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SENTENCING STRUCTURE IN CANADA: HISTORICAL PERSPECTIVES

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SENTENCING STRUCTURE IN CANADA: HISTORICAL PERSPECTIVES

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SENTENCING STRUCTURE IN CANADA: HISTORICAL PERSPECTIVES*

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I. INTRODUCTION

Sentencing philosophy is today at a crossroads. The Canadian Sentencing Commission[1] was set up to tell us which road to take. It is, of course, usually useful to know where one has been before deciding where one should go. The purpose of this study is to examine the past, hoping that it might, to some extent, give some clues as to the most desirable route to follow.

This study does not claim to be comprehensive. Only the most significant trends can be covered in a relatively short analysis such as this, short both in terms of length and time spent on research. With the current interest in legal history in Canada,[2] we can expect in the future more thorough analyses of many of the issues explored here. No doubt many of the points made in this paper will have to be modified in the light of further research.

The present Criminal Code standardizes the maximum penalties for prison sentences. For summary conviction offences, the maximum term of imprisonment is 6 months;[3] for indictable offences, the maximum is one of the following number of years: 2, 5, 10, 14, or life. This study will trace the general development of potential sentences over the years.

Tracing possible sentences for specific categories of offences is perhaps less helpful than looking at maximum sentences in general

because the maximum for an individual offence reflects society's changing views of the seriousness of the particular offence over time. Two examples, sedition and buggary will illustrate this point. Sedition is an offence that has fluctuated widely. Fear of communism caused Parliament to raise the penalty in 1919 from the two year maximum found in the 1892 Code to 20 years. It was reduced back to two years in 1930, raised to seven years in 1951, and then to 14 years in the 1953-54 revision.[4]

Before Confederation, the penalty for the offence of buggery was death. In 1865, a possible sentence of life imprisonment was substituted for the death penalty,[5] with a minimum sentence of 2 years required by legislation in 1869.[6] In 1955, 14 years was substituted for life[7] and in 1969[8] buggery between consenting adults in private was no longer subject to any penalty at all. So, for this offence we can see a clear shift in attitude with consequent changes in the penalty structure.

Sentencing cannot properly be examined without also studying the institutions where the sentences are served. This interrelationship was clearer in earlier periods. Judges had a greater awareness of the consequences of a sentence. Today, judges pick a specific length of imprisonment and it is the executive branch of government that determines in what institution the sentence will be served. Thus, this paper is also necessarily the history of penal institutions in Canada.

II. KINGSTON PENITENTIARY

The institution that looms largest in Canadian penology is Kingston Penitentiary.[9] It has cast a long shadow. Not only was it at one time the largest public building in Canada,[10] but for almost a century it influenced the development of all other Federal penal institutions.

Kingston Penitentiary was opened in 1835. Before then, imprisonment was not the primary weapon in the judicial arsenal against crime in Canada or England.[11]

Studies of early Canadian court records show that imprisonment was not then widely used. The cell capacity of the local jails in Upper Canada in 1827, for example, was under 300 - and this included cells for those awaiting trial and also those imprisoned for debt.[12] In the Toronto District (called the Home District), for example, there were only 143 persons incarcerated in the year 1828 - well over half of those imprisoned in the entire province - but over 100 of the 143 were there for non payment of debts. Only 29 were incarcerated for misdemeanours and 13 for felonies. An analysis of Assize Court Records in Upper Canada between 1792 - 1802 shows only about half a dozen persons imprisoned out of 36 persons convicted and it seems that some of those imprisoned were only held until they were whipped or paid their fines.[13] A study of the London, Ontario, District Court of the Quarter Sessions of the Peace, 1800-1809, shows a similar picture: during that period only one out of the 51 convicted persons was incarcerated.

The early Ontario legislation - and the same is probably true of the other colonies in British North America - did not seem to provide for a greater prison sentence than 2 years to what was called, a "house of correction".[15] Local jails[16] were declared "houses of correction" by an Act of 1810.[17]

There were many reasons why Kingston Penitentiary was established, but high on the list was the decline in the use of capital punishment, coupled with a decreasing use of transportation and banishment.

A. CAPITAL PUNISHMENT

There were hundreds of offences at the end of the eighteenth century in England - and consequently in Canada, because we adopted English Criminal law[18] that called for capital punishment. Sir Samuel Romilly, an English reformer, who played a leading role in Parliament in reducing the number of offences that called for capital punishment[19] said in 1810[20] that "there is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England." This is not the place to outline the movement to reduce the number of capital crimes. Others have done so, tracing the influence of Montesquieu, Beccaria, Bentham and others.[21] Those influences were felt in Canada, as in England, and in 1833, at about the time the construction of Kingston Penitentiary was commenced, an Act was passed[22] designed to limit capital punishment, as had been done in

England,[23] to specific very serious offences, such as treason, murder, rape, robbery, burglary and arson.

Even before then, capital punishment for most lesser felonies had become a dead letter. Many Juries refused to convict,[24] and even when they did convict, the sentence was usually commuted by the Crown. Such a commutation was so usual that in 1826 an Act was passed in Upper Canada[25] providing that if the court was "of opinion, that under the particular circumstances of the case such offender is a fit and proper subject to be recommended to the royal mercy, it shall and may be lawful for the Court" not to pronounce the death sentence.

Another technique used to soften the harshness of the law was "benefit of clergy", originally a technique to protect the clergy,[26] but later extended to anyone who could read, and still later to anyone at all.[27] This allowed a convicted felon to plead his "clergy" and thus escape the penalty of the law. To prevent its use more than once, a person who pleaded benefit of clergy was burned or branded in the hand. An Act of 1800 in Upper Canada[28] gave the Court the power to substitute for "burning in the the hand", which the statute said is "often disregarded and ineffectual, and sometimes may fix a lasting mark of disgrace and infamy on offenders, who might otherwise become good subjects and profitable members of the community," the alternative of "a moderate pecuniary fine" or whipping.[29] Benefit of clergy was finally eliminated in England in 1827[30] and in Canada in 1833.[31]

B. TRANSPORTATION

Transportation was widely used in the 18th century, both as a condition for commuting a death sentence or as a penalty imposed by the Judge. An English Act of 1717 was the major English statute upon which, to a great extent, transportation was based.[32] It provided for transportation for seven years in all cases, except that receivers of stolen property could be transported for a period of 14 years. This Act, as D.A. Thomas states,[33] "served as a model for many later transportation statutes; and it established that preference for the seven times table which was to be the hallmark of much subsequent criminal legislation, long after transportation itself had ceased." This " biblical faith in multiples of seven"[34] was as firm in Canada as in England. Convicts were transported from England to America, and later to Bermuda and Australia.[35]

For obvious geographical reasons, a variation on transportation was used in British North America, that is, banishment. In 1800, Upper Canada passed a provision stating[36] that "whereas so much of the said criminal law of England as relates to the transportation of certain offenders to places beyond the seas, is either inapplicable to this Province or cannot be carried into execution without great and manifest inconvenience", the Court, "instead of the sentence of transportation, shall order and adjudge that such person be banished from this Province, for and during the same number of years, or term for which he or she would be liable by law to be transported." Early Upper Canada Assize Court records show that out of 36 convictions between 1792 and 1802, four persons were banished; one was transported

during that period.[37] Records from the Montreal Prison show the use of both transportation and banishment. In 1826, no one was hanged for any crime, but six persons convicted of capital offences were transported to Bermuda.[38] In 1834, a convicted burglar had his death sentence commuted, provided he left Lower Canada.[39]

The Upper Canada Select Committee which reported in 1831 on the expediency of erecting a Penitentiary was not impressed with banishment as a deterrent, stating:[40]

> "Banishing the province is so nonsensical that nothing need be said on the subject, it is no punishment to a rogue to order him to live on the right bank of the Niagara river instead of the left and it is cruelly unjust to our neighbours to send among them thieves, robbers, and burglars, to exercise their iniquitous callings in a country, where, not being known, they cannot be guarded against."

Banishment and transportation continued to be used - even after Kingston was built. Banishment was specifically mentioned in an 1837 Upper Canada Act respecting the punishment of Larceny[41] and another Act of 1837 allowed transportion to be substituted for banishment.[42] Indeed, as late as the 1870s, Lepine, one of Louis Riel's confederates in the Red River Rebellion of 1869, had his death sentence commuted to 2 years imprisonment followed by banishment from Canada[43] and Riel himself was given amnesty on condition of banishment from Canada for 5 years. Transportation was used as the punishment for about 150 rebels who took part in the 1837 Rebellions in Canada, along with about 50 soldiers guilty of desertion in Canada.[44] The 58 rebels from Lower Canada were transported to New

South Wales and the 92 from Upper Canada to Tasmania (then Van Dieman's Land).[45] Apart from the 1837 rebels, transportation does not appear to have been widely used in Canada after Kingston Penitentiary was built, certainly not as compared to England, where between 1840 and 1845 seventeen thousand convicts were transported to Tasmania alone.[46] Banishment was, it seems, an easier alternative, but we will have to wait until there is a full Canadian study of the subject before final conclusions can be drawn. Transportation was discontinued in England in 1867.[47]

Other penalties that were possible in this period were the public humiliation of the pillory (for the arms and the head) or stocks (for the arms and legs), specifically mentioned in some statutes.[48] These punishments were abolished in the United Canadas in 1841.[49] Whipping and fines were also used in both Upper [50] and Lower Canada.[51] The "biblical" 39 lashes was usually administered.[52] Courts at common law had a broad discretion to impose such alternative penalties for misdemeanours.[53]

C. THE ESTABLISHMENT OF KINGTON PENITENTIARY

With the decline in the use of capital punishment and transportation and a disinclination to use banishment, an alternative was sought. That alternative was Kingston Penitentiary. A Select Committee, set up in Upper Canada, reported in 1831, recommending that a Penitentiary be built near Kingston, Ontario:[54]

> "It is well protected by an effective Garrison and extensive fortifications -- the situation is healthy, and land can be purchased at a moderate price. In addition to these recommendations, the materials for building are abundant, and of the most substantial kind, and the inexhaustible Quarries of stone, which exist in every direction within the township of Kingston, will afford convicts that description of employment which has been found by actual experiment to be the most useful in Institutions such as your committee recommend."

The Penitentiary was to be so harsh that it would deter people from crime, and, possibly, make them repent for their sins. The Committee stated:[55]

> "A Penitentiary, as its name imports, should be a place to lead a man to repent of his sins and amend his life, and if it has that effect, so much the better, as the cause of religion gains by it, but it is quite enough for the purposes of the public if the punishment is so terrible that the dread of a repetition of it deter him from crime, or his description of it, others. It should therefore be a place which by every means not cruel and not affecting the health of the offender shall be rendered so irksome and so terrible that during his after life he may dread nothing so much as a repetition of the punishment, and, if possible, that he should prefer death to such a contingency. This can all be done by hard labor and privations and not only without expense to the province, but possibly bringing it a revenue."

The planners of Kingston had a number of American models to choose from, principally the Auburn model (a penitentiary in the Finger Lakes District of New York), which was based on complete silence, with solitary confinement at night and collective work during the day. The alternative system at the time was the Philadelphia system, which

required the inmate to sleep, eat and work in his cell, also in complete silence. The Auburn system was chosen.[56] The deputy-keeper of Auburn, who was hired to help design and run Kingston, said, as the plans were being made for Kingston: "the particularly excellent and distinguishing characteristic of the Auburn system is non-intercourse among the convicts, while at the same time, they are employed by day, in active useful labour. This is the grand foundation on which rests the whole fabric of Prison discipline."[57]

D. PENALTY STRUCTURE

The penalty structures in the years following the decision to establish Kingston Penitentiary are complex. We have already seen that by the 1833 Act,[58] some specific offences such as murder, rape and robbery continued to be capital offences. The same Act provided that for other felonies not dealt with by specific provisions the convicted person could be banished or transported for seven years or more.[59] Imprisonment was now also possible, for up to 14 years, with hard labour or solitary confinement.[60] Kingston Penitentiary had still not been completed and so these potentially harsh sentences could be served in the common jail. Returning from banishment or transportation could lead to imprisonment for life.[61] This potential use of imprisonment was in dramatic contrast to its use in previous decades.

The potential 14 year period was, however, in 1837, reduced to seven years for most non-capital felonies.[62] The maximum penitentiary term for felonies such as perjury, fraud, and receiving stolen goods was now to be seven years. If the conviction took place

at Quarter Sessions rather than at Assizes, the maximum penitentiary term was to be two years.[63] The important offence of larceny also called for a maximum two year penitentiary term;[64] and imprisonment for larceny could be followed by banishment.[65] There were, of course, other specific provisions for particular offences. Unlawful drilling, for example, could result in up to 2 years in the Penitentiary.[66] So, the Penitentiary was not at first confined solely to long-serving prisoners.

In 1841, however, shortly after the establishment of the United Provinces of Upper and Lower Canada, a dramatic change was introduced for Kingston Penitentiary, now to serve as the penitentiary for both Lower and Upper Canada.[67] The Penitentiary was now, in general, for those serving a sentence of <u>at least</u> seven years. Local jails were to be used for those serving up to two years, the first important statute[68] with the 2 year period as the dividing line between penitentiaries and prisons. The sentencing judge had to choose between the maximum of two years in the local jail or seven years minimum in the penitentiary for a recidivist[69] or in any case where a specific penalty was not provided.[70] A number of major Acts were passed in that year following this pattern, such as an Act relating to larceny and other offences,[71] an Act relating to Malicious Injuries to Property,[72] and an Act relating to Offences against the Person.[73]

The following year, however, the philosophy set out in the 1841 Act was changed. The judges were now no longer forced to make the harsh choice demanded by the previous Act. The 1842 Act, entitled "An

Act for Better Proportioning the Punishment to the Offence," reduced the minimum penitentiary term from seven years to three years.[74] Now the choice for the judge was between up to two years in the local jail and three years or more in the penitentiary.

The 1842 Act also provided that an offender could receive a penitentiary term equal to "any term for which he might have been transported beyond Seas".[75] So, seven years transportation equalled seven years imprisonment. When England passed a similar measure ten years later, they substituted a proportionately lesser number of years imprisonment for transportation. The English Penal Servitude Act of 1853 substituted four years penal servitude where seven years transportation had been provided.[76] However, the second English Penal Servitude Act of 1857 provided that the term for imprisonment should be identical to the term for transportation,[77] as Canada had already done. Transportation was always necessarily for long periods and so the equation of penitentiary terms with transportation necessarily meant long terms of imprisonment.

There were later specific variations in the penalties for specific offences. There was, therefore, no one formula. For example, an 1847 Act dealing with Malicious Injury to Persons[78] provided that the judge had to choose between a seven year minimum term in the penitentiary and three years maximum in the jail. Whipping was also provided for this offence for males under 18.[79] An 1848 Act on Counterfeiting, to take another example, provided that the offender could receive up to four years in the penitentiary.[80]

It is hard to get a clear picture of the penalty structure for Canada in the 1840s. Canada could not follow England's lead as the penitentiary system in Canada had in most respects preceded the English system. Canada did not have the usual comfort of following what England had done. Perhaps this is just as well, because the penalty structure that did emerge in England, to use the words of a recent Home Office Report, "was devoid of any appearance of system or principle."[81] The variations and fluctuations in the legislation we have looked at reflect , no doubt, the not unexpected uncertainty and experimentation as Canada moved from capital punishment, transportation and banishment to incarceration.

III. MID CENTURY

From at least the mid-forties Kingston Penitentiary was under attack by the Press, particularly by the Globe and its editor, George Brown. "It appears from statements which are not contradicted", wrote the Globe in November, 1846,[82] "that from 200 to 300 punishments are inflicted on the Prisoners of the Penitentiary every month." In August, 1847, the Globe talked of the "most barbarous acts" charged against the managers of the Penitentiary[83] and in March, 1848, it referred to Kingston as "a den of cruelty, where the most savage treatment is given to the unfortunate inmates, who must emerge from durance not subdued but infuriated, without one ray of light infused into their minds to guide their future path but confirmed and strengthened in their bad habits by the treatment they experience at the hand of authority."[84] Not surprisingly, a Royal commission was established in 1848 to look into the administration of Kingston Penitentiary. The Commission is known by the name of its secretary and driving force, George Brown of the Globe.[85]

A. THE BROWN REPORT

Again not surprisingly, the Commission supported the allegations made in the Globe. The Report stated:[86]

> As many as twenty, thirty, and even forty men, have been flogged in one morning, the majority of them for offences of the most trifling character; and the truth of the complaint resting solely on the word of a Guard or Keeper, subject at best to all the

> frailties of other men. The exasperation which such a system could only produce, must have bid defiance to all hope of reform. To see crowds of full grown men, day after day, and year after year, stripped and lashed in the presence of four or five hundred persons, because they whispered to their neighbour, or lifted their eyes to the face of a passerby, or laughed at some passing occurrence, must have obliterated from the minds of the unhappy men all perception of moral guilt, and thoroughly brutalized their feelings.

The Commission produced a Second Report[87] in which they looked at ways to improve the Penitentiary System. As the 1831 Committee had done, they visited American institutions, such as the Mount Pleasant State Prison at Sing-Sing on the Hudson River in New York, which followed the Auburn Congregate system, and the Cherry Hill Penitentiary in Philadelphia, the pioneer institution built on the so-called separate system. The Brown Commission spent nearly a week "devoted to a minute inspection of Cherry Hill, and to personal discussion of the merits of the two great systems of discipline with the Warden." They came away impressed with the separate system, an impression not dispelled by a quick visit to Auburn. Their main conclusion was "to recommend the combination of the two systems, the Separate and the Congregate, in the future management of the Prison". They went on to say:

> "Were a new Penitentiary about to be erected, we might have been in favour of a somewhat different plan: but with so costly and commodious an establishment nearly completed, we are of opinion that the most advisable course is to continue the Congregate system as the main principle, and to engraft on it the ameliorating influences of

> individual separation. We recommend to Your Excellency, the erection of a sufficient number of cells to apply the Separate system to every newly-arrived Convict; while so confined, the Convict to be furnished with secular instruction and labour, and to be earnestly dealt with by the Chaplain and Warden. The length of this ordeal, we think, should be left to the discretion of the Prison authorities, but should in no case exceed six months; and the termination of it might in many cases where mitigating circumstances existed, it is to be hoped, offer a favourable opportunity of exercising the Royal Mercy with benefit to society and to the Criminal.

They recommended "that fifty separate cells shall be the number at first to be erected, and that they be built with all convenient speed."

This was their main conclusion. They also had examined the use of a system of rewards, a technique we will explore shortly:

> "Much has been written in favour of a graduation in the severity of the Penitentiary discipline, founded on the conduct of the Convict during his confinement. It has been proposed as an incentive to good behaviour.... Exemplary obedience would thus purchase privileges denied to those who either occasionally or frequently infringed them."

The Commission did not think much of the rewards technique:

> "This would open a wide door to favoritism, and even should the strictest impartiality be shown in the grading of the Convicts, it would be difficult to make them believe that such was the case... All Convicts should as far as possible be placed on the footing of perfect equality; each should know what he has to expect, and his rights and obligations should be strictly defined. If he break the Prison rules,

> he should also have the quantum of punishment to which he becomes subject."

"It is well known," the Commission said, "that the worst men commonly make the best conducted Convicts." The Commission did not oppose the use of solitary confinement or corporal punishment, they simply wanted those punishments used more discriminately:

> "There are, however, a few characters in most prisons...who are only to be ruled by bodily fear. On such persons and for such offences as seriously involve the discipline of the prison, such as assaults on the officers, it will undoubtedly be a matter of necessity, sometimes, to inflict the severe punishment of the dark cell, or failing that, of the cat...."

The Brown Commission Report was, for the most part, implemented by the Government. In 1851, Canada passed a new "Act for the Better Management of the Provincial Penitentiary."[88] It provided[89] that there should be "erected within the...Penitentiary...not exceeding fifty cells with a workshop attached to each cell, adapted to carry out the 'separate' or 'solitary' system of discipline...." The Penitentiary would still be based on the silent system.[90] A system of Inspectors was established to help prevent the type of arbitrary punishment that the Commission had found. The Warden was given a number of duties, including, "to see that justice, kindness and morality shall prevail in the administration of every department of the prison...."[91] The inspectors had to authorize the use of corporal punishment by the Warden, the legislation stating: "the Warden shall

have recourse to it only in extreme cases, and shall not inflict more than seventy-five lashes for any one offence."[92] So the regime, which was still based on the silent system, had not changed dramatically.

Another Act which came about as a result of the Brown Commission was one to deal with the Young Offender. The Commission had recommended "the immediate erection of one or more Houses of Refuge for the reformation of juvenile delinquents." In 1857, Canada passed "An Act for Establishing Prisons for Young Offenders[93] which permitted the erection of "two Buildings, one to be situated in Lower Canada, and one in Upper Canada," for offenders under 21. The sentence of the Court, which would be anywhere from six months to five years, could be served in the Reformatory.

B. SENTENCING STRUCTURE UP TO CONFEDERATION

Sentencing structure from the middle of the century to Confederation shows no discernible coherent structure. The Acts show a wide variety of possible penalties. They do, however, show frequent use of minimum penalties, and they often show higher penalties for subsequent offences. They also show a great amount of judicial discretion.

An Act in 1855,[94] for example, provided up to two years for having instruments for housebreaking,[95] up to three years for forging tickets,[96] anywhere from two to five years for unlawfully administering chloroform,[97] and anywhere from three to seven years for causing of railway accidents.[98]

Statutes in 1859 bring together sections from earlier statutes and similarly show a wide variation in possible penalties. Offences against the State were consolidated into one Act in 1859.[99] In that Act, counterfeiting coins could lead to a four year penalty,[100] but uttering such a coin was punishable with a penalty from three to fourteen years.[101] A subsequent offence for uttering brought a penalty of from 14 years to life.[102] Making tools for counterfeiting coins would result in a sentence of from 2 to 7 years, with a subsequent offence bringing a penalty of from 2 to 14 years.[103]

The Offences Against the Person Consolidation of the same year[104] also shows a great hodge-podge of sections. Some, such as murder and rape, provide the death penalty. Having carnal knowledge of a girl under 10 was also punished by death, but if over 10, then the punishment was in the complete discretion of the court.[105] An accessory after the fact to murder was punishable with a term anywhere from 0 to life.[106] The penalty for manslaughter was anywhere from 0 to life, or a fine at the discretion of the court.[107] Administering drugs carried a penalty of 2 to 5 years.[108] Carrying certain weapons called for a fine of between $10 and $40.[109] In some cases the Court had to choose, as in the old 1841 legislation, between under 2 years and over 7 years.[110]

The penalties in the Postal Service Act of 1867[111] also show a wide range for various offences, including 0 to 7 years; 2 to 7 years; 3 to 5 years; not less than 3 years; and 5 years to life.

The same type of seemingly irrational penalty structures were found in England.[112] The Criminal Law Commissioners who sat between 1833 and 1849 had tried to come to grips with this issue.

C. THE ENGLISH CRIMINAL LAW COMMISSIONERS

The English Criminal Law Commissioners, described by Sir Rupert Cross,[113] as the "largest and most abortive codification enterprise" yet seen in England, was set up by Lord Brougham in 1833.[114]

The Commission, a product of Benthamite philosophy, produced a great number of reports. John Austin, the legal philospher, and one of Bentham's disciples[115], was one of its original members: he quit, however, wrote his wife, because he came home from every meeting "disheartened and agitated."[116] Bentham wanted to limit judicial discretion and so did the various Commissioners, who in their Second Report said:[117] "It is of the very essence of a law that its penalties should be definite and known; how else are they to operate on the fears of offenders, or to afford a practical guide of conduct?" In their Fourth Report in 1839 they advocated up to 20 possible penalties.[118] Their Seventh Report of 1843 increased the number of categories even further.[119] A new body of Commissioners was then appointed. D.A.Thomas succinctly gives the subsequent history of this new body, appropriately called the Second Commissioners:[120] "The forty-five classes proposed in the Seventh Report were reduced to thirteen by the Second Commissioners in their Second Report (1846).... By the Third Report (1847) the number of classes had grown again to

thirty-one, but in the Fourth Report of the Second Commissioners the number was reduced to eighteen."

Their reports and abortive Bills in 1853[121] seemed, however, to have no direct effect in England or in Canada. It did, though, at least to some extent, influence the important English Consolidations of 1861[122] which were later adopted in Canada in 1869.[123] Before dealing with those Acts, we should first examine how Confederation affected criminal justice in Canada.

IV. CONFEDERATION

The division of legislative power between the federal government and the provinces in the British North America Act of 1867, now the Constitution Act, 1867,[124] naturally affects what level of government has legislative power over criminal penalties and the institutions in which sentences are served.[125]

A. CRIMINAL LAW POWER

The federal government was given control over criminal law and procedure by s. 91(27) of the Act and thus has control over the penalties that can be imposed.

The discussion and legislative debates leading to Confederation show that there was no controversy over whether legislative power over criminal law and procedure should be given to the federal government. Centralizing the criminal law power was in deliberate contrast to the American Constitution, which left control over the criminal law power to the individual states.

Why was the criminal law power given to the federal government? Sir John A. Macdonald, then the Attorney-General, expressed what must have been the consensus at the time when, in the parliamentary debates in 1865, he stated:[126]

> The criminal law too - the determination of what is a crime and what is not and how crime shall be punished - is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law

> throughout these provinces - that what is a crime in one part of British America, should be a crime in every part - that there should be the same protection of life and property in one as in another.

He then commented on the American division of authority:[127]

> It is one of the defects in the United States system, that each separate state has or may have a criminal code of its own, - that what may be a capital offence in one state, may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, or going to any other part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the criminal laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighboring Republic.

There is no doubt that the Civil War in the United States was a major factor in the desire of many to place some of the more important powers and symbols of nationhood within the legislative authority of the federal government. The criminal law plays an important role in society in stating fundamental values. At the Quebec Conference in 1864, Oliver Mowat had commented on the advantages of a uniform system of law, stating,[128] "It would weld us into a nation." The Colonial Secretary, Lord Carnarvon, expressly gave his approval of the arrangement in his speech on the British North America Act in the House of Lords:[129]

> To the Central Parliament will also be assigned the enactment of criminal law. The administration of it, indeed, is vested in the local authorities; but the power of general legislation is very properly reserved for the Central Parliament. And in this I cannot but note a wise departure from the system pursued in the United States, where each State is competent to deal as it may please with its criminal code, and where an offence may be visited with one penalty in the State of New York, and with another in the State of Virginia. The system here proposed is, I believe, a better and safer one; and I trust that before very long the criminal law of the four Provinces may be assimilated - and assimilated, I will add, on the basis of English procedure.

That assimilation did in fact happen. Shortly after Confederation, Sir John A. Macdonald introduced a series of consolidation statutes,[130] which we will examine in a later section.

A further reason for making the criminal law federal was to ensure that Quebec maintained English criminal law, first introduced into Canada in 1763 following the victory of the English over the French. Governor Murray was given full power in 1763 to makes laws "not to be repugnant, but as near as may be agreeable to the laws and statutes of this our Kingdom of Great Britain."[131] As is well known, the French civil law was reintroduced by the Quebec Act of 1774[132], but not French criminal law.[133]

It should be added that the provinces were given legislative power under section 92(15) of the B.N.A. Act to impose "punishment by fine, penalty, or imprisonment for enforcing any law of the Province...."

B. PENAL INSTITUTIONS

There are a number of other sections in the British North America Act which are relevant to the subject of criminal law. One of these is section 91(28): "The establishment, maintenance, and management of penitentiaries".[134] This was transferred from the provincial to the federal list at a very late stage. The Quebec Resolutions of 1864 had given to the provinces "the establishment, maintenance and management of penitentiaries, and of public and reformatory prisons," and this had been approved at the 1866 London Conference.[135] In the final draft, however, "Public and Reformatory Prisons in and for the Province" were given to the provinces and "Penitentiaries" to the federal government. Why was this change made? The public record does not supply an answer. The change has been labelled "inexplicable".[136] It may well have been that the Colonial Secretary himself, Lord Carnarvon, requested the change. In 1863 he had chaired a very important Select Committee of the House of Lords on "the State of Discipline in Gaols and Houses of Correction."[137] The Committee was of the view that discipline in prisons throughout England was not strict enough. It wanted the "separate system" to be rigorously enforced. Prisoners should be kept isolated from one another and subjected to hard labour at the treadwheel, crank or shot drill. Discipline, according to the Report, was an integral part of the criminal process and the Committee wanted to "establish without delay a system approaching as nearly as may be practicable to an uniformity of labour, diet, and treatment".[138] Placing penitentiaries under federal jurisdiction was, therefore, a step towards achieving that objective in Canada.[139] The desire to

achieve uniformity in prison discipline is a better explanation of the change respecting penitentiaries than some of the others that have been offered, such as economic considerations,[140] politics, [141] giving the provinces responsibility over treatment[142], and providing a means "through which the federal government could exercise its monopoly of coercive force."[143]

The dividing line later established by federal legislation[144] between federal penitentiaries and provincial institutions was a two-year penalty. Two years less a day would be served in a provincial institution; two years or more in a federal institution.[145] It reflected the practice that we have already seen with respect to penitentiaries before Confederation,[146] and is still the law today.[147] Note that the specific two-year dividing line is not mentioned in the Constitution. Over the years there have been many suggestions that the specific division be changed. In 1887 an Interprovincial Conference called at the request of the Premier of Quebec recommended that a six-month dividing line be substituted for the two-year division.[148] The 1938 Archambault Report similarly wanted to further centralize corrections,[149] as did the 1956 Fauteux Report.[150] A swing back to the provinces is reflected in the 1969 Ouimet Report[151] and a Report by the Law Reform Commission of Canada.[152] The debate continues.

C. PARDONING POWER

Another change between the Quebec Resolutions and the British North America Act was with respect to the Pardoning Power.[153] The

Quebec Resolutions had given this power to the Lieutenant-Governor in Council, that is, the provincial cabinet, "subject to any instructions he may, from time to time, receive from the general Government, and subject to any provisions that may be made in this behalf by the general Parliament." But the Colonial Secretary, Cardwell, objected to this provision. Indeed it was only one of two provisions arising out of the Conference that the British government formally took objection to.[154] "It appears to her Majesty's Government", Cardwell stated,[155] "that this duty belongs to the representative of the Sovereign, - and could not with propriety be devolved upon the Lieutenant-Governors, who will, under the present scheme, be appointed not directly by the Crown, but by the Central Government of the United Provinces." In spite of the Colonial Office objections, the delegates at the 1866 London Conference reaffirmed the view that the pardoning power belonged to the provinces, but conceded that the federal government should have the sole responsibility in capital cases.[156] The Colonial Office, however, would not accept this version and as a result, nothing was stated in the British North America Act with respect to the pardoning power.

After Confederation there was a continuing controversy over the issue. The colonial Office[157] and the federal government[158] took the position that the pardoning power for both federal and provincial offences rested solely with the federal government.[159] The provinces took the position that they could pardon those convicted of provincial offences and the 1887 Interprovincial conference called by the premier of Quebec passed a resolution to this effect.[160]

Matters were brought to a head in 1888 when Ontario passed An Act Respecting the Executive Administration of Laws of this Province.[161] The ensuing litigation, known as the Executive Power Case, settled the issue in favour of the provinces.[162] Chancellor Boyd stated:[163] "The power to pass laws implies necessarily the power to execute or to suspend the execution of those laws, else the concession of self-government in domestic affairs is a delusion." Thus, today, legislative authority over the pardoning and parole power for offences under federal jurisdiction belongs to the federal government and for offences under provincial jurisdiction belongs to the provinces.

V. AFTER CONFEDERATION

A number of statutes were passed by the Federal Government after confederation relating to criminal law and procedure and the administration of prisons and penitentiaries.

A. THE CONSOLIDATION ACTS, 1869

In 1869, Canada passed a number of important Consolidation Acts.[164] These were, to a very large extent, direct copies of the English Consolidation Acts of 1861.[165] Sir John A. Macdonald, the Prime Minister, told the House:[166]

> "At present, the English system of criminal law, as a matter of science, was ... as complete as it could be. The principle of the Bills ... was identical with that of the English law, a little altered in order to suit a new country and new institutions."

At another point in the debates he stated that having Canadian law the same as English law meant that English decisions could be applied in Canada:[167]

> "the language was as nearly as possible the language of the criminal laws of England. The language used in such measures in the Lower Provinces might be shorter and more concise, but he had chosen rather to adhere to that before the House, because it was of the greatest importance - and members of the legal profession would fully appreciate this - that the body of the Criminal Law should be such that the Judges in the Superior Courts should have an opportunity of adjudicating upon it, as on English law. It would be of incalculable advantage that

> every decision of the Imperial Courts at Westminster should be law in the Dominion. On every principle of convenience and conformity of decision with that of England, he thought it well to retain the English phraseology.

The Canadian legislation incorporated the heavy penalties found in the English legislation. An English Home Office Report of 1979 commented as follows on the 1861 English legislation:[168]

> "The 1861 Acts were a consolidation of the existing criminal law and the punishments it prescribed, and were not a codification. They incorporated, therefore, a penalty structure that bore all the marks of earlier legislative activity and outdated penological thought. The legislation consisted chiefly of re-enactments of the former law with amendments and additions. While the consolidation owed much to the work of the Criminal Law Commissioners, the Acts do not in any way reflect the views of the Commissioners, either on the penalty structure or on the scope of judicial discretion in sentencing. The Acts inclined towards relatively broad definitions within specific branches of the criminal law but there was still a multiplicity of punishments for analogous crimes. They also reflected a very wide measure of judicial discretion in sentencing by providing maxima according to the severe penalties fixed in even harsher penal times. Despite the many and vigorous criticisms by the Criminal Law Commissioners of the disorderly nature of the penalty structure of the early 19th century, no significant rationalisation was achieved. Improvements were limited to minor amendments.... The result was often a wide variety of penalties within the same field, derived from different statutes enacted at different times and usually without regard to the existing state of the criminal law."

The draftsman of the English legislation, Charles Greaves, was not particularly happy with what he had produced, stating in the preface to his book on the new Acts:[169]

> "I have long wished that all punishments for offences should be considered and placed on a satisfactory footing with reference to each other, and I had at one time hoped that that might have been done in these Acts. It was however impracticable.... The truth is, that whenever the punishment of any offence is considered, it is never looked at, as it always ought to be, with reference to other offences, and with a view to establish any congruity in the punishment of them, and the consequence is that nothing can well be more unsatisfactory than the punishments assigned to different offences."

These new Canadian Consolidation Acts established the pattern for future Canadian legislation, that is, very wide discretion, few minimum sentences (buggery seems to be the only offence in the Consolidations carrying a minimum period of imprisonment),[170] and prison terms usually based on the number 7. The first of the Acts, one dealing with coinage,[171] provides the following potential sentences: up to six months imprisonment;[172] up to 1 year imprisonment;[173] up to 2 years imprisonment;[174] up to 3 years in the Penitentiary;[175] up to 7 years in the Penitentiary;[176] up to 14 years in the Penitentiary;[177] and up to life imprisonment in the Penitentiary.[178]

Other Acts are the same, but with minor variations. Some, of course, still provide the death penalty, for example, murder[179] and carnal knowledge of a girl under 10[180] in the Offences Against the Person Act. One provision (forgery) added a potential 21 year penalty,[181] also, of course, a multiple of 7; some a 10 year penalty,[182] and some, such as certain types of larceny, had a 3 month limit on imprisonment.[183] Some offences only provided for a

fine: carrying illegal weapons was subject to a fine of $10-$40,[184] and engaging in cockfighting a fine of $2-$40.[185] Whipping, it seems, was only used for two offences: administering chloroform[186] and attempted carnal knowledge,[187] an omission that was objected to by some members of the House[188] because it did not follow the English legislation of 1863, the so-called "garotting legislation", passed after a number of violent robberies in London.[189]

Unlike the English Acts, where the minimum for penal servitude was 3 years, the minimum for a Penitentiary term in Canada was, as today, 2 years. Thus the old no-man's land betwen 2 and 3 years found in earlier Canadian legislation was now gone. But otherwise the English and Canadian legislation were similar and, with their high penalties and wide judicial discretion, to a great extent similar to legislation in England and Canada today.

B. PRISON DISCIPLINE

Shortly after Confederation the philosophy of prison discipline changed. In spite of the previously mentioned 1863 Report from the Select Committee of the House of Lords on Discipline,[190] which advocated total isolation, with hard labour at the treadwheel, crank or shot drill, and in spite of a later 1867 document on prison discipline in the colonies making the same points,[191] Canada did not continue with a totally repressive regime, based solely on deterrence. The new 1868 Penitentiary Act[192] added a new concept, that of rewards, a concept that had earlier been rejected by the Brown Commission. It also continued with the changes that had come in after the Brown Report,

that is, initial isolation,[193] followed by the congregate system, with, to the extent possible, useful work. The system continued to be based on the silent system.[194]

Section 62 of the 1868 Penitentiary Act provided for remission of sentences for good behaviour:

> "In order to encourage convicts to good behaviour, diligence and industry, and to reward them for the same, it shall and may be lawful for the Directors of Penitentiaries to make rules and regulations, under which a correct record may be kept of the daily conduct of every convict in any Penitentiary, noting his industry, diligence and faithfulness in the performance of his work, and the strictness with which he observes the prison rules; with a view to permit such convict under the prison rules to earn a remission of a portion of the time for which he is sentenced to be confined, not exceeding five days for every month, during which he shall have been exemplary in industry, diligence and faithfulness in his work, and shall not have violated any of the Prison Rules."

The chairman of the Board of Inspectors, the draftsman of the Act, informed the Director of Irish Convict Prisons about the possible adoption of this new Canadian philosophy, borrowed from the Irish Crofton system, named after an earlier head of the Irish Prison system, Sir Walter Crofton:[195]

> "In my capacity as Chairman of the Board of Inspectors of Asylums and Prisons of Canada, I have been requested to prepare a rough draft of the proposed measure, and in doing so I am anxious to introduce into the Dominion the principles found to work so well in the Irish Convict Prisons, so far as they may be thought applicable to the circumstances of this country."

Thus we now had in Canada a mixture of philosophies of prison discipline: the Auburn congregate system and the Philadelphia separate system, both based on punishment and deterrence, and the Crofton system, based on rewards. In the 1870s and 1880s, because of the growth in population, new Federal Penitentiaries were created in Quebec, New Brunswick, Manitoba and British Columbia. All used this new hybrid system of punishment and rewards, making distinctions according to the conduct of the prisoners. Deprivation of chewing tobacco and the granting of privileges, such as a light to read by at night, were also part of the scheme. Even the prisoners' uniforms varied according to levels of behaviour.[196]

VI. CODIFICATION

A Criminal Code was enacted in Canada in 1892.[197] In moving the second reading of the Bill, Sir John Thompson, the Minister of Justice, stated:[198] "It aims at making punishments for various offences of something like the same grade more uniform." To a considerable extent it did that: there was now a measure of consistency previously lacking. It did not, however, radically change the penalty structure of the criminal law. The major penalties were, as before, 6 months, 2, 5, 7, 10, and 14 years, life imprisonment and death.

Not all offences fit this precise structure. There were, for example, variations for offences at the lower end of the scale, such as penalties of 30 days,[199] 2 months,[200] 4 months,[201] and 12 months.[202] There were also a few offences in which the maximum was 3 years[203] and one in which it was 4 years.[204] The origin of the 4-year period is interesting, illustrating some of the accommodations made to pressure groups,[205] or in this case, an individual. When the offence of having sexual relations with an idiot was discussed in Committee, the following exchange took place (the total discussion of the provision):[206]

> "Mr. Flint: I do not think the punishment in this case is severe enough.
>
> Sir John Thompson: Make it four years, then."

The Code was based to a great extent on the English Draft Code of 1881 (never, however, enacted in England), which in turn had been based on the Commissioners' Draft Code of 1879, which in turn had modified James Fitzjames Stephen's Draft Code of 1878.[207] Those Codes had used similar penalty structures, drawing on the 1861 English Consolidation Acts. The Canadian 1869 Consolidations, as we have seen, were similar to the English Consolidations of 1861, so whether the 1892 Code was based on Stephen's work or the previous Canadian legislation, it would not have ended up looking very much different.

Wide judicial discretion continued to be a feature of Canadian law. Sir John Thompson told the House:[208] "we have to provide the maximum punishment for the gravest kind of ... offence, leaving it to the discretion of the court to mitigate the punishment according to circumstances."

There were very few offences carrying a minimum penalty. Some offences relating to the administration of justice had a one-month minimum[209] and other offences relating to the post, as in earlier legislation, carried three-year minimum penalties.[210] But there were few, if any, others.

The 1892 Code kept the boundary line between federal and provincial institutions at 2 years.[211] There was no gap, as in England, between penitentiaries, or as it was there called, penal servitude, and imprisonment in other institutions. Two years was to be served in the penitentiary; two years less a day in a provincial institution. Stephen's Code[212] and the Commissioners' Code[213] had provided that penal servitude should be for a minimum

of 5 years and imprisonment for a maximum of two years. In this respect, Canadian legislation, therefore, continued to differ from English legislation.

Felonies and misdemeanours were abolished by the 1892 Code. The new distinction was to be between indictable and non-indictable offences. It should be noted that other Codes being discussed in the latter part of the 19th century, in particular one drafted by R.S. Wright, kept the distinction between felonies and misdemeanours.[214]

The maximum penalty for a summary conviction offence was 6 months and/or $50, if nothing was specifically stated in the provision creating the offence.[215] The penalty for an indictable offence, if nothing was specifically stated, was 7 years.[216] The so-called "hybrid offence", occasionally found in earlier legislation, was used in the 1892 Code, whereby the prosecutor could choose whether to prosecute by indictment or by way of summary conviction, thus giving the prosecutor a large measure of control over the potential penalty. Such a "hybrid" approach was used, for example, in the 1892 Code for the offence of assault.[217] There has subsequently been widespread employment of the hybrid offence in the Code. When the hybrid offence was challenged in the early 1970s as a violation of the Bill of Rights, the Supreme Court of Canada could state that the hybrid offence was used in "some thirty sections of the Criminal Code and ... in some forty Canadian statutes."[218] Its use seems to have increased further since then. The recent amendments to the Criminal Code contain a number of additions to the list of hybrid offences.[219]

Appeals were introduced in the 1892 Code for the first time,[220] but this did not affect sentencing except when the sentence was one "which could not by law be passed".[221] A general right of appeal from the sentence was not introduced in Canada until legislation was passed in 1921 which provided that "the court of appeal shall consider the fitness of the sentence passed".[222] The provision was borrowed from the 1907 English Act setting up the English Court of Criminal Appeal.[223] This general right of appeal in sentencing matters provides a measure of control over the widespread discretion given to trial judges under the Code. (It had been thought by most persons that the Supreme Court of Canada had no jurisdiction to hear a further appeal relating to a sentence, but in 1982, in The Queen v. Gardiner,[224] the Supreme Court of Canada decided that in exceptional cases such an appeal was possible.) It should be noted that American jurisdictions do not generally provide for a right of appeal from the sentence imposed, thus giving the individual trial judge greater ultimate power over sentencing than in Canada.

VII. REHABILITATION

The 1892 Code was based on deterrence and punishment. This is not surprising. James Fitzjames Stephen, who had drafted the Code from which ours was taken, believed in deterrence and punishment. "Vengeance affects, and ought to affect, the amount of punishment", he had written earlier.[225]

The concept of rehabilitation started to make headway in England, the United States and Canada towards the end of the nineteenth century. It was in keeping with the scientific age to treat crime as a disease that could be treated. Lombroso and others had attempted to show a connection between crime and one's physical condition. Some day, it was thought, a cure for crime would be found. The important English Gladstone Committee Report of 1895 put the rehabilitation concept this way:[226]

> "We think that the system should be made more elastic, more capable of being adopted to the special cases of individual prisoners; that prison discipline and treatment should be more effectually designed to maintain, stimulate, or awaken the higher susceptibilities of prisoners, to develop their moral instincts, to train them in orderly and industrial habits, and whenever possible to turn them out of prison better men and women, both physically and morally, than when they came in."

Prison reform societies in Canada pressed for reform of prisons.[227] In 1908, a Special Committee in Ontario recommended that the Central Prison in Toronto be closed down and a new institution

built.[228] As a result, Guelph Reformatory was completed in 1915, patterned after the reformatory in Elmira, New York. Ontario pressed Ottawa for the adoption of the indeterminate sentence and parole, necessary ingredients, it was thought, of rehabilitation. The 1908 Special Committee stated:[229]

> "The importance of the indefinite sentence and parole plans as features of a reformatory system can scarcely be over-estimated. New York, Massachusetts and Ohio have had a lengthy experience of these systems and that experience has been uniformly satisfactory. Indeed, the leading prison administrators in those States unite in declaring that without indeterminate sentence and parole, reformatory effort would be almost abortive."

As a result, Ontario established the Ontario Board of Parole in 1910[230] and convinced the Federal Government to amend Federal law to permit Ontario judges to add a two-year indeterminate sentence to a possible two-year-less-a-day fixed sentence for persons sent to the Guelph Reformatory.[231]

Some of the same ideas contained in the 1908 Ontario Report were repeated by the 1914 Federal Royal Commission Report on Penitentiaries, which stated:[232] "Undeniably, the trend of prison administration the world over is away from the purely punitive and towards the reformative." They wrote of the "scientific treatment of moral delinquents", speculating that "possibly some day there may be a prison in which each inmate will have his particular case analyzed by experts, with a view to special treatment, aiming at his readjustment."[233] A necessary part of the scientific

rehabilitative approach was, of course, the indeterminate sentence to "cure" the accused:[234]

> "The indeterminate sentence is regarded by penologists as essential to the effective operation of any reformative system. It is at once a scientific and a common-sense proposal. It presupposes the necessity of the cure or reclamation of the man as well as his punishment.... Carried to its logical development the indeterminate sentence should have neither minimum or maximum limits."

This extreme version of the indeterminate sentence was, of course, not adopted into Canadian law. The view of the Inspector of Penitentiaries represented the general consensus in official and legal circles: "At present the judge fixes a maximum and the convict himself determines the minimum by the amount of remission he may earn. I think the existing system preferable."[235] So did the Minister of Justice, C.J. Dougherty, who told the House:[236]

> "when it is suggested that a penitentiary should cease to be a place where people are punished, that the conditions in it shall be made such as it shall cease to be a punitive institution, then I think the time will have arrived when the state would have no right to maintain such an institution. We have no right, in my judgment, to imprison a man exclusively for the sake of reforming him; our right rests on the necessity of punishing him to protect society, and when the necessity for punishment will have disappeared, the right to imprison will have disappeared also."

No doubt, if Canada had gone further at the time and adopted one of the more extreme American schemes, there would now be the same extreme

reaction against rehabilitation in Canada as has recently been taking place in the United States.

In 1938 the Archambault Commission again stressed rehabilitation, stating[237] that "it is admitted by all the foremost students of penology that the revengeful or retributive character of punishment should be completely eliminated, and that the deterrent effect of punishment alone ... is practically valueless...." The Commission recommended[238] that "the task of the prison should be ... the transformation of reformable criminals into law-abiding citizens...." Changes implementing this new approach were not introduced until after the war.

In 1969 the Ouimet Committee recommended that the limited form of indeterminate sentence that existed in Ontario and British Columbia, that is, up to two years indefinite added to two years definite, be abolished.[239] The Committee stated 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 provisions were repealed in 1977.[240]

VIII. PAROLE

Parole, as we have seen, was thought to be a necessary part of the concept of rehabilitation. As the 1956 Fauteux Committee stated:[241] "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.... Parole offers an opportunity for the practical application of rehabilitation programs prior to the expiration of sentence." As a result of the Fauteux Report, a Parole Act was passed in 1958[242] and, for the first time, a National Parole Board established.[243] Until then, early release from confinement was through exective clemency under the Ticket-of-Leave Act of 1899,[244] which had used an earlier English Act as a model.[245] "Clemency", said the Fauteux Report,[246] "has very little, if anything, to do with reformation or rehabilitation. It is nothing more than an exercise of mercy by the Crown, usually upon purely humanitarian grounds."

IX. HABITUAL CRIMINALS

Another aspect of the rehabilitative ideal was the segregation of offenders into categories to prevent "contagion". Some classification took place in the 1930s with the construction of Collins Bay in Kingston and Laval at St. Vincent de Paul for younger and less hardened offenders.[247] The construction of these institutions is important in the history of sentencing because, for the first time, the judges lost a great measure of control over the institution in which the sentence would be served. It was now up to the Penitentiary Branch to decide where an inmate sentenced to over two years would go. Prior to this, the Ontario judge, for example, made the decision between a provincial institution or Kingston Penitentiary, the only Federal institution in Ontario.

There had also been some attempt in earlier years to segregate some of the more brutal offenders by using the Prison of Isolation at Kingston.[248] One group in particular that was thought to require special attention was the habitual criminal. The Gladstone Committee of 1895 talked of the "large class of habitual criminals not of the desperate order, who live by robbery and thieving and petty larceny, who run the risk of comparatively short sentences with comparative indifference."[249] The Committee recommended "that this class of prisoners should be kept as a class apart from others. We think that they are a most undesirable element in a mixed prison population, and that they require and deserve special treatment." Moreover, they said, "a new form of sentence should be placed at the disposal of the judges by which these offenders might be segregated for long periods of

detention...." Such special legislation was enacted in England in 1908,[250] but not in Canada. The Archambault Report recommended that similar legislation be passed[251] and in 1947 such legislation was enacted.[252] A habitual criminal was defined[253] as one who "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". A person found to be a habitual criminal would be incarcerated for life, with a yearly review.[254] The English legislation, it should be noted, was repealed in 1967.[255] As the Ouimet Report pointed out,[256] legislation "was enacted in Canada at a time when its defects were already being recognized in England". The Ouimet Committee recommended its abolition.[257] In 1977 the habitual criminal legislation was repealed[258] and replaced by "Dangerous Offenders" legislation.[259]

X. THE DECLINE OF THE REHABILITATIVE IDEAL

In the 1960s a revolution occurred in penal philosphy whereby the quest for the rehabilitative ideal was jettisoned by many influential writers.[260] The Ouimet Committee reported in 1969, just as the concept of rehabilitation was on the downward slide in Canada. The Committee was cautious, stating that "no definite conclusions can yet be drawn with respect to the possibility of true rehabilitation under detention."[261] By the 1980s, however, rehabilitation in a prison setting was no longer spoken of with any enthusiasm.[262] The provision in the 1966 United Nations Covenant on Civil and Political Rights which stated that "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"[263] was now sufficiently discredited that it did not find a place in the new Canadian Charter of Rights and Freedoms.[264]

The Ouimet Committee recommended techniques that would give the trial judge alternatives to keep people out of prison and the Law Reform Commission of Canada has taken the same approach. The Commission stated in its 1976 Report, Our Criminal Law:[265] "The major punishment of last resort is prison. This is today the ultimate weapon of the criminal law. As such it must be used sparingly." The Ouimet Committee had taken the same approach, stating[266] that "imprisonment or confinement should be used only as an ultimate resort when all other alternatives have failed."

Some of the techniques recommended by the Ouimet Committee to keep offenders out of prison, which were later adopted by legislation, are absolute and conditional discharges,[267] removal of restrictions on the use of the suspended sentence and probation, which had been introduced in 1961,[268] and the use of intermittent (night and weekend) incarceration.[269] The Ouimet Committee also wanted a greater use of fines, recommending that a fine be permissible in lieu of imprisonment, even when the potential sentence carried a penalty of more than five years.[270] This provision, however, has not yet been adopted; nor has the Committee's recommendation relating to hospital permits[271] whereby judges, as in England, could send mentally ill offenders directly to a mental hospital.

The Ouimet Committee was hesitant about recommending an expansion of the use of restitution or reparation,[272] making "no recommendation other than that the correctional possibilities of such disposition be kept under review with a view to their development." The Law Reform Commission, on the other hand, had no hesitation in advocating greater use of restitution,[273] stating:

> "One penalty our system should use more extensively is the restitution order. To compel offenders to make restitution to their victims is one of the most fruitful types of punishment.... Restitution has a vital place in any decent criminal justice system."

The Law Reform Commission also recommended[274] "more creative penalties like community service orders compelling the offender to do something positive to make up for the wrong he has done society."

The Ouimet Committee also strongly condemned the use of corporal punishment,[275] which was later finally abolished in 1972:[276]

> "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 in liability to be whipped in the Criminal Code presents an astonishing anachronism."

XI. CONCLUSION

This historical survey shows that philosophies of sentencing change over the years. We have seen in the last 100 years the use at various times of deterrence, vengeance, rehabilitation and rewards. The historical approach shows that what we now have did not arise logically or inevitably. Penitentiaries were, for the most part, an invention of the nineteenth century. Many of the institutions were designed to meet a particular penal philosphy of the time.

The crucial question - the cross-roads issue - is whether Canada should eliminate the wide discretion now possessed by trial judges and the parole board and adopt relatively fixed denunciatory or punitive sentences. This historical review shows that Canada never wholeheartedly adopted the rehabilitative approach, with the wide indeterminate sentence used in the United States. Moreover, in Canada, unlike the United States, sentencing by trial judges has for many years been supervised by Courts of Appeal and thus the extreme power of the trial judge in the United States does not exist in Canada. The apparent failure of the rehabilitative ideal, therefore, need not - and, in my opinion, should not - bring about the same vigorous reaction in Canada as it has in the United States.

XII ENDNOTES

* This study was prepared under contract with the Canadian Sentencing Commission. The views expressed here do not, of course, necessarily represent the views of the Commission. I am indebted to Richard Owens, now in his second year at the Faculty of Law, University of Toronto, for his excellent research assistance over the past summer.

1. Order-in-Council P.C. 1984-1585 of May 10, 1984, established under Part I of the Inquiries Act, R.S.C. 1970, c. I-13. See the Department of Justice document, Sentencing (Ottawa, February, 1984).

2. See, for example, the work of the Osgoode Society of Ontario and, in particular, the two volumes of essays, D.H. Flaherty (ed.), Essays in the History of Canadian Law (the Osgoode Society, Toronto, vol. 1, 1981, vol. 2, 1983).

3. Canadian Criminal Code, R.S.C. 1970, c. C-34, s. 722.

4. See M.L. Friedland, National Security: the Legal Dimensions (Ottawa, 1980), at p. 18.

5. Stat. Can. 1865, c. 13, s. 1(10).

6. Stat. Can. 1869, c. 20, s. 63. The minimum penalty was eliminated by R.S.C. 1886, c. 157, s. 1.

7. 1953-54 Code, s. 147.

8. Stat. Can. 1968-69, c. 38, s. 7.

9. See generally, J.M. Beattie, Attitudes Towards Crime and Punishment in Upper Canada 1830-1850: A Documentary Study (Centre of Criminology, 1977); R.B. Splane, Social Welfare in Ontario 1791-1893 (U. of T. Press, 1965), at pp. 128 et seq.; W.A. Calder, The Federal Penitentiary System in Canada, 1867-1899: A Social and Institutional History (unpublished U. of T. doctoral dissertation, 1979) and a short article drawn from the thesis, "Convict Life in Canadian-Federal Penitentiaries, 1867-1900" in L.A. Knafla, Crime and Criminal Justice in Europe and Canada (Wilfred Laurier U.P., 1981), 297. See also, J.W. Ekstedt and C.T. Griffiths, Corrections in Canada: Policy and Practice (Butterworths, Toronto, 1983); M. Jackson, Prisoners of Isolation: Solitary Confinement in Canada (U. of T. Press, 1983); D. Curtis, A. Graham, L. Kelly, A. Patterson, Kingston Penitentiary: The First Hundred and Fifty Years (Supply and Services, Ottawa, 1985); K. Joliffe, Penitentiary Medical Services: 1835-1983 (Ministry of the Solicitor General, Ottawa, 1984); M.S. Cross, "Imprisonment in Canada: a Historical Perspective", John Howard Society of Ontario, Community Education Series 1, No. 6, no date; J.A. Edmison, "Some Aspects of Nineteenth-Century Canadian Prisons" in W.T. McGrath, Crime and Its Treatment in Canada (2nd ed.,

Macmillan, Toronto, 1976), at p. 347. The Annual Reports of the Minister of Justice on Penitentiaries, containing individual reports from the wardens, surgeons and others is a very valuable source of information.

10. See J.W. Ekstedt and C.T. Griffiths, Corrections in Canada, at p. 33.

11. See generally, the valuable study, D.A. Thomas, The Penal Equation, Derivations of the Penalty Structure of English Criminal Law (Cambridge Institute of Criminology, 1978).

12. C.K. Talbot, Justice in Early Ontario, 1791-1840 (Crimcare, Ottawa, 1983) at pp. 152-3.

13. Ibid., at p. 150.

14. See J.K. Elliott, "Crime and Punishment in Early Upper Canada" (1931), 27 Ontario Historical Society 335; C.K. Talbot, Justice in Early Ontario, at p. 146.

15. Stat. U.C. 1800, c. 1, s. 4. This was similar to the English Act of 19 George III, 1779, c. 74, s. 4.

16. Stat. U.C. 1792, c. 8.

17. Stat. U.C. 1810, c. 5.

18. Stat. U.C. 1800, c. 1.

19. L. Radzinowicz, A History of English Criminal Law and its Administration from 1750 (Stevens, London, 1948) vol. 1, at pp. 313 et seq. See also E.O. Tuttle, The Crusade against Capital Punishment in Great Britain (Stevens, London, 1961), at pp. 3 et seq.

20. Ibid., at p. 3.

21. See L. Radzinowicz, A History of English Criminal Law, and E.O. Tuttle, The Crusade against Capital Punishment.

22. Stat. U.C. 1833, c. 3.

23. See, e.g., English Statute 7 & 8 George IV, 1827, c. 27 and c. 28.

24. C.K. Talbot, Justice in Early Ontario, at pp. 145 and 149; J.M. Beattie, Attitudes Towards Crime and Punishment in Upper Canada, at pp. 9, 57, 65-67.

25. Stat. U.C., c. 3, s. 1.

26. See M.L. Friedland, Double Jeopardy (Oxford U.P., 1969), at pp. 332 et seq.

27. See generally, J.F. Stephen, A History of the Criminal Law of England, vol. 1, (Macmillan, London, 1883), at pp. 459 et seq.

28. Stat. U.C. 1800, c. 1, s. 3.

29. Except for manslaughter, ibid., s. 3.

30. 7 & 8 George IV, 1827, c. 28, s. 6.

31. Stat. U.C. 1833, c. 3, s. 25. See also Stat. Can. 1841, c. 24, s. 19, ensuring that benefit of clergy would not apply in the former Province of Lower Canada, now united with Upper Canada.

32. 4 George I, 1717, c. 11. See D.A. Thomas, The Penal Equation, at pp. 3 et seq.

33. Ibid., at p. 4.

34. Foreward by Nigel Walker to D.A. Thomas, The Penal Equation.

35. See generally, A.G.L. Shaw, Convicts and the Colonies (Faber and Faber, London, 1966).

36. Stat. U.C. 1800, c. 1, s. 5.

37. C.K. Talbot, Justice in Early Ontario, at p. 150.

38. J.D. Borthwick, History of the Montreal Prisons (Montreal, 1907), at p. 48.

39. Ibid., at p. 50.

40. J.M. Beattie, Attitudes Towards Crime and Punishment in Upper Canada, at p. 82. See also the 1838 Molesworth Report (Report of the Select Committee on Transportation), cited in D.A. Thomas, The Penal Equation, at p. 30.

41. Larceny Act, Stat. U.C. 1837, c. 4, s. 3.

42. Transportation of Convicts, Stat. U.C. 1837, c. 4, s. 1.

43. See the unpublished Carleton University M.A. thesis, M.K. Evans, The Prerogative of Pardon in Canada: Its Development 1864-1894 (1971); P.B. Waite, Canada 1874-1896 (McClelland and Stewart, Toronto, 1971), at p. 45.

44. A.G.L. Shaw, Convicts and the Colonies, at p. 153.

45. J.A. Edmison, "Some Aspects of Nineteenth-Century Canadian Prisons" in W.T. McGrath, Crime and Its Treatment in Canada, at p. 352.

46. See D.A. Thomas, The Penal Equation, at p. 30.

47. Home Office Report of the Advisory Council on the Penal System, Sentences of Imprisonment: a Review of Maximum Penalties (1979), at p. 19.

48. See, e.g., Stat. U.C. 1833, c. 3, s. 26 ("to be set in the pillory once or oftener"). See generally, J.A. Edmison, "Some Aspects of Nineteenth-Century Canadian Prisons", at pp. 350-1; J.D. Borthwick, History of Montreal Prisons, at pp. 13-14.

49. Stat. Can. 1841, s. 31.

50. See C.K. Talbot, Justice in Early Ontario, at p. 150.

51. See J.D. Borthwick, History of Montreal Prisons, passim.

52. Ibid., at p. 14.

53. See D.A. Thomas, The Penal Equation, at p. 8.

54. J.M. Beattie, Attitudes Towards Crime and Punishment in Upper Canada, at p. 85.

55. Ibid., at p. 82.

56. See generally, W.A. Calder, The Federal Penitentiary System in Canada, at pp. 11 et seq.; J.M. Beattie, Attitudes Towards Crime and Punishment in Upper Canada, at pp. 15 et seq. and 82 et seq.

57. Cited in J.M. Beattie, Attitudes Towards Crime and Punishment in Upper Canada, at p. 93.

58. Stat. U.C. 1833, c. 3.

59. S. 25.

60. Ibid.

61. Ibid.

62. Stat. U.C. 1837, c. 6, s. 1.

63. S. 2.

64. Stat. U.C. 1837, c. 4, s. 3.

65. Ibid., s. 4.

66. Stat. U.C. 1838, c. 11, s. 1.

67. Stat. Can. 1841, c. 69, s. 1.

68. Stat. Can. 1841, c. 24.

69. Ibid., s. 30.

70. Ibid., s. 24.

71. Stat. Can. 1841, c. 25, containing 70 sections.

72. Stat. Can. 1841, c. 26, containing 42 sections.

73. Stat. Can. 1841, c. 27, containing 44 sections.

74. Stat. Can. 1842, c. 5, s. 2.

75. Ibid., s. 4.

76. D.A. Thomas, The Penal Equation, at p. 30.

77. Ibid., at p. 32.

78. Stat. Can. 1847, c. 4, s. 5.

79. Ibid., s. 9.

80. Stat. Can. 1849, c. 20, s. 1.

81. Home Office Report, Sentences of Imprisonment, at p. 21.

82. The Globe, Nov. 4, 1846, cited in J.M. Beattie, at p. 148.

83. Ibid., at p. 150.

84. Ibid., at p. 151.

85. See J.M.S. Careless, Brown of the Globe, vol. 1 (Macmillan, Toronto, 1959), at pp. 78-87.

86. Journal of the Legislative Assembly (1849), Appendix B.B.B.B.B., cited in J.M. Beattie, at p. 156.

87. Ibid.

88. Stat. Can. 1851, c. 2.

89. S. 7.

90. S. 5.

91. S. 15.

92. S. 40.

93. Stat. Can. 1857, c. 28, s. 1.

94. Stat. Can. 1855, c. 92.

95. S. 28.

96. S. 37.

97. S. 29.

98. S. 32.

99. Stat. Can. 1859, c. 90.

100. S. 3.

101. S. 6.

102. S. 7.

103. S. 19.

104. Stat. Can. 1859, c. 91.

105. Ss. 20 and 21.

106. S. 2.

107. S. 3.

108. S. 13.

109. S. 9.

110. Ss. 15, 16 and 17.

111. Stat. Can. 1867, c. 10, s. 77.

112. Home Office Report, 1978, Sentences of Imprisonment, at pp. 23-26.

113. R. Cross, "The Report of the Criminal Law Commissioners (1833-1849) and the Abortive Bills of 1853" in P.R. Glazebrook (ed.), Reshaping the Criminal Law (Stevens, London, 1978), at p. 5.

114. Ibid.; D.A. Thomas, The Penal Equation, at pp. 19-27.

115. See W.L. Morrison, John Austin (Stanford U.P., 1982); L. & J. Hamburger, Troubled Lives: John and Sarah Austin (U. of T. Press, 1985).

116. Cited in Cross, "The Report of the Criminal Law Commissioners", at p. 6.

117. Second Report from the Commissioners on Criminal Law, 1836, at p. 24, dealing here with capital punishment, but indicative of their views. See also the Seventh Report of the Commissioners on Criminal Law, 1843, at p. 92. See D.A. Thomas, The Penal Equation, at pp. 20 et seq.

118. Fourth Report from the Commissioners on Criminal Law, 1839, at pp. xvi-xvii.

119. Seventh Report from the Commissioners on Criminal Law, 1843, at pp. 92 et seq.

120. Thomas, The Penal Equation, at p. 25.

121. See Cross, "The Report of the Criminal Law Commissioners", at p. 8.

122. 24 and 25 Vict., 1861, cc. 94-100.

123. Stat. Can. 1869, cc. 18-36.

124. 30 & 31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II, No. 5.

125. This section is drawn from "Criminal Justice and the Constitutional Division of Power in Canada" in M.L. Friedland, A Century of Criminal Justice (Carswell, Toronto, 1984), chapter 2.

126. See M.A. Lapin and J.S. Patrick (eds.), Index to Parliamentary Debates on Confederation of the British North American Provinces (Ottawa, 1951), at pp. 40-1.

127. Ibid., at p. 41.

128. See G.P. Browne (ed.), Documents on the Confederation of British North America (McClelland and Stewart, Toronto, 1969), at p. 120.

129. See R. Herbert (ed.), Speeches on Canadian Affairs by the Fourth Earl of Carnarvon (John Murray, London, 1902).

130. See Stat. Can. 1869, cc. 18-36.

131. A. Shortt and A.G. Dougherty (eds.), Documents Relating to the Constitutional History of Canada 1759-1791 (2nd ed., Ottawa, 1918), at p. 126.

132. 14 Geo. 3, c. 83 (U.K.). See generally, H.M. Neatby, The Administration of Justice under the Quebec Act (U. of Minnesota Press, 1937); A.L. Burt, The Old Province of Quebec (McClelland and Stewart, Toronto, 1968).

133. For further discussion, see M.L. Friedland, A Century of Criminal Justice, at pp. 49 et seq. See also J.Ll.J. Edwards, "The Advent of English (Not French) Criminal Law and Procedure Into Canada - A Close Call in 1774" (1983-84) 26 Crim. L.Q. 464.

134. Penitentiaries became the property of the federal government by virtue of s. 108 and the Third Schedule.

135. The earlier Charlottetown Conference had taken the same position: see Appendix 4, "A Brief Legislative History of Penitentiaries Prior to Confederation" in the government document dated April 29, 1976, Bi-Lateral Discussions on the Division of Correctional Responsibilities Between the Federal Government and the Government of British Columbia.

136. Ibid.

137. See their Report, 1863, vol. ix.

138. Ibid., at p. iv.

139. See Senate Debates, May 12, 1868, at pp. 282-3. See also the 1867 Prison Report prepared by R.S. Wright, Digest and Summary of Information Respecting Prisons in the Colonies, supplied by the Governors of Her Majesty's Colonial Possessions, in answer to Mr. Secretary Cardwell's Circular Dispatches of Jan. 16 and 17, 1865, C. 3961, 1867.

140. R.M. Zubrycki, The Establishment of Canada's Penitentiary System: Federal Correctional Policy 1867-1900 (Publication Series, Faculty of Social Work, U. of Toronto, 1980), at pp. 22 et seq.; K.D. Jaffary, "Correctional Federalism" (1965) 7 Can. J. of Corr. 362 at p. 365.

141. See Bi-Lateral Discussions on the Division of Correctional Responsibilities, at p. 7.

142. Report of the Canadian Committee on Corrections (Ottawa, 1969) (the Ouimet Report), at p. 279.

143. Zubrycki, The Establishment of Canada's Penitentiary System, at p. 36.

144. See the Procedure in Criminal Cases Act, Stat. Can. 1869, c. 29, s. 96.

145. But see the Prisons and Reformatories Amendment Act, Stat. Can. 1913, s. 1, permitting a 2-year indefinite term to be added to a 2-year-less-a-day sentence.

146. See the Procedure in Criminal Cases Act, Stat. Can. 1859, c. 99, s. 100, initially introduced in 1842: see the Report of the Royal Commission to Investigate the Penal System of Canada (Ottawa, 1938) (the Archambault Report), at p. 339. See also Stat. Can. 1841, c. 24, s. 24.

147. Criminal Code, s. 659.

148. See Needham, "Historical Perspectives on the Federal-Provincial Split in Jurisdiction in Corrections" (1980), 22 Can. J. of Criminology 298, at p. 299.

149. At pp. 339 et seq.

150. Report of a Committee Appointed to Inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada (Ottawa, 1956), at p. 50.

151. At pp. 279 et seq.

152. A Report on Dispositions and Sentences in the Criminal Process: Guidelines (Ottawa, 1976).

153. See generally, the Carleton University Master's thesis, M.K. Evans, The Prerogative of Pardon in Canada: Its Development 1864-1894 (1971).

154. The other provision objected to related to the life appointment of senators: see the letter from the Colonial Secretary, Edward Cardwell, to Viscount Monck, Dec. 3, 1864, set out in W.P.M. Kennedy (ed.), Statutes, Treaties and Documents of the Canadian Constitution 1713-1929 (2nd ed., Oxford U.P., 1930), at pp. 547 et seq. The Colonial Office eventually gave in on this matter, but not on the pardoning power.

155. Ibid., at p. 548.

156. See Evans, The Prerogative of Pardon, at p. 8.

157. See the views of the Colonial Secretaries: Lord Granville, set out in Canadian Sessional Papers, 1869, No. 16, p. 5, and Lord Carnarvon, set out in Canadian Sessional Papers, No. 11, 1875, p. 38.

158. See the views of Sir John A. Macdonald in 1869 (Canadian Sessional Papers, 1869, No. 16, p. 1) and of Sir John Thompson in 1889 (see the correspondence between Thompson and Mowat set out in J.M. Beck (ed.), The Shaping of Canadian Federalism: Central Authority or Provincial Right? (Copp Clark, Toronto, 1971), at pp. 92-3).

159. Another controversy - this time between the Colonial Office and the federal government - involved the question whether the Governor-General could act on his own without the advice of the federal government. This was resolved in 1877, whereby the Governor-General could not act without the advice of the Cabinet in capital cases and of a cabinet minister in other cases, although he could act on his own in extra-Canadian matters: see the thorough discussion of this issue in Evans, The Prerogative of Pardon in Canada, at pp. 62 et seq.

160. Set out in J.M. Beck (ed.), The Shaping of Canadian Federalism, at p. 91.

161. Stat. Ont. 1888, c. 5.

162. A.G. Can. v. A.G. Ont. (1890), 20 O.R. 222 (Chancery Div.), affirmed (1892), 19 O.A.R. 31 (C.A.), which was affirmed without a decision on the substantive issue, (1894), 23 S.C.R. 458. Before the Supreme Court case, the Privy Council had decided the important Maritime Bank Case (Liquidators of Maritime Bank v. Receiver General of N.B. [1892] A.C. 437, establishing the status of the Lieutenant-Governors. This put the question beyond dispute.

163. (1890), 20 O.R. 222 at p. 249.

164. Stat. Can. 1869, cc. 18-36.

165. 24 & 25 Vict., 1861, cc. 94-100.

166. Hansard, House of Commons, April 23, 1869, at pp. 54-55.

167. Hansard, House of Commons, April 27, 1869, at p. 89.

168. Home Office Report, 1979, Sentences of Imprisonment, at p. 23.

169. C. Greaves, The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict. with notes and observations (Stevens, London, 1861), p. xlv, cited in Home Office Report, 1979, at p. 24.

170. Stat. Can. 1869, c. 20, s. 63.

171. Stat. Can. 1869, c. 18.

172. E.g., s. 20.

173. E.g., s. 15.

174. E.g., s. 8.

175. E.g., s. 11.

176. E.g., s. 23.

177. E.g., s. 4.

178. E.g., s. 2.

179. Stat. Can. 1869, c. 20, s. 1.

180. Stat. Can. 1869, c. 20, s. 51.

181. Stat. Can. 1869, c.19, s.14.

182. Stat. Can. 1869, c. 20, s. 64 (attempted buggery); c. 21, s. 7 (larceny after a previous conviction for felony).

183. Stat. Can. 1869, c. 21, ss. 12, 22, 24 and 27.

184. Stat. Can. 1869, c. 20, s. 72.

185. Stat. Can. 1869, c. 29, s. 1.

186. Stat. Can. 1869, c. 20, s. 21.

187. Stat. Can. 1869, c. 20, s. 53.

188. Hansard, House of Commons, April 27, 1869, pp. 89-91, and May 24, 1869, 424-427.

189. See the Home Office Report, 1979, Sentences of Imprisonment, pp. 24-25.

190. 1863, vol. ix.

191. Digest and Summary of Information Respecting Prisons in the Colonies, supplied by the Governors of Her Majesty's Colonial Possessions, in answer to Mr. Secretary Cardwell's Circular Dispatches of Jan. 16 and 17, 1865, C. 3961, 1867.

192. Stat. Can. 1868, c. 75.

193. S. 61.

194. S. 32.

195. See generally, W.A. Calder, The Federal Penitentiary System in Canada, at pp. 50-51; M.S. Cross, "Imprisonment in Canada". See also R.B. Splane, Social Welfare in Ontario 1791-1893, at pp. 152-3.

196. See generally W.A. Calder, passim.

197. Stat. Can. 1892, c. 29.

198. Hansard, House of Commons, April 12, 1892, col. 1313.

199. E.g., s. 105.

200. E.g., s. 199.

201. E.g., s. 450.

202. E.g., s. 94.

203. E.g., s. 215.

204. E.g., s. 189.

205. See G. Parker, "The Origins of the Canadian Criminal Code" in D.H. Flaherty, Essays in the History of Canadian Law, vol. 1, (Osgoode Society, Toronto, 1981), at pp. 249 et seq.

206. Hansard, House of Commons, May 25, 1892, col. 2972.

207. See generally, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" in M.L. Friedland, A Century of Criminal Justice, at pp. 1 et seq.

208. Hansard, House of Commons, May 19, 1892, col. 2840.

209. Ss. 136 et seq.

210. Ss. 326 et seq.

211. S. 955.

212. S. 12.

213. S. 12.

214. Draft Criminal Code and Code of Criminal Procedure, 1877, C. 1893.

215. S. 951(2).

216. S. 951. A penalty of 10 years was provided for a second indictable offence by s. 952.

217. S. 265.

218. Regina v. Smythe (1971), 3 C.C.C. (2d) 366 at p. 371.

219. Criminal Law Amendment Act, 1985, Stat. Can. 1985, c. 20, s. 9 (false passport), s. 10 (forcible entry), s. 20 (escape).

220. Ss. 742 et seq. See generally, V. Del Buono, "The Right to Appeal in Indictable Cases: A Legislative History" (1978), 16 Alberta L. Rev. 446.

221. S. 744(4).

222. Stat. Can. 1921, c. 25, s. 22; see also Stat. Can. 1923, c. 41, s. 9.

223. 7 Edw. 7, 1907, c. 23. See Rex v. Adams (1921), 36 C.C.C. 180 (Alberta C.A.).

224. (1982), 68 C.C.C. (2d) 477.

225. J.F. Stephen, Liberty, Equality, Fraternity, 2nd ed. (London, 1874), at p. 152, reprinted with an introduction by R.J. White (Cambridge, 1967).

226. Report from the Departmental Committee on Prisons, 1895, C. 7702, at p. 8.

227. See R.B. Splane, Social Welfare in Ontario 1791-1893, at pp. 185 et seq.

228. See the Report of the Special Committee to Investigate the Question of Prison Labour, 1908.

229. At p. 43.

230. The Board was put on a proper statutory basis in 1917: see the Ontario Parole Act, Stat. Ont. 1917, c. 63. The 75th Anniversary of the Board was celebrated in 1985.

231. See the Prisons and Reformatories Amendment Act, Stat. Can. 1913, c. 39, s. 1. The provision was extended to British Columbia in 1948: see the Ouimet Report, at p. 332.

232. Report of the Royal Commission on Penitentiaries (Ottawa, 1914) (Sessional Paper No. 252), at p. 26.

233. At p. 30.

234. At pp. 38-39.

235. Reactions to the Commission Report can be found in P.A.C. R.G. 73, vol. 41, file 1-20-10, vol. 6.

236. Hansard, House of Commons, March 30, 1915, at p. 1782.

237. Archambault Report, at p. 9.

238. Ibid.

239. At. p. 205.

240. Criminal Law Amendment Act, 1977, Stat. Can. 1976-77, c. 53, s. 46(3).

241. Report of a Committee appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada (Ottawa, 1956), at p. 51.

242. Parole Act, Stat. Can. 1958, c. 38.

243. See the Ouimet Report, at p. 333.

244. An Act to Provide for the Conditional Liberation of Penitentiary Convicts, 1899, c. 49.

245. Hansard, House of Commons, Aug. 5, 1899, at col. 9600.

246. At. p. 51.

247. Archambault Report, at pp. 302 et seq. and 283 et seq.

248. See M. Jackson, Prisoners of Isolation: Solitary Confinement in Canada (U. of T. Press, 1983) at pp. 31 et seq.

249. At p. 31.

250. Prevention of Crime Act, 1908, c. 59, Part II.

251. At p. 222.

252. Criminal Code Amendment Act, Stat. Can. 1947, c. 55, s. 18. See generally N. Morris, The Habitual Criminal (Longmans, London, 1951) at pp. 137 et seq.

253. Criminal Code, Stat. Can. 1953-54, c. 51, s. 660(2).

254. See the Ouimet Report, at p. 244.

255. Ibid.

256. Ibid., at p. 243.

257. At pp. 251-3.

258. Stat. Can. 1976-77, c. 53, s. 14.

259. Ibid. For background, see R.R. Price and A.D. Gold, "Legal Controls for the Dangerous Offender" in the Law Reform Commission of Canada document, Studies on Imprisonment, 1976, at pp. 153 et seq. See also J.J.M. Shore, "An Evaluation of Canada's Dangerous Offender Legislation" (1984), 25 Cahiers de Droit 411.

260. Perhaps the most influential legal article was Francis Allen, "Criminal Justice, Legal Values and the Rehabilitative Ideal" (1959), 50 J. Crim. L.C. & P.S. 226; an earlier important article by a non-lawyer was C.S. Lewis, "The Humanitarian Theory of Punishment" (1953), 6 Res Judicatae 224. See also P.C. Weiler, "The Reform of Punishment" in Law Reform Commission of Canada, Studies on Sentencing (Ottawa, 1974) at pp. 91 et seq.

261. At p. 202.

262. See, e.g., Department of Justice, The Criminal Law in Canadian Society (Ottawa, 1982) at pp. 38 et seq.

263. Annex to G.A. Res. 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, at 52 (1966); Canadian accession in force August 19, 1976: see O/C P.C. 1976-1156 of May 18, 1976.

264. Set out in Part I of the Constitution Act, 1982, as enacted by the Canada Act 1982 (U.K.), c. 11.

265. At p. 24.

266. At. p. 204.

267. At pp. 194 et seq. Now, s. 662.1 of the Criminal Code, introduced by Stat. Can. 1972, c. 13, s. 57, as amended by Stat. Can. 1974-75-76, c. 93, s. 80 and c. 105, s. 20.

268. At p. 196. Now, s. 663 of the Criminal Code, introduced by Stat. Can. 1972, c. 13, s. 58, as amended by Stat. Can. 1974-75-76, c. 93, s. 81.

269. At pp. 203-4. Now, s. 663(1)(c) of the Criminal Code, introduced by Stat. Can. 1974-75-76, c. 93, s. 81.

270. At p. 199.

271. At pp. 233 et seq. See also the Law Reform Commission of Canada, Mental Disorder in the Criminal Process (Ottawa, 1976).

272. At pp. 200-201.

273. Our Criminal Law (1976), at p. 25.

274. Ibid.

275. At p. 207.

276. Stat. Can. 1972, c. 13, s. 59.