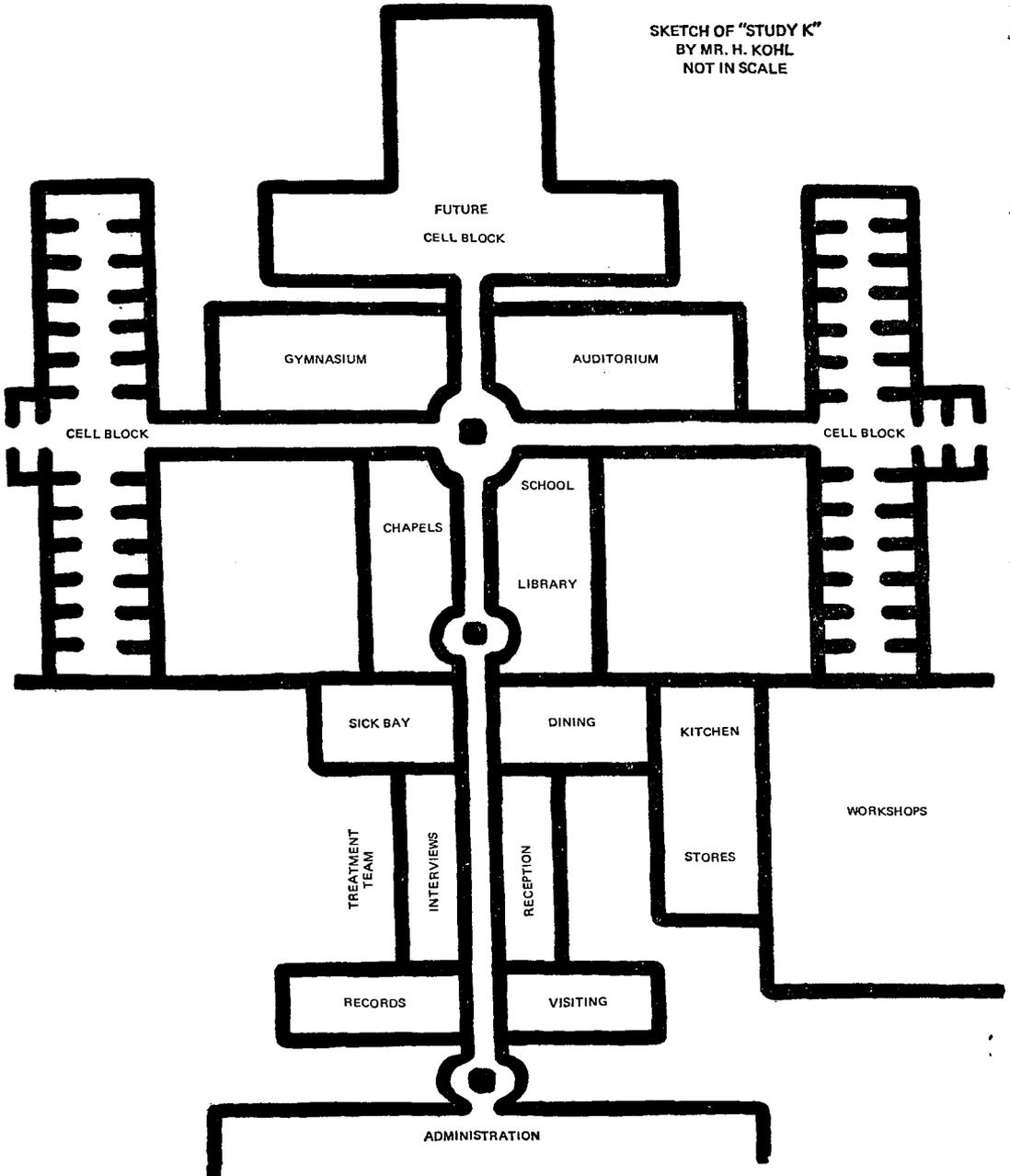
Ancillary facilities are really not a zone, but are indeed other facilities, and include such items as the double metal mesh wire fence, the control towers for perimeter security, the control gates and the store house beyond the perimeter enclosure referred to above.

The Laundry indicated as part of the workshop should only be within the perimeter if it deals only with the laundry of the staff and personnel and inmates of this institution alone. If the laundry is to service other than this institution it should be deleted from the project or be beyond the perimeter security fence.

Yours very truly,

HARRY B. KOHL

SKETCH OF "STUDY K"  
BY MR. H. KOHL  
NOT IN SCALE



**LETTER TO THE HON. MR. JUSTICE ROGER OUMET  
FROM MR. HARRY B. KOHL**

November 5, 1966

MR. JUSTICE ROGER OUMET,  
Chairman of the Canadian Committee  
on Corrections,

251 Bank Street,  
Ottawa 4, Ontario

DEAR SIR:

Re: *Maximum Security Institution*

*Our File #66/28*

Pursuant to Committee Meeting of Wednesday, November 2nd, and in accordance with your instructions, I enclose herewith a new drawing— Study L. This drawing incorporates revisions made to drawing Study K.

The revisions are the result of the conclusions arrived at by the Committee after their consideration of Study K and the recommendations made by those to whom it was sent for comment.

I submit this drawing with a description of the revisions as an addendum to my letter of October 13th and drawing Study K.

As a preface, I wish to state that it must be understood that Study L (like all previous Studies) is prepared in accordance with Treasury Board Order as a sketch, and is not intended to include every minor detail. Time and authority do not permit the finalization of such things as, number and size of sanitary facilities, classrooms, staff facilities etc. If this general design concept is found acceptable, and I am instructed to provide additional information, I will be pleased to do so. Therefore, I request that it is with this understanding and on this premise that this drawing will be examined. I further hope that the layout of the building will be considered in this light and not be criticized because of the absence of details. You will note that on the drawing, each facility is shown in dotted line as able to be extended and marked "E", representing potential expansion. This is done in order to assure you that if a more detailed Study proves that more space in any area is required, it will be possible to provide such additional space without interference with the general layout. Further, the building is designed this way, in order to provide reduced or increased facility as may be in turn required by a reduced or increased housing capacity. (See housing below).

(a) *Administration Facility*

1. The administrative facility has been relocated with an indication that provision has been made for a separate possible entrance for inmates with a chain linked enclosed vehicle sallyport, if such is found desirable.

Further, the relocation is the result of a recommendation that it be considerably removed from the vehicle sallyport, storehouse, and industry yard, you will note that this has been accomplished.

2. The administration facility has been placed outside of the compound (beyond the perimeter security enclosure) and will house all administrative facilities, such as warden's office, other offices, conference room, lounge, record rooms, lobby, etc., and staff facilities such as lockers, cafeteria, showers, lounge etc.

(b) *Classification Unit*

Notwithstanding the general remarks referring to absence of detail, I have revised this area to specifically indicate a Board Room because of one of the comments made. Further, I have rearranged this area so that the offices of the psychiatrist, psychologist and other professionals is in reasonable proximity to the recreational, educational and medical facilities, while being only 150' from the disassociation and reception housing. This location at the administrative end permits for the inmate on being admitted or discharged to be able to be seen by those having jurisdiction of that function. The control points in this facility are by no means final, but are suggested to indicate the need for control in respect to the functions of visiting, admission, discharge and classification.

(c) *Housing—Cell Blocks*

1. The location of the housing units was criticized because they were separated by other facilities (gymnasium, auditorium, etc.) and by extensive corridors. They have been relocated so that they are in an uninterrupted housing zone, close together and tightly related to the central control for convenient "back-up". However, in compliance with a recommendation, the housing units have been equipped with two day rooms per housing unit of 30 inmates to function as an alternate for these men having a quiet or unquiet area for free time. These rooms will be available for group interview, but this programme will be further facilitated by the provision in Study L of interview rooms adjacent to the day rooms and control point of the housing unit. Further study might prove the possibility of relating each interview room to each wing as opposed to grouping them as shown.
2. The special housing for disassociation cells and hospital cells is brought down to the ground floor in the revised scheme and is adjacent to but separated from the other housing by controls.  
In accordance with the Committee's request and as supported by comments received, Study L shows accommodation for a smaller inmate population. (Regular housing 240, reception 20, disassociated 10, and hospital 20—approximate total 290). This is all on one floor without expensive elevators or trouble making stairs. Should accommodation for a larger population be required, 240 additional cells could be provided on a second floor over the regular housing unit, retaining the disassociation, hospital and reception cells on the ground floor. Should the newly

received inmates be housed in the regular housing units, then the wing marked Reception Cells might be used for special categories of reward and reduced control or more secure housing for troublesome inmates of a category not sufficient to put them into the disassociation unit. Thus providing a variety of housing types to suit the programme.

(d) *Industry*

In Study L the location of the industry and related training facilities, has been changed from Study K in accordance with the comment made that inmate movement to industry should not be through the same corridor as inmate movement to other facilities (e.g., sick parade, disassociation, gymnasium etc.) Industry facilities in Study L are now so located that inmates would travel to industry in exactly the opposite direction from that which they would travel to other facilities.

(e) *Food*

From most of the comments and your instructions, I understand that the communal dining room was to be eliminated and that the kitchen was an unsettled item. In Study L therefore, I have shown the location of the kitchen, should it be desired to be kept, and indicated where the communal dining room might be located, should at some later date it be decided to be desirable.

At the risk of being impertinent, I would suggest we reconsider the dining room, because of the support to it as an idea provided by one of the comments which complimented us on the availability of a variety of feeding procedures permitting a warden to have a flexibility in feeding programme.

(f) *Storage and Warehousing*

Storage and warehousing is shown as being outside of the compound and beyond the limits of the perimeter security enclosure.

(g) *Recreational and Educational Facilities*

This control is intended for reasonable vision into the classrooms, library, auditorium, gymnasium, to the chapels, and access to the outdoor athletic fields. A canteen has been added adjacent to the library as requested in one of the letters with the storage facility adjacent to it.

(h) *Control Points*

In view of the fact that Study L has generally the same facilities (hospital, disassociation, chapels, gymnasium etc.) and houses the inmates in two buildings rather than three it follows that Study L will have one less control center than the Canadian Penitentiary Services' design. The exception to this statement is the special reception or reward housing unit which is a separate facility which may not be approved, and which Canadian Penitentiary Services does not have as such. Lack of time has prevented me from establishing which control centers in the Canadian Penitentiary Services'

design are 24 hours and which are not, and therefore, I am unable to compare 24 hour posts. Logically, however, they occur in the housing buildings, where we have one less, and at main control, hospital, segregation, central control and front control where Study L and Canadian Penitentiary Services are identical in number.

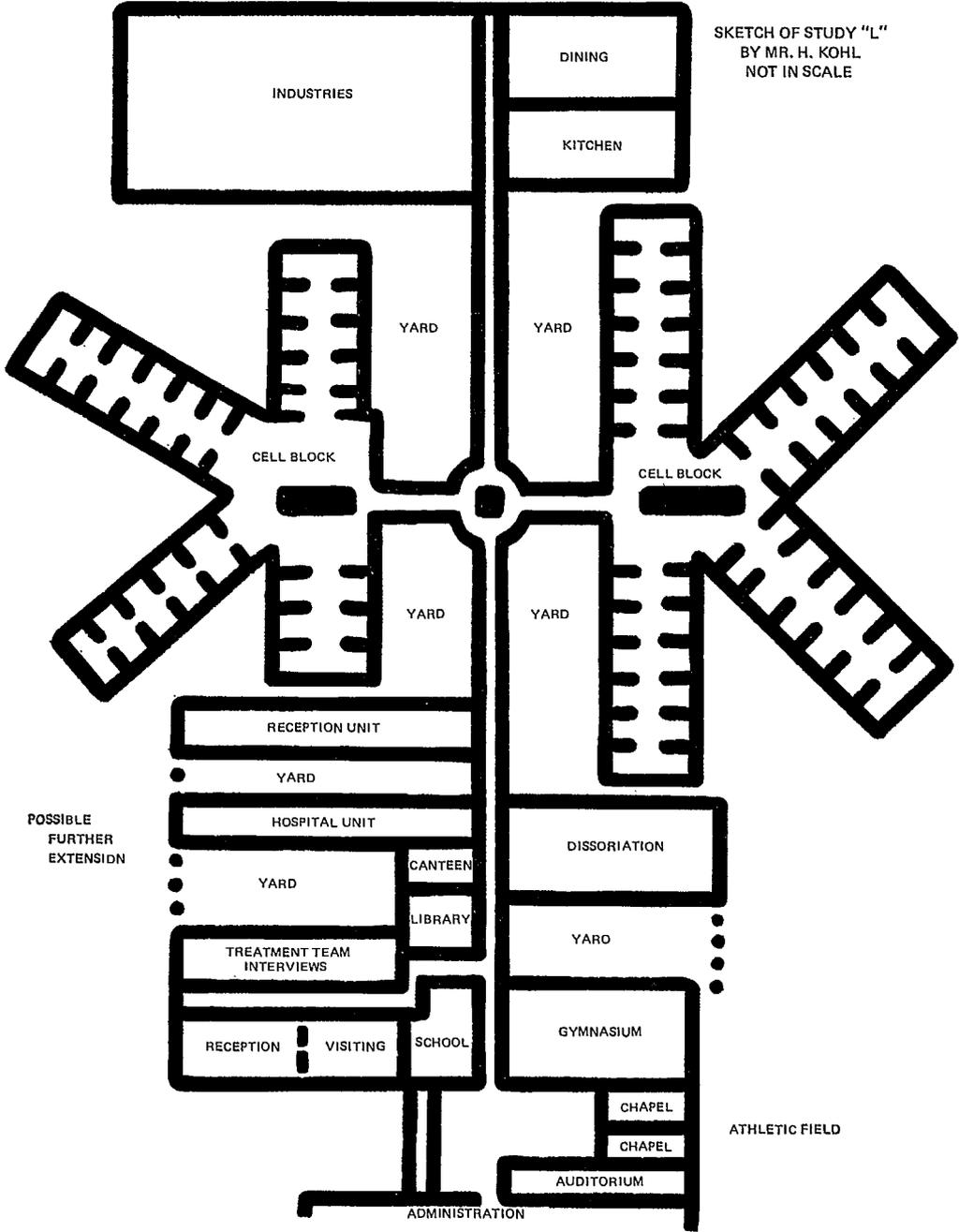
Very truly yours,

HARRY B. KOHL

HBK:PFH

cc: Mrs. Dorothy McArton  
Mr. G. Arthur Martin  
Deputy Commissioner "Ret". J. R. Lemieux  
Mr. Claude Bouchard, Associate Secretary  
Canadian Committee on Corrections  
Mr. W. T. McGrath, Secretary

SKETCH OF STUDY "L"  
BY MR. H. KOHL  
NOT IN SCALE



**LETTER TO HON. L. T. PENNELL FROM  
HON. MR. JUSTICE ROGER OUMET**

November 10, 1966

THE HONOURABLE L. T. PENNELL, P.C., Q.C., M.P.  
Solicitor General of Canada,  
Room 418 Justice Building,  
Kent and Wellington Streets,  
Ottawa, Ontario

DEAR MR. MINISTER:      Re: *Maximum Security Institutions Design*

In the last paragraph of our Committee's Evaluation of the Design for Maximum Security Prisons Developed by the Canadian Penitentiary Service forwarded to you on August 16, 1966, we advised you that we were working in conjunction with Mr. Harry B. Kohl, with a view to having comprehensive sketches reflecting, in architectural terms, our Committee's thinking in relation to maximum security institutions. We further informed you that it was not the intention of the Committee to submit these sketches as detailed plans for an alternative design (as we considered this to be outside our terms of reference) but rather as a visual supplement to our report.

Since then, representatives of this Committee have visited two recently constructed penitentiaries of maximum security type in the United States (at Marion, Illinois and Somers, Connecticut) as well as other institutions in California and Canada, housing inmates requiring varying degrees of custody.

In addition to talking with various officials of the Canadian Penitentiary Service itself, we have also consulted with and received opinions and evaluative comments from many other experts. These have included members of our panel of consultants with direct administrative experience in institutions for adult males; other persons with similar experience in institutions in several provinces of Canada, including Ontario and Quebec; and persons with extensive experience in prison administration in the United States, more particularly in penitentiaries of maximum security type. These persons could by no means be described as mere theorists or as being unfamiliar with the dangers and difficulties of dealing with maximum security inmates. Comments were also received from experienced American prison architects.

While the opinions expressed by this substantial group of knowledgeable people differed on a number of specific questions, such as location of certain areas in relation to one another; advantages and disadvantages of interior kitchen as against food preparation outside the walls, and central dining facilities as against smaller units, there was marked and striking consensus on three major points of criticism of the plans adopted by the Canadian Penitentiary Service, namely:

(1) That control of inmate movement is unnecessarily rigid and centralized, the consequent restrictive atmosphere resulting in serious loss of time and disrupting program.

(2) That division of staff from inmates by wire screening is unwise; that it could give the impression to prisoners that the staff is afraid of them; that emphasis needs to be placed on increasing contact of staff with inmates, rather than on increasing separation.

(3) That space allocated for program needs is inadequate.

In the course of the development of Mr. Kohl's sketches through a series of study drawings duly circulated, and subsequently revised in the light of comments received, the Committee has endeavoured to have due regard to all necessary security features including:

- (1) A secure perimeter.
- (2) Provision for closing off sections of the prisons from other sections.
- (3) Appropriate control points.
- (4) Reduction of mass movement through proper zoning of facilities.
- (5) Elimination of stairs in the event a one-floor plan is adopted.
- (6) Small living units with equal and independent facilities for certain specific functions.
- (7) Ready access to temporary segregation facilities and psychiatric facilities.

We are enclosing herewith Mr. Kohl's drawing Study K dated October 13th together with his explanatory letter of the same date, as well as the final revision entitled Study L, with accompanying letter of November 5th. These documents will provide a visual and recorded illustration of the work performed within a relatively short period of time.

May we add that the descriptive notes prepared by Mr. Kohl are to be construed in the light of the objectives expressed by him from an architectural point of view and may we particularly stress the fact that this represents a broad concept of a maximum security institution and does not imply completeness of detail.

However, it is our opinion that the accompanying revised sketch Study L, without sacrificing necessary security features, provides for proper emphasis on program.

Moreover, Mr. Kohl's design clearly appears to provide for flexibility, recognizing that all inmates do not require the same degree of security within the institution and foreseeing adaptation of program over the years.

In the course of its study of the design for maximum security institutions, our Committee became increasingly aware that the matter could not be dealt with as thoroughly as would be desirable without taking into consideration the basic correctional philosophy of an integrated system which is comprised of a variety of institutions with varying degrees of security, thus implying a distinct operational purpose and program for each institution. The study of plans for maximum security prisons must therefore be undertaken in relation to the system as a whole. Particularly pertinent are the proposed Special Correctional Units and the Medical Psychiatric Centres. If constructed as separate buildings, the Special Correctional Units will remove from the maximum security institutions some of the more violent inmates classed as non-psychotic, and the medical psychiatric centres will remove the psychotic inmates.

Also pertinent is the estimated percentage of penitentiary inmates requiring maximum security facilities, as expressed in the "Ten-year Plan", on which the Service's present building plans are based. This estimate has been questioned by a number of persons in the correctional field with whom the Committee has consulted, among whom were persons holding responsible positions in maximum security institutions, and the Committee is of the opinion that further research is required in this area.

In conclusion, may we say that this is meant to be the final portion of our Committee's Evaluation of the Design for Maximum Security Prisons Developed by the Canadian Penitentiary Service, within the terms of reference as expressed in your previous correspondence.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Roger Ouimet".

The Canadian Committee on Corrections

per: ROGER OUIMET  
*Chairman*

## Appendix F

### STATISTICS OF CRIME AND CORRECTIONS

The tables and graphs that follow are based on *Statistics of Criminal and Other Offences*, the annual series of court statistics issued by the Dominion Bureau of Statistics. At the request of the Committee, the Judicial Section of the Dominion Bureau of Statistics prepared detailed tables of statistics on some selected aspects of crime and corrections in Canada. Some of the general statistical questions of interest to the Committee could not be answered on the basis of the official statistics. As the original tables unfortunately are too lengthy to be reproduced here, some have been summarized in the tables that follow and in other instances graphs have been used instead of tables. The statistics and discussion of Chapter 3 have not been repeated. Unless otherwise noted the rates per 100,000 population are based on the number of Canadian residents 16 years and older, the population "at risk". Offenders below this age are classified as juvenile delinquents in the criminal statistics and are not dealt with in this report.

#### *Changes in the Volume of Crime*

Tables F-1 and F-2 contain the statistics on which Figures 1 and 2 of Chapter 3 are based. Since the traffic offences referred to in Table F-2 and in the graphs of Chapter 3 are summary convictions only, the changing part that motor vehicle offences have played in the total conviction rates for indictable offences is not shown. Much of the variation in the number of indictable convictions for motor vehicle offences is attributable to changes in the proportion of the more common Criminal Code automobile offences—impaired driving, driving while disqualified, failing to stop at the scene of accident, dangerous driving, and driving while intoxicated—proceeded against as summary rather than indictable offences.

Since the revised Criminal Code came into force in 1955, the trend has been to use the summary alternative in an increasing proportion of cases. Taking impaired driving as an example, we find that the proportion of the total convictions for this offence accounted for by indictable convictions dropped from 25 per cent in 1954, to 11 per cent in 1958, to one per cent in 1965—the remaining 99 per cent being summary convictions. The net result has been that motor vehicle offences have declined as a proportion of all indictable convictions from 13 per cent in 1954 (the high point) to 0.7 per cent in 1965, in a period that has seen a great increase in summary convictions for these same offences. If the prosecuting authorities had continued to use the indictable alternative to the same extent as in 1954, the total indictable conviction rates would have given the impression of an alarming increase in serious crime in Canada.

Figure F-1 shows the changes in the total indictable conviction rates over a 30 year period. No trend is discernible. The sharp decline in 1959 is known to be due, in part at least, to the failure of several courts, including that of a large urban centre, to submit returns to the Dominion Bureau of Statistics. No reasons for other sharp fluctuations are readily apparent.

TABLE F-1  
 Convictions by Type of Offence  
 Rates per 100,000 Population 16 Years and Older, Canada  
 1901-1966

Year	Indictable Offences	Non-Indictable Offences	Total Convictions	(Number)
1901.....	165	1,070	1,236	(42,148)
1911.....	269	2,144	2,413	(113,260)
1921.....	347	2,820	3,167	(177,173)
1931.....	458	4,762	5,221	(359,320)
1941.....	528	6,774	7,302	(590,202)
1951.....	422	13,707	14,129	(1,348,755)
1961.....	608	26,515	27,123	(3,180,545)
1962.....	599	27,636	26,235	(3,368,156)
1963.....	622	28,454	29,076	(3,529,183)
1964.....	616	31,100	31,716	(3,929,774)
1965.....	592	31,418	32,010	(4,066,957)
1966.....	615	29,991	30,606	(3,976,437)

TABLE F-2  
 Summary Convictions for Traffic Offences  
 1901-1966  
 Rate for 100,000 Population and Percentage of Total Convictions

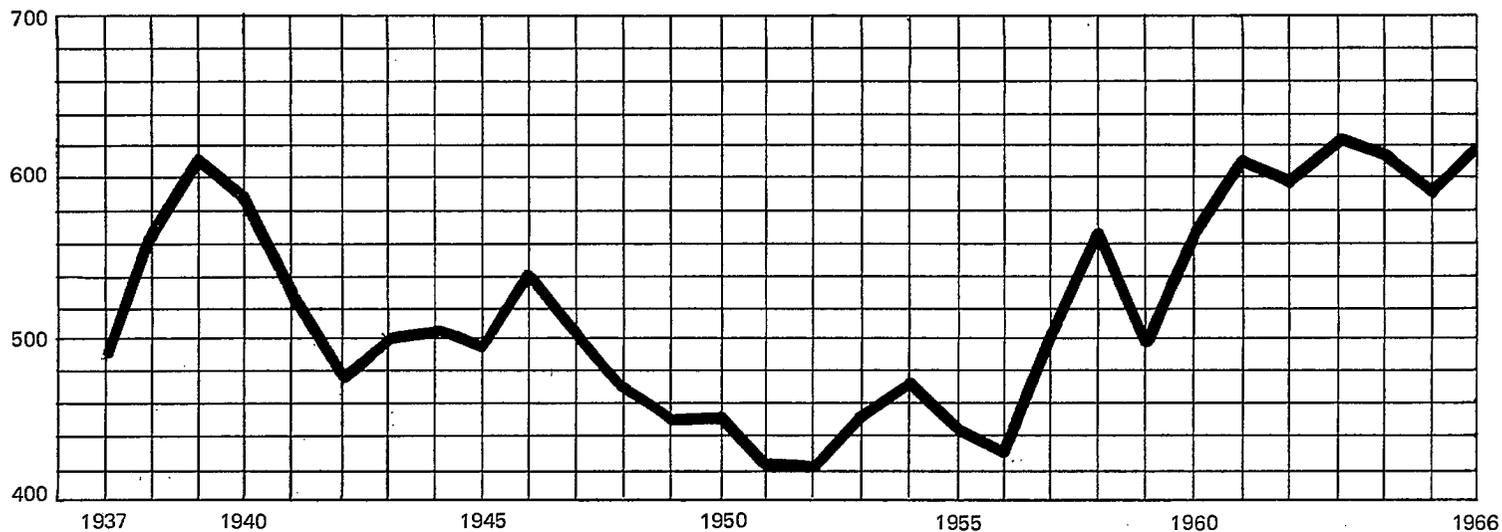
Year	Number	Rate	Per Cent of All Convictions
1901.....	185	5	4.4
1911.....	5,777	123	5.1
1921.....	51,843	927	34.2
1931.....	212,361	3,085	59.1
1941.....	369,234	4,568	62.6
1951.....	1,065,426	11,161	79.1
1961.....	2,772,386	23,642	87.2
1966.....	3,427,096	26,378	86.2

FIGURE F-1 — GRAPHIQUE F-1

CONVICTIONS FOR INDICTABLE OFFENCES  
CANADA 1937-1966  
RATES PER 100,000 POPULATION  
16 YEARS AND OLDER

CONDAMNATIONS POUR ACTES CRIMINELS  
AU CANADA, DE 1937 à 1966  
NOMBRE ET TAUX POUR 100,000 HABITANTS  
16 ANS ET PLUS

RATE  
TAUX



## The Age and Sex of Offenders

The tables and graphs in this section are based on the number of persons convicted rather than on the number of convictions, corresponding to a change in the unit of tabulation used in reporting court statistics which was introduced by the Dominion Bureau of Statistics in 1949. As some offenders account for more than one conviction, these "person" rates are somewhat lower than the rates based on convictions reported in the previous section. However, they give a more accurate account of the relative proportion of men and women of various ages in the offender population.

Table F-3 states indictable rates by sex for the years 1950 to 1966. The rates for both sexes declined from 1950 to 1956 and rose thereafter but the proportionate increase was much greater for women. Whereas the men's rate in 1966 was 28 per cent higher than their 1956 rate, the women's rate was up 193 per cent.

A crime rate index is used in Figure F-2 to indicate the relative change in rates by age as well as sex for the same period. The index expresses the rate of persons convicted for indictable offences each year as a percentage of the 1950 rate. Among women the rate has increased in all age groups. The male rate, in contrast, has declined in all but the three youngest age categories.

Table F-4 shows the very large contribution of the youngest age groups to the total crime rate.

TABLE F-3  
Persons Convicted of Indictable Offences  
Rate per 100,000 Population by Sex  
1950-1966

Year	Male	Female	Total Rate	(Total Number)
1950.....	613	42	333	(31,385)
1951.....	562	41	303	(29,980)
1952.....	562	41	304	(29,761)
1953.....	551	36	296	(29,567)
1954.....	562	36	302	(30,848)
1955.....	505	33	271	(28,273)
1956.....	482	30	258	(27,413)
1957.....	545	33	292	(31,765)
1958.....	579	37	311	(34,546)
1959.....	506	38	274	(31,092)
1960.....	566	44	307	(35,443)
1961.....	603	54	330	(38,679)
1962.....	594	53	324	(38,663)
1963.....	644	61	353	(42,914)
1964.....	612	67	340	(42,097)
1965.....	584	76	329	(41,832)
1966.....	615	88	351	(45,670)

FIGURE F-2 — GRAPHIQUE F-2

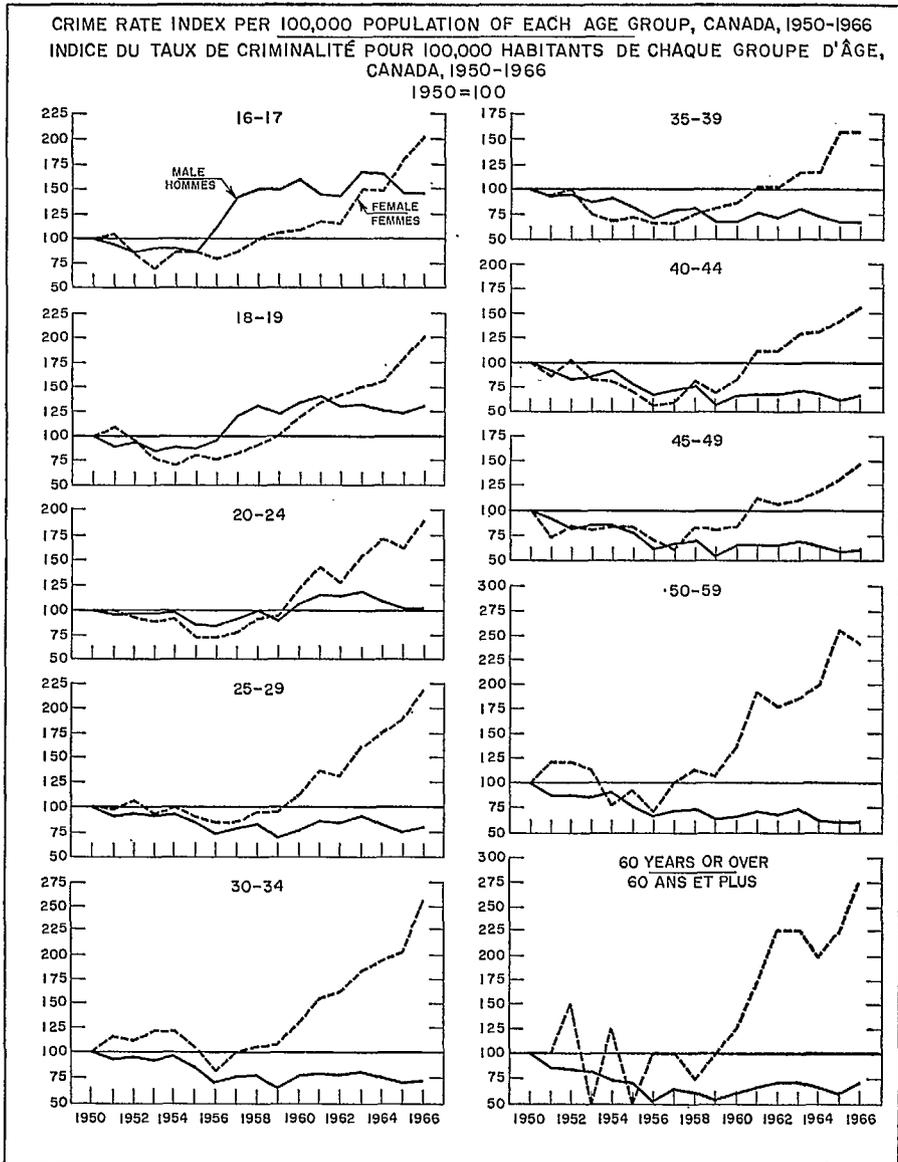


TABLE F-4

Persons Convicted of Indictable Offences by Age and Sex—1950 and 1966  
Rate per 100,000 Population

Age	Males		Females	
	1950	1966	1950	1966
16-17.....	1,267	1,861	85	172
18-19.....	1,346	1,746	88	177
20-24.....	1,147	1,173	74	140
25-29.....	870	739	53	116
30-34.....	663	480	37	95
35-39.....	543	367	45	71
40-44.....	454	299	37	58
45-49.....	360	223	31	46
50-59.....	235	146	14	34
60 years and over.....	82	59	4	11
Total.....	618	615	42	88

#### *Types of Offence*

In Figure F-3 the indictable conviction rates from 1950 to 1966 are shown for 6 classes of offences. The classification is the one long used by D.B.S. in reporting court statistics except that forgery and offences relating to currency are here included with the other non-violent property offences instead of being a separate category. The types of offences included within each of the 6 classes may be ascertained by consulting one of the annual volumes of *Statistics of Criminal and Other Offences*. The graph illustrates the large role of non-violent property crimes, theft predominantly, in the increase in indictable offence rates between 1955 and 1966.

Tables F-5 and F-6 use a crime rate index (rate of convictions as a percentage of the 1950 rate) to show, for men and women, the proportionate change in the rates in the 6 offence groups from 1950 to 1966. A significant change in the pattern of male crime emerges in the 1950's: The two main groups of Criminal Code property offences have become more dominant than in the past and the other types of offences have declined in importance.

What Table F-5 does not show is that the increase in the category "against property with violence" among males is largely accounted for by an increase in breaking and entering convictions. Although the robbery rate rose slightly, in 1966 it still accounted for only 13 per cent of males convicted of violent property crimes. Little significance should be attached to the 1966 increase in the index for malicious offences against property because the small volume of convictions in this category (2 to 3 per cent of indictable convictions) means that a few cases can make a large difference in the index.

FIGURE F-3 — GRAPHIQUE F-3

PERSONS CONVICTED BY  
CLASS OF INDICTABLE OFFENCE  
RATE PER 100,000 POPULATION  
1950-1966

NOMBRE DE PERSONNES CONDAMNÉES  
PAR CATÉGORIE DE CRIMES  
ET POUR 100,000 HABITANTS  
DE 1950 à 1966

- |                     |   |
|---------------------|---|
| ○ ○ ○ ○ ○ ○ ○ ○     | 1. Offences against the person                      |
|                     | 2. Against property with violence                   |
| - - - - -           | 3. Against property without violence                |
| - - - - -           | 4. Malicious offences against property              |
| - ○ - ○ - ○ - ○ - ○ | 5. Other Criminal Code                              |
| —————               | 6. Other Federal Statutes                           |
| ○ ○ ○ ○ ○ ○ ○ ○     | 1. Infractions contre la personne                   |
|                     | 2. Contre la propriété, avec violence               |
| - - - - -           | 3. Contre la propriété, sans violence               |
| - - - - -           | 4. Actes délictueux volontaires contre la propriété |
| - ○ - ○ - ○ - ○ - ○ | 5. Autres infractions au Code criminel              |
| —————               | 6. Autres infractions aux lois fédérales            |

RATE  
TAUX

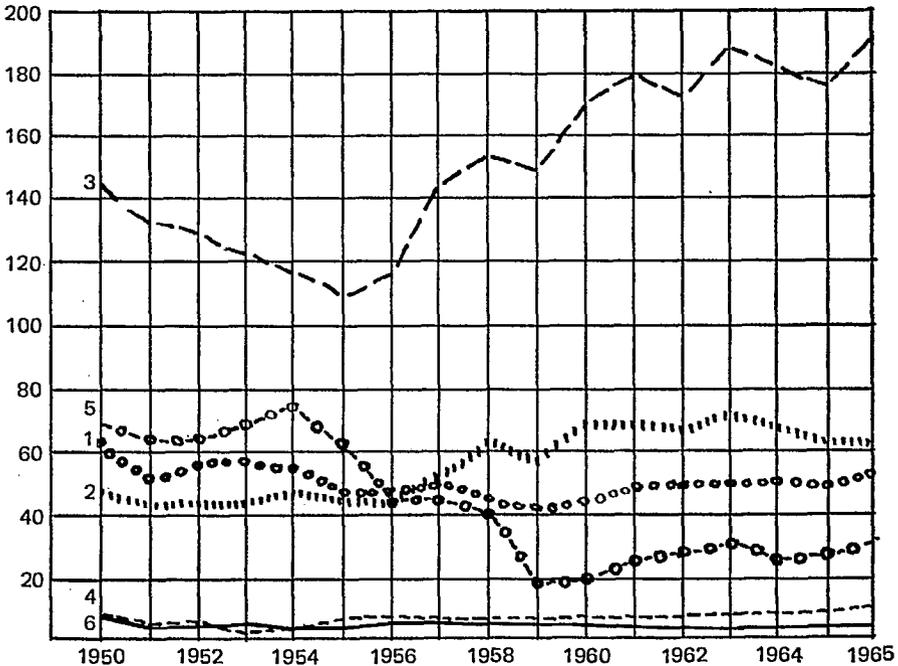


TABLE F-5

Male Crime Rate Index by Class of Offence 1950-1966  
Offence Groups

Year	Against Persons	Against Property with Violence	Against Property without Violence	Malicious Offences against Property	Other Criminal Code	Other Federal Statutes
1950.....	100	100	100	100	100	100
1951.....	85	89	95	73	93	80
1952.....	90	89	92	73	93	80
1953.....	90	91	84	40	103	60
1954.....	87	101	83	40	114	50
1955.....	75	97	77	60	93	50
1956.....	75	93	82	60	65	50
1957.....	79	111	99	67	63	60
1958.....	73	134	107	67	61	60
1959.....	64	123	103	67	27	70
1960.....	70	144	116	73	28	50
1961.....	77	145	122	87	35	50
1962.....	79	142	117	87	38	40
1963.....	82	157	126	100	46	50
1964.....	83	148	120	100	39	40
1965.....	82	138	113	100	39	40
1966.....	86	133	120	120	45	50

The female index for the two main property crimes has increased even more than the male index, reaching a level of 300 in recent years. However, the rarity on the part of women of crimes of violence against property should be emphasized. A 300 per cent increase in such crimes was brought about by an increase in rate from 1 conviction per 100,000 in 1950 to 3 convictions per 100,000 in 1965. Non-violent property crimes, as noted earlier, account for most of the overall increase in female rates.

Finally, Table F-7 shows the differences between selected age groups of men and women in their conviction rates for the 6 classes of offences in 1966. It can be seen that among women the contrast between the young and the middle-aged in both the amount and pattern of crimes is much less than it is among males. The younger males appear to be involved in an unduly large proportion of the violent crimes against both property and persons.

TABLE F-6  
Female Crime Rate Index by Class of Offence 1950-1966  
Offence Groups

Year	Against Persons	Against Property with Violence	Against Property without Violence	Malicious Offences against Property	Other Criminal Code	Other Federal Statutes
1950.....	100	100	100	100	100	100
1951.....	86	100	96	—*	100	150
1952.....	86	100	96	—	100	100
1953.....	71	100	83	—	100	100
1954.....	71	100	83	—	100	50
1955.....	57	100	78	—	87	100
1956.....	57	100	78	—	37	100
1957.....	57	100	87	—	50	100
1958.....	43	200	104	—	50	150
1959.....	57	200	109	—	37	150
1960.....	57	200	135	—	50	150
1961.....	71	200	165	—	62	150
1962.....	57	200	169	100	62	100
1963.....	57	200	204	100	100	75
1964.....	57	300	226	100	75	100
1965.....	71	300	261	100	62	100
1966.....	86	200	313	100	75	50

\* Where no index is given, rate is less than one.

TABLE F-7  
Persons Convicted of Indictable Offences by Sex for Selected Age Groups, 1966  
Rate per 100,000 Population

Offence Class.....	Age Groups			
	16-17	18-19	35-39	40-44
	Males			
Against the Person.....	100	209	80	68
Against Property with Violence.....	593	443	37	24
Against Property without Violence.....	1,032	910	188	162
Malicious Offences against Property.....	60	57	8	6
Other Criminal Code.....	75	119	48	37
Other Federal Statutes.....	1	6	5	3
	Females			
Against the Person.....	4	7	5	6
Against Property with Violence.....	15	8	1	1
Against Property without Violence.....	144	144	59	46
Malicious Offences against Property.....	1	3	1	—
Other Criminal Code.....	7	12	4	4
Other Federal Statutes.....	1	3	1	—

### *Courts: Trends in Sentencing*

Changes in the sentencing patterns of the courts might be expected on the basis of the trends toward more younger and more female offenders, and toward an increase in the relative importance of conventional property offences. Moreover, change might be expected as a response to long term changes in opinion within the correctional field in favour, among other things, of less imprisonment and greater use of probation and parole. The Criminal Code revision of 1955 would have facilitated lighter sentencing for several offences by no longer laying down minimum penalties.

The sentences given to persons convicted of indictable offences, yearly from 1950 to 1966, is represented in Figure F-4 as a proportion of the total. No striking changes are evident. The tendency to use probation has been somewhat higher since 1958 (12.5 per cent of sentences in that year but 18.7 per cent in 1966) and the proportion of gaol sentences has declined slightly since the early 1950's (38.1 per cent of sentences in 1950 compared to 29.7 per cent in 1966).

It is possible, however, that the constancy of sentencing shown in Figure F-4 is specious; that the sentencing patterns have changed but that the changes have differed by type of offence and offender in such a way that they have cancelled each other. To test one aspect of this contingency the sentencing patterns were calculated separately for five offences; theft, breaking and entering, robbery and extortion, manslaughter, and rape—and have been presented graphically in Figures F-5 to F-9.

A change in the pattern of sentencing for theft is clearly discernible in Figure F-5. Starting in 1955, the proportion of offenders sent to gaol has tended to decline and the proportion given a fine, to increase. The courts sent 44.5 per cent to gaol in 1954; 25.0 per cent in 1966. In the same years, the courts fined 18.7 per cent and 33.3 per cent. The proportion sent to penitentiary has declined from 4.8 per cent in 1955 to 1.9 per cent in 1966. No marked trend is to be seen in the use of the other sentencing choices for persons convicted of theft.

The notable change in sentences for breaking and entering (Figure F-6) has been the increased use of probation; whereas in 1950 only 9.2 per cent of persons convicted of this offence were put on probation, in 1966 the proportion was 30.4 per cent. This has meant a decline in the role of all the types of incarceration—gaol, reformatory and training school, and penitentiary.

The only trend that emerges in regard to sentencing for robbery and extortion, shown in Figure F-7, is an increase in the proportion put on probation from 3.4 per cent in 1950 to 12.0 per cent in 1966. The great majority of these offenders (82.6 per cent in 1966) are still sent to prison.

Sentencing for manslaughter (Figure F-8) shows a clear pattern of increasing severity after 1956. This may be due in part to changes in the Criminal Code which made it possible to charge motorists with criminal negligence in the operation of a motor vehicle instead of manslaughter, thus removing from the population under sentence some of the persons most likely to be dealt with leniently. It is also noteworthy that 10.7 per cent of the guilty were fined in 1960, but none in most years since 1956.

Sentencing for rape (Figure F-9) shows no pattern either of constancy or change. The only element of stability is that in most years all or most of the offenders have been sent to prison, but the length of sentences has fluctuated widely. For example, in 1957 penitentiary sentences of 2 to 5 years were given to 17.8 per cent of the offenders, while in 1964 sentences in this range were given to 40.3 per cent of the offenders. The degree of fluctuation may be attributed to the fact that rape convictions are so infrequent (ranging from 27 to 74 per year in the period under survey) that a change of a few sentences in any category is enough to alter greatly the percentages.

The difference between the sentencing patterns for these five offences is striking. Although there is a tendency to use alternatives to imprisonment more frequently for the major property offences, quite different patterns are found in sentencing for the two types of offence against the person. All that we can conclude at this point is that there is no dominant trend of change in sentencing that applies to all types of offences.

It should also be kept in mind that our classification of imprisonment by type of institution is only a crude indication of severity of sentencing. The average length of sentence within each category of imprisonment may also have changed. To test this, the reformatory sentences for breaking and entering were examined. It was found that the proportion of reformatory sentences of one year and over diminished from 63.9 per cent in 1950 to 43.8 in 1966. More marked trends in sentencing than those noted above might emerge if we had the data necessary to calculate average lengths of sentence for each offence.

FIGURE F-4 — GRAPHIQUE F-4

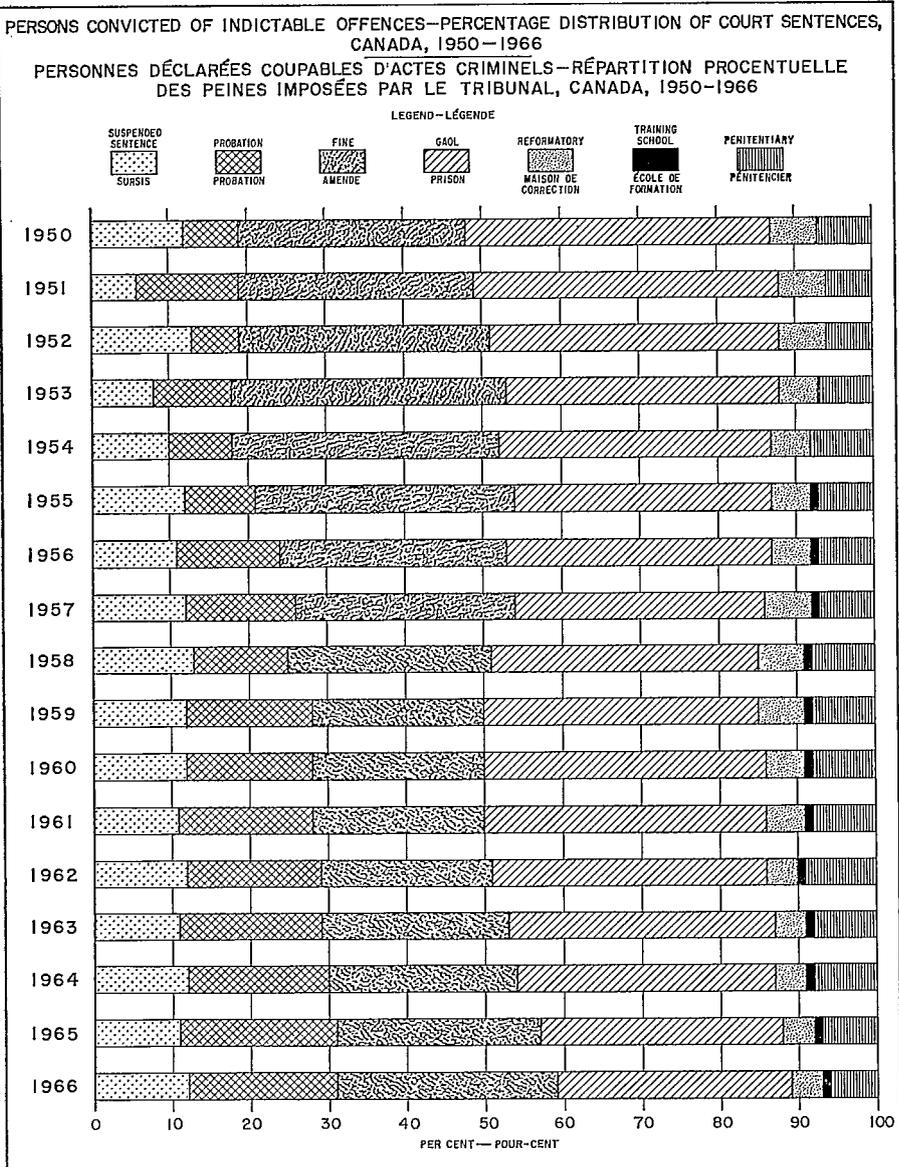


FIGURE F-5 — GRAPHIQUE F-5

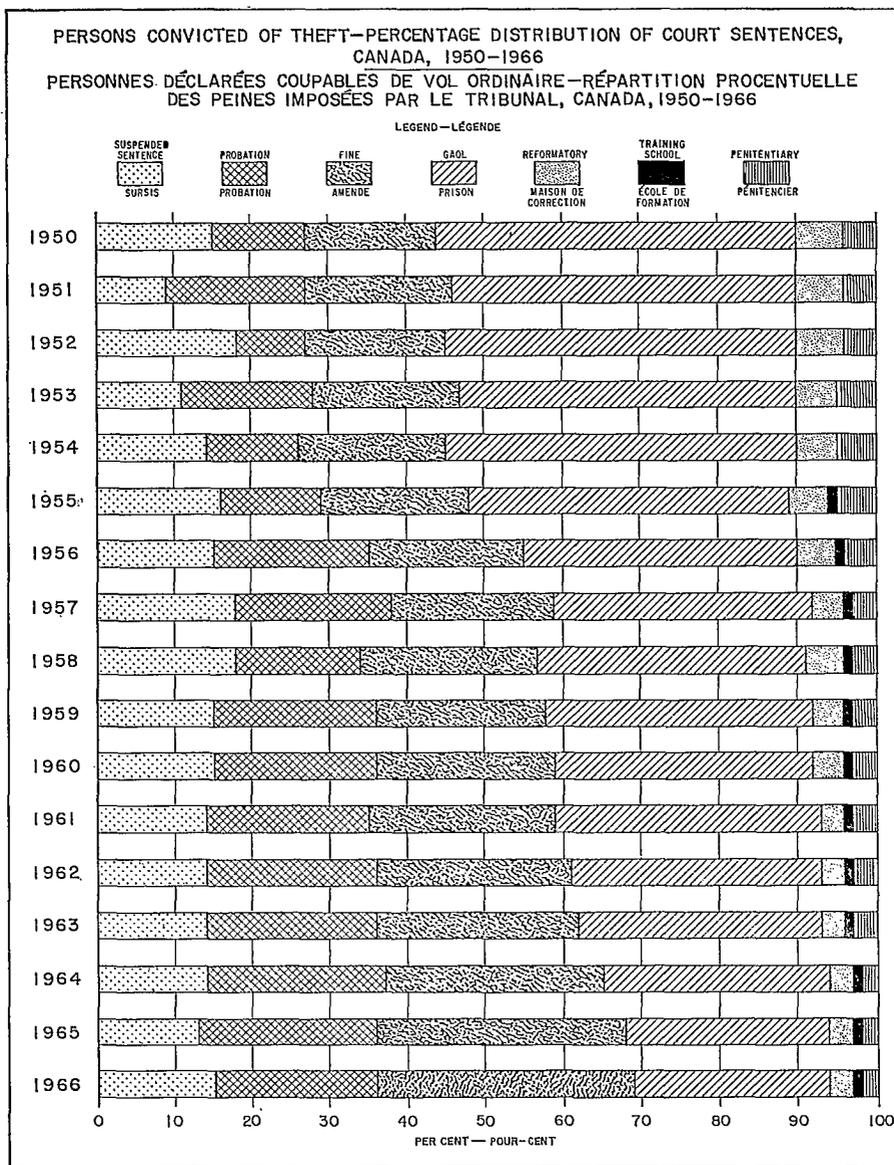


FIGURE F-6 — GRAPHIQUE F-6

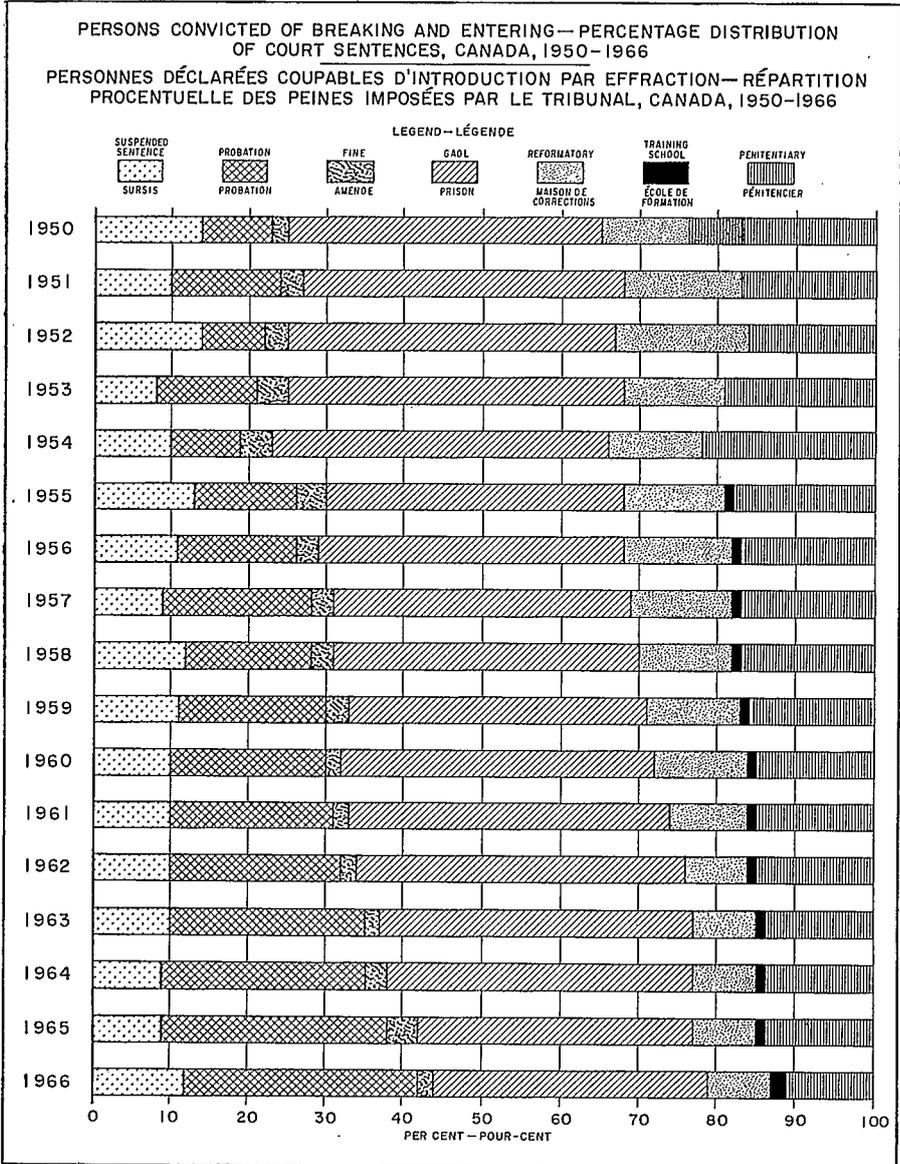


FIGURE F-7 — GRAPHIQUE F-7

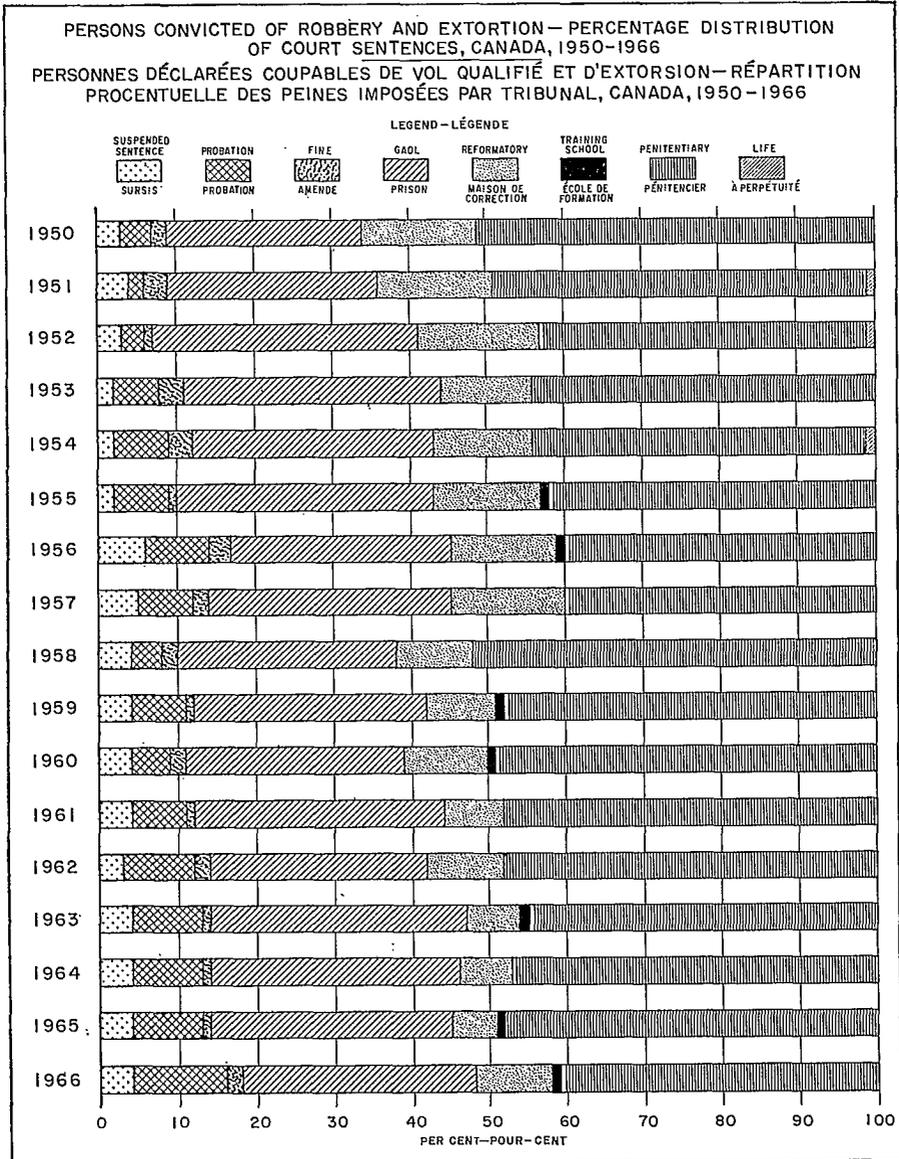


FIGURE F-8 — GRAPHIQUE F-8

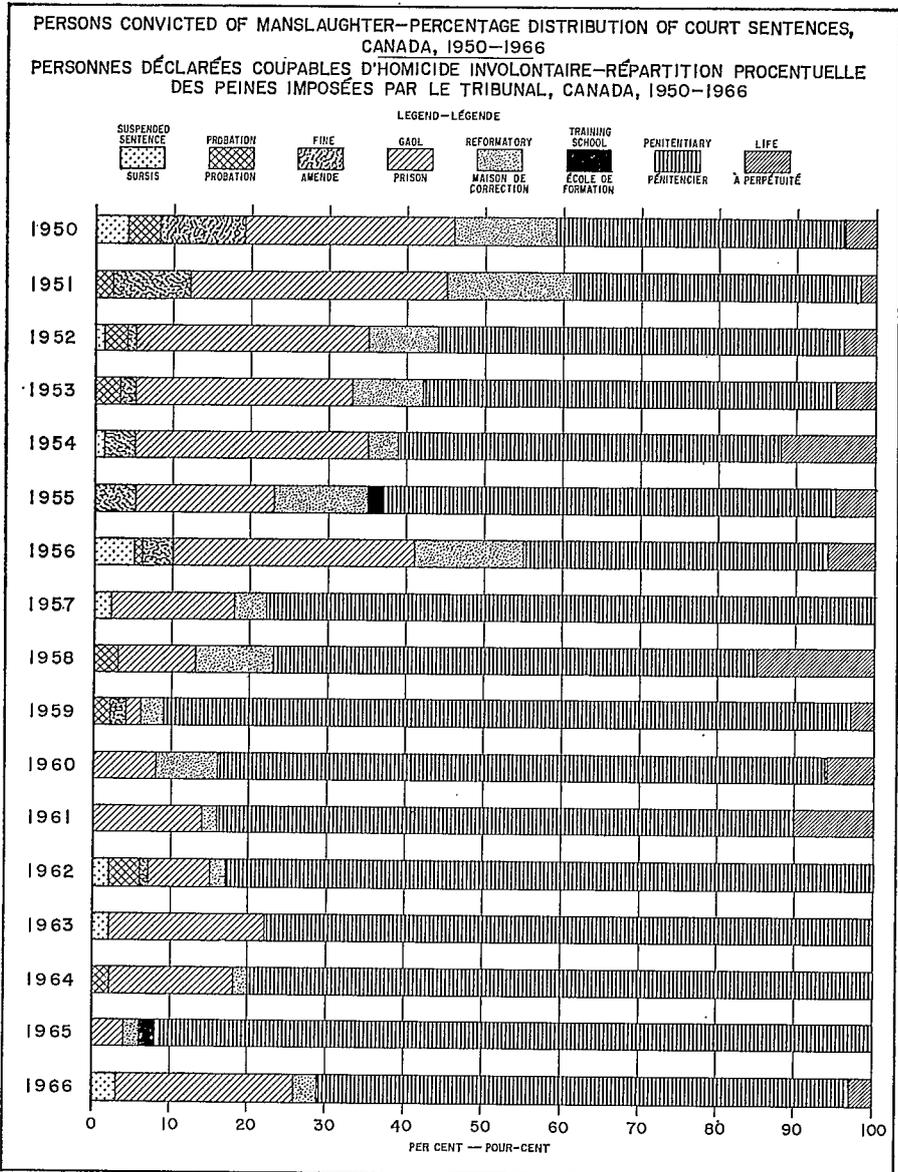
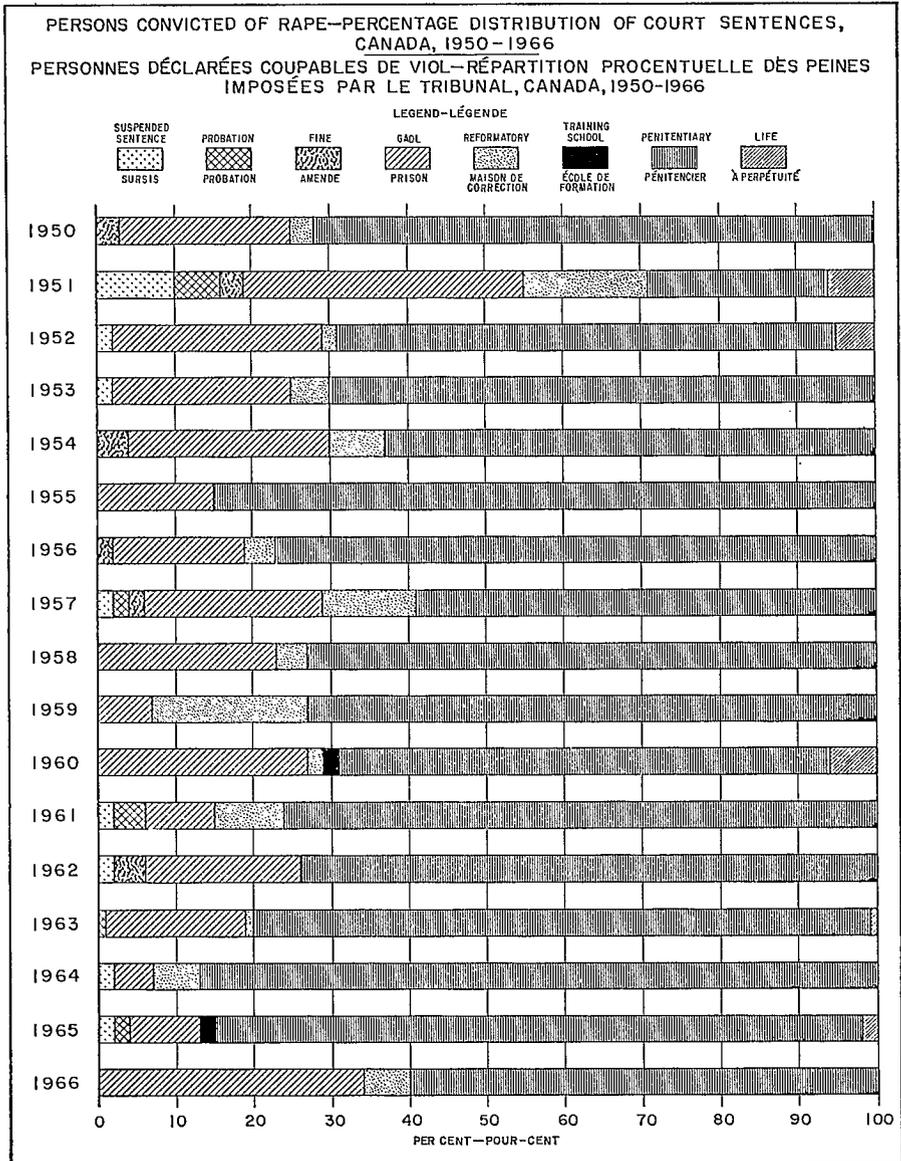


FIGURE F-9 — GRAPHIQUE F-9



### *The Population of Correctional Institutions*

The number of persons in custody in Canadian correctional institutions in a given day each year (December 31 for Quebec and March 31 for the rest of Canada) is shown in Table F-8 and Figure F-10 for the years 1950-1966. These figures, like the sentencing data, are a simple accounting and not an index of something else. Since correctional institutions at all levels place a high value on keeping track of their inmates and are required to report these statistics regularly to the government departments that administer them, the figures are probably fairly accurate. The census type figures reported here yield a measure of trends of change in the use being made of the three categories of correctional institution. They do not, of course, give us an accurate picture of the number of persons admitted to each type. The number admitted to gaols in a year greatly exceeds the number present on the census day and the number admitted to penitentiaries in a year is less than the accumulated population of any one day.

The general impression given by these statistics is, again, one of relative stability. This is in keeping with the small range of fluctuations that we have noted for the same period in the rates of persons convicted for indictable offences and in the distribution of sentences for indictable offences as a class. The one aspect that raises a question is the fairly sharp decline in the population of provincial adult institutions (gaols and reformatories) since 1963 and in training school and penitentiary populations since 1964. The change is unlikely to be a reporting artifact since it takes place in all three types; nor does it correspond with changes in conviction rates.

FIGURE F-10 — GRAPHIQUE F-10

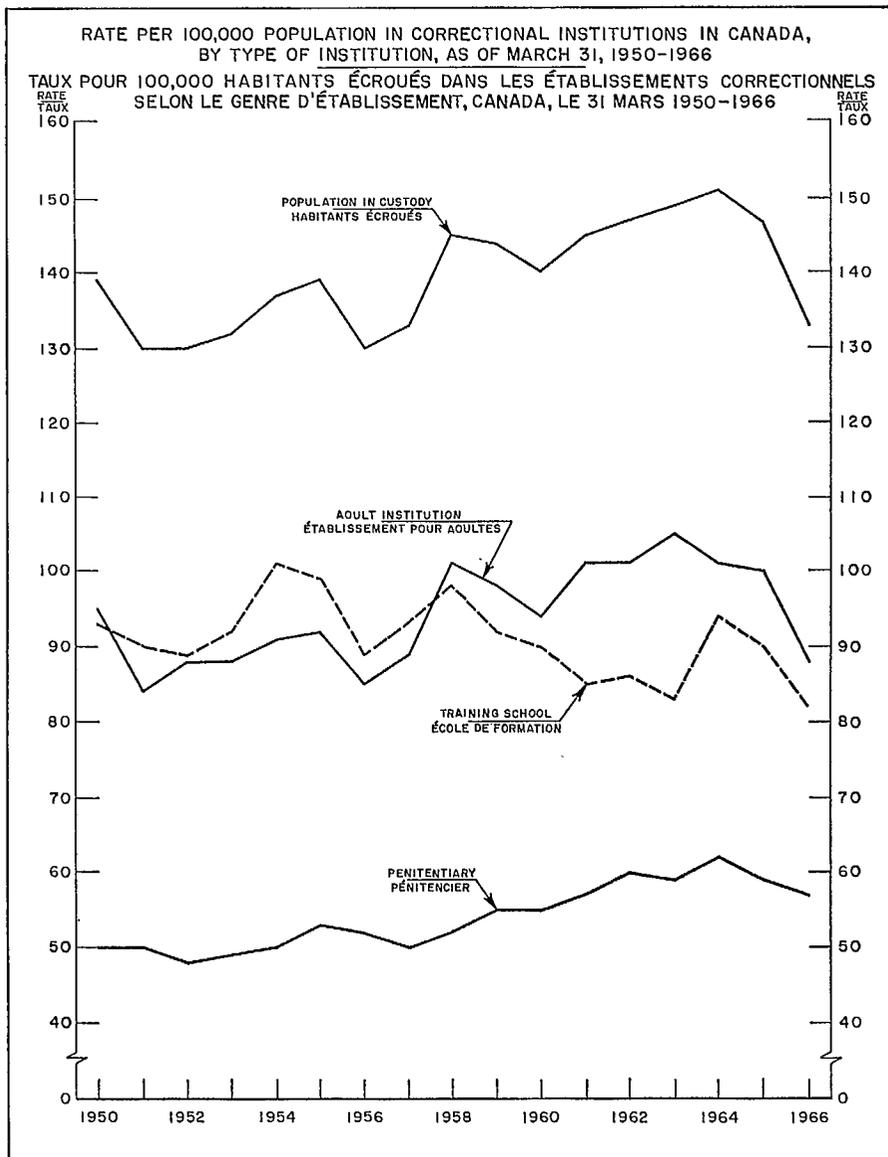


TABLE F-8

Persons in Custody in Correctional Institutions in Canada as of March 31\*, 1950-1966  
Rate per 100,000 Population

Year	Type of Institution			Total	(Number)
	Training Schools	Provincial Adult Institutions	Penitentiaries		
1950.....	93	95	50	139	(16,012)
1951.....	90	84	50	130	(15,153)
1952.....	89	88	48	130	(15,658)
1953.....	92	88	49	132	(16,246)
1954.....	101	91	50	137	(17,369)
1955.....	99	92	53	139	(18,049)
1956.....	89	85	52	130	(17,352)
1957.....	93	89	50	133	(18,301)
1958.....	98	101	52	145	(20,382)
1959.....	92	98	55	144	(20,790)
1960.....	90	94	55	140	(20,628)
1961.....	85	101	57	145	(21,960)
1962.....	86	101	60	147	(22,747)
1963.....	83	105	59	149	(23,512)
1964.....	94	101	62	151	(24,288)
1965.....	90	100	59	147	(24,179)
1966.....	82	88	57	133	(23,455)

\*Quebec figures are expressed as of December 31.

## Separate Statement by Mrs. McArton

While as a member of the Canadian Committee on Corrections I have taken active part in its work and concur fully in its report, there are nevertheless two issues which, in my opinion, do not receive in the report as adequate an examination as they merit. My point of view differs somewhat from that of other members of the Committee on these issues. The differences are not in essentials, but in emphasis and sometimes in specific application of mutually accepted principles. These two issues are the division of responsibility between the federal and provincial governments for correctional services, and the division of responsibility between the criminal justice system and other available measures for "social defence".

It also appears to me that there are aspects of the present correctional services in Canada concerning which more specific evaluative comment than is contained in the report would be useful.

### *Division of Responsibility between Federal and Provincial Jurisdictions*

Reports following two previous federal studies, those of the Archambault Commission and the Fauteux Committee, made recommendations in the direction of extending the area of federal jurisdiction over correctional services. As Chapter 14 of the present report notes, the Fauteux Report recommended that the federal government assume responsibility for all prisoners sentenced to a term of more than one year, and also that parole of prisoners from both federal and provincial institutions be under the jurisdiction of the National Parole Board.

The present report recommends that the division of responsibility for prison sentences remain at its present point, with provinces retaining responsibility for offenders sentenced for periods up to two years, and also that the provinces accept responsibility for the parole of prisoners from provincial institutions.

The logical basis for these recommendations is apparent, I believe, only in the light of certain other recommendations in this report, as well as certain developments which have taken place in Canada since the time the Fauteux Committee reported.

The concept of parole held by the Canadian Committee on Corrections is that parole should form an integral part of a normal prison sentence. Since the correctional aim is to alter the offender's behaviour *when he is in the outside community*, a gradual release from imprisonment with a period of

partial control, together with active help and guidance, *while he is living in the community*, is as logical and necessary a step as was the original removal to a situation of direct physical control.

If this concept of the normal way of serving a sentence is implemented, a sentence of up to two years in length would very seldom involve a period longer than a year actually spent in prison. This means that from the standpoint of prison planning, the provinces would be freed to concentrate their efforts on developing institutions for short-term prisoners, with an emphasis on use of educational, health and welfare resources in the outside community which would continue to be available to the offender after his release on parole. The federal services could concentrate on institutions and services for those offenders who present a greater danger to the community, and therefore require longer periods, and frequently a greater degree, of control. The Committee's recommendation concerning division of responsibility for parole services, so that the jurisdiction having responsibility for correctional treatment of the offender within the institution will have it also during the portion of his sentence spent outside the institution, is logically related to this concept.

It should of course be noted that the administrative unity of a single jurisdiction is valuable only in strengthening the potential for continuity, consistency and appropriate flexibility in treatment of each offender. Its purpose will be achieved only if policies, procedures and working relationships within a jurisdiction, whether federal or provincial, make this continuity, flexibility and consistency actual.

It should also be noted, as it is in Chapter 14 of this report, that a division according to length of sentence is only one possible method of determining the appropriate division of responsibility between the federal government and the provinces for correctional services. It is an arbitrary division, and one which offers only a rough measurement of relevant factors. Because of the complexity of the factors which have to be taken into consideration in determining sentence, as discussed in Chapter 11, and the similar complexity of factors which would have to be taken into consideration by an alternative body such as a diagnostic or classification board, there are serious difficulties in arriving at any general criteria. No better criteria are evident to the Committee at this time.

Any time measurement, however, is relative to the conditions under which it is served. Both the Archambault and Fauteux Reports strongly criticized Canadian sentencing practices in terms of excessive length of sentence. They pointed out both the deteriorating effect upon the prisoner which commonly follows the long periods spent in the traditional prison, and secondarily the expense of this form of treatment to the community. In these respects it is evident that the Canadian Committee on Corrections agrees with its predecessors.

However, there have been significant developments in the correctional field in Canada since the publication of the two previous reports. Length of time served within prisons has been reduced, both by provisions for remission

of a portion of the sentence as provided in the Penitentiaries Act revision of 1961, and by the development of Canada's parole system. In addition, there have been significant and encouraging developments in probation services, which have meant that some offenders have not been sent to prison who otherwise would have gone there, although these developments have been somewhat uneven as among the provinces. Development of more minimum security facilities, work camps, and resources such as pre-release and after-care hostels, have further affected the conditions under which some prisoners serve their sentences or portions thereof. Recommendations made in this report for more extensive use of these resources and for development of facilities for part-time imprisonment for certain offenders, will, if implemented, also change the situation materially.

As noted in Chapter 14, there are already certain exceptions to the use of the two year sentence period as sole criterion to determine the jurisdiction responsible for a particular offender. Chapter 14 also recommends the removal of certain anomalies in the present situation; if these recommendations are adopted there will be further exceptions. In my opinion the specific anomalies quoted in Chapter 14 should be considered merely as examples of situations requiring a greater flexibility of decision as to the appropriate jurisdiction to be responsible for a particular offender.

There are many aspects of government and government services which are presently the subject of discussion between the federal government and the provinces, in order that there can be joint planning in areas of mutual concern and that the respective roles of each jurisdiction may be appropriately defined. I suggest that there is need for such discussions in relation to the correctional services, and that through such discussions it is quite possible that guide lines will emerge which will lead to a division of responsibility different from the present one. As stated previously, however, an improved basis for such division is not at this time apparent to the Committee.

It is also evident to an observer of the Canadian political scene that while there was a period in history of Canadian Confederation during which the responsibilities of the federal government tended to increase in relation to that of the provinces, an opposite trend is presently apparent. The growing importance of organized educational, health and welfare services from the proportionate position they occupied at the time of Confederation, is an important factor in this trend. Chapter 14 points out that as an emphasis on correction replaces an emphasis on punishment, a close relationship between correctional services and these other community services becomes increasingly necessary.

Canada's federalism reflects certain facts: that Canada is a large country, containing within its borders regions which differ from one another in geography, history, cultural and ethnic characteristics and economic conditions. This means that in establishing an integrated system of corrections, and an integrated criminal justice system of which the corrections services form a part, Canada faces certain problems which would not be faced by a small, comparatively homogeneous country, or even by a more populous

but less geographically or culturally diverse country. Both the Archambault Commission and the Fauteux Committee were conscious of the values of an integrated and consistent system of corrections and tended to see the most rapid and effective method of achieving this aim as being the extension of direct jurisdiction of the central government. The present Committee however, perhaps because it has had a much wider frame of reference than had been given to its predecessors, has been keenly conscious of the fact that Canada's federal type of government affects all aspects of the criminal justice system. While high court judges are federally appointed, the administration of the courts and appointment of those members of the judiciary who hear the large majority of criminal cases are provincial. With the exception of the Royal Canadian Mounted Police, police forces are under provincial or local jurisdiction. Lawyers are called to the Bar of the province in which they practice. Probation services and general health, welfare and education services which bear upon corrections are under the jurisdiction of the provinces.

On the other hand, in assigning to the central government responsibility for the criminal law, the Fathers of Confederation endeavoured to ensure that any citizen of Canada should be subject to the same laws governing criminally prohibited conduct wherever he lives or travels within the borders of the country. The increasing mobility of the population, associated with the economic interdependence of different sections of the country and with general technological advances, together with the emergence of a type of organized criminal activity which operates across international as well as interprovincial boundaries, would appear to emphasize rather than detract from the wisdom of this provision. I wish to record emphatically my opinion that it would be most unfortunate for all Canadians if a strengthened role for the provinces in corrections should result in fragmentation of the Canadian system of criminal justice. It may be useful to note here that a comment frequently volunteered to Committee members during their travels and discussions in the United States, concerned Canada's good fortune in possessing a uniform criminal code, which the United States does not enjoy.

The position reflected in this Committee's report is based on the belief that achieving integration through centralizing all relevant services under the direct administration of the federal government is not possible for Canada and is incompatible with our system of government. Therefore the Committee accepts that the desired integration must be sought and achieved through cooperation among the various levels of government. Such a position does not, however, undervalue the importance of the responsibility of the federal government. On the contrary, an active and statesmanlike role by the Government of Canada is essential if the goal of equal justice for all Canadian citizens, which is such an important constituent in the "peace, order and good government" of Canada, is to be achieved.

The Committee's report suggests that the responsibility of the central government does not end with ensuring that services under its direct control are well administered and effective. It has a responsibility, which

in many respects is more difficult and complex, to ensure establishment of an adequate minimum level of correctional services throughout Canada, while encouraging variety and experiment. The report suggests that this responsibility can be carried out through appropriate fiscal arrangements, and through promoting co-operative working relationships and the interchange of ideas and experience.

It is frequently assumed that it would be preferable if responsibility for corrections lay either entirely with the federal government, or entirely with the provinces. This is suggested in Chapter 14 of the report. I would suggest however that there are advantages as well as disadvantages in a divided jurisdictional responsibility for corrections. Variety in jurisdictions usually means that different governments select different aspects of the system for priority and emphasis, and thus may develop these areas to a level higher than the average found elsewhere. Progress often comes through such differences. Moreover within any jurisdiction political winds change from time to time, leadership changes, and the quality of service fluctuates. The visible presence of a comparable second service within each province gives both citizens and governments an opportunity to assess and compare the quality of both services, and provides a source of stimulation to the personnel responsible for each service.

In my opinion, there is a widespread tendency to over-emphasize the importance of administrative unity in achieving integrated and effective services. Interrelationship and interdependence in matters affecting the social well-being of people are so great that there is no conceivable administrative umbrella under which all related services can be gathered. In corrections this is evident from an examination of the wide variety of administrative structures existing in different provinces. For instance, a province may have a separate Department of Corrections, or corrections services may be within a Department of Justice or of the Attorney-General, or within a Department of Welfare Services. Some provinces stress integration of all adult correctional services, whether institutional or community-based; others have an administrative division between reform institutions and adult probation and parole. Some integrate administration of adult and juvenile correctional services; in others the adult programs are separate and the juvenile program integrated with other child welfare services. Such differences reflect not only different local conditions in geography, size of population, and stage of program development, but also different answers to the question, "Integration with what?"

Further, it should be noted that as the size of any administrative system grows, it is necessary to break the system down again into smaller units for practical administrative purposes. A closer administrative relationship with one part of the system has to be at the expense of greater administrative distance from another part.

For these reasons, it appears to me that effort sometimes expended in the search for a perfect administrative structure would often be more wisely invested in searching out ways to develop open communication and co-operative

working relationships between all parts of the system and with related systems. Without such communication and co-operation, no administrative structure can work well. With them, any one of several different structures can work effectively.

For these same reasons, it is my opinion that specific recommendations concerning organizational structures or administrative divisions of responsibility, such as are made in Chapter 14, Chapter 22, and Chapter 25 of this report, should be regarded primarily as examples or suggestions. Details of administrative structure must be worked out by the governments responsible and may require attention to factors of which this Committee is not fully aware. It is my hope, that these specifics will be worked out in ways which will best promote the purposes and accord with the principles discussed in these chapters and throughout the report.

### *Evaluation of Existing Services*

If the overall responsibility of the Government of Canada has been correctly stated, it is important that the government have as complete and accurate an overall view as possible of the present state of corrections in Canada. The Committee's report, I believe, contains information and comment which contributes significantly to such an overview. The Committee has in general however, avoided overall evaluative comment concerning existing services.

There is no question that broad general evaluations are difficult to make with accuracy and fairness. Nevertheless, members of the Committee have had unusual opportunities for observation and comparison. Like other members of the Committee I have formed from these certain overall impressions. In this statement I, of course, speak only for myself, and I am fully conscious of the degree to which my judgment is subject to human error. Nevertheless, I intend to state these impressions.

Reformers in Canada have evidenced a persistent tendency to draw public attention to the need for change in Canada's system of criminal justice by comparing it unfavorably with the systems of other countries. Such wholesale comparisons are almost inevitably misleading and inaccurate. A country such as Sweden, for instance, has achieved a well-planned, logical and progressive system of criminal justice which is consistent and well-integrated both internally and with other, broader, social legislation and resources. There is no question that, in comparison with such a country, Canada has to pay a price in both administrative convenience and overall consistency, for its geographic vastness and cultural variety. Comparisons are frequently made with our neighboring country, the United States, and such comparisons are nearly always made with the best services existing there. It is of course wise that we should examine the best, since it is from this that we have most to learn, but it would also be wise to remember that the worst, as well as the best, in the United States tends to be more extreme than in Canada. I suggest that

Canadians would be wise to pay more attention to the wide range of difference in services existing within Canada. From the opportunities for observation and study which I have had as a member of the Committee, I would assert confidently that, whatever may have been the situation at the time of earlier reports, in 1969 the difference between the best and the worst within Canada is much greater than between the "average" in Canada and the "average" in any other country whose system we have examined.

There have been significant advances in the services under the direct administration of the Government of Canada since the publication of the Fauteux Report.

In the penitentiary service, the proportion of inmates held under conditions of medium or minimum security, with consequently a closer approximation to normal community living, has increased substantially. Size of individual institutions has been reduced, below and usually well below the maximum of 600 suggested by the Fauteux Committee. Classification has improved, and there is greater specialization in the programs of different institutions. Staff salaries and recruitment standards have improved, and staff training facilities extended, so that all staff having direct relationship to inmates now receive at least a basic training, and more advanced courses are given for those being promoted in the service. Many traditional petty restrictions on inmates, which had an effect opposite to rehabilitative, have been removed.

Greater variety and modernization is evident in educational and work programs for inmates; there have been adjustments in prison pay, and development in programs of sports, recreation, and informal education.

In visiting newly-constructed medium security institutions at Cowansville and Matsqui, I was impressed with the fact that necessary security provisions had been built in ways which were much less oppressive psychologically than the traditional prison bars; for instance, covered walkways sided with semiopen brickwork, and windows using strong mesh screening and concrete louvres. A decent respect for privacy was also evident — something which unfortunately cannot be said of many local jails.

I was well impressed by the active program of informal education and recreation which has been developed at Joyceville, for example, and by the overall educational focus in the program of the minimum security institution at William Head. The visiting facilities at the latter institution, both for indoor visiting and the outdoor facilities for family picnics, were the most attractive and informal I have seen anywhere.

These reforms represent substantial achievement. What the public does not fully realize, however, is that reforms which have taken place in penal institutions in recent years have in the main served only to offset the most harmful and deteriorating effects of prolonged imprisonment. The most difficult task, that of transforming prisons into institutions which will be positively effective in their announced purpose of "correcting" the attitudes and behaviour of the offender, is for the most part still ahead for the Canadian Penitentiary Service, as for other prison systems throughout the world.

In my opinion, the degree of success which the penitentiary service will achieve in meeting this next challenge will be heavily dependent on its success in attracting and making effective use of able and creative people from among the treatment professions. These two things—recruitment and effective use—are closely related, since able and creative people in any profession choose employment which they believe will offer scope and freedom, and will enable them to make full use of their skills to produce positive results. While numbers of professional staff in the penitentiary service have increased substantially since the time of the Fauteux report, it is my impression that in the main they have been grafted somewhat tentatively onto the main plant. They are not being used as fully as they might be in affecting the total program in a therapeutic direction.

Responsibility for this is undoubtedly not one-sided. It has been traditional in prison services to place heavy reliance on the use of authority, producing an outward conformity which unfortunately has usually disappeared promptly after the external pressures have been withdrawn. It has been traditional in the treatment professions, pursuing inner change, to place reliance on free expression of feelings and on the individual's right to self-determination; often any use of authority has been disavowed. Thus, alliances between the two groups have typically been uneasy, particularly in the initial stages.

Changes which are taking place in both groups, however, are producing brighter prospects for future collaboration. The changes which I see as relevant within the treatment professions are, first, an increased tendency to make use of confrontation and to define the therapist's own position in relation to certain choices which face the client or patient, and second, a decreased emphasis on treatment of the individual through a direct relationship with the professional, in favor of increased attention to the effect of the total environment. In a correctional institution this means that the professional spends a considerable amount of his time helping non-professional staff in their work with offenders. It means also that he accepts rather than ignores the significance which inmates have for one another, and encourage and helps them to work together towards their mutual rehabilitation. A group of offenders, like any other group of people, contains within itself positive personal characteristics and insights which can help its members in solving their personal problems.

Beginnings have been made within the penitentiary service in the use of these methods, specifically in the Pilot Treatment project in the institution for drug-addicted offenders at Matsqui. The service is also developing an experimental program in a Special Correctional Unit for offenders who have proved particularly difficult and intractable within regular institutions. In my opinion, the service deserves credit for attempting to organize a program for this group, since the type of offender for whom it is designed spends a great deal of his time, if in a regular institution, in isolation and therefore in idleness. However, there is a good deal of questioning and controversy about selection and treatment methods in this program, and it is to be hoped that results will be documented and examined, as is being done in the Matsqui

project. It must be admitted that the treatment professions have been less than spectacular in their success with this type of offender. Nevertheless, there have been recent breakthroughs, and it is to be hoped that full use will be made of available professional expertise in what could become a valuable contribution to correctional experience.

Plans now beginning to be implemented within the penitentiary system for special Diagnostic and Reception Centres, Psychiatric Treatment Units, and Pre-Release Hostels, will also make increased demands for professional expertise.

Development of National Parole Service, which followed publication of the Fauteux Report, is discussed and evaluated in Chapter 18 of this report. Achievements during the twelve-year period have been substantial. Recommendations are made in the report for certain changes in procedure, and the need to extend parole or statutory conditional release to a wider group of offenders is discussed. I have a few comments to add, which relate to staffing and to the desirability of certain additional resources.

In the development of any new service, difficult choices have to be made as to timing and rate of expansion. On the one hand, it is desirable to develop such a necessary service as rapidly as possible, but this may often be at the expense of quality, particularly when staff of desired qualifications is in short supply. The alternative is to build soundly but more slowly, and to ensure that key positions are filled with capable and well qualified personnel. The National Parole Service has on the whole followed the latter option. In my opinion, this was a wise choice, since I believe it is better to build a foundation carefully; expansion may then be more rapid in later stages.

If the major transfer of emphasis recommended in our report is to be achieved, from traditional prisons to community centred services, the National Parole Service is on the verge of a period of rapid expansion. As has been noted in our report, it has only been possible to achieve the degree of growth to date because the parole service has made extensive use of voluntary agencies and of staffs of provincial services. Such cooperation will still be needed, and our report recommends continuance of this policy. Nevertheless, as parole becomes accepted as an integral part of correctional services, as basic and essential as prisons, the proportionate importance of directly-administered public services may be expected to increase.

Like the prison services, community-centred correctional services such as parole must be constantly alert to screen and eliminate from their staffs persons with actively harmful, anti-rehabilitative attitudes: persons who delight in the authority they hold and use it with petty tyranny or even sadism; persons who are corruptible; persons who are vague, indecisive and inconsistent in use of their authority, thus tempting offenders to further offences. Elimination of such people is only a beginning, since clearly it is necessary to develop staff who have not merely negative qualifications, but who are actively helpful and effective.

As the proportionate size and importance of community-centred correctional services grows, it will clearly be no more possible to staff such services entirely with professionally-qualified people than it is to staff prisons in this way (or hospitals, or welfare agencies). Development of other levels and types of education relevant to direct work with people in trouble has been noted in our report, and should be of assistance at this stage. Considerable responsibility will remain with the parole service, however, for both selection and in-training of staff. It should be remembered that staffs of such community services as parole operate under less direct scrutiny of their daily work by senior staff, than is true in prisons.

I wish to highlight also, in their direct relevance to the parole service, certain comments made in our report concerning need for additional facilities such as hostels, approved boarding homes, attendance centres and drop-in centres. While I do not believe that such facilities must necessarily be developed by the parole service directly, I nevertheless believe that an expanded use of parole will require their availability if it is to be successful.

While there is now wide acceptance of the fact that a prison system needs to include a range of facilities, varying from those closely related to normal community living to those operating within conditions of maximum physical security, I think there is less clear realization that a range in proportion of control and freedom is also required in community-centred services such as parole.

As discussed in relation to the penitentiary service, the traditional approach in corrections has been characterized by over-reliance on authority and control, while the newer professionals have sometimes tended to disavow any need for these. I believe that some re-adjustments are required from both groups. Unless the shift of emphasis to community-central treatment which our Committee recommends is accompanied by recognition of the range in degree of control and freedom appropriate for each offender at a specific time, there will, I believe, be an inevitable backlash towards more traditional correctional methods.

This means, I suggest, that for some parolees or conditional releasees there will be need for required approval of living arrangements, and attendance for specific periods at part-time attendance centres. For others, a more informal kind of help through availability of a drop-in centre would be appropriate.

Like many newer developments in corrections, the use of attendance centres has been pioneered mainly in relation to youthful offenders. With other members of the Committee I was privileged to observe two of these in operation in California. It is important, obviously, that attendance at such centres not be used merely as a control requirement, but for positive support to the offender's efforts towards a law-abiding life.

Committee members were permitted, when visiting Oakalla prison in British Columbia, to take part in discussion with a group of inmates who were drug-addicted, and who were being prepared, in a special small living

unit developed within the prison, for release on parole. I was struck by a comment by one member of the group, who said that the regular group discussions taking place within the unit had been very significant for him, but who questioned his own ability to withstand the pressures of community living when such support was withdrawn. I think that, as a community, we should listen to him.

In view of the fact that this report differs from two preceding federal reports in suggesting a greater emphasis on services under the jurisdiction of the provinces, it appears to me that in addition to comment on the federal services, some plain words are necessary concerning the present state of provincial and local services. The Canadian Committee on Corrections, like its two predecessors, was a federally appointed committee. In order to discharge its task it was necessary to enlist the co-operation of the provinces, and without exception, such co-operation has been courteously extended. In such circumstances, being in a sense a federal representative and a guest, one is bound to feel some inhibition about direct public criticism of provincial and local services. Despite these feelings however, I find it necessary to state flatly my opinion that in Canada provincial and local services are on the whole considerably behind federal services in level of development.

Being scattered and more numerous, local lock-ups and provincial institutions are less visible to public scrutiny than the federal penitentiaries. For instance, certain conditions in older maximum security penitentiaries, particularly St. Vincent de Paul, have been widely reported and have aroused justifiable public indignation. Yet nothing in this or any other federal institution which I have seen is in my opinion as bad as conditions existing in certain local and provincial jails, which, for the most part, house less serious offenders and include accused later found not guilty.

There are jails still in use in Canada which could have been taken physically out of a novel by Dickens. Many institutions in the Maritimes, for instance, were built in the early 1900's or earlier; in some the date of construction has been listed as "not known". Similar institutions are still in use in other provinces. Yet perhaps even more disturbing is the fact that in various parts of Canada certain institutions of recent construction give physical expression to penal concepts which have no place in an effective modern correctional system. To my shame, I must admit that one of the most striking examples of the latter is found in my home city of Winnipeg. Recently constructed detention quarters, housing persons still awaiting trial, consist of barred cages, furnished with several metal bunks (many of them without mattresses), benches and a table for eating purposes, and an open toilet situated a few feet away from the latter. Money has not been spared, however, on expensive electronic locking devices which are far in excess of security requirements for the majority of people housed in these quarters.

Certainly there are individual institutions in many of the provinces which are of excellent quality. Examples which come to mind are the Correctional Centre at Regina, Saskatchewan, the Correctional Institution at Haney, British Columbia, and the Vanier Centre for Women in Ontario. The Oak

Ridge Unit of the Ontario Hospital at Penetanguishene has developed, even in a mediocre building, an outstanding program of treatment for offenders who suffer varying degrees and kinds of mental disorder.

Often, wide variations in quality of institutions exist within the same province. At The Pas, Manitoba, a small institution for women offenders serving short terms, which is extremely simple and inexpensive in construction and unsophisticated in program and staffing, nevertheless evidenced the common sense and humanity which I found so lacking in the detention quarters in Winnipeg's "Public Safety Building".

British Columbia is a province which has pioneered many fine correctional programs, particularly for young offenders. Yet it still maintains, at Oakalla, an old institution of over a thousand inmates, including many still awaiting trial.

Quebec holds over 1,200 inmates in the Montreal Men's Jail ("Bordeaux Jail"). I was appalled at this institution. Yet a few miles away in the same province there is an institution for youthful offenders, at Boscoville, which impressed me as much as anything seen in Canada or abroad. The unique blend of education and therapy in this institution's program derives from a European tradition and has a great deal to teach English-speaking Canada and other parts of North America.

It must be emphasized, however, that the achievements of such individual institutions are unfortunately not representative of the general level. It ought to be a matter of grave concern for all Canadians that some of our worst penal institutions are local lock-ups in which first or minor offenders and persons later found not guilty of the charges against them, are held. It is by no means unusual for individuals to be held in such quarters for weeks or even months, in complete idleness, under conditions which would cause deterioration in the most mentally, physically and socially healthy individual. Staffs of these locks-up are nearly always completely untrained, and medical, psychiatric and social services entirely lacking.

Because federal prisoners are held for longer terms, and thus the effect of the federal institutions is cumulative over a longer period of time, there must certainly be no slackening of efforts to ensure that their programs are of high quality. But first arrest and early incarceration are typically times of crisis, and it is almost incredible that society can be so careless about what happens at this important stage of a process intended to be "correctional".

Our report contains several recommendations concerning steps which can be taken to change this situation. Reform of pre-trial procedures can ensure that people who do not have to be held in custody at this stage are not held in custody; thus the size of the problem and the expense of meeting it can be reduced. For those who must be held before trial, and for others in the first weeks of incarceration, Chapter 15 of the report discusses how present facilities for human storage can be replaced by centres for diagnosis, classification and beginning treatment. Like other Committee members, I see these reforms as urgent and having highest priority.

Development of probation services is discussed in Chapter 16 of this report. The developments which have taken place are of course attributable to the provinces responsible, and in the past twelve years have been substantial. Nevertheless, there is a wide range of difference in the availability and quality of probation services as between provinces, and sometimes between different regions within a province. The large and important province of Ontario has achieved considerable success in the rapid development of necessary services without sacrifice of essential quality. In the equally large and important province of Quebec, however, such development is only in its beginning stages. Nevertheless, recent action by the responsible government department in that province, as well as statements contained in Volume 1 of the report of the Commission of Enquiry into the Administration of Justice on Criminal and Penal Matters in Quebec, suggest that significant developments may be looked for in Quebec in the near future.

Comments which have been made concerning the staffing and the necessary supporting services for effective administration of a parole program have equal relevance to probation. In fact, the requirements of the two programs are so similar that in some provinces, and in sparsely settled regions of other provinces, they will be administered by the same staff, and some of the same facilities could be used in both programs.

#### *Comparative Responsibilities of the Criminal Justice System and other Social Defence Measures*

Having discussed the division of responsibility in corrections between the federal government and the provinces in somewhat more detail than is contained in the report, and having made certain evaluative comments and suggestions related to services under both jurisdictions, I have a few further comments regarding the appropriate responsibility to be taken by the criminal justice system, in comparison with responsibility which might in my opinion be taken more appropriately by other social institutions, for the general purpose sometimes described as "social defence".

The basic function of the criminal justice system in society, and the general area which should be its concern, is set out in Chapter 2 of the Committee's report. As a Committee member, I am proud of this statement. I consider it to be of encouraging significance in relation to the type of unity envisioned in the report's title, that such consensus has been achieved by a committee representing varied backgrounds and points of view. My comments therefore are merely to develop somewhat more fully what I see as the basis for this position, and to discuss in a little greater detail some applications of it.

The system of criminal justice cannot in my view be adequately understood if it is considered only as a planned social institution which has developed on a logical basis. I suggest that it has the same roots as had the "taboo" provisions of primitive societies. It is a way in which the ordinary members

of society have projected, institutionalized, and attempted to separate themselves from, their own aggressive impulses, which they fear. Thus the drama and the strong emotions which are attached to the operations of criminal justice are not irrelevant trappings, but are part of its essence.

From the point of view of the system's generally deterrent effect in strengthening avoidance of violently disruptive behaviour by the majority of people, it may be that this emotional component is one of the most effective aspects of the system. Certainly the system works best from the generally deterrent point of view when the majority of citizens avoid criminally prohibited behaviour on a basis which seems almost "instinctive", and does not call for conscious choice. If this is so, it follows that extension of the criminal justice process to deal with familiar and less seriously regarded aspects of behaviour in the general society, tends to reduce its essential effectiveness.

From the point of view of the individual offender, however, the strong and often irrational emotions associated with the system of criminal justice have serious negative effects. It is desirable that feelings of revulsion towards such acts as murder, gang rape, or robbery with violence, should be general. When these emotions, appropriate to the acts themselves, are transferred to the offenders who committed the acts, however, they constitute the most serious existing obstacle to their rehabilitation. It is these feelings which underlie brutal punishments, various forms of banishment, and the attitude that the offender is society's outcast. It is these feelings which result in the persistence of punitive attitudes and methods in the face of evidence that they are self-defeating.

Developments in the social and behavioral sciences during recent decades have certainly modified these attitudes. Sociology has pointed out the co-relation between crime and poverty, lack of education and other forms of social disadvantage. Psychiatry and psychology have discovered a great deal about the complicated motivations of human behaviour, and revealed areas which are beyond the conscious control of the individual.

The fact that separation of feelings about an act from attitudes about and treatment of the person who did the act is not impossible is demonstrated by the fact that it is even now done in relation, for instance, to certain brutal and revolting murders. The multiple murderer, who "goes berserk" and kills six or seven people would at times in the past have been literally torn to pieces by society. Now he is usually found "not guilty by reason of insanity". While the conditions under which he is held and the psychiatric treatment available to him may leave something to be desired, it is at least formally recognized that punishing him is not appropriate and will serve no useful purpose.

With regard to the varying degrees of individual responsibility which accompany other criminal or anti-social acts, we are as yet much less clear.

It is sometimes assumed that because discoveries in the behavioral sciences have pointed to a narrowing in areas of behaviour which are controlled by

conscious choice, a logical application of their findings would eliminate the concept of individual responsibility entirely. In my opinion, this is a misapplication of the findings of the behavioral sciences. The existentialist movement in philosophy and its applications in psychology, represent, in opposition to earlier mechanistic trends of thought, a reaffirmation that man has an active, conscious and creative role in his own destiny. Both educators and therapists know that responsibility and maturity are promoted by treating the individual "as if" he were responsible, in areas where responsibility and choice are in fact possible.

One of the most controversial and difficult questions in relation to achieving a consistent philosophical base for criminal justice and corrections, is the meaning and use of punishment. Our statement of basic principles in Chapter 2 repudiates the idea of punishment in the sense of retribution or vengeance. It recognizes however a valid function for punishment as a deterrent for rationally-motivated crimes, though it suggests that attention first be paid to removal of profit from such crimes. The chapter points out that the reward-penalty concept applies widely throughout our society and cannot be separated from the criminal justice system. It points out that some of the most civilized and least freedom-restricting sanctions which can be used, such as the fine, are punishments in this sense. What should be kept clearly in mind, however, is the fact that in every other aspect of society, punishment is only half of a reward-punishment duality. This is its proper use in corrections, as through restriction or increase in rights and privileges according to the degree of responsibility demonstrated in behaviour.

The relation between the concept of punishment and that of restitution or compensation for an injury should also be examined. It is an unfortunate fact that while some injuries can be compensated for and the original condition restored, the most serious kinds of physical and psychological injury cannot. In primitive societies, punishment for such an injury often represented a kind of symbolic restitution or compensation; such symbolic compensation could be accomplished by the sacrifice of a life, a part of the body, or payment of material compensation by someone other than the offender. In my opinion, there is still some confusion of these two ideas in the present operation of the criminal justice system.

The state may collect a fine but does not pay it to the injured party. He may of course seek civil redress, but this is usually so complicated and disproportionately costly as to be useless. I believe that both criminal justice and corrections would be greatly strengthened if the concept of compensation to the injured party could be rescued from confusion and obscurity, and recognized as a valid guiding principle.

There is discussion in Chapter 22, and occasional reference elsewhere in the report, in regard to certain types of behaviour which may be categorized as "offences without a victim" (though this is surely a contradiction in terms) or alternatively as "self-victimizing offences". While there may be indirect harm to society from such behaviour, the major sufferer, or victim, is clearly the offender himself.

The kinds of behaviour which I consider are appropriately viewed in this light include vagrancy, attempted suicide, use of harmful drugs, excessive use of alcohol, sexually deviant behaviour which does not involve violence or the corruption of minors, and most forms of prostitution. In view of the principles outlined in Chapter 2 of our report, I do not believe these forms of behaviour to be appropriate to the jurisdiction of the criminal law or the methods of the criminal justice system. They should be considered primarily as social problems, to be met by social treatment measures.

As discussed in Chapter 22, I recognize that there is a "grey area" in which behaviour associated with these kinds of problems must remain the concern of criminal justice and corrections. The drug addict may become a "pusher" or steal to support his habit; excessive consumption of alcohol may contribute to violent or dangerous behaviour; protection is necessary against sexual exploitation or physical or psychological damage from sexual attack.

It is also necessary and desirable, in my opinion, that the police continue to have the right and duty to intervene protectively in relation to much of this behaviour. I see it as self-evident that the police should attempt to prevent a suicide, to prevent drunken driving, or to protect the excessive imbibor from the hazards of the elements or of traffic. I do not see it as necessary that the full machinery of the law should thereupon inexorably be put in motion.

I recognize that different methods of social control in these areas will require new resources, and will also require defined areas of administrative discretion, with due regard for civil liberties. As Chapter 2 points out, any form of action which may restrict individual liberty requires safeguards; the fact that such procedures are intended for the individual's own protection, and may be carried out in the name of medical or social treatment, does not change this fact.

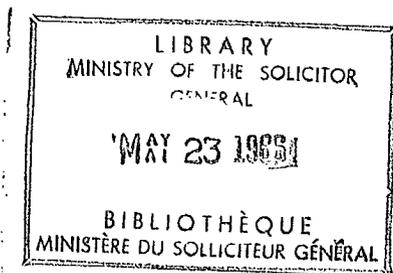
I also point out that removing certain social problems from the direct concern of the criminal justice system does not ensure their solution. Causative factors in many instances are complex and widespread so that broad preventive social measures are needed. It is often more difficult to effect change in the behaviour of addicted, vagrant or sexually deviant individuals than in that of persons who have evidenced violent, aggressive behaviour.

However, treatment under social and health auspices involves less stigma and social rejection than that encountered by the person who is labelled as an offender against the law. Energies of the individual are not expended or his defences against change strengthened by opposition to procedures he considers unjust. Certain unnecessary kinds of expense are eliminated. There is a greatly reduced hazard of escalation from minor to more serious offences.

In addition, I believe that a clear legal distinction between this kind of behaviour and behaviour which is readily accepted as the proper concern of the criminal law, would do much to restore the dignity and respect presently being undermined in both the offender and the general society, for the formal system of criminal justice.

I have a final comment on the unity between criminal justice and corrections which is envisaged in the title of our report. It is clear that this unity is still a goal and not a fact. Differences in philosophy, attitude and methods among people who perform different functions necessary to the total system are often so great as to leave both the offender and the public confused and cynical.

Complete unanimity in philosophy and approach is of course not to be expected, nor perhaps desired. Personnel who perform different functions will differ in their emphasis, values and specific methods. It is not desirable that police, crown attorneys, defence lawyers, judges, doctors, clergy, educators, and social workers, should be indistinguishable from one another in their points of view. Working arrangements which afford regular and frequent opportunities to discuss mutual concerns and differences can be expected, however, to reduce differences which are based on misunderstanding, and to clarify and increase mutual respect for those which result from different functions and experience.



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