An Introduction to the Criminal Process in Canada

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Preface

Books that purport to be introductions to technical subjects run the dual risk of either being too simple and hence inaccurate, or too complicated and thus incomprehensible. I have no doubt that such faults are present in this book.

An understanding of what the criminal process is all about is not, however, a matter that should be limited to those who have a special expertise in the subject. The criminal law affects everyone and while no one — not even the lawyer — can be expected to know all of the criminal offences that now exist, there is no reason why *how* the criminal law works should not be known to everyone who is interested. Criminal procedure embraces the whole system that starts with the commission of an offence and does not end until an acquittal or expiry of the sentence in the case of a conviction. Access to an understanding of this system, at least in its broad outline, should be available to everyone.

The Canadian Charter of Rights and Freedoms exists for the protection of everyone, and most of us are familiar with the Charter. But a knowledge of the Charter without some knowledge of how it interacts with the rules of criminal procedure gives an incomplete picture.

I have tried to make this book intelligible to the reader without a legal background. I am not sure who that reader might be, though I hope it will be anyone, from the student to the social worker, from the police recruit to the justice of the peace. The lawyer will, doubtless, find much to criticize in it. Generalities and precision go uneasily together, and I can only hope that where I have had to sacrifice detail, I have not unwittingly led the reader into error.

List of Statutes

Constitution Act, 1867 (30 & 31 Vict.), c. 3
Constitution Act, 1982 [en. by the Canada Act, 1982 (U.K.), c. 11, s. 1]
Criminal Code, R.S.C. 1970, c. C-34 [R.S.C. 1985, c. C-46]
Criminal Records Act, R.S.C. 1970, c. 12 (1st Supp.) [R.S.C. 1985, c. C-47]
Excise Act, R.S.C. 1970, c. E-12 [R.S.C. 1985, c. E-15]
Food and Drugs Act, R.S.C. 1970, c. F-27 [R.S.C. 1985, c. F-27]
Identification of Criminals Act, R.S.C. 1970, c. I-1 [R.S.C. 1985, c. I-1]
Income Tax Act, R.S.C. 1970, c. I-5
Narcotic Control Act, R.S.C. 1970, c. N-1 [R.S.C. 1985, c. N-1]
Official Secrets Act, R.S.C. 1970, c. O-3 [R.S.C. 1985, c. O-5]
Provincial Offences Act, R.S.O. 1980, c. 400
Young Offenders Act, S.C. 1980-81-82-83, c. 110 [R.S.C. 1985, c. Y-1]

In the spring of 1988, the 1985 Revised Statutes of Canada are expected to come into force. This revision will result in changes to the section numbers of the Canadian Criminal Code as well as other federal statutes. In order to inform the reader of the amended sequential numbering, the section numbers under the 1985 Revised Statutes of Canada are shown in square brackets after the current section numbers wherever they appear in the text or footnotes of the book. In addition, the statutes which are referred to in the book are provided in the above list. In the case of federal statutes, current and revised chapter numbers are given.

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Crime and Investigation

INTRODUCTION

Without criminal law, there could be no such thing as a crime and without a crime, no such thing as the criminal process. Criminal law must begin, therefore, with an enactment by a competent body creating a criminal offence. In Canada, this simple statement requires some elaboration. Under the Constitution Act of 1867, which is now part of the Constitution Acts, 1867 to 1982, the federal government is given jurisdiction by section 91(27) over "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters." It follows from this that only the federal Parliament is competent to legislate criminal law and criminal procedure. However, section 92 of the same Act lists those areas within the exclusive jurisdiction of the provinces and item (15) is "The Imposition of Punishment by Fine, Penalty or Imprisonment for enforcing any Law of the Province made in relation to any matter coming within any of the Classes of Subjects enumerated in this Section." Section 92 itself lists several matters within the exclusive jurisdiction of a province such as property and civil rights, shop, saloon and other licences in order to raise revenue, and all matters of a merely local or private nature. While, therefore, it is perfectly true to say

that in Canada, all criminal law is federal, there is a large body of provincial legislation that imposes a penalty (either a fine or imprisonment or some lesser penalty) for its breach.

Indeed, in terms of bulk, there is probably more provincial "criminal" legislation than federal and certainly, in terms of its impact on the ordinary man in the street, provincial legislation is much more likely to intrude upon his life than is federal legislation. The reason for this is clear. Provincial legislation that merely creates a crime is invalid since it invades federal jurisdiction, but it is valid if the purpose of it is better to enforce some matter that is otherwise within the provincial jurisdiction. Since those items reserved for the provinces by section 92 are largely those governing such everyday matters as controlling traffic, regulating retail businesses, licensing alcohol and other sales, regulating municipal affairs and so on, it is not surprising to find so much provincial criminal legislation. It would be rather pointless to give the province, for example, the power to regulate speed on the highway or the sale of alcoholic beverages, if the province were not also given the power to impose a penalty to enforce its rules.

Thus Canada has two distinct branches of criminal law — that justified under section 91(27) as "criminal law" and reserved for the federal government, and that justified under section 92(15) and within the provincial jurisdiction. Section 91, however, reserves for the federal government other matters besides criminal law; banking, bankruptcy, trade and commerce, and the postal service, to name only a few (not to mention a general power to legislate for the "Peace, Order and good Government of Canada"). If, therefore, the federal government legislates over one of those particular matters and attaches a penalty to some act, that legislation may be valid criminal law, not by virtue of the criminal law power contained in section 91(27), but by virtue of powers contained in some other clause.

When one talks about the criminal law of Canada, it is therefore necessary to distinguish between criminal law that arises from section 91(27) and is within the exclusive jurisdiction of the federal government, criminal law that arises from the better enforcement of some other clause in section 91, which is also within the exclusive jurisdiction of the federal government, but which may have certain procedural differences attached to it because of its different basis, and that criminal law which is really the enforcement by way of some penal sanction of some clause of section 92 and which is within the exclusive jurisdiction of the provinces. This last is sometimes called quasi-criminal law or provincial penal law, to avoid the confusion of equating

it with what is sometimes called "real" criminal law or criminal law "properly so-called."

As can be seen, the distinction between federal criminal law and provincial penal legislation may not be all that easy to draw in practice. It is possible for the two different areas of jurisdiction to overlap. For example, the regulation of traffic is within the provincial jurisdiction and hence all provinces have Highway Traffic Acts or Motor Vehicle Acts or some such named Act that creates numerous driving offences. On the other hand, if some form of driving conduct reaches such proportions as to be a danger to the public in general, it may be the subject of federal criminal legislation. Drunk driving may be seen as a matter affecting the regulation of traffic or it may be viewed as a matter of criminal law. Provincial legislation governing such conduct would be valid as being for the better enforcement of traffic regulation; federal legislation would be valid as being criminal law. In such a case both pieces of legislation would be jurisdictionally valid, but under the constitutional doctrine of paramountcy, if federal and provincial legislation (both jurisdictionally valid) cover precisely the same subject matter, the federal legislation is said to occupy the field and the provincial legislation must give way, leaving only the federal legislation in effect. This, in fact, is what has happened in the case of drunk driving and related offences.

On the other hand, if the two pieces of legislation do not cover the same subject matter, then they can co-exist and both are valid. For example, there are obvious forms of poor driving — one can drive carelessly, drive dangerously, or drive absolutely recklessly. All provinces have legislation that penalizes what is variously called careless driving or driving without due care and attention. The Criminal Code, however, creates by section 233 [s. 249], an offence of dangerous driving, punishment for which varies from that for merely a summary conviction offence to a maximum term of imprisonment for 14 years if death results. If these modes of driving mean the same thing, then there cannot be separate offences covering exactly the same type of act, yet provincial careless driving offences generally are punishable by a maximum of six months' imprisonment. Not without some difficulty, the Supreme Court[1] has held that both offences are

1 In a series of cases, *O'Grady v. Sparling*, [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145 (S.C.C.); *Mann v. R.*, [1966] S.C.R. 238, 47 C.R. 400, [1966] 2 C.C.C. 273, 56 D.L.R. (2d) 1 (S.C.C.); *Binus v. R.* [1967] S.C.R. 594, 2 C.R.N.S. 118, [1968] 1 C.C.C. 227 (S.C.C.); and *Peda v. R.*, [1969] S.C.R. 905, 7 C.R.N.S. 243, [1967] 4 C.C.C. 245, 6 D.L.R. (3d) 177 (S.C.C.).

valid because they do not cover the same type of act; careless driving being driving in a manner that an ordinary prudent driver would not adopt, and dangerous driving being driving that, in addition to that, has, in the circumstances, an element of danger to the public.

At the same time, one can have a situation where the province, purporting to rely on the jurisdiction given to it under section 92, of the Constitution Act, 1867 enacts penal legislation that encroaches on the federal jurisdiction over criminal law; or conversely, the federal government, purporting to enact criminal law under its section 91 power, encroaches on the jurisdiction of the provinces. In these cases, such legislation is *ultra vires*. For example, for a number of years, the Criminal Code has contained the offence of driving a motor vehicle while one's licence to drive was suspended or cancelled, on the theory that unlicensed drivers constituted a danger to all users of the highway, and thus it was properly a criminal offence within the competence of the federal government. However, the Supreme Court[2] recently held that this was not properly criminal law, but the regulation of highway traffic since merely being unlicensed did not necessarily create any danger. It was thus properly a matter falling within provincial jurisdiction and the federal provision was held *ultra vires*. If, however, a person's licence has been suspended as part of the criminal sanction for having committed a criminal offence under the Code, then driving in violation of that criminal sanction may itself properly be a criminal offence and section 242 [s. 263] of the Code makes it a true criminal offence to drive in those circumstances.

It is more accurate to say, therefore, that the criminal process must begin with some valid criminal law, and that criminal law may be criminal in the real sense of the word and justified under section 91 of the Constitution Act, 1867 as being within the federal jurisdiction; or criminal in the sense of being for the enforcement of some other federal power; or criminal in the sense of being provincial penal legislation and justified under section 92 and being for the better enforcement of some power reserved for the provinces by section 92 of that Act. If must also, however, be constitutional in the sense that it does not violate the provisions of the Charter of Rights and Freedoms, which form Part I of the Constitution Act, 1982. This requirement will be dealt with in a separate chapter.

Criminal offences must also exist by virtue of an express piece of legislation. Section 8 [s. 9] of the Criminal Code provides that:

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2 *Boggs v. R.*, [1981] 1 S.C.R. 49, 19 C.R. (3d) 245, 8 M.V.R. 247, 10 M.V.R. 293, 58 C.C.C. (2d) 7, 120 D.L.R. (3d) 718; 34 N.R. 520 (S.C.C.).

. . . . no person shall be convicted . . .

(*a*) of an offence at common law,

(*b*) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(*c*) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the 1st day of April 1955, to impose punishment for contempt of court.

This section requires some explanation. It was not, of course, until 1867 that the power to create criminal law passed to the then newly-created federal government. Before that time, criminal law, in the various parts of what was to become Canada, consisted of that part of the English common law as had been brought into the various colonies at the time of their independent existence,[3] such imperial legislation as was applicable to the colonies and any Acts of the Colonial legislatures as were criminal in nature. Indeed, section 129 of the Constitution Act of 1867 provided:

> Except as otherwise provided by this Act, all Laws in force in Canada, Nova Scotia or New Brunswick at the Union . . . shall continue in Ontario, Quebec, Nova Scotia, and New Brunswick respectively, as if the Union had not been made; subject nevertheless . . . to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or that Legislature under this Act.

After the passing of the Constitution Act, 1867, the power to enact criminal law passed to the federal government and for some time therefore, criminal law in Canada was a rather confusing mixture, varying from province to province, of partly English common law, partly Imperial statutory law, partly pre-Confederation colonial legislation and partly post-Confederation federal legislation. The first codification came into force in 1892 and while it went a long way towards unifying criminal law in Canada, it was not a complete code. It not only preserved a number of criminal statutes, but also provided that the criminal law, as then existed in the various provinces, continued

3 To avoid argument, the dates were fixed at September 17, 1792 for Ontario, and October 1, 1763 for Quebec. For Nova Scotia and New Brunswick, 1758 is the generally accepted date. British Columbia is fixed at November 19, 1858, and for other Provinces and Territories after the Union, the date is the date of their admission. Newfoundland continued with its own criminal law until 1949.

in force except insofar as it had been altered, varied or modified by the new Code or other legislation. Thus, criminal law in Canada might still vary from province to province. It was not until the coming into force of the Revised Code of 1955 that section 8 [s. 9] was finally enacted, providing, as we have seen, for the abolition of common law offences or pre-Confederation offences.

The Criminal Code of Canada, however, is certainly not a comprehensive code, by any means, of all of the criminal law of Canada at the federal level. As we have seen, many other statutes have criminal provisions making it an offence to do certain things. Such an offence may not be justified merely because it is criminal law, but because it is the only, or at least is considered to be the best way to enforce the power to regulate and control other matters within the federal competence. An incredibly large number of federal Acts of Parliament contain provisions enacting criminal offences besides the Criminal Code, such as the Income Tax Act, the Food and Drugs Act, the Narcotic Control Act and so forth. The body of federal criminal law then is the Code along with all the other federal statutes with penal provisions.

In addition, criminal law is also to be found in what is called subordinate legislation. The power to legislate criminal law must, obviously, belong to the Parliament in Ottawa in the case of federal legislation or the provincial legislature in the case of provincial legislation. But Parliament or the legislature can, in turn, delegate to someone else the power to legislate within the limits set out in the delegated power. An Act of Parliament may, for example, contain a section stating, "The Minister [which Minister is usually spelled out in a definition section] may make regulations governing certain matters" that are then specified, or it may state, "The Governor in Council [which, in practice, means the Cabinet] may make" such regulations. The same type of thing may occur in provincial legislation, or the Act governing municipalities may give the municipalities the power to make by-laws governing their municipal affairs. Such regulations or by-laws (assuming that they are within the terms of reference) are law and many of them contain certain penal provisions. Usually the penalties are not very serious — one tends to think of breaches of municipal by-laws as involving something like a $50 fine — but that is not always the case. For example, under the Food and Drugs Act the maximum penalty for trafficking in restricted drugs is imprisonment for 10 years, yet the Governor in Council is empowered to add any substance to the list of restricted drugs if it is deemed

necessary by him to be in the public interest.

We know, then, that what is embraced in the term "criminal law" in Canada must be a statement written down somewhere — be it the Criminal Code or other federal statute or a regulation, or if it is provincial criminal law, in some piece of provincial legislation, regulation or by-law — that certain activity (or, in some cases, certain omissions) is punishable by some criminal sanction that may range from a small fine to life imprisonment.

THE INVESTIGATION

Most criminal law, unlike the Ten Commandments for example, is not phrased in the imperative. The Criminal Code, for instance, does not say "No person shall commit murder." Rather, it defines what murder is and then states "Everyone who commits murder is guilty of an indictable offence and should be sentenced to life imprisonment." It is a statement of an offence, and a statement of the consequences of committing that offence. Read literally, it is, of course, not true. The statement must be read in the context of the entire criminal process, with which this book is concerned.

Given that certain conduct constitutes a criminal offence, the process begins when a person engages in that conduct. From that moment, a criminal offence has been committed. But, if one asks, "what happens then?" the answer is that in many cases, absolutely nothing at all happens. Crimes can be victimless, consensual or non-consensual, although this classification is not necessarily mutually exclusive. In the case of a large number of crimes, the act is not committed against anyone else, but is merely an act declared to be a criminal offence because it is, in some way, harmful to the state. Such acts may range from minor ones such as going through a stop sign or speeding on a deserted road to very serious ones such as importing narcotics or conspiring to murder. The moment the relevant legislation has been breached it is true that an offence has been committed, but whether anything further happens depends upon someone other than the offender knowing that the offence has taken place. This may depend upon chance — upon a policeman happening to be present when a driver goes through a stop sign, or it may depend upon surveillance or investigation. As we shall see, there are legal limits to the powers of surveillance and investigation which may make the uncovering of undetected crime difficult, but, in any case, one might well ask how far society is prepared to go in committing