THE RIGHT TO APPEAL IN INDICTABLE CASES; A LEGISLATIVE HISTORY

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The author traces the history of criminal appeals legislation in Canada from the Crown Cases Act of 1848 to the present. Through his analysis he illustrates the various forces giving rise to change and amendment, with special emphasis on the strong and often inappropriate influence of British legislation. In addition, the author examines the aim of national uniformity in criminal procedure, and the way in which appeals legislation has fostered this aim.

I. INTRODUCTION

Legislation regarding criminal appeals is a relatively recent development in the criminal law; the first piece of legislation in the area, the Crown Cases Act,[1] was enacted by the British Parliament as recently as 1848. Since that time criminal appeals have been subject to much legislative attention, most of it, however, constituting little more than cosmetic and inconclusive tinkering rather than substantive, consistent modification. Indeed, the amendment process in this area reflects that which has been typical of the criminal law as a whole and which Professor Mewett has characterized as haphazard, disjointed, inconsistent, and probably worse than useless.[2] His description of the process of legislative reform in the area of criminal law as a whole applies very much in the specific case of criminal appeals:

> The present hit-or-miss method which is sparked by a newspaper story, by a private member's interest, by an influential agitator, has highlighted the most outstanding problem of Canadian criminal law, the simple problem of criminal legislation.[3]

In addition to those influences mentioned by Professor Mewett, legislation regarding criminal appeals has been affected by a veritable "hodge-podge" of other, often conflicting forces. Among the most significant of these is prior British legislation which, in many cases, has been automatically imitated by Canada without first undergoing more than the most superficial discussion of its suitability. The relevant sections of both the Crown Cases Act of 1848 and the Criminal Appeals Act of 1907[4] were incorporated virtually *mutatis mutandis* into Canadian legislation and continue to provide the foundation of our present criminal appeals procedure. The former forms the basis of the present s. 762 of the Code[5] (appeal by way of stated case from summary conviction proceedings); the latter appears unchanged as the present s. 603(1)(a).

Decisions in specific cases have, of course, sparked legislative response, both positive and negative, to judicial findings by way of amendment. The present s. 624 confers upon the Attorney General of Canada the same status as that of a provincial Attorney General. The section was originally enacted as s. 601 of the 1953-54 Code in order to overrule a series of judicial interpretations which had limited the term

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1. (1848) 11 & 12 Vic., c. 78 (U.K.).
2. A. W. Mewett, *Criminal Law Revision in Canada* (1969) 7 Alta. L. Rev. 272 at 277.
3. Mewett, *The Criminal Law 1867-1967* (1968), 45 Can. Bar Rev. 726 at 737.
4. (1907) 7 Edw. 7, c. 23.
5. (1953-54) 2-3 Eliz. 2, c. 51 as amended.
6. (1953-54) 2-3 Eliz. 2, c. 51.

"Attorney General", as it appeared in the Code, to provincial Attorneys General only.[7]

It is, in fact, the provincial Attorneys-General who have been the most powerful lobby for change in the law relating to criminal appeals and this power has, not surprisingly, invariably been applied in efforts to strengthen the Crown's position on appeal. Through the mechanism of the Conference of Commissioners on Uniformity of Legislation and through meetings with successive Ministers of Justice, they have promoted amendments which have been received with uncritical, even disinterested acquiescence by Parliament merely on the strength of the Minister of Justice's statement that the proposed amendment has been requested by the provincial Attorneys General. Because these meetings have been and continue to be held *in camera* one may only speculate about the policies underlying certain such amendments.

Sheer administrative expediency, too, has played its role in either advancing or retarding amendments to appeals legislation. In 1956, for example, a special joint committee of the House of Commons and Senate recommended that persons sentenced to death should have an automatic right of appeal on all issues.[8] The reasons offered by the then Minister of Justice, Stuart Garson, in support of the government's decision not to propose such an amendment are instructive:[9]

> Is my honourable friend urging that we should amend the criminal law here by attempting to throw a burden upon the principal administration of justice, upon the provincial governments, by saying that under a federal law they must provide counsel for an accused?
>
> We are going to confer with them. We are going to seek their advice, seeing that they are the administrators of the criminal law, as to what they think of this. It is not merely a question of the money involved; it is a question of whether the procedure we finally adopt is a practical procedure which has been evolved by people who have had the actual experience of administering justice.

Not only have criminal appeal amendments themselves been haphazard and inconsistent but discussion of them in Parliament has suffered from the same shortcomings. The vast majority of criminal appeal amendments which have been introduced over the years have been passed with little or no debate. (The (1960-61) Capital Murder Amendments[10] were an exception to this rule. However, they were discussed in the context of a much wider debate on the abolition of capital punishment which, although not the actual subject of the legislation, quickly became the effective subject of the debate). This absence of debate is not surprising, however, since criminal appeal amendments were invariably introduced as minor parts of omnibus Criminal Code amendment bills which also dealt with much more controversial subjects. Unobtrusive in themselves, and usually bearing the *imprimatur* of the Provincial Attorneys General, they were whisked through without significant debate.

In spite of the generally unsatisfactory nature of the amendment process, a broad direction to the evolution of legislation in the field of criminal appeals can be discerned. The tendency has been to expand the scope of what constitutes a proper subject of appeal while at the same

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7. *Reg.* v. *St. Louis* (1897) 1 C.C.C. 141; *Rex* v. *Hodgson* (1927) 47 C.C.C. 171; *Rex* v. *H. Gallant and F. Gallant* (No. 2) (1944) 83 C.C.C. 55; *see also Rex* v. *Perry* (1945) 84 C.C.C. 323.

8. Report of the Special Joint Committee of the House of Commons and Senate, 1956.

9. Hansard, (1956) Commons, 6679.

10. (1960-61) 9-10 Eliz. 2, c. 44, ss. 8, 11 and 12.

time maintaining the ever-shifting balance between the rights of the accused and those of the Crown. Underlining this process of change is a consistent policy of promoting uniformity of interpretation and application of the criminal law throughout all Canadian jurisdictions. This latter consideration seems to have taken primacy even over the need to ensure that the accused is dealt with fairly and according to law. As precedents were established and communications improved, this general aim of uniformity came to lose some of the imperative force which it formerly possessed. Nevertheless as an article of policy it has had an overwhelming influence in shaping our criminal appeals procedure.[11] Not only can the establishment of the Supreme Court be directly traced to it, but less positively, in some cases substantive advantages possessed by the accused were sacrificed to the exigencies of uniformity, whose demands have remained more or less constant throughout successive amendments which have sometimes curtailed and sometimes enlarged the rights of either the Crown or the accused to appeal.

Let us turn now to an analysis of each of the particular legislative enactments in the field of criminal appeals, tracing the development of criminal appeals procedures and illustrating the general trends that have been mentioned.

II. LEGISLATION

1. The Crown Cases Act 1848

The Crown Cases Act and the several colonial Acts which duplicated it[12] established the first legislative scheme of appeals. Until that time the only way of challenging a verdict in a criminal proceeding was by the common law writs of *certiorari* and error.

The writ of error was abolished in criminal proceedings in Canada by s. 743(1) of the 1892 Code.[13] Until that time it was the most frequently used method of challenging a verdict in a criminal case. Although no longer used in Canada it is still employed in criminal proceedings in many states of the United States. It has been defined as:[14]

> . . . a writ issued from a court of appellate jurisdiction, directed to the judge or judges of a court of record, requiring them to remit to the appellate court the record of an action before them, in which a final judgment has been entered, by order that examination may be made of certain errors alleged to have been committed, and that judgment may be reversed, corrected, or affirmed, as the case may require.

It has been distinguished from review by way of appeal as follows:[15]

> 'Appeal" is a process of civil law origin that entirely removes cause to an appellate court subjecting facts as well as law to review and retrial, while 'writ of error' is a process of common law origin and removes nothing to the appellate court for re-examination except law.

The Crown Cases Act of 1848 did not in any way limit the use of the writ of error but instead provided that:[16]

11. *Rex* v. *Jananshy* (1922) 37 C.C.C. 226 (S.C.C.) at 227. Idington J. on a motion for leave to appeal: "I think that the conflict [between the judgments of different Courts of Appeal] had in view in the amendment clearly must be one of law and not any one of the accidental results of litigation from a different set of facts and circumstances. The object thereby sought is to render the administration of the criminal law as uniform as possible."

12. Province of Canada, (1857) 20 Vic., c. 61, s. 4; R.S.N.B. (1854) 17 Vic., c. 159, ss. 22 and 23; Nova Scotia, (1862) 25 Vic., c. 6.

13. (1892) 55-56 Vic., c. 29.

14. *Black's Law Dictionary* 1785 (4th ed. rev. 1968), for a detailed discussion of the history of the writ of error; Stephen, *A History of the Criminal Law of England* 308-18 (1973).

15. *Whidden* v. *Abbott* 119 Fla. 25, 160 So. 475.

16. (1848) 11 & 12 Vic., c. 78 (U.K.), s. 1.

> . . . when any person shall have been convicted of any Treason, Felony, or Misdemeanor before any Court of Oyer and Terminer or Goal Delivery or Court of Quarter Sessions, the Judge or Commissioner or Justices of the Peace before whom the case shall have been tried may, in his or their discretion, reserve any Question of Law which shall have arisen on the Trial for the consideration of the Justices of either Branch and Barons of the Exchequer.

In effect, the trial judge could in his discretion reserve any question for further consideration. There was no provision for any appeal from his exercise of such discretion.

Section II specified:[17]

> That the Judge or Commissioner or Court of Quarter Sessions shall thereupon state, in a case signed in the Manner now usual, the Question or Questions of Law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said Justices andBarons.

It should be noted that a case could be reserved only if the trial had ended in a conviction. Chief Justice Harvey commented on this requirement in the Alberta Supreme Court (Appellate Division) decision in *Rex* v. *Imperial Tobacco:*[18]

> By the terms of s. 742 [of the 1927 Code] these provisions are only available to a defendant 'if convicted'. It seems clear and it was definitely held by the Court of the Court of King's Bench of Quebec (Appeal Side) in *R.* v. *Trepanier* (1901) 4 C.C.C. 259, that the Court of Appeal has no jurisdiction to consider such a case until after a trial and a conviction. *R.* v. *Lantz* (1914), 15 D.L.R. 651, 22 C.C.C. 212 a decision of the Nova Scotia full court is to the same effect as is the decision of our own Division in *R.* v. *Stayk* (1920), 16 A.L.R. 92, as explained by Stuart J.A. in *R.* v. *Power* (1922), 36 C.C.C. 389, 62 D.L.R. 470, 17 A.L.R. 247.

The Crown Cases Act of 1848 was adopted in substantially similar but not identical terms in the Province of Canada and the colonies of Nova Scotia and New Brunswick.[19] The legislation in Canada varied from the original statute in that it explicitly granted the court to which the reserved case was transmitted the power to order a new trial. There was no comparable provision in either the Nova Scotia or New Brunswick statute.

2. The Criminal Procedure Act[20]

This was the first exercise of the legislative authority in relation to criminal procedure conferred on the Dominion Parliament by the British North America Act, (1867) 30 Vic., c. 3 (U.K.).

Section 80 amended certain provisions of the Consolidated Statutes of Upper and Lower Canada regarding criminal appeals. As to the Provision of the C.S.U.C.:

> Any Appeal to the Court of Error and Appeal, in any criminal case where the conviction has been affirmed by either of the Superior Courts of Common Law, on any question of law reserved for the opinion of such Court, is hereby repealed as regards any conviction had after this Act is in force, and the judgment of such Superior Court on any question so reserved shall be final and conclusive.

In addition, the power of the Court of Error and Appeal to order a new trial was abolished. The section also recognized that the various

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17 *Id.* The terms "reserved" and "stated" case were thought to be interchangeable and both meant that the trial judge was required to transmit "a recital of the nature of the charge and of the objection on which the appeal is taken including a summary of all necessary evidence or findings upon the evidence requisite for the proper consideration of the case in appeal." *Annotation* (1911) 19 C.C.C. 43.

18 (1939) 73 C.C.C. 9 at 14. *See also R.* v. *Goldhammer* (1922) 40 C.C.C. 15 (Q.K.B.).

19 *Supra*, n. 12.

20 (1869) 32-33 Vic., c. 29.

duplicates of the Crown Cases Act served much the same function that the writ of error had previously done and limited the scope of the common law remedy accordingly.

> No writ of error shall be allowed in any criminal case unless it be founded on some question of law which could not have been reserved, or which the Judge presiding at the trial refused to reserve for the Court having jurisdiction in such cases.

At the same time however, recognizing that a right of appeal could not be satisfactorily guaranteed simply by judicial discretion, s. 80 also introduced a statutory right to review the trial judge's discretionary power whether to reserve a question or not.[21]

3. The Speedy Trials Amendments Act 1875[22]

Section 1 of this Act simply extended the practice and procedure of "case reserved" to trials under the Speedy Trials Act.[23] The operation of the Act was limited to trials in the Province of Ontario.

4. The Supreme and Exchequer Courts Act 1875[24]

Under s. 101 of the British North America Act[25] the Parliament of Canada was given the power to "provide for the constitution, maintenance and organization of a General Court of Appeal for Canada . . ."

In the debate relating to the establishment of the Supreme Court there was considerable disagreement as to whether the court should concern itself with local laws, particularly the Civil Law of the Province of Quebec. However, there was no question that Dominion laws shoud receive uniform interpretation. Typical of the general agreement on this latter point are the reported remarks of the member for Bothwell, David Mills, who later became a Senator, 1897-1902; Minister of Justice of Canada, 1898-1902; and a Judge of the Supreme Court of Canada, 1902-1903:[26]

> Therefore there was no propriety in giving to the law in New Brunswick precisely the same construction given to the local law in Ontario or any other of the provinces, but that did not apply to the law of Canada. It was of very great consequence that the laws of Canada operating over the entire Dominion should raise the same construction in all the provinces. In order that they might receive a uniform interpretation where interpretations were given, it was necessary there should be a court of final resort for determining the construction of Canadian Acts of Parliament.

Besides giving the Supreme Court of Canada a general appellate jurisdiction under s. 15, Parliament made specific provision in s. 49 for criminal appeals:

> Any person convicted of treason, felony, or misdemeanor, before any Court of Oyer and Terminer or Gaol Delivery, or before the Court of Queen's Bench in the Province of Quebec, its Crown side, or before any other Superior court of criminal jurisdiction, whose conviction has been affirmed by any Court of last resort, or in the Province of Quebec by the Court of Queen's Bench on its appeal side . . . may appeal to the Supreme Court against the affirmation of such conviction . . .

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21. As to whether a judge should reserve a question, Kelly J. in *Rex* v. *Batterman* (1915) 24 C.C.C. 351 (Ont. H.C.) at 353. "More than once it has been held in Canadian courts that a reserved case should not be granted by the trial judge unless he has some doubt in the matter upon which it is suggested that a question be reserved for the opinion of a court of appeal. *Regina* v. *Letang* (1899) 2 C.C.C. 505; *Rex* v. *Brindamour* (1906) 11 C.C.C. 315.

22. (1875) 38 Vic., c. 45.

23. (1869) 32-33 Vic., c. 35.

24. (1875) 38 Vic., c. 11.

25. (1867) 30 Vic., c. 3 (U.K.).

26. Hansard (1875) Commons, at 741.

An important qualification to the section however, was that no such appeal would be allowed where the superior court affirming the conviction was unanimous in its decision.[27] This disclosed the true function of the Supreme Court in criminal matters: to resolve disagreements between judges in appeal on points of law. It must be noted that implicitly, though not explicitly, only questions of law were appealable to the Supreme Court. The several provincial statutes ensured that only questions of law could be reserved at the discretion of the trial judge. Likewise the writ of error was limited specifically to errors of law.

5. The Supreme and Exchequer Courts Act (1886) R.S.C.[28]

In 1886, the first consolidation and revision of the Dominion statutes was enacted. Section 68 of the 1886 Supreme and Exchequer Courts Act was identical to s. 49 of the 1875 Act in all but two respects. By an amendment to the Act passed in 1876,[29] all sections conferring jurisdiction in *habeas corpus* matters arising out of any claim for extradition made under any treaty were repealed. Secondly, and more importantly, s. 68 of the new Act limited jurisdiction in criminal appeals to cases where a person had been convicted of "an indictable offence" whereas s. 49 of the 1875 Act conferred jurisdiction in cases where the person had been convicted of "treason, felony, or misdemeanor".

6. The Crown Cases Reserved Amendment Act 1886[30]

This short Act contained only one section which extended to any judge in Canada trying a person under The Speedy Trials Amendment Act the discretion to reserve any questions of law for the appropriate court which had jurisdiction to hear Crown Cases Reserved. In effect, the provisions of s. 80 of the 1869 Criminal Procedure Act were extended to all of Canada and not solely limited to the province of Ontario as under the 1875 Speedy Trials Amendment Act.

7. The Criminal Procedure Act (1886) R.S.C.[31]

The Crinimal Procedure Act of 1886 consolidated inter alia the pre-confederation[32] as well as the post confederation legislation[33] dealing with criminal appeals. The term "Court for Crown Cases Reserved" was defined in s. 2, while s. 259 and s. 260 consolidated the procedure in Crown Cases Reserved.

When both those sections are compared with the wording of the original 1848 Crown Cases Act, the similarities are striking. Section 259 provided that:

> Every court before which any person is convicted on indictment of any treason, felony, or misdemeanor, and every judge within the meaning of 'The Speedy Trials Act' trying any person under such Act may in its or his discretion, reserve any question of law which arises on the trial, for the consideration of the justices of the Court for Crown Cases . . .

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27. If the conviction had been set aside and a new trial ordered, there was no appeal therefrom to the Supreme Court of Canada, *Viau* v. *The Queen* (1898) 2 C.C.C. 540 (S.C.C.). Also, if the Court of Appeal was unanimous in affirming the conviction as to one of the grounds of appeal but there was a dissent as to another ground, an appeal to the Supreme Court of Canada could be based on the latter only, however the appeal could not be dealt with in respect to the ground on which the Court of Appeal was unanimous. *McIntosh* v. *The Queen* (1894) 5 C.C.C. 254 (S.C.C.).

28. (1886) R.S.C. 49 Vic., c. 135.

29. (1876) 39 Vic., c. 26.

30. (1886) 49 Vic., c. 47.

31. (1886) R.S.C. 49 Vic., c. 174.

32. C.S.U.C., c. 112, s. 1; C.S.L.C., c. 77, s. 57; R.S.N.S. (3rd S.), c. 171, s. 99, *part*; 1 R.S.N.B., c. 159, s. 22, *part*.

33. 38 Vic., c. 45, s. 1; 46 Vic., c. 10, s. 5, *part*; 49 Vic., c. 47, s. 1.

Note that although s. 68 of the 1886 Supreme Court Act uses the term "indictable offence", s. 259 of the Criminal Procedure Act passed in the same year retains the wording of s. 49 of the 1875 Supreme Court Act when it speaks of a person who is convicted on "indictment of any treason, felony, or misdemeanor".

Section 260 similarly bears a striking resemblance to s. 2 of the Crown Cases Act.

> The judge or other person presiding at the court before which the person is convicted, shall therupon state in a case to be signed by such judge or other person, any question of law so reserved.

Section 266 also incorporated the limitations on the use of the writ of error introduced by s. 80 of the 1869 Criminal Procedure Act. The consolidation of 1866 was to form the basis of the procedural sections of the 1892 Code, and the fundamental basis of procedure on appeals in all indictable offences until 1923.

8. The Trade Combinations Act 1889[34]

Section 5 of this Act provided for an unprecedented right of appeal for anyone convicted under that Act by a judge sitting alone. The convicted person could as of right appeal to "the highest court of appeal in criminal matters in the province upon all issues of law and fact". This exceptional provision was not contained in the original Bill when it was introduced into the House of Commons but was added by the Senate.

9. The Criminal Code 1892[35]

The work of attempting a codification of the English criminal law had began in England in 1838 with the appointment of the first Criminal Law Commissioners.

Sir John Thompson, the then Minister of Justice, outlined some of the history of its development when introducing the 1892 Code for debate in the Commons:[36]

> The Bill is founded on the draft code prepared by the Royal Commission in Great Britain in 1880, on Stephens' Digest of the Criminal Law, the edition of 1887, Barbridge's Digest of the Canadian Criminal Law of 1889, and the Canadian Statutory Law. The efforts at the reduction of the criminal law of England into this shape have been carried on for nearly sixty years, and although not yet perfected by statute, those efforts have given no immense help in simplifying and reducing into a system of this kind our law relating to criminal matters and relating to criminal procedure.

Although the Code purportedly "substantially followed the existing law",[37] very major changes were introduced especially with regard to criminal appeals. The distinction between felony and misdemeanor was abolished. Writs of error were abolished and an Appeal Court was provided for. According to Sir John Thompson, this court was to be "practically the same as the old Court of Crown Cases Reserved with larger powers than at present."[38]

There was considerable debate in the Commons on a new section, s. 744 of the Draft Bill, which sought to confer on the Court of Appeal the power to order a new trial. The proposed section also sought to have juries

34. (1889) 52 Vic., c. 41.
35. (1892) 55-56 Vic., c. 29.
36. Hansard, (1892) Commons, at 1314.
37. *Id.* at 1315.
38. *Id.*

give answers to questions, which sought to confer on the Court of Appeal the power to order a new trial:[39]

> MR. MULOCK: I suggest that this section be not adopted this session, as it proposes very important changes in the criminal law. One of these is with respect to the drawing of inferences in criminal proceedings. There are cases in which juries bring in a verdict of guilty or not guilty and do substantial justice, whereas if they were compelled to answer specifically certain questions, this might not be the case. Another change appears to render a prisoner liable to be retried.
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> SIR JOHN THOMPSON: We do not intend to do so.
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> MR. MULOCK: This section is, at all events, an innovation in the law as it is today. These two questions raised by this section are so important they sould be held over and considered at a future time.
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> MR. LISTER: There is this to consider: suppose a jury found a verdict of acquittal upon certain facts, upon which the court held the opinion that a conviction should be rendered, will the court order a new trial and that the man be retried? If so, that will be a complete departure from the old law, and I doubt the wisdom of it. The old English rule is, that when once a man is tried and acquitted, that is the end of it.
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> MR. MILLS (BOTHWELL): The old rule is, that once a man is put in jeopardy he cannot again be put on trial. Under this section not only might a man be put in jeoprady, but he might be tried again after he has been acquitted.
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> MR. MASSON: Personally, I am opposed to submitting questions to juries in criminal cases, and I hold that we should not depart from the old rule. In the committee, however, I stood almost alone in opposing this section. The question of new trials in cases where juries have acquitted might be held over.
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> MR. LISTER: The method of submitting questions to juries as carried out under our law is a very unsatisfactory one. The judge after the trial has concluded and when the counsel have addressed the jury, submits certain questions, of which counsel have no information and on which they were unable to address the jury.
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> SIR JOHN THOMPSON: I will strike out subsection 3; also in subsection 6 the words 'if the result is acquittal, the accused shall be discharged subject to being arrested again if the Court of Appeal orders a new trial'; also the words in subsection 4: 'unless it considers the application frivolous.'

Although the Minister of Justice may have been persuaded that no acquittal should be overturned by the Court of Appeal the sections, when finally passed, did not exclude the possibility that a person who had been acquitted at trial could have his acquittal set aside and a new trial ordered.

Whether through inadvertence or by design, the operation of Part 52 of the 1892 Code (s. 752-751 inclusive) gave the Crown a right unprecedented in English jurisprudence, *e.g.* the right to appeal an acquittal on any question of law which was requested to be reserved at trial. If the question had been reserved by the trial judge then the appeal went, as of right, by way of stated case (s. 743(6)). If the judge declined to reserve the question then the Crown, like the accused, required the leave of both the Attorney-General of the province and the Court of Appeal (s. 744). This right of appeal by the Crown against an acquittal on a question of law is nowhere stated explicitly in Part 52; but it unquestionably accrues by the combined operation of the individual sections and constituted, as Mr. Lister quite rightly observed in his remarks as reported above, a significant departure from the common law. Thus the widely-held belief that the Crown had no right of appeal against an acquittal until it was conferred by statute in 1930 is erroneous.[40] The proposition that the Crown did enjoy such a right is also supported by a statement made by the Minister of Justice, Mr.

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39. Hansard, (1892) Commons, at 4267.

40. (1975) 20 C.C.C. (2d) 449 at 484.

Lapointe, in 1925; two years after the passage of the 1923 Amendments which are the basis of our present s. 603(1):[41]

> When amendments were made to the Criminal Code two years ago giving the right of appeal in criminal cases to the accused through a mistake that right was taken away from the Crown.

Although the basic structure of appeal by way of reserved case outlined in ss. 259 and 260 of the Criminal Procedure Act of 1886 was retained in the 1892 Code, many other substantial changes were introduced.

Section 742 was so worded that the grounds of appeal for an accused who had been convicted were to be limited only to those specifically enumerated in the remaining sections of Part 52.

By s. 743(1) proceedings by way of writ of error were abolished altogether. Instead, either party during a trial could apply to the court to reserve any question of law. If the court refused to reserve such a question it was nevertheless required to take note of the objection made.[42]

The party applying for reservation of the question could subsequently seek leave to the Court of Appeal to have a case stated on that question of law.[43] However, before such an application for leave could be sought from the Court of Appeal, written leave was required from the Attorney General and the granting of such leave was in the absolute discretion of the Attorney General. The trial judge, of course, still retained the right to reserve any question of law on his own motion (743(2)).

The 1892 Code also legislated a scheme of appeals against sentence. Section 744 specifically provided for an appeal on the basis that the sentence conferred was not one permitted by law. This represented a further codification of the common-law writ of error, this time in the area of sentencing. Unlike an appeal against the refusal to reserve a question, the motion to pass a proper sentence could be brought without the leave of the Court of Appeal and without the leave of the Attorney General.

Section 746 specified the powers of the Court of Appeal. Subsection 2 allowed the court to split the counts and give separate directions as to each count.

Section 747 represented another major modification of previous law by creating an entirely new ground of appeal. Subsection 747(1) allowed a trial judge to grant leave to appeal to the Court of Appeal to a person convicted of an indictable offence on the grounds that the verdict was against the weight of the evidence. This was a significant departure from the previous limitation that the only proper questions for appeal were questions of law, and one which effectively gave the trial judge a saving power when he disagreed with a conviction imposed by a jury.

When combined with s. 742(2) which provided that appeals could only

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41. Hansard (1925) Commons, at 4012.

42. The hearing on the "case reserved" was limited to those matters which either party had objected to at trial. *Rex* v *Jennings*, *Rex* v. *Hamilton* (No. 2) (1916) 28 C.C.C. 164, (Alta. S.C., A.D.).

43. On a reserved case the Court of Appeal would not answer a hypothetical question. In *Rex* v. *Fong Soon* (1919) 31 C.C.C. 78 (B.C.C.A.) the trial judge reserved the question of whether the accused should have been charged under a different section of the Chinese Immigration Act. All the judges in appeal refused to answer that question. *Per* MacDonald C.J.A. at 80: "As to the second question under s. 27, the accused being already convicted, it is purely academic and ought not to have been submitted. I would therefore make no answer to it." *Per* Martin J. at 82: "The question is not a proper question and should not have been reserved or submitted to this court, and ought therefore to be ignored, it is not for us to give advice." *Per* McPhillips J. at 85: "I express no opinion with respect to the question—it is not a necessary question—or one, with deference to the judge which can rightly be submitted. The stated case is to be confined to questions of law affecting conviction, not relative to any other information or charge which might have been capable of being laid."

be taken to the Supreme Court of Canada when the judges of the Court of Appeal were not unanimous, s. 747 produced the singular result that the Supreme Court of Canada could consider appeals on questions of fact. For if an appeal was brought under the provisions of s. 747 and there was a dissent in the Court of Appeal, on the appeal, the Supreme Court of Canada would be required to decide whether a verdict was against the weight of the evidence: a question of fact.

Section 750 of the 1892 Code reproduced the provisions of s. 68 of the Supreme Court and Exchequer Court Act of 1886 with only minor changes, and thus incorporated a complete scheme of criminal appeals into the Criminal Code.[44] However, s. 981 of the Code, by which the various acts which had been consolidated were repealed, did not make any reference to the Supreme and Exchequer Court Act of 1886 and therefore the anomalous situation arose in which two virtually identical sections dealing with the same subject matter existed side by side in two different statutes. This was corrected by the 1906 Amendments.

Section 750, like s. 68 of the 1886 Supreme and Exchequer Courts Act, attempted to assert that the pronouncements of the Supreme Court of Canada would be final and conclusive; and s. 751 went so far as to specifically abolish appeals to the Privy Council. Both these sections proved to be abortive.[45]

10. The Criminal Code Amendment Act 1900[46]

Section 3 of this Act *inter alia* repealed subsections 1 and 2 of s. 744 of the 1892 Code thereby abolishing the requirement that either the prosecutor or the accused required the leave of the Attorney-General before an application could be made to the Court of Appeal challenging a trial judge's refusal to reserve a question of law and instead permitted the accused to apply directly to the Court of Appeal for leave to appeal such refusal. This change was the direct result of a private member's amendment and the reasons given for the amendment illustrate a concern both to balance the interests of the accused and the Crown and to expand the scope of the appeal as to matters of law:[47]

> MR. POWELL: I have been asked by several members of the Bar of the province of New Brunswick to have this done, because experience has shown that the Attorney-General is rather convinced that he is right, and is sometimes rather averse to granting appeals, as he wants to vindicate his own judgment, which might be overturned on appeal. So, complaint is made of the existing state of affairs and they want application made to the court of appeal in the first instance for leave to appeal. I think that the Solicitor General (Mr. Fitzpatrick) will agree with the Hon. Member for Kingston (Mr. Britton) and myself that the amendment should pass. Take, for instance, the case of a man convicted of receiving stolen goods or of stealing goods—if he is sued civilly, where he is only

44. *See Rice* v. *The King* (1902) 5 C.C.C. 529 (S.C.C.). *Per* Strong C.J.C.: "The question therefore is whether the plain provisions of the Code, which requires a dissent in the Court of Appeal to give jurisdiction to this court, are no longer in force so that an appeal may not be entertained where there is no dissent. The only possible ground on which this can be rested is subsection (e) of 60 and 61 Vic., c. 34, s. 1 [Ont.], passed in 1897 in which it was enacted that the provisions of a statute, itself *ultra vires*, previously passed by the Ontario Legislature, should be confirmed. The Act in its preamble states that its object is to confirm or re-enact the inefficacious Ontario Act referred to. When we do so we find that, on its face, it is confined to civil cases and does not attempt to interfere with criminal appeals. It was *ultra vires* because the Ontario Legislature had no jurisdiction to pass an Act regulating appeals to this court, but if it had professed to deal with criminal cases, it would have been *ultra vires* on that ground also. It is therefore plain beyond all doubt that the subsection referred to, which authorizes this court as well as the Court of Appeal to grant leave to appeal in certain cases, does not in any way apply to criminal cases. We have, therefore, section 743 of the Criminal Code which gives an appeal from the judgment on a reserved case, standing uninterfered with by any subsequent Dominion legislation."

45. *R.* v. *Townsend* (No. 4) (1907) 12 C.C.C. 509; *see also* Note (1907) 12 C.C.C. 520; *Nadan* v. *The King* [1926] A.C. 482, [1926] 2 D.L.R. 177, [1926] 1 W.W.R. 801, 45 C.C.C. 221.

46. (1900) 63-64 Vic., c. 46.

47. Hansard, (1900) Commons, at 5703.

responsible for the value of the goods and some incidental damages, then, he can appeal; but if he is convicted in a criminal case, where he is liable to be sent to penitentiary, and it is far more important to him that he should get the benefit of the law, if any in his favour, he is not entitled to appeal.

11. The Supreme Court Act, (1906) R.S.C.[48]

The anomalous existence of sections in two separate Acts providing in similar though not identical terms for appeals to the Supreme Court of Canada was corrected by the second series of statutory consolidations, the Revised Statutes of Canada, 1906. Section 35 of the 1906 Supreme Court Act restated the general power which the Supreme Court held as an appellate court with both civil and criminal jurisdiction within and throughout Canada. Section 36 of the same Act provided for appeals from provincial courts of last resort except that in criminal matters its jurisdiction was limited in two respects. First, there would be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari*, or prohibition arising out of a criminal charge and second, there would be no appeal in any criminal case except as provided in the Criminal Code.

The intended effect of this section was to make the Code itself the sole enabling legislation with respect to criminal appeals to the Supreme Court of Canada and thereby to extend the process of the consolidation of all criminal appeals legislation under the Code.[49]

12. The Criminal Code (1906) R.S.C.[50]

Except for changes in the numbering of sections the 1906 Code was a virtual duplicate of the 1892 Code including the 1900 amendment. The only exception was s. 1012 which provided for the separate grounds for appeal from a conviction of a person charged with the offence of trade conspiracy, and which was directly taken from s. 5 of the 1889 Trade Combinations Act legislation which had not previously been incorporated into the Code.[51]

13. The Criminal Code Amendment Act 1909[52]

Subsection 1014(3) of the Code, dealing with the question of when the prosecutor or the accused could apply to the court to have a question reserved, was amended without debate in either House. The result was to allow such application to be made not only during the trial but after it as well.[53]

14. The Criminal Code Amendment Act 1920[54]

This was the first in a series of Amendment Acts in the 1920's and 1930's which significantly altered the provisions of the Code dealing with

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48. R.S.C. 1906, c. 135.

49. However, section 41 (am. 1956, c. 48, s. 3) of the Supreme Court Act, R.S.C. 1952, c. 259 was employed by the Supreme Court of Canada to give itself jurisdiction to hear an appeal from a sentence of preventive detention for a habitual criminal *Poole* v. *The Queen* [1968] 3 C.C.C. 258.

50. R.S.C. 1906, c. 146.

51. *See The King* v. *Clarke* (No. 2) (1908) 14 C.C.C. 57, (S.C.A. in Appeal). *Per* Harvey J. at 66: "In any event there being an appeal given on the facts as well as the law, I apprehend that the duty of this court [in Appeal] is to decide whether the judgment of the trial judge should have been for the defendant or whether there was evidence on which the judgment could reasonably be supported."

52. (1909) 8-9 Edw. 8, c. 9.

53. The Supreme Court of the Northwest Territories had held in *R.* v. *Toto* (1904) 8 C.C.C. 410 that although the trial judge could if he saw fit grant a reserve case during or after the trial, either upon application therefor or of his own motion, the Court of Appeal itself could only grant leave to appeal in the case of an application made *during* the trial being refused.

54. (1920) 10-11 Geo. 5, c. 43.

criminal appeals in indictable offences. Section 16 of this Act added a new subsection, 1024A, which provided that either the Attorney General of the province or an accused convicted on indictment could appeal to the Supreme Court of Canada from the judgment of a court of appeal if that judgment conflicted with the judgment of any other court of appeal in a like case.[55] However, such appeal required the leave of a judge of the Supreme Court of Canada.[56] Mr. Doherty, the then Minister of Justice, explained the reasons for the amendment on first reading:[57]

> There being no appeal in criminal matters in cases where the courts of appeal of the provinces are unanimous, it has happened that on several different questions arising under the Criminal Code the Court of Appeal of one province has decided in one sense and the Court of Appeal of another province has dicided in another sense, and there being no appeal, we have contradictory jurisprudence interpreting the same law . . .
>
> The purpose (of the section) is simply to make it possible to have a uniform jurisprudence in the application of this law, which is common to the whole Dominion and rests on Dominion statute.

In the debate on the amendment in committee the Minister of Justice noted that:[58]

> . . . we have had representations from the judges of the different courts in the different provinces pointing out this anomalous condition of affairs.

However, the section was limited in its application to cases where the judgment of the Court of Appeal set aside or affirmed a conviction of an indictable offence. The section did not apply where the Court of Appeal's judgment set aside or affirmed an acquittal.

15. The Criminal Code Amendment Act 1921[59]

Section 18 of this Act amended s. 1024 of the 1906 Code, dealing with the jurisdiction of the Supreme Court of Canada in these matters, by the insertion of a new clause 1(a) which provided that any person whose acquittal had been set aside could appeal to the Supreme Court of Canada against such a decision. The right of appeal was restricted neither to questions of law nor to questions on which there had been a dissent in the Court of Appeal. It was an absolute right. The motivation behind the amendment seems to have been one simply of fairness. Mr. Doherty, the Minister of Justice, remarked during first reading:[60]

> There are particular provisions for an appeal to the Supreme Court in criminal cases where, the accused having been acquitted by the trial courts, a court of appeal has set aside that verdict and orders a new trial.
>
> As the law stands at present, a man who is convicted in the first court, and who upon an

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55. For a definition of what constitutes a "conflicting judgment of any other Court of Appeal in a like case" *see Rex* v. *Hill* (1928) 49 C.C.C. 211 (S.C.C.) in which Mignault J. held that for the purposes of s. 1025 (1927 Code) the decision of one Divisional Court in Ontario which conflicts with a decision of the other Divisional Court in Ontario is to be considered as a decision of "any other Court of Appeal". But, *Abbott* v. *The King* (1944) 82 C.C.C. 14 (S.C.C.) held section 1025 is not applicable where the conflict alleged is between judgments of the same Court of Appeal. *See also Krawchuk* v. *The King* (1941) 77 C.C.C. 24; and *Arcadi* v. *The King* [1932] 2 D.L.R. 441, S.C.R. 153, (1932) 57 C.C.C. 130 (S.C.C.)—the courts of appeal contemplated by s. 1025 of the Code do not include any courts other than Canadian courts. *See also Attorney General for Alberta* v. *Imperial Tobacco Co. et al.* (1924) 77 C.C.C. 316 (S.C.C.), Hudson J. at 321. The answers and reasons given by the Supreme Court of Canada to questions submitted to its opinion by the Governor-General in Council do not amount to "the judgment of any other court of appeal" within the meaning of the Criminal Code, s. 1025(1), so as to afford a ground for granting leave to appeal from a conflicting judgment subsequently rendered by a provincial Court of Appeal.

56. *See Duval et al.* v. *The King* (1938) 51 C.C.C. 75 (S.C.C.). There was no appeal to the Supreme Court of Canada from dismissal by one of the judges in Chambers of an application for leave to appeal under s. 1025 of the Criminal Code.

57. Hansard, (1920) Commons, at 2841.

58. *Id.* at 3422.

59. (1921) 11-12 Geo. 5, c. 25.

60. Hansard, (1921) Commons, at 3006.

appeal to the Appellate Court of the province succeeds in having even one judge dissent from the decision, expressing the view that the conviction should be set aside, is entitled to appeal to the Supreme Court, whereas a man who has a verdict of absolute acquittal in the first court, is debarred from any appeal if the Court of Appeal should set aside that verdict in his favour and send him back to be tried over again. Attention was called to this condition of affairs by a recent case in Alberta, and I think the fairness of providing for an appeal in this case will be obvious to everybody.

16. The Criminal Code Amendment Act 1923[61]

In the House of Commons debates on the Bill forming the basis of this Act, the Minister of Justice, Sir Lomer Gouin, introduced an amendment to section 1024A which had been enacted in 1920. The effect of the proposed amendment would have been to allow the Attorney General to appeal from an acquittal on the basis that the verdict conflicted with the judgment of another court of appeal in a like case. The memorandum which he read into the debate and his accompanying comments illustrate the effect that specific decisions have had on the amendment process:

> This amendment is asked for by the Attorney-General of Alberta, and appears to me to be unobjectionable. As section 1024A stands at present (1920, chap. 43, sec. 16), it does not cover the case of a person acquitted in the court below, and the purpose of the amendment is to make it extend to such a case. It appears that in the case of *Rex* v. *Stubbs*, 24 Ca. Cr. Cas., p. 303, the Appellate Division of the Appellate Division of the Supreme Court of Alberta decided that a certain kind of automatic gum vending machine, which paid rewards or premiums of varying amounts upon irregularly occurring times, was not a gambling device under section 228 of the Code, whereas it has been held unanimously by the Courts of Appeal of both Ontario and Quebec that the machine in question is a gambling device, and this has also been held by the Court of Appeal of Manitoba. In the case of one *MacNeil*, subsequent to the *Stubbs* case, the Appellate Court of Alberta unanimously held that notwithstanding the decision of Appellate Courts of the other provinces above mentioned they were not prepared to overrule their decision in the *Stubbs* case. The result is that the law of Alberta on this subject is not the same as that of the other provinces, and as the purpose of section 1024A was to provide a means of obtaining uniformity of interpretation of the Criminal Code throughout all the provinces, I think the section should be amended as above so as to cover cases like the *Stubbs* case.[62]
>
> That is to say, that under a special section of the Criminal Code the Appellate Courts of Ontario, Quebec and Manitoba have decided that a certain machine was a gambling machine. The Appellate Court of Alberta had decided to the contrary. To make sure what the real meaning of any clause of our Criminal Code is it was provided in 1920 that in such cases where decisions were contradictory, an appeal should be provided to the Supreme Court so that the citizens of Canada might be sure as to the meaning of any of the sections of our Criminal Code. As the section was drafted, it only applied to conviction on appeal to set aside a conviction, and did not apply to the case of acquittal, so that in case of acquittal, the Attorney-General or any other interested party had not the right to appeal. By adding the words 'or acquittal' the whole case will be covered.[63]

Although this amendment was passed in the Commons it was defeated in the Special Committee of the Senate which considered the entire amendment Bill of which it was a part.

The primary significance of the 1923 Amendment Act was its introduction in s. 9 of our present system of appeals in indictable offences. Section 9 was limited however, in that it repealed and replaced only those sections which dealt with appeals to the provincial courts of appeal. It did not touch upon any of the sections regarding appeal to the Supreme Court of Canada. As such, it was a haphazard and incomplete piece of legislation which required sections of four later amendment Acts to

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61. (1923) 13-14 Geo. 5, c. 41.

62. Hansard, (1923) Commons, at 2283.

63. *Id.*

reconstitute a totally consistent appeals procedure. Perhaps the most remarkable feature of s. 9 was that, in spite of its far-reaching effects it was never introduced or debated in the House of Commons—much to that chamber's later chagrin. Instead, it was entirely a creation of the Senate, hastily concurred in by the House in the dying days of a Session.

Debate on the new appeals procedure had begun two years before in the Senate. Senator McMeans had presented a motion:[64]

> That in the opinion of the Senate it is essential for the better administration of the criminal law that a Court of Criminal Appeal should be established in the different provinces with jurisdiction similar to that possessed by the Court of Criminal Appeal in England and will inquire whether it is the intention of the government to create such courts.

The motion was approved and a Bill introduced in the 1922 Session. It was not an exact duplicate of the English Criminal Appeal Act (1907) rather as Senator McMeans explained:[65]

> The law of England is different in that there is a special Act (which) deals with the matter, creates a criminal court of appeal, or appoints certain judges to sit as a separate and distinct court. That is not proposed here. The purpose of this Bill is simply to give jurisdiction to the Courts of Appeal in the different provinces to deal with the matter. This is along the lines of the English Act, but there is no further expense put upon the country.

The 1922 Bill was referred to a special committee of the Senate which considered it, however it was not presented for third reading and died on the order paper.

In 1923 the same Bill was again introduced in the Senate with a major alteration which would have permitted the Court of Appeal to order a new trial. It is curious that in light of the radical changes which were effected by the Bill opposition to it was so slight:[66]

> SENATOR McMEANS: I may point out that the chief opposition to such a measure, if there is any opposition at all, comes from the judges in the eastern part of Canada, who base their opposition on the ground that they will have more appeals to deal with and that consequently . . . I believe that the judges are mistaken in this view.

The exchange on the question of the Crown's right of appeal against an acquittal illustrates the habitual uncritical acceptance of English precedent and the lack of any concern as to its appropriateness in Canada:[67]

> SENATOR FOWLER: . . . In the case of an acquittal, can the Crown appeal?
> SENATOR McMEANS: No. There is no provision for that in the English Act.

The fact that the Crown in Canada had enjoyed such a right on questions of law since before Confederation seemed to have escaped the Senator. This lapse which effectively eliminated the Crown's right to appeal, caused considerable consternation when discovered by the Commons only after that House had passed the 1923 Senate amendments without debate.

The Crown's rights were reinstated in 1930. The changes eventually introduced by s. 9 were quite sweeping in their significance. The new s. 1013 introduced a threefold classification of all questions which arose on trial. Questions were henceforth to be questions of law, or of fact, or of

64. Hansard, (1921) Senate, at 476.
65. Hansard, (1922) Senate, at 48.
66. Hansard, (1923) Senate, at 64.
67. *Id.*

mixed fact and law. This scheme was taken directly from s. 3 of the English Criminal Appeal Act 1907. The object of the classification scheme was to make all questions fit subjects for appeal. However, only questions of law were appealable as of right. All other questions required either the leave of the Court of Appeal or the certificate of the trial judge. This requirement of prior leave was extended in 1013(2) to appeals from sentence. This represented in part, a new limitation on the right to appeal, since previously appeals from a sentence contrary to law were as of right.

Section 1013(5), although apparently only a minor elaboration of s. 1016(2) of the 1906 Code which outlined the process by which judgments were rendered in the Court of Appeal, in fact placed a new limitation on the grounds and matters fit for a further appeal to the Supreme Court of Canada. Section 1013(5) required that a decision of the Court of Appeal would be pronounced *per curiam* unless:

> . . . in the opinion of that court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court.

This section not only scotched the possibility which had existed by virtue of the combined effects of the former s. 747 and 750 namely, that questions of fact might be considered by the Supreme Court of Canada but it also precluded any possibility of dissents being registered if the question being considered was one of fact or mixed law and fact.[68] The only reason for its enactment seems to have been that it had a direct precedent in s. 1(5) of the English Criminal Appeal Act (1907). There was no debate on the appropriateness of these changes in light of previous Canadian practice.

By introducing the terms "law", "fact", and "mixed fact and law" and by making rights to appeal dependent on the applicability of these terms to the question under appeal the new section invited judicial definition of the three terms.

17. The Criminal Code Amendment Act 1925[69]

After the House of Commons realized that in acquiescing to the 1923 Senate Amendments they had unwittingly abolished the Crown's right of appeal on questions of law, they moved quickly to introduce corrective legislation. Ernest Lapointe, the then Minister of Justice, commented on the first reading of the omnibus 1925 Criminal Code Amendment Bill:[70]

> Another important section of the Bill gives the Attorney-General the right to appeal. Some years ago amendments were enacted giving the prisoner the right of appeal which he did not formerly possess, but Parliament took away from the Crown the right of appeal which it had before that time. This is to restore the right of the Crown to appeal.

In the debate on the section (s. 29 of the Bill) in Committee of the Whole, Mr. Lapointe's comments further characterized the House's attitude towards the Senate Amendments:[71]

> When amendments were made to the Criminal Code two years ago giving the right of appeal in criminal cases to the accused through a mistake, that right was taken away from the Crown.

An exchange in the same debate demonstrated how confused some members still were about the effect of the Senate amendments:[72]

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68. *Davis* v. *The King* [1924] 4 D.L.R. 843, [1924] S.C.R. 522, (1924) 43 C.C.C. 51.

69. (1925) 15-16 Geo. 5, c. 38.

70. Hansard, (1925) Commons, at 3538.

71. *Id.* at 4012.

72. *Id.* at 4013.

MR. STEWART (LEEDS): Do I understand the Minister of Justice to say that under the amendments of two years ago the Crown have no right of appeal on the facts?

MR. LAPOINTE: Yes.

Mr. STEWART (LEEDS): I thought the right was wide open.

Nevertheless s. 29 was deleted from the Bill by the Senate's Special Committee considering it.

Another section however, dealing with criminal appeals, was passed. Section 27 was intended to bring the sections dealing with the Supreme Court of Canada's jurisdiction to hear appeals into line with the changes introduced by s. 9 of the 1923 Act. It repealed s. 1024(1) of the 1906 Code and substituted for it a new subsection which is the basis of our present s. 618(1)(a). In effect it simply reiterated and clarified the limitation introduced by the new s. 1013(5) of the 1923 Amendments. As the Minister of Justice stated when introducing this amendment in Committee:[74]

It is the old section with the addition of the words, 'on any question of law'. The Supreme Court decided, a few months ago, that they have no jurisdiction on matters of fact in the *Davis* case of Montreal. The object of the amendment is to make it perfectly clear that this appeal applies only to questions of law.

18. The Criminal Code R.S.C. 1927[75]

The third consolidation of Dominion legislation introduced only cosmetic changes in the sections of the Code relating to criminal appeals in indictable offences. Section 1024 which had been amended in 1921 and 1925 remained unchanged except for its renumbering as s. 1023. The changes effected by the 1920 and 1921 Amendments regarding further grounds of appeal to the Supreme Court of Canada were combined into a new section 1025 which provided that either the Attorney-General or the person convicted could appeal to the Supreme Court from a judgment of a Court of Appeal setting aside or confirming a conviction for an indictable offence when that judgment conflicted with the judgment of any other Court of Appeal in a like case. One could only appeal under this section by leave of the Supreme Court. This section clearly promoted the function of the Supreme Court as a mechanism for the uniform interpretation and application of the law across Canada. Furthermore s. 1025(3) incorporated the 1921 amendment which provided for an appeal as of right to the Supreme Court of Canada against the setting aside of an acquittal by a Court of Appeal on any ground.

19. The Criminal Code Amendment Act 1930[76]

Section 28 of the 1930 Amendment Act repealed subsections 4 and 5 of section 1013 which had been passed in 1923. The requirement that judgments of the Court of Appeal be given *per curiam* unless otherwise opportune was abolished having been rendered redundant by the amendments to s. 1024 which specifically limited appeals to the Supreme Court to questions of law. In their place were introduced subsections which conferred on the Attorney General the right to appeal an acquittal on a question of law. Unlike the fate met by their predecessors in the 1925 Bill, the sections were passed in the Senate without debate. The only comment made by Mr. Lapointe, when introducing these subsections

73. *Id.* at 3538.

74. *Id.* at 4216.

75. R.S.C. (1927) 17-18 Geo. 5, c. 36.

76. (1930) 20-21 Geo. 5, c. 11.

which had been the source of so much controversy between the two Houses, sounds like little more than an afterthought:[77]

> There are certain amendments in the matter of procedure which have been suggested and recommended by the attorneys-general and other persons entrusted with the administration of criminal justice in the province.

Subsection 1025(4) and s. 1025(5) as enacted by the 1930 Amendment Act appear as s. 605(1) of our present Code.

20. The Criminal Code Amendment Act 1931[78]

It may be helpful to the reader to recapitulate at this point what the law was after the passage of the 1930 Amendments. An accused who had been convicted at trial could appeal against his conviction to the court of appeal on any question of law alone as of right, and with leave of the court of appeal or upon the certificate of the trial court on any ground of appeal which involves a question of fact alone or a question of mixed law and fact. Furthermore the accused could, with leave of the court of appeal, appeal on any other ground which the court of appeal thought sufficient. The Attorney General had the right of appeal from an acquittal on any ground which involved a question of law alone.

As to sentence, the person convicted, or the Attorney General, or the counsel for the Crown at trial could appeal only by leave of a judge of the court of appeal and only if the sentence was not one fixed by law.

With respect to appeals to the Supreme Court of Canada, any person who had been convicted at trial of an indictable offence and whose conviction had been affirmed on appeal could appeal to the Supreme Court of Canada on any question of law on which there had been a dissent in the Court of Appeal. As well any person whose acquittal at trial was set aside by the court of appeal could appeal to the Supreme Court of Canada on any or all grounds.

The Attorney General had only one possible ground of appeal to the Supreme Court of Canada: namely that the judgment of the Court of Appeal sought to be challenged conflicted with the judgment of any other court of appeal in a like case. An accused who had been convicted and whose conviction had been affirmed on appeal could likewise appeal on this ground. However, both the Attorney General and the accused required leave of a judge of the Supreme Court of Canada in order to appeal on this ground. There was no provision for either the accused or the Attorney General to appeal sentence to the Supreme Court of Canada.

The 1931 Amendment Act enacted two new sections in relation to criminal appeals. The first was a relatively minor one which restricted the rights of the accused; the second enlarged them.

Section 14 added a new subsection 1013(6) to the Code which required that any judge dissenting in the Court of Appeal specify the ground or grounds in law on which his dissent was based.[79]

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77. Hansard, (1930) Commons, at 2062.

78. (1931) 21-22 Geo. 5, c. 28.

79. *See Reinblatt* v. *The King* (1933) 61 C.C.C. 1 (S.C.C.). "In the *Davis* case and in others referred to by the Crown, upon the state of the law as it then was, no dissenting judgment could be legally pronounced, unless the Court of Appeal directed to the contrary, and unless the direction was plainly evidenced by the order of the court" (*Gouin* v. *The King*, [1926] 46 C.C.C. 1); and this court held that dissenting opinions expressed contrary to the prohibition of the statute should be treated as non-existent—the consequence being that there was to be found in the record, no dissent as a result of which the right of appeal could operate under s. 1023 of the Code. But the restrictions to the power of a judge of the Court of Appeal to pronounce a dissent have been removed. The cases relied on by the Attorney-General therefore no longer apply. The new enactment does not forbid a dissent from being expressed without leave of the court; and the circumstance that the grounds of

The second section, s. 15, was introduced as a clarification of s. 1025(3):[80]

> MR. GUTHRIE: It has been brought to my attention, since this Bill was printed, that there is an anomaly in one of the appeal sections, section 1025, subsection 3, which reads:
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> 'Any person whose acquittal has been set aside may appeal to the Supreme Court of Canada against the setting aside of such acquittal.'
>
> The case which has arisen or will arise is this: Certain people are indicted on a charge of conspiracy. One of them is convicted; three others are acquitted, and in the case of those three the Crown appeals to the provincial Court of Appeal. The provincial Court of Appeal convicts them. From that conviction, under the section which I have read, they have an appeal to the Supreme Court of Canada, but the other man who was convicted in the first instance, has no appeal. The result may be a favourable judgment in the Supreme Court in respect of the three, while the unfortunate man who was convicted in the first instance, has no appeal and stands convicted, although they have been tried together for the same offence. The suggestion has been made that that sentence should be clarified by adding these words:
>
> 'And any person who was tried jointly with such acquitted person and whose conviction was sustained by the Court of Appeal may appeal to the Supreme Court of Canada against the sustaining of such conviction.'

This provision as limited by a later amendment which restricts it to questions of law, now appears as s. 618(2)(b) of the present Code.

21. The Criminal Code Amendment Act 1935[81]

It seems almost axiomatic that no sooner was a new section relating to criminal appeals approved, than a further amendment was needed to clarify and limit that section.

This was the case with s. 17 of the 1935 Act. It further amended s. 1025(3) (previously amended in 1931) by limiting the accused's right of appeal to the Supreme Court of Canada to questions of law alone. In introducing the amendment in the Senate, Senator Meighen stated that:[82]

> The purpose of this amendment is to limit to questions of law alone the right of any person to appeal to the Supreme Court of Canada against the setting aside of his acquittal by the Court of Appeal of a province. Any person tried jointly with such acquitted person, and whose conviction was sustained by the provincial Court of Appeal, may appeal to the Supreme Court of Canada against the sustaining of such conviction but only on a question of law.

This amendment represented a substantial attenuation of the rights of the accused while maintaining the Supreme Court's function as the final interpreter of the law. Section 16 of the 1935 Act promoted this function as well. Section 1023(2) was repealed and two new subsections added. The new s. 1023(2) gave the Attorney General the right which until then had been granted only to the accused—the right to appeal to the Supreme Court of Canada on any question of law on which there had been a dissent in the Court of Appeal. In introducing this amendment in the Senate, Senator Meighen stated that it had been suggested by the Attorney General of British Columbia which, as always, provided the *imprimatur* for speedy and uncritical acceptance. Although both ss. 16 and 17 deprived the accused of substantial advantages, they were approved in both Chambers without debate.

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dissent are not specified in the formal judgment of the court does not avoid the fact of there being a dissent—which remains the sole condition for the foundation of our jurisdiction, provided the dissent was in respect of a question of law. *See also Taylor* v. *The King* (1947) 89 C.C.C. 209 (S.C.C.).

80. Hansard, (1930) Commons, at 4142.

81. (1935) 25-26 Geo. 5, c. 56.

82. Hansard, (1935) Senate, at 404.

22. The Criminal Code Amendment Act 1947[83]

Section 30 of the 1947 Amendment Act deprived the accused of yet another advantage which he had previously enjoyed. A new s. 1023(2) was enacted limiting the accused's right of appeal to the Supreme Court of Canada against the setting aside of an acquittal by a court of appeal to questions of law alone. The right of appeal enjoyed by any person who was tried jointly with such an acquitted person, and whose conviction was sustained by the court of appeal was similarly limited. This is the present s. 618(2)(b). Again, there was no debate on this new limitation in either the Commons or the Senate.

23. The Criminal Code Amendment Act 1948[84]

Under the provisions of the Code as they stood in 1948, if the Court of Appeal quashed a verdict of guilty and entered an acquittal the Crown had no right to appeal to the Supreme Court of Canada. Section 42 of the 1948 Amendments was intended to correct that situation. As Senator Hayden stated in introducing the amendment in the Senate:[85]

> Honourable Senators will recall the situation that arose recently in connection with the *Dick*[86] case in Hamilton. There was a (unanimous) acquittal by the Court of Appeal, and the Crown sought leave to go to the Supreme Court of Canada. It was unable to do so however, because the law provided that one could only go to the Supreme Court when one could show that there was a conflict in legal decisions. The proposed amendment provides that on a question of law in a criminal matter, with leave of a judge of the Supreme Court of Canada, a person may go to that court from a Court of Appeal.

It is clear from the debate that "person" was meant to include the provincial Attorney General. Once more this provision, which removed from the accused a further significant advantage, was passed without debate.

24. The Criminal Code (1955)[87]

When the fourth revision of Dominion Statutes was completed and enacted as the Revised Statutes of Canada (1952) the Criminal Code of Canada was omitted. Instead it was extensively debated and amended during the 1953-54 session of Parliament and came into force in 1955. By virtue of s. 745 of the 1955 Code the 1927 Code was repealed *in toto*, but there were few substantive changes. In the area of criminal appeals only one new section (s. 601) was added—giving the Attorney General of Canada the same rights of appeal in proceedings as those possessed by the provincial Attorney General and thereby overruling judicial pronouncements which had defined the term "Attorney General" as referring to provincial Attorneys General only.[88]

25. The Supreme Court and Criminal Code Amendment Act, 1956[89]

No case has ever matched *R.* v. *Coffin*[90] in its impact on criminal appeals legislation. Coffin was charged with murder and convicted in a trial which received international attention. The evidence against him was entirely circumstantial and many people had grave reservations

83. (1947) 11 Geo. 6, c. 55.
84. (1948) 11-12 Geo. 6, c. 39.
85. Hansard, (1948) Senate, at 583.
86. (1947) 87 C.C.C. 101 (O.C.A.), (1947) 89 C.C.C. 252 (S.C.C.).
87. (1953-54) 2-3 Eliz. 2, c. 51.
88. *Supra*, n. 7.
89. (1956) 4-5 Eliz. 2, c. 48.
90. [1956] S.C.R. 191, (1956) 114 C.C.C. 1, 23 C.R. 1, (1957) 7 D.L.R. 568.

about his guilt. His conviction however, was unanimously affirmed by the Quebec Court of Appeal.

Coffin subsequently applied for leave to appeal to the Supreme Court under what was then s. 597(1)(b). His application was heard by a single judge who refused it. When Coffin attempted to appeal to the Supreme Court of Canada as a whole from the refusal to grant leave to appeal, his application was dismissed on the grounds that the Supreme Court was without jurisdiction to entertain an appeal from a refusal to grant leave to appeal. Agitation on behalf of Coffin was so widespread that the Cabinet passed an Order-in-Council directing a reference to the Supreme Court of Canada requesting its views:[91]

> On the question of what disposition of the appeal would after argument of the said application have been made by the court if the application made by Wilbert Coffin for leave to the Supreme Court of Canada had been granted on any or all of the grounds alleged on the said application.

The court divided five to two. Kerwin C.J., Taschereau, Rand, Kellock, and Fauteux JJ. would have dismissed the appeal. Locke and Cartwright JJ. would have allowed the appeal, quashed the conviction and directed a new trial. His legal avenues exhausted, Wilbert Coffin was executed.

One result of the *Coffin* case was a considerable agitation for reform of the appeals procedure in capital cases. The House and Senate established a joint committee on Capital Punishment whose recommendations formed the basis of both the 1956 Supreme Court and Criminal Code Amendment Act and the 1960-61 Capital Murder Amendment Act. Both sets of amendments sought to correct procedural injustices which the *Coffin* case had brought to light.

The debate on the 1956 Bill centred around the question of appeals in capital murder cases. The Progressive Conservative Opposition strongly endorsed the recommendation made by the joint House-Senate Committee on Capital Punishment that in a case of capital murder, appeal should be as of right on any ground both to the Court of Appeal and to the Supreme Court of Canada. The Liberal Government of the day however, chose not to include this recommendation in its 1956 Bill and its absence was the occasion for extensive debate. Stuart Garson, the then Minister of Justice, explained the Government's position:[92]

> We have felt that inasmuch as these various reports all deal with aspects of what, after all, is one entire problem, namely the administration of justice in the enforcement of criminal law, the least that we could do would be to confer with the provincial Attorneys-General who have the primary responsibility for the administration of justice, before we attempted to take any action within our own sphere of jurisdiction here to implement recommendations in which the interest of the provinces is at least as great as that of the federal government, if it is not greater. I say that because while we may enact these provisions, it is the provincial authorities that have to enforce them. As we all know, as I think it was stated in this chamber just this very day, no law is any better than its administration. Thus when we are dealing with a problem of this sort we should certainly confer with those who have the responsibility of that administration before we attempt to make any changes in it. Therefore I am recommending to my fellow members and to this House that in the present circumstances we adopt for the time being this provision that in capital cases the application for leave to appeal should be made to a quorum of five judges; and that this will stay in effect until such time as we can discuss with the provinces, for example, whether they are prepared to undertake this responsibility, which has been suggested, that they should provide counsel if necessary for the accused. We should also at least pay them the courtesy of getting their reaction to

91. P.C. 1552, dated October 14, 1955.

92. Hansard, (1956) Commons, 6676.

this idea of there being an appeal as of right to the Supreme Court, in which, if they are to undertake the cost of providing the counsel, they must have a considerable interest.

The Opposition strongly disagreed:[93]

MR. FULTON: I do not feel the argument that provincial Attorneys-General would be faced with extra costs is really one that can be seriously advanced or seriously maintained where a man's life is at stake.

Although the debate centred around this question of appeals in capital cases, there was some discussion of s. 20 of the Act, which altered the requirements for leave to appeal on questions of law where there had been no dissent in the Court of Appeal:[94]

MR. GARSON: . . . applications for leave to appeal in criminal cases are under the Criminal Code, made to a single judge of the court. It is proposed that in all cases the application for leave to appeal should be made to the court, but that the quorum on the hearing of the application would be three judges in both civil and criminal cases with the single exception that in capital cases the quorum would have to be five judges.

The influence in the *Coffin* case is obvious. Considerable opposition to the amendment was voiced on the grounds that it would lead to duplication of appeals since the question would be heard twice: once on the application and again on its own merits, if leave were granted.

In spite of these objections the amendment was approved and is now incorporated into the requirement for leave to appeal to the Supreme Court contained in s. 618(1)(b) and s. 621(1)(b) of the present Code.

26. The Criminal Code Amendment Act 1960-61[95]

Section 25 of this Act repealed s. 584(2) and replaced it with an expanded definition of "acquittal".[96]

For the purposes of this section a judgment or verdict of acquittal includes an acquittal in respect of an offence specifically charged where the accused has on the trial thereof been convicted of an included or other offence.[97]

This section appears as s. 605(2) of our present Code.

27. The Criminal Code (Capital Murder) Amendment Act, 1960-61[98]

Never has a series of amendments in the area of criminal appeals been the subject of such protracted debate as that concerning this piece of legislation. The recommendation contained in the report of the Joint House-Senate Committee on Capital Punishment that a person convicted of capital murder be given an automatic right of appeal to both the Court of Appeal and the Supreme Court of Canada was not introduced by the government in 1956. It was, however, the subject of a long and heated

93. *Id.* at 6684.

94. *Id.* at 6676.

95. (1960-61) 9-10 Eliz. 2, c. 43.

96. For definitions of acquittal prior to the amendment: *Rex* v. *Orlin* (1945) 85 C.C.C. 150, an order quashing an indictment is not a judgment or verdict of acquittal from which an appeal lies. Since the order does not dispose of the charge on the merits it is not a bar to subsequent proceedings for the same offence; *Rex* v. *Tremblay* (1949) 95 C.C.C. 38 (Q.K.B., Appeal Side). In the case where the Crown decides its case is closed and counsel for the accused, after declaring that he has no witnesses to call, moves for and obtains a non-suit, the mere liberation of the accused is not equivalent to acquittal. Since the accused had not been placed in jeopardy at the hands of the jury, which alone could declare his guilt or innocence, he cannot plead *autrefois acquit* if the Crown should choose to indict him again for the same offence. *Contra*, *R.* v. *Mato li*, *R.* v. *Nadeau* (1953) 108 C.C.C. 227 (Q.Q.B. (Appeal Side)). The granting of a motion for a non-suit amounted to an acquittal. Also *contra*, *R.* v. *Hayward* (1957) 118 C.C.C. 365 the dismissal of a charge for want of evidence is tantamount to a "judgment or verdict of acquittal" enabling the Crown to appeal. Also *contra*, *Lattoni and Corbo* v. *The Queen* (1958) 121 C.C.C. 317.

97. This definition overrules the Supreme Court of Canada decision in *Rex* v. *Wilmot* (1940) 75 C.C.C. 161 in which it was held that a conviction for a lesser included offence was not "a judgment or verdict of acquittal".

98. (1960-61) 9-10 Eliz. 2, c. 44.

debate at that time. The Progressive Conservative justice critic, Mr. Fulton, went so far as to incorporate the recommendations into two successful Opposition amendments. By the 1960-61 Session the Progressive Conservatives were in government and Mr. Fulton was himself the Minister of Justice. Mr. Fulton's views were well known from his remarks in the 1956 debate:[99]

> MR. FULTON: If there had been an appeal as of right the situation in the *Coffin* case would never have arisen. I have already expressed my very critical views in this House of the conduct of the Minister and the results that developed there with respect to the manner in which that case was handled. As it was, because there was no appeal as a right, because there had to be an application made for leave to appeal and because of the way that matter was handled, there exists in the minds of millions of Canadians, I should imagine very grave doubts as to the final outcome and execution in that case. The whole messy, unfortunate and deplorable situation should have not arisen.

The relevant sections of the Act were 8, 11 and 12.

Section 8 added a new s. 583(a) to the Code which granted an appeal as of right on all grounds to any person sentenced to death. Section 583A(2) provided that even if such person did not himself give notice of appeal he would be deemed to have done so and the Court of Appeal would proceed accordingly. Section 583A(3) imposed a duty on the Court of Appeal to examine all possible grounds even if they had not been advanced in the notice of appeal. These provisions of s. 583A are now contained in s. 604 of the present Code.

Section 11 of the 1960-61 (Capital Murder) Amendment Act created a new Code section 597A which provided that any person who had been sentenced to death and whose conviction was affirmed by the Court of Appeal, or who was acquitted of an offence punishable by death and whose acquittal was set aside by the Court of Appeal, could appeal to the Supreme Court of Canada as of right on any ground as well. This provision now forms s. 619 of the present Code.

Section 12 of the Act simply extended the Attorney General's rights of appeal to the Supreme Court of Canada to encompass the other changes made by the Act. This section has been incorporated into the present Code s. 621.

Although in political terms the 1960-61 (Capital Murder) Amendment Act was a skilful compromise between abolition and retention of capital punishment, it was nonetheless motivated by a concern for the fairness of the Code provisions regarding appeals from capital convictions.

It should be noted that although these new sections conferred greater rights on the accused they in no way limited the Supreme Court of Canada's ability to be the final arbiter of law.

28. The Criminal Law Amendment Act 1968-69[100]

Just as the 1960-61 (capital murder) amendments provided for a distinct appeal procedure in the specific instance of a sentence of death; so the 1968-69 amendments, specifically ss. 55, 56, 64 and 65, made provisions for appeals from the verdict of unfit to stand trial and from the special verdict of not guilty by reason of insanity. Section 55 repealed the former s. 583 and enacted a new s. 583 containing an additional subsection 2 which provided for the specific grounds of appeal. This provision now appears as 603(2) of the present Code. Section 64 made

99. Hansard, (1956) Commons, at 6678.

100. (1968-69) 17-18 Eliz. 2, c. 38.

similar changes with respect to s. 597 which dealt with appeals to the Supreme Court of Canada. This is now s. 620 of the Code. Section 56 enacted a new subsection 584(3) which allowed the Attorney General the right to appeal on the question of law the verdict of unfit to stand trial by reason of insanity. This is the present s. 605(3). Section 65 amended s. 598 to provide the same right of appeal to the Supreme Court of Canada to the Attorney General on these two verdicts as all others. This provision now appears as s. 621. Although contained in an omnibus criminal amendment Bill which was extensively debated, none of the specific sections cited were debated in either House.

III. CONCLUSION

Although history of criminal appeals legislation in Canada has been a relatively short one, it has nevertheless been one of the most muddled chapters of our criminal jurisprudence. When the various legislative enactments which have shaped our criminal appeals procedure are viewed as a whole what emerges is not a pattern of gradual, purposeful change but rather a patchwork of statutes, each the result of a specific influence, need, or vogue at the particular time of enactment and many of which created as much new confusion and disarray as they eliminated.

Two major observations emerge from an overall consideration of this patchwork. The first is the absolute imperative that criminal appeal procedures foster and reflect a unity of interpretation and application of the criminal law throughout Canada. It is clear that the legislation was successful in promoting this paramount aim. The establishment of the Supreme Court of Canada may be seen as the realization of this purpose. As well, although the various Acts continuously altered the relative positions of Crown and accused, none curtailed the ability of the courts of appeal and the Supreme Court to review decisions of inferior courts on questions of law. On the contrary, if one coherent pattern does emerge from the various Acts it is the gradual enlargement of the number and types of questions of law which are reviewable. And such a pattern is, of course, a natural concomitant of the desire for the greatest possible uniformity of interpretation and application.

The second major observation to be made is that Canadian legislators, for the most part, have been completely mindless of the fact that, beginning with the Criminal Cases Appeal Act (Upper Canada) 1857[101] which although apparently similar to the Crown Cases Act of 1848 was significantly different in that it accorded to the reviewing court the power to order a new trial and consequentially the Crown a right of appeal, Canadian criminal procedure has in many ways been significantly different from that of the United Kingdom.[102] These differences were reinforced by the fact that the British North America Act, 1867 split the criminal law power, alloting to the federal government the legislative function while making the enforcement of the criminal law a provincial responsibility.

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101. (1857) 20 Vic., c. 61 (Province of Canada).

102. Mewett, *The Criminal Law, 1867-1967* (1967) 45 Can. Bar Rev. 726, at 730: "While it is true that the original Code of 1892 followed very closely the English Draft Code which, in turn, followed closely the existing common law, the considerable number of alterations, developments and amendments has led to an ever-increasing gap between Canadian and English law. Indeed, in all the major areas, it is difficult to think of many sections of the Code in which interpretations by English courts would be, in themselves, of immediate relevance. Offences against the person, particularly homicide, many sexual offences, most property offences, offences relating to the administration of justice, the law relating to parties to offences, the provision respecting habitual criminals and dangerous sexual offenders as well as practically the whole of the law of procedure bear no relation to the existing criminal law of England."

Canadian criminal jurisprudence became even more distinctive with the adoption of the Code in 1892.

Although Mr. John Thompson, the then Minister of Justice, stated that the 1892 Code did not make any significant departures from what the law has been, this was simply not true. Instead the 1892 Code did reflect many particular Canadian innovations and practices. It is significant to note that the use of the writ of error was abolished in criminal proceedings in Canada in 1892 by s. 743(1) of the Code whereas its use was not abolished in England until 1907 by s. 20(1) of the Criminal Appeal Act of that year.

The insensitivity of Canadian legislators to the fact that Canadian criminal law was distinctive accounts in great measure for patchwork pattern of amendment. Certainly the fiasco of the 1923 amendments can be directly traced to this insensitivity.

Senator McMeans in proposing, and the Senate and Commons in adopting the 1923 amendments were completely unaware of how inappropriate it was for Canada to adopt literally the provisions of the English 1907 Criminal Appeal Act. As a result of this neglect or ignorance, four subsequent amendment acts were required to repair the damage and reconstitute a consistent and complete scheme of appeals. Furthermore, from the debates in both Houses it is difficult to believe that many members understood the effect of the 1923 and subsequent amendments let alone their intended purpose. In this respect Canadian criminal appeal legislation should be viewed as a failure in that it has tended to retard and stifle those aspects of our criminal jurisprudence which were native to Canada and therefore perhaps more appropriate.

In all, the history of criminal appeals legislation has been an unsatisfactory one in that the legislation has lacked coherence in terms of the values it espouses; in terms of the policies it promotes with the singular exception of uniformity of interpretation and application of the criminal law; and in terms of the relationship it seeks to define whether between superior and inferior courts or between Crown and accused.

To chart the course of criminal appeals legislation in England one need only look to three Acts, the Crown Cases Act of 1848, the Criminal Appeal Act of 1907, and the Criminal Appeal Act of 1966. To do the same for a shorter period of time in Canadian history requires examining close to forty Acts or parts of Acts. What is significant is that in spite of this great number of Acts none has been the result of a thoughtful review since Sir Fitzjames Stephen's Draft Code was considered for adoption in the 1880's.

Clearly the process of legislation in the area of criminal appeals has been haphazard, inconsistent and in some cases tinkering probably worse than useless. It has, however, promoted a policy of national uniformity in the criminal law and that in itself may be enough of a success.