**The Role of the Canadian Judiciary
in the Development of the Canadian Criminal Code of 1892**

by
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Abstract

The nineteenth-century creation of the Canadian Criminal Code was an important achievement in law reform viewed from the perspective of the cruel and unorganized criminal laws received from England by eighteenth-century British North American colonies. Codification of the criminal law was encouraged by the Canadian judiciary, particularly by William Badgley, Sir James Robert Gowan and Sir Henri-Elzéar Taschereau. Their participation in the political process leading to codification is examined in this thesis to demonstrate a close relationship between Canadian politicians and some judges in public policy debates. These judges did not confine their judicial duties to A.V. Dicey's model for judges as interpreters and appliers of the law.

Nineteenth-century criminal law codification was influenced by enlightened legal thinkers including Jeremy Bentham who appealed for an organized, systematized criminal code to replace the common law and the disorganized creation of substantive criminal law. Although English judges rejected codification, Canadian judges were inclined to consider reformist argumentation and were aided by English and American codification models.

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Chapter One

Introduction and Purpose of Thesis

The codification¹ of Canada's criminal law may be understood within the historical context of the development of English criminal law and its reform in the nineteenth century. Influenced by the Enlightenment, British legal theorists began to contemplate law reform in the eighteenth century, and the most prominent thinkers of the period were Jeremy Bentham and William Blackstone. However, it was not until the nineteenth century that English law reform, including the possibility of codification, began in earnest. Reforms to the substantive criminal law began with the consolidation² of parts of it by Sir Robert Peel, between 1827 and 1832, when "hundreds of obsolete statutes were repealed or modernized, and there was a dramatic reduction of the death penalty from over 200 to a dozen offences."³ There were also efforts to move beyond consolidation to criminal law codification including the work of Lord Brougham's royal commission of 1833 and Lord Macaulay's Indian Penal Code of 1837. The latter was imposed upon India in 1860 and was the first codification of English law in the British

¹Codification: "(I)n the nineteenth-century English-speaking world. . . there appear to have been three distinct elements [of codification]. . . consolidation of several centuries of statute and case law; . . . law reform . . . [and] attempts to systematize the law while reforming it, first by Thomas Babington Macaulay and later by James Fitzjames Stephen and his Canadian disciples." See: Graham Parker, "The Origins of the Canadian Criminal Code" in D.H. Flaherty, ed., Essays on the History of Canadian Law (Toronto, 1981) 249 at 249.

²Consolidation [is] "the technique whereby existing statute law on a given topic is reduced from many statutes into one." See: Desmond H. Brown, The Genesis of the Canadian Criminal Code of 1892 (Toronto: The Osgoode Society, 1989) footnote 17 at 183.

³Barry Wright, "Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890's" (2008) Vol. 12 Legal History 19 at 19.

Empire. However, this model of codification did not suit self-governing dominions seeking to accommodate local laws that had been added to English laws received during earlier colonial periods.

A number of attempts were made at various times throughout the nineteenth century to codify the criminal law in England without success. The final effort was carried out under the leadership of Sir James Fitzjames Stephen but the draft English code was left on the legislative order paper when Parliament was dissolved over the Irish Question in 1880 and was never reintroduced into the British Parliament after that time. In contrast to the English experience, efforts to codify Canada's criminal code went into high gear after the abandonment of the English draft code by English legislators and Canada's example was followed in swift succession by two other 'self-governing' British jurisdictions: New Zealand in 1893 and Queensland in 1899. In all three jurisdictions, codification of the criminal law was accomplished as a "democratic and autonomous self-determined effort that combined local consolidations with the cautious Draft English Code as the primary external reference."⁴

Research Question/Thesis

An important factor that frustrated English codification of the criminal law was opposition from the bar and bench. Codification in England was regarded as an assault on the common law and the law-making powers of the judiciary. This study focuses on the role of the Canadian judiciary in law reform and codification efforts. What was the relative influence of the judiciary in Canada's successful codification during a time when

⁴Wright, *supra* note 3 at 21.

English judges strongly and effectively opposed proposals to codify the criminal law in England itself? Were there specific members of the Canadian judiciary who encouraged the codification of Canada's criminal law in the nineteenth century? My thesis is that one or more Canadian judges actively sought to codify the criminal law, a project which was influenced by the political challenges inherent in the development of a Canadian state and the need for effective federal jurisdiction over criminal law. I contend that active judicial advocacy for codification coincided with political needs in the last quarter of the nineteenth century when there was a perception among politicians such as Sir John A. Macdonald and his Minister of Justice, Sir John Thompson, that criminal law codification could enhance the effectiveness of the rule of law over the vast terrain and diversity of the Dominion of Canada. At the same time, there appears to be little evidence of the existence of opposition to codification from a nineteenth century Canadian judiciary that could not have failed to observe the frequent but failed efforts of the mother country to codify its criminal law in the same century.

I also contend that the encouragement of the Canadian judiciary was not, in and of itself, the only or final reason why Canada was the first self-governing state in the British Empire to produce a criminal code. Politicians decided to seek consolidation and/or codification only when law reform was seen to advance a political agenda. Codifying the criminal law was not a primary political objective but rather a secondary one which supported political requirements of the time. Codification was settled when the political firmament was quiescent and there were no crises or scandals for the politicians to attend to. When a codification bill had finally been drafted, parliamentary objections

consisted primarily of objections to the content of specific terms of the codified law (although there was some opposition from the Liberal members to codification itself.) However, the development of the Canadian Criminal Code would have occurred more slowly if prominent members of the Canadian judiciary had ignored the need for law reform or had actively opposed codification as did many prominent members of the nineteenth century English judiciary.

There was active or tacit support among some members of the legal profession for reforms of the criminal law to make it more accessible in a country which was, geographically speaking, far removed from the halls of English learning and knowledge and having “a less developed bar and bench, . . . a transplanted attenuated common law culture and practical challenges accessing the sources of law . . .”⁵ But the most relevant legal issue affecting the British North American colonies, two of which had been joined in a legislative union, was law reconciliation. English criminal law had been received as the foundation of colonial law at different times in different colonies and amended in different ways according to local conditions. There was, for example, the challenge of reconciling the criminal laws of the two largest British North American colonies - Canada East (Quebec) and Canada West (Ontario) - which came together as the Province of Canada in 1841. At that time, Canada East had over two hundred offences punishable by death, the legacy of English criminal law received in 1763. Canada West had eleven such offences, having first received English criminal law in 1792, and then adopting, in 1833, Sir Robert Peel’s recent English consolidations that had radically scaled back the death

⁵Ibid. at 20.

penalty.⁶

Intermingled with this inquiry into the role of the Canadian judiciary in the development of a Canadian Criminal Code is the secondary question of what is an acceptable role for the judiciary in law reform. The participation of judges in policy discussions on law reform raises questions about judicial independence and neutrality. Should members of the Canadian judiciary advise politicians on the use of the law to strengthen the state? What does this tell us about the role of judges as political actors and the realities behind the formal claims of the rule of law?

I propose to examine the role of three Canadian judges in the development of the Canadian Criminal Code. Canadian judges were sensitive to the political challenges faced by the Dominion of Canada in the early years of its formation, and indeed in the decades immediately preceding Confederation; they had wide experience of the practical challenges of accessing the law, and were familiar with the difficulties of dealing with the complexities of received English criminal law. Some of them were also receptive to the idea of codification of the criminal law, which suggests that they were receptive to the ideas of Jeremy Bentham, an English legal theorist of the late eighteenth and early nineteenth centuries who advocated codification as a major measure of law reform.

The first judge under consideration, chronologically speaking, is William Badgley, an early proponent of codification who had both a judicial and a short political career, a not uncommon phenomenon in the nineteenth century. While he was a politician, he introduced two bills into the Legislative Assembly of the Province of

⁶Brown, *Genesis*, *supra* note 2 at 57.

Canada on criminal law codification and procedure in 1850 but, unfortunately, he was not a member of the governing party. Moreover, momentous political events were in progress at that time and political attention was focused on those events entirely. He was, therefore, unsuccessful in his efforts to achieve law reform.

The most influential judge in the development of the Canadian Criminal Code was Sir James Robert Gowan, a confidant of both Sir John A. Macdonald and Sir John Thompson. Gowan sought various kinds of legal reforms in Canada over a period of four decades. He was a prolific writer on a variety of issues related to Canadian law, the common law, codification of the criminal law and the administration of justice. Gowan associated the development of a criminal code with the process of building a 'modern' country at a time when the Canadian federation was actively seeking to establish its identity, boundaries and security.

The third judge, Sir Henri-Elzéar Taschereau, was a member of an old Quebec family of politicians and judges. Like Gowan, Judge Taschereau was a prolific writer. He was also a legal scholar and his published writings became a major part of the Canadian law literature of the nineteenth century. As a jurist of considerable repute, he had offered to draft a Canadian criminal code in 1889 but his offer to do so was rejected by the Minister of Justice. Taschereau was critical of the criminal code which was finally produced without his expertise.

Methodology

This thesis requires a combination of primary and secondary sources of a legal

historical nature. Core primary source material consists of private archival fonds⁷ of nineteenth-century judges and Canadian Prime Ministers as well as records of the Colonial Office of Great Britain relating to English governance and legal policy. These archival units are being consulted in preference to the records of the Canadian Department of Justice on the subject of codification. Some of the Justice documents were rendered anonymous but originals of many of the same or similar documents, whose authorship is identified, are preserved in the private archival fonds of their creators or the persons who received them. Moreover, many pertinent records of the Department of Justice have already been extensively utilized and even published by other researchers, notably Desmond H. Brown. Private archival fonds appear to have been consulted to a lesser degree and reveal new information about the activities of the Canadian judiciary.

Most, but not all, of the archival holdings consulted are found in Library and Archives Canada⁸ (LAC) which has acquired the fonds of many nineteenth century politicians and some members of the judiciary. Documentation on the British presence and government in Canada has also been documented by LAC which has also acquired copies of ‘classes’ of records of the Colonial Office housed in the National Archives of the United Kingdom in London, England, and formerly known as the Public Record

⁷The word ‘fonds’ is the archival term for the archival records created, received or accumulated by an individual or organization during the course of that person or organization’s activities. It replaces the word ‘papers’ which is inadequate to describe many archival fonds consisting of material in several media.

⁸Established in 1872, it became the Public Archives of Canada in 1912, the National Archives of Canada in 1987, and Library and Archives Canada in 2003. The institution now includes both the former National Archives of Canada and the National Library of Canada.

Office. However, only a selection of documents from some classes pertaining to British North America were copied. Documentation on British policy for all colonies was not copied if Canadian interests were not specifically highlighted in the class. Since the general classes pertaining to all colonies contain material regarding policy on the criminal law and its codification, it is necessary to consult some classes of documents which reside only in the United Kingdom.

Archival papers of nineteenth century Canadian judges are not always available for research, and it appears that most of this material has not survived the passage of time. Some of these Canadian judges believed that their papers contained sensitive material that should never be made available for research.⁹ Fortunately, and most uncommonly, personal papers of Sir James R. Gowan have survived to the present day providing a detailed record of his thoughts, actions and relationships with the most powerful politicians in colonial Canada and afterwards in the Dominion of Canada. They contain not only extensive correspondence to him but also copies of his own writings, including speeches, outgoing correspondence, notes, memoranda and diaries.

As happens fairly frequently in efforts to preserve historically valuable archival papers, the Public Archives of Canada (PAC) was only allowed to microfilm the originals in the possession of the Gowan family in Barrie, Ontario. The microfilm was received in two lots in 1969 and 1970 and the originals were not preserved at PAC. The

⁹For example, in his last will and testament, Sir Lyman Poore Duff directed that his papers be destroyed after his death. Duff papers which did survive did not come from the Duff family. Archivists operating the systematic national acquisition programme established in 1967 at the Public Archives of Canada, for which I was responsible for a number of years, had little success in acquiring papers of 19th century members of the judiciary.

microfilmed, archival papers of Judge Sir James Robert Gowan represent his views on a wide variety of legal matters including his view of the necessity to codify the criminal law. His papers will demonstrate that he opposed extensive use of the common law and judge-made law in the administration of the criminal law. These papers show the links between the political actors and the judiciary and demonstrate that Gowan provided guidance to Sir John A. Macdonald and, more critically, to Sir John Thompson on codification of the criminal law. In addition to the Gowan fonds, Gowan's original correspondence to Sir John A. Macdonald and Sir John Thompson are found in the papers of these two prime ministers. Original papers of Judge Gowan have also been preserved in two other repositories: the Archives of the Province of Ontario and Simcoe County.

The William Badgley fonds and the papers of the Taschereau family are incomplete and do not appear to provide information on the support or lack of support for a criminal code in Canada by William Badgley or Henri-Elzéar Taschereau. A critical assessment of William Badgley's bills on codification and procedure written by lawyer Maximilien Bibaud is available. In lieu of the Taschereau fonds, the papers of two of Canada's nineteenth century prime ministers will provide documentation on Taschereau's participation in the criminal code project.

Theoretical Dimensions

The legal theorists William Blackstone (1723-1780) and Jeremy Bentham (1748-1832) are examined here in order to understand the premises behind English codification efforts. This analysis also draws upon the theories of Max Weber (1864-1920) and the more recent work of Lindsay Farmer on codification as an aspect of "modernization and

legal modernity.”¹⁰

Eighteenth century momentum for law reform in England was guided by William Blackstone who, in his published work, *Commentaries on the Laws of England*, had criticized “the poor drafting of existing statutes . . . [and] lamented the indiscriminate use of capital punishment.”¹¹ In the same century, Jeremy Bentham had endeavoured to distinguish between civil and penal law to determine how to write a penal code. Both men influenced legal reform in its early stages in the following century even though they did not agree on how to approach law reform. Bentham wanted to eliminate the common law whereas Blackstone regarded it as the cornerstone of English law, unchangeable, and a key part of English legal traditions.

As a persistent critic of the common law, Bentham devised a ‘science of legislation’ in which written statutes would replace all common law. As an advocate of codification of the criminal law, he “bemoan(ed) the partial or incomplete modernization of the common law and the institutions of law and government.”¹² Bentham and other law reformers were undoubtedly influenced by events in European jurisdictions where law reform took the form of codification as a new and formalized relationship between citizen and state, for example, codified law in France in 1791 and in 1810.¹³ This concept of modern statehood linked law and the citizen in a relationship “which limited the use of

¹⁰Lindsay Farmer, “Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45” (Summer, 2000) 18 *Law and History Review* 397 at 398.

¹¹*Ibid.* at 405-406.

¹²*Ibid.* at 399.

¹³*Ibid*

torture and the death penalty and introduced fixed punishments according to law.”¹⁴

Reformers like Bentham wanted a sense of certainty in the criminal law and regarded judicial discretion and precedent as an uncertainty making the criminal law less predictable and rational than required.

The development of forms of governance and laws and their relationship to the economy and to capitalism in “the politically organized and territorially bounded society of the modern Western nation-state”¹⁵ were Max Weber’s major interest. He developed a range of ideal models for the legal systems of modern states based on sociological rather than historical considerations. Associated with these models were forms of power, for instance, legal domination, which emerged as an inherent characteristic of a legal system based on what he called ‘legal rationality’, supposedly a “distinguishing characteristic of Western civilization”.¹⁶

In Weber’s ideal modern state based on legal rationality, laws were created by legislation and the state’s bureaucracy conducted its business in accordance with generally accepted laws. Within the modern state, government had authority over all persons within its boundaries and the capacity to coerce compliance with its authority by virtue of enacted statutes.¹⁷ In Weber’s theory of the modern state, ‘rationalized’ laws

¹⁴Ibid.

¹⁵Roger Cotterrell, “Law in Social Theory and Social Theory in the Study of Law” in ed., Austin Sarat, The Blackwell Companion to Law and Society (Malden, MA: Blackwell Publications, 2004) at 16.

¹⁶Reinhard Bendix, Max Weber: An Intellectual Portrait (Berkeley: University of California Press, 1977) at 385.

¹⁷Ibid. at 418.

provided stability and predictability as to what was expected of citizens, be they individuals or corporate bodies. These laws were to be “ impersonal, abstract rules.”¹⁸

Weber’s theory of formal law excluded precedent in statute formation since precedent was associated with laws that were not made by the people through their governments. Precedent or judge-made law was deemed to be of an arbitrary nature and atypical of the modern state with its formal laws and bureaucracy. Therefore, common law countries such as England and Canada that produce laws through both legislation and precedent did not fit into Weber’s ideal model of formal rationality. Weber concluded that England’s failure to codify its criminal law and its reliance on a common law tradition made “English law . . . in some sense, pre-modern . . .”¹⁹ Logically, it follows that all common law countries lacked legal modernization.

Lindsay Farmer views Weber’s sociological theorization of English legal institutions as helpful but ultimately inadequate to understand nineteenth-century English law reform and observes that closer attention should be directed to an “historical context of the modernizing of the state and institutions of criminal justice”²⁰ that is focused on the work of the Criminal Law Commission of 1833 to 1845.²¹ Although the Commissioners were unable to achieve a major objective - the passage through Parliament of legislation

¹⁸Richard Wellen, Dilemmas in Liberal Democratic Thought since Max Weber (N.Y.: Lang, 1996) at 83.

¹⁹Farmer, supra note 10 at 400.

²⁰Lindsay Farmer, “The Principles of the Codification We Recommend Has Never Yet Been Understood” (Illinois: University of Illinois Press for the American Society for Legal History, 2000) at 1. <http://www.historycooperative.org/journals>

²¹Farmer, “Reconstructing the English Codification Debate: . . .” supra note 10 at 401.

to create a digest of the criminal law - they did emphasize the importance of legislation as “the primary medium for the expression of law”²² as opposed to the unwritten common law. Farmer also believes that Weber’s model of formal legal rationality ignored real nineteenth-century English reforms that included the creation of more rational and humane laws, the elimination of many capital statutes, the development of the “prison as the primary form of punishment, . . . the creation of a professional police [force] . . . and the provision of defence counsel rights . . . ”²³ These English law reforms showed “evidence of humanitarianism”²⁴ and a growth in intellectual reflection on what a criminal law system should look like.²⁵ Weber’s model overlooked these important developments because of the longevity of such English traditions as the common law.

Canada was also a common law country whose judiciary was actively concerned with the development of criminal law in the nineteenth century - first the consolidation and later the codification of the criminal law. Judicial interaction with the political process was an important factor in the success of codification of the criminal law. Although the judges may not have explicitly engaged with the ideas of Blackstone and Bentham, they approached the challenges faced by a new state equipped with reform ideas influenced by those legal theorists.

This research aims to enhance the field of Canadian legal history and the politics

²²Ibid. at 424.

²³Randall McGowen, “The Image of Justice and Reform of the Criminal Law in Early Nineteenth-Century England” (1983) 32 Buffalo Law Review 89 at 93-94.

²⁴Ibid. at 94

²⁵Ibid.

of law reform by illuminating the role of the Canadian judiciary in criminal law reform from 1850 to 1892. It will highlight the active participation of members of the Canadian judiciary in the formation of the country's criminal law as opposed to the once prevailing view of the judiciary as persons engaged only in case law and the development of precedent.

Literature Review

An interdisciplinary legal and historical approach is needed which brings together the legal theories of Blackstone and Bentham with the political and social theories of Weber and Farmer. Although Canadian historiography is rich in military and political history, Canadian legal history has, until recent decades, received far less attention by historians and was focused inwardly on the law itself rather than on law in society. In fact, "[b]efore the 1970s, much. . . legal history . . . was defined by. . . the profession, the courts, and the judiciary."²⁶ This approach concerned the "internal history of legal doctrine and institutions"²⁷ rather than "examinations of the role of the legal system in the development of the structures of modern society. . ."²⁸ However, after the groundbreaking legal historical work of Graham Parker and Desmond Brown, there is now an increase in secondary sources that combine legal, i.e., doctrinal sources, with historical sources, for the study of law and society. Most of it has been published within the last

²⁶Jim Phillips, review article: "Recent Publications in Canadian Legal History" (1997) 78 Issue 2 Canadian Historical Review 236 at 236.

²⁷W. Wesley Pue and Barry Wright, Canadian Perspectives on Law and Society: Issues in Legal History (Ottawa: Carleton University Press, 1988) at 7.

²⁸Ibid.

thirty years including literature on codification.

Canada's criminal laws are derived from received English laws and administered according to English institutional models. Debates there were also a primary influence on reform ideas here. K.J.M. Smith's *Lawyers, Legislators and Theorists* is a principal resource on theoretical debates about the judicial interpretation of law²⁹ including institutional and intellectual forces in the development of the criminal law such as the judiciary, legal profession and Parliament, theorists and commentators.

A study of English law reform as context for law reform in Canada may also be provided by Michael Lobban's treatment of the common law in England during the period 1760-1850³⁰. In particular, William Blackstone's legal treatise defending the common law and Jeremy Bentham's opposing view of the need to dispense with the common law in favour of codified law represent two opposite ends of the spectrum on law reform in Britain. Lobban provides a context for this thesis by discussing Bentham's criticism of the nineteenth century legal system as well as his demands for specific forms of law reform through codification of the criminal law. These critiques may have influenced not only English politicians but also Canadian jurists and politicians. Bentham's desire to limit or circumscribe judicial precedent provided an important aspect of the discussion of law reform in both England and in Canada.

With regard to a study of Canadian law reform and the judiciary, there is some

²⁹K.J.M. Smith, Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence, 1800-1957 (Oxford: Clarendon Press, 1998) at 10.

³⁰Michael Lobban, The Common Law and English Jurisprudence, 1760-1850 (Oxford: Clarendon Press, and New York: Oxford University Press, 1991).

nineteenth-century literature of interest to the topic but it is frequently ephemeral and weak. It includes works of hagiography on the judiciary which are unsuitable for this thesis. There are, however, biographical profiles which provide insight into the achievements of prominent members of society. This will be particularly enlightening where there is scarce archival material of or about the judiciary. Henry James Morgan, Pierre-Georges Roy and Francis-Joseph Audet published lengthy and complex biographical tomes about contemporary judges and other ‘men of distinction’ and their research notes survive to complement published works. However, as generous as these published and unpublished writings are about the lives of judges, they often contain only snippets of information relating to the unique legal accomplishments of Canadian jurists and never an analysis of their contributions to Canadian judicial history.

Canadian literature on codification had an early twentieth century proponent in George H. Crouse, a lawyer whose 1934 article may have been the first to situate the Canadian Criminal Code within the larger context of nineteenth century Canadian law reform and its origins in English law reform.³¹ Much later, in 1974, Graham Parker wrote an historiographical essay lamenting the dearth of legal historical writing³² and critical studies on some of the earliest legal scholarly works as, for example, on William Blackstone’s legal treatise, *Commentaries on the Laws of England*. Parker himself offered a critical evaluation of *Commentaries* within its social and intellectual time period

³¹George H. Crouse, “A Critique of Canadian Criminal Legislation” (Nov. 1934) XII (9) Canadian Bar Review, 547-78.

³²Graham Parker, “The Masochism of the Legal Historian” (1974) 24 University of Toronto Law Journal, 279.

including Blackstone's ideological purpose in writing the treatise.³³ In 1989, Desmond

Brown harkened back to Parker's lament when he wrote:

a history of Canadian law has never been published [and] even less historical work has been done on the criminal law . . . For over eighty years after the enactment of the code the only systematic works with historical content were articles . . . on the content and applicability of the law rather than on the reasons that caused it to be enacted by the legislature or enunciated by the bench.³⁴

In 1981, Parker wrote an article regarding the successful Canadian effort to achieve codification of the criminal law in the last decade of the nineteenth century, basing his work on a single primary source, the records of the Department of Justice in Ottawa. As a result of this research, Parker surmised that "the actual origins of the idea to codify the criminal law of Canada remain difficult to determine."³⁵

Parker's conclusions on the origins of the codification of criminal law triggered an interest in the topic among other Canadian legal historians who pursued it more fully. The origins of the Canadian bill on codification were extensively researched by Desmond Brown who also examined the nature of the new code to determine if it was "a reform of the substantive law as well as systematization, or . . . merely an administrative measure . . . to tidy up the tangled mass of statutes and common law precedents that then constituted the criminal law. . ."³⁶ In a subsequent work, Brown positioned Canada's Criminal Code

³³Ibid. at 293.

³⁴Brown, Genesis, supra note 2 at 4.

³⁵Parker, "The Origins of the Canadian Criminal Code" supra note 1 at 259.

³⁶Brown, Genesis, supra note 2 at 5.

within the larger context of the history of English jurisprudence.³⁷ Brown's two major works not only explore the legal and historical issues surrounding codification of the criminal law in depth, they also provide a context of law reform developments in England for a study of codification in Canada.

The changing role of the nineteenth century Canadian judiciary was a progression from partisanship in the political process to a role which was independent in nature. The Canadian legal terrain was quite different from that in England which had well established legal traditions dating back many centuries including security of judicial tenure through the Act of Settlement, 1701, in Britain. Security of judicial tenure was adopted in Canada in 1867 through the British North America Act building upon the granting of judicial independence in the late 1840s. Barry Wright has observed that there were abuses of the criminal law by colonial governments including the appointment of judges at royal pleasure, i.e., the executive or legislative council.³⁸ As a result of the 'royal pleasure' concept, judges "acted in compliance with government interests."³⁹ Peter Oliver contrasts this 'Baconian' (partisan) judiciary of the early part of the century with the growing independence granted to the judiciary after the 1830s. Growing independence of thought and action meant that judges could no longer be formally appointed to or serve as active members in government councils or cabinet. Judicial independence "was gradual and . . . developed as part of the impassioned struggle for

³⁷Desmond H. Brown, The Birth of the Criminal Code: The Evolution of Canada's Justice System (Toronto: University of Toronto Press Inc., 1995).

³⁸Wright, supra note 3 at 29.

³⁹Ibid.

responsible government [in the 1840s].”⁴⁰

Twentieth century literature includes writings of the modern judiciary about the Criminal Code. Mr. Justice Josiah Wood edited a volume of essays regarding efforts to develop a criminal code in England and in Canada and reflected upon a century of amendments to the Canadian Code.⁴¹ Writing almost two hundred years after the death of Jeremy Bentham, Mr. Justice Allen M. Linden was very critical of the archaic nature of the Canadian code, comparing it unfavourably to the ideal code envisioned by Jeremy Bentham.⁴² The writings of these judges may provide insight into the role of the judiciary in the code’s creation.

The limited amount of published historical research on the role of nineteenth-century Canadian judges on law reform suggests that there is room for a study of the role of the judiciary with specific reference to their role in the development of the Canadian Criminal Code. My central focus is the role of the Canadian judiciary on law reform in general and, more specifically, the influence of the judiciary in Canada’s successful codification in contrast to the opposition of the English judiciary on the codification of the English criminal law. Judicial advocacy coincided with Canadian political

⁴⁰Peter Oliver, “Power, Politics, and the Law: The Place of the Judiciary in the Historiography of Upper Canada” in eds., G. Blaine Baker and Jim Phillips, Essays in the History of Canadian Law, Volume VIII In Honour of R.C.B. Risk (Toronto: University of Toronto Press, Osgoode Society for Canadian Legal History, 1999) at 457.

⁴¹Mr. Justice Josiah Wood and Richard C.C. Peck, Q.C., eds., 100 Years of the Criminal Code in Canada: Essays Commemorating the Centenary of the Canadian Criminal Code (Ottawa: Canadian Bar Association, 1993).

⁴²Mr. Justice Allen M. Linden, “Toward a New Criminal Code for Canada” in ed., Patrick Fitzgerald, Crime, Justification and Codification: Essais à la mémoire de Jacques Fortin / Essays in Commemoration of Jacques Fortin (Toronto: Carswell, 1986) at 163-196.

requirements in the last quarter of the nineteenth century. There is also the ancillary but very interesting issue of the appropriateness of judicial participation in the politics of a young nation and whether or not such interplay between politicians and judges challenged the concept of judicial independence and neutrality as understood at that time with regard to the rule of law.

My contribution to scholarship on this topic is being made through the discovery and analysis of specific archival records for the study of nineteenth century Canadian law reform and the influence and participation of the Canadian judiciary in this process. In particular, I hope to provide new information on the contribution of judges Gowan, Badgley and Taschereau to the work of law reform. Such a task is lightened by the richness of available information about Sir James Robert Gowan and made more difficult by the brevity of sources regarding Messieurs Badgley and Taschereau.

The codification of criminal law may be understood as a modernizing rationalization of law and state power that failed in England, in part, because of the opposition of judges. Canada proved to be more receptive to this comprehensive reform, in part, because of the support of judges. Chapter two will frame Canadian law reform within similar efforts in England in the same century with particular attention to the role of the English judiciary on these reforms. Chapters three and four will trace the influence of English reforms on British North America and Canada and explore the role of three Canadian judges who were deeply connected with law reform within the political process. Finally, chapter five reflects upon the historical role of judges in relation to legislative law reform and to judicial independence in relation to policy and political processes.

Chapter Two

English Criminal Law Reform: Impact on the British Empire

Introduction

In the nineteenth century, consolidation of the criminal law or its codification both in England and in Canada became important objectives at various times. Consolidation in England was used to reduce numerous laws on the same or similar offences, a problem which had occurred because of “the haphazard accumulation . . . of laws and the failure to repeal obsolete laws”⁴³ over a period of many centuries of lawmaking. Consolidation was a means of streamlining statutes without infringing upon the existing common law.

In the nineteenth century, the word codification referred not only to the abrogation of the common law but also to “more systematic reorganization, [and] reformulat[ion of] disparate elements into a cohesive whole . . .”⁴⁴ Jeremy Bentham’s theoretical *Pannomion* was “a complete and perfect code of laws [which was] to be the reverse of the common law method” [with] “a body of clearly defined rules for judges to apply . . .”⁴⁵ Andrew Amos, “one of Brougham’s Criminal Law Commissioners”⁴⁶ in 1833, described codification as “a consolidation conjointly of the Common Law, and of the Statute Law . . . according to a scientific arrangement, terminating all controverted questions.”⁴⁷ In

⁴³Farmer, supra note 10, “Reconstructing The English Codification Debate” at 408.

⁴⁴Wright, supra note 3 at 22.

⁴⁵Lobban, supra note 30 at 116-117.

⁴⁶Smith, supra note 29 at 75.

⁴⁷Ibid.

Canada and elsewhere, codification generally requires that criminal laws be organized and set out in a specific document which has been organized into chapters or titles. Technically, the first chapter of a criminal code may consist of introductory information for all of the remaining chapters which incorporate offences under broadly defined areas of the criminal law.

In Canada, initially, consolidation was seen as a less time-consuming way to organize criminal laws. Before Confederation, there were several colonies which consolidated their criminal laws, notably, the united Province of Canada. After Confederation, when criminal law became the responsibility of the federal government, Canada's initial efforts at organizing and streamlining the criminal law of the various jurisdictions that comprised the new country were achieved through consolidation. At the outset, this was done by simply adopting Greaves' 1861 Consolidation Acts. However, since Greaves' work was designed for English conditions, it became necessary to update it for Canadian usage on a regular basis. Eventually, consolidation was replaced by codification.

The codification of criminal law in Canada was informed by late eighteenth and nineteenth-century debates on English criminal law reform. Since English criminal law formed the foundations of criminal law in British North America, law reform in England retained a prominent influence on Canadian reformers. English influence on Canadian law and its reform continued even as British imperial supervision slowly yielded its grip on the Canadian colonies and Dominion of Canada in the wake of responsible government and then self-government.

The English common law system developed in a different direction from other European legal systems. (Common law was created in courts of law by judges applying their knowledge of the law and of legal precedent to the facts of a case. Judge-developed law based on precedent is a characteristic of the traditional English legal system.) In the pre-industrial period, common law was “based on natural law and inflexible rules,”⁴⁸ as well as the discretionary power of judges. By the mid to late eighteenth century, however, Enlightenment thought was raising challenges to the legal *status quo*, influencing British legal thinkers to generate new ideas about law reform and public policy through legislative measures. This included critical reflection about the nature of common law and the wide reliance on capital punishment for all manner of criminal offences. Foremost among the legal thinkers to question legal institutions and the harshness of English criminal law were William Blackstone and Jeremy Bentham.

William Blackstone sought to render the common law more comprehensible in his *Commentaries on the Laws of England* which was published in four volumes between the years 1765 and 1769. Blackstone supported English legal institutions including pre-industrial common law “as an oral tradition among the judges”⁴⁹ and he portrayed the legal system of England as “ideal and static . . . serving in a society the same function that the laws of nature served in the world, . . . [and] ultimately grounded in the Bible as the word of God.”⁵⁰ He was, however, critical of the state of English law and offered “a first

⁴⁸Lobban, supra note 30 at 1.

⁴⁹Lobban, supra note 30 at 49.

⁵⁰Will and Ariel Durant, Rousseau and Revolution: A History of Civilization in France, England and Germany from 1756, . . . (New York: Simon & Schuster, 1967) at 737.

obvious manifestation . . . of the broad effect of Enlightenment thinking . . . [and] a spirit of critical inquiry into the objectives of the system of criminal law.”⁵¹ As part of the enlightened thought on law reform of the eighteenth century, he was influenced by continental legal scholars including Cesare Beccaria who, in his work *On Crimes and Punishment*, “expressed . . . tenets of penal philosophy.”⁵²

Blackstone’s views on English law were challenged by Jeremy Bentham who argued that English law no longer supported the needs of society in the industrial age. Jeremy Bentham’s *Fragment on Government* was published anonymously in 1776⁵³ as a counterpoint to Blackstone’s *Commentaries*. Bentham “scorned the jurist’s worship of tradition . . . [and] expounded the ‘greatest-happiness principle’ to which John Stuart Mill in 1863 gave the name ‘utilitarianism’.”⁵⁴ Bentham spread the message that laws should be based on the needs of the greatest number of people in a society in order to ensure their happiness and should be utilitarian in nature. Bentham’s theory of the modern state posited “a political order that takes as its aim the expression and satisfaction of changing and conflicting desires.”⁵⁵ As such, it required a new way of thinking about law in general and criminal law in particular. Unlike William Blackstone’s defence of the

⁵¹Smith, *supra* note 29 at 20.

⁵²*Ibid.*

⁵³H.L.A. Hart and J.H. Burns, eds., *A Comment on the Commentaries and A Fragment on Government* (London: The Athlone Press, 1977) at xxix.

⁵⁴Will and Ariel Durant, *supra* note 49 at 738.

⁵⁵Nancy L. Rosenblum, *Bentham’s Theory of the Modern State* (Cambridge: Harvard University Press, 1978) at 17.

common law and acceptance of older views of law as part of the natural order or as a matter of tradition, Bentham expected the law to reflect the needs of a particular state at a particular time. These utilitarian needs were the “rationale for legislation.”⁵⁶

Bentham sought to disassociate positive law from older views of natural law⁵⁷ in order to frame law within his vision of a sovereign state which exercised law-making power through Parliament. Bentham thought that English common law should be discarded in favour of positive law, that is, law based solely on statutes passed by a legislative body.⁵⁸ Bentham viewed the criminal law and all law as a reflection of public interests. In his view, the existing legal system in eighteenth-century England was “increasingly out of alignment with the expectations and needs of an emerging industrial and commercial society.”⁵⁹ Indeed, he was “a theorist of the modern state . . . (with) all of the principal themes of state theory - sovereignty, law as a way of exercising power, diplomacy and the relations of states. . . .”⁶⁰

The reflections upon English society offered by Bentham, Blackstone and others of the time informed early nineteenth-century British reformers who adopted three different approaches to the criminal law including: debates on the purposes of the criminal law in society, notably prevention or deterrence; humanitarian needs, especially

⁵⁶Ibid. at 9.

⁵⁷M.H. James, ed., Bentham and Legal Theory [Belfast: Northern Ireland Legal Quarterly, 1973] at 1.

⁵⁸Smith, supra note 29 at 17.

⁵⁹Ibid.

⁶⁰Rosenblum, supra note 55 at 2.

with respect to the reduction in the use of capital punishment; and, economic concerns for the protection of personal property.⁶¹ Law reformers sought to have incarceration defined as the “primary form of punishment, . . . [they also wanted] the creation of a professional police [force] . . . [and] the provision of defense counsel rights.”⁶² During the 1820s, these aspects of legal reform acted as a framework for the work of politicians who were confronted by “statute law [that] was vast and incongruous, [and a] common law. . . riddled with a confusion of jurisdictions and an absence of clear precepts.”⁶³

British Criminal Law Commissioners, 1833-45: Codification

“Well over half of the criminal law”⁶⁴ was consolidated by lawmakers under the leadership of Sir Robert Peel between 1827 and 1832 and the number of capital offences was reduced from over two hundred to a dozen. Bolstered by these successes, the new Whig government of the 1830s sought continuing improvements to the criminal law to make it more humane and also more efficient as a body of statutes. For this purpose the Lord Chancellor Henry Brougham appointed a royal commission in 1833 to “draft two bills, one codifying the statute criminal law, the other codifying the common law on that subject.”⁶⁵ Combining the two bills into one piece of legislation⁶⁶ was also an objective.

⁶¹McGowen, supra note 23 at 90.

⁶²Ibid. at 94.

⁶³Lobban, supra note 30 at 189.

⁶⁴Brown, Genesis, supra note 2 at 17.

⁶⁵Brown, Birth, supra note 37 at 25.

⁶⁶Ibid

Between 1833 and 1845 Brougham's Royal Commission on the Criminal Law published eight reports regarding the need for extensive legal reforms but the length of time taken to produce these reports worked against the commissioners and, by the time their work was finished, political and legal aspirations were changing. There was growing opposition from critics who feared that the commissioners' work was a threat to the very existence of the cherished common law.⁶⁷ As a result, "legislation prepared by the Commissioners, either in the form of a digest or [as] . . . a number of separate bills produced by a reconstituted commission between 1845 and 1849, were unsuccessful."⁶⁸ Although the commissioners were driven by a desire to modernize and systematize British criminal law and were inspired by Jeremy Bentham, other influential legal figures, especially in the bar and bench, were influenced by the works of William Blackstone, their own legal peers, and by longstanding British legal traditions. Common law lawyers wanted to retain the common law as part of the legal system.⁶⁹ Judges were reluctant to yield their common law powers. The commission's objectives were, therefore, not met.

At mid-century, law reform in England had stalled. There appeared to be a dominant Blackstonian belief that English legal traditions including the common law should not be altered or dispensed with by modern innovations such as codification. In 1852, the Lord Chancellor attempted, once again, to prepare legislation for codification without success and there followed a gradual narrowing of the project from codification

⁶⁷Farmer, supra note 10 at 405.

⁶⁸Ibid.

⁶⁹Lobban, supra note 30 at 219.

to consolidation. It seems that neither the judiciary nor the politicians wanted such extensive law reform.⁷⁰

Criminal Law Consolidation Acts, 1861

Instead of codification, Charles Greaves' seven Criminal Consolidation Acts of 1861 were used to update and develop Peel's earlier consolidations. Greaves hastened to assert, during the work of consolidation, that "no attempt had been made to codify the law or to integrate any part of the common law in the bill"⁷¹ so anxious was he to prevent the rejection of his work by persons who might see in consolidation a plot to undermine English common law traditions. However, for jurists who favoured the creation of codified law, the consolidation effort was unsatisfactory as written by H.L. Stephen many years after Greaves completed his consolidation.

These Acts are, as their name implies, a collection of a great number of earlier enactments . . . with no compression of their intricate and clumsy phraseology, and with a careful preservation of a quantity of learning of no importance except from an archaeological point of view . . . (T)hese Acts are unintelligible to anyone who has not an acquaintance with the principles of law they deal with, and a comprehension of the technical terms they employ, both of which must be acquired from some other source; . . . their arrangement is haphazard and defective, and . . . the . . . operative part of any enactment is so carefully concealed that it needs an experienced practitioner to say where it is.⁷²

Noting that the consolidation of English law represented about half of the criminal law, Stephen bitterly wrote that Greaves' consolidations "have for forty years been, and are

⁷⁰Smith, supra note 29 at 136-137.

⁷¹Brown, Genesis, supra note 2 at 22.

⁷²H.L. Stephen, Draft Criminal Code, Covering Minute at iv-v. Colonial Office fonds, War and Colonial Department: CO 885/7/26, formerly Misc. No. 136, National Archives of the United Kingdom.

likely to continue indefinitely to be, the written criminal law of England.”⁷³

The Role of the English Judiciary in Law Reform

As noted earlier, while momentum increased for law reforms in nineteenth century England, English judges were quick to defend existing legal institutions. They observed that, unlike codified law, the common law was a superior kind of law because it was malleable and capable of application in many different situations in different times and centuries. Therefore, it should not be altered or removed since its genius - its flexibility - would disappear if common law defences, for example, were incorporated into a codified criminal law. If the criminal law was codified, judicial precedent and discretion would disappear and these were considered great assets in the English criminal law system which had to be vigorously defended by the judiciary.

Since the first thirty years of the nineteenth century was a period of considerable unrest and increased criminal activity, Tory politicians and judges reasoned that it was a bad time to eliminate judicial discretion which they believed could be used for purposes of social control.⁷⁴ Tory views have been summed up as follows: “Severe laws, wide judicial discretion and mercy constituted a system that was wise.”⁷⁵ Lord Chancellor Eldon⁷⁶ was an early proponent of this view of the criminal law and its punishments as

⁷³*Ibid.* at vii.

⁷⁴McGowen, *supra* note 23 at 106.

⁷⁵*Ibid.* at 104.

⁷⁶Eldon was Lord Chief Justice of Common Pleas, 1799, and Lord Chancellor. He opposed the reform bills of 1831-1832. See: E.A. Smith, “John Scott, first Earl of Eldon (1751-1838)” in ed., Lawrence Goldman, *Oxford Dictionary of National Biography*: <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/24897>, accessed Nov 2009.

was Lord Chief Justice Ellenborough.⁷⁷ They were powerful opponents of any and all attempts at criminal law reform.⁷⁸ Ellenborough, for his part, criticized the possible elimination of the death penalty for property thefts of small amounts of money and thought that it was more important to have the possibility of terrifying consequences for the commission of an offence coupled with judicial discretion and mercy which could be meted out in individual cases.⁷⁹ The protection of property was one of the foremost aims of the criminal law and those with property desired to ensure that no harm would befall it, hence severe and capital punishments.

English jurist, Baron James Parke⁸⁰ referred to the advantage of flexibility that the common law provided to the English legal system by noting that it was “capable of application to new combinations of circumstances perpetually occurring.”⁸¹ But the generally held view of the judiciary on codification was perhaps typified by the words of

⁷⁷Ellenborough was appointed Lord Chief Justice in 1802. He opposed Sir Samuel Romilly’s attempts to reform the criminal law, including capital punishment. See: Michael Lobban, “Edward Law, first Baron Ellenborough (1750-1818)” in ed., Lawrence Goldman, Oxford Dictionary of National Biography: <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/161427>, accessed Nov 2009.

⁷⁸Smith, supra note 29 at 62.

⁷⁹Ibid.

⁸⁰Parke was master of the Common Law, judge of the King’s Bench, 1828, judge of the Court of Exchequer, 1834 to 1855; appointed to the Judicial Committee of the Privy Council in 1833. See: Garth H. Jones, “James Parke, Baron Wensleydale (1782-1868)” in ed., L. Goldman, Oxford Dictionary of National Biography: <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/21283>, accessed Nov 2009.

⁸¹A.H. Manchester, “Simplifying the Sources of Law: An Essay on Law Reform. II James Fitzjames Stephen and the Codification of the Criminal Law of England and Wales” (1973) 2 *Anglo-American Law Review* 527 at 527.

Mr. Justice Alderson⁸² who responded to Lord Chancellor Cranworth's request in 1853 for the opinions of the judiciary on draft legislation to codify indictable offences and related common law.⁸³ Described as "a great exponent of the flexibilities of the common law when in the right hands, and . . . an enemy of codification,"⁸⁴ Alderson admonished legislators to ensure that legal reform would be "confined to consolidating and amending . . . the statute law . . . but, he added, let us retain the rules and principles of the common law as they have been handed down to us from our predecessors."⁸⁵

In contrast to Tory views which favoured only some form of consolidation, Whig proponents of law reform like Romilly⁸⁶ disliked the discretionary power used by judges and thought that "the existing judicial process was . . . potentially tyrannical."⁸⁷ As the century wore on, however, proponents of legal reform lost ground to those who supported the legal *status quo*, that is, traditional and familiar legal institutions reflecting their understanding of justice, morality, and a balance between private and public interests.

⁸²Alderson was a judge of the Court of Common Pleas and baron of the Exchequer. See: Steve Hedley, "Sir Edward Hall Alderson, Baron Alderson (1787-1857)" in ed., Lawrence Goldman, Oxford Dictionary of National Biography.
<http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/303,2009>.

⁸³Brown, Genesis, supra note 2 at 21.

⁸⁴Hedley, supra note 82.

⁸⁵Brown, Genesis, supra note 2 at 21.

⁸⁶Romilly was a lawyer and politician whose primary area of interest was reform of the criminal law: corporal punishment, incarceration and capital punishment. He tried to reduce severe punishments for smalltime theft unsuccessfully. See: R.A. Meliken, "Sir Samuel Romilly (1757-1818)" in ed., Lawrence Goldman, Oxford Dictionary of National Biography.
<http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/24050,2009>.

⁸⁷McGowen, supra note 23 at 100.

There was a renewed interest in codification in the 1870s both for England, and, as we shall see shortly, for the colonies. England's chief proponent of criminal law reform in this decade was Sir James Fitzjames Stephen⁸⁸ whose draft criminal law codification bill of 1877 was referred to a commission composed of himself, Lord Blackburn, Mr. Justice Barry and Lord Justice Lush. The results of their combined work was the Criminal Code (Indictable Offences) Bill of 1879. To his judicial critics who opposed the bill Stephen wrote that "codification means merely the reduction of the existing law to an orderly written system, . . . and that the larger and more important [part] of the criminal law of this country is already reduced to writing in statutes, in particular the portion dealt with by the Consolidated Acts of 1861."⁸⁹ His vaguely worded comments on the nature of codification failed to allay the fears of the judicial community on the solidness of his proposals.

Lord Chief Justice Alexander Cockburn Responds to the Draft English Code

Sir Alexander James Cockburn,⁹⁰ one of the most influential jurists of his era, had

⁸⁸Sir James Fitzjames Stephen (1829-1894) was called to the bar in 1854. His two major works, published in 1863 and 1883, respectively, General View of the Criminal Law and The History of the Criminal Law, made him his century's "most significant contributor to the conceptualization and exposition of English criminal law." He was appointed to a high court judgeship in 1879 "in recognition of his service to the cause of law reform. . ." See K.J.M. Smith, Oxford Dictionary of National Biography, <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/26375>, Nov 2009.

⁸⁹Sir James Fitzjames Stephen, A History of the Criminal Law of England, Volume III (New York: Burt Frankline, 1964) at 350-351.

⁹⁰Cockburn was a member of the British Parliament; Attorney-General, 1851-56; Chief Justice, Common Pleas, 1856-59; and Lord Chief Justice, 1859-80. In 1874, he criticized a bill to codify the law of homicide drawn up by J.F. Stephen and the bill was withdrawn. See: Michael Lobban, "Sir Alexander James Edmund Cockburn (1802-1880)" Oxford Dictionary of National Biography <http://www.oxforddnb.com.proxy.library.carleton.ca/view/article/5765>, Nov 2009.

served in a political capacity as Attorney General in 1854 and was knowledgeable about the damning effect of negative commentaries of the judiciary on earlier codification legislation proposals. As the Lord Chief Justice at a later period, Cockburn was ready to examine in great detail the Criminal Code (Indictable Offences) Bill of 1879. His letter to the Attorney General in June 1879 identified serious errors and omissions in the Bill. Cockburn's letter was printed by the British House of Commons to permit a large audience to read its contents.⁹¹

Cockburn's lengthy and detailed letter occupied nineteen pages of single spaced, text after printing by the House of Commons. The Lord Chief Justice criticized certain sections as well as the arrangement and content of the draft code. Cockburn concluded that "the Bill is as yet far from being in a condition in which it ought to become law"⁹² and he urged the Attorney General not to allow passage of the Bill in its present form.⁹³ He did not, however, write that the Bill should be abandoned. In fact, he expressed admiration for the bill as well as encouragement to produce "a complete and perfect code."⁹⁴ Moreover, Cockburn seemed willing to explore the need for codification of English criminal law in one of the opening statements of his 1879 letter:

Let me assure you that I approach the subject in no hostile spirit, either

⁹¹Printed copy of letter of the Lord Chief Justice Alexander Cockburn to the Attorney General dated 12 June 1879 in a "Return to an Order of the Honourable the House of Commons, 16 June 1879" containing comments and suggestions in relation to the Criminal Code (Indictable Offences) Bill at 1.

⁹²Ibid. at 19.

⁹³Ibid.,

⁹⁴Ibid. at 1.

from disbelief in the results of codification, or from any want of appreciation of the merits of the work embodied in the present measure. I have long been, . . . a firm believer in, not only the expediency and possibility, but also in the coming necessity, of codification; . . .⁹⁵

Cockburn stated that, although the Commissioners responsible for the Bill had made remarkable progress in drafting the bill, they had not had enough time to see it through to its proper completion and he offered some specific improvements which the bill needed before becoming law. The Bill covered only indictable offences and he described the omission of any reference to “offences punishable on summary conviction . . . as a radical defect which must necessarily mar the completeness of the work. . .”⁹⁶ To be useful to all concerned, Cockburn recommended that the codification legislation be amended to cover all of the criminal law in a manner that would allow persons who consult it to have all that they needed “without having to search for it in Acts of Parliament scattered over the Statute Book, . . .”⁹⁷ Warning to his subject, Cockburn asserted that “the main purpose of codification of the law is utterly defeated by leaving the code to be supplemented by reference to statutes, and, what is still worse, to parts of statutes which are still to remain in force, but are not embodied in it [the Code].”⁹⁸ Meticulously, he identified thirty-nine statutes which were “partially repealed and partially left standing.”⁹⁹

⁹⁵Ibid.

⁹⁶Ibid. at 9.

⁹⁷Ibid. at 6.

⁹⁸Ibid. at 6.

⁹⁹Ibid.

In an apparent reversal of the generally held pronouncements of the judiciary on the common law, Cockburn expressed astonishment that common law defences to the commission of a crime had not been eliminated in the code and he criticized the continued usage of “rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge . . .”¹⁰⁰ In his view, “(i)f it is worth while to codify at all, whatever forms a material part of the law should find its place in the Code.”¹⁰¹ In his version of a ‘perfect code’, all material references to portions of the unwritten common law which pertain to the criminal law should be absorbed into the code to eliminate the need for the administrators of the law to search in more than one place for authoritative references to specifics of the criminal law. Portions of the common law which pertain to the criminal law would then become obsolete. His words contradict the commonly held belief that Cockburn held fast to the common law in all its manifestations. He wrote:

If the unwritten law is, as part of the law, to be embodied in a Code, so material a part of it as that with which we are dealing ought certainly to be carried into the Code, and should not be left at large, to be sought for in the unwritten and traditional law, which, the Code once established, it will be worth no one’s while to study, and which will speedily become obsolete. We have done with the common law so far as it relates to criminal matters. No one is henceforth to be indicted under it.”¹⁰²

The letter was described as “devastating to the government’s hopes”¹⁰³ for

¹⁰⁰Ibid. at 13.

¹⁰¹Ibid. at 14.

¹⁰²Ibid. at 14.

¹⁰³Brown, Genesis, supra, note 2 at 36.

criminal law codification. It must have evoked a remembrance of earlier opposition to codification including the 1854 opposition when Cockburn himself was the Attorney General. This was an unfortunate reading of Cockburn's words since a patient and prolonged study of his extensive letter of 1879 and a respectful response on the part of legislators to his suggestions for improvements might have elicited a different outcome in which the judiciary and the politicians could finally have reached an amicable agreement on codification of the criminal law. Cockburn appeared, in 1879, to have had a change of heart on the need for codification.

Imposed Imperial Codes in the Dependent Colonies

Although the English did not succeed in codifying their criminal laws, the Imperial Parliament was interested in codification for its crown colonies "to make English law more effective in foreign settings and to ameliorate problems of colonial governance such as abuses of justice and over-reliance on costly military responses."¹⁰⁴ Criminal codes were prepared for this purpose by Lord Thomas Macaulay, R.S. Wright and later by H.L. Stephen, the son of Sir James Fitzjames Stephen.

As head of the first Indian Law Commission, Macaulay was appointed in 1834 to convert administrative regulations and native laws into codes.¹⁰⁵ Inspired by Jeremy Bentham's ideas, his Indian Penal Code "reflected the utilitarian ideal of a comprehensive code."¹⁰⁶ However, although it was drafted in 1837, it became law in India only in 1860

¹⁰⁴Wright, supra note 3 at 25.

¹⁰⁵K.J.M. Smith, James Fitzjames Stephen: Portrait of a Victorian Rationalist (United Kingdom, Cambridge University Press, 2002) at 126.

¹⁰⁶Wright, supra note 3 at 25.

after the Mutiny. It did not reflect local influences or concessions to indigenous legal customs¹⁰⁷ and was also used as the model code for a number of imperial “Asian and African colonies.”¹⁰⁸

When it turned out that Macaulay’s code did not have a wider usage among the imperial colonies, the Colonial Office sought out R.S. Wright to draft a new and updated code intended for Jamaica.¹⁰⁹ It was the Colonial Office’s intention to have Wright’s code serve as a model criminal code for colonies of the British Empire since the criminal law of some of them was in need of reorganization and classification¹¹⁰ but it was used, ultimately, only by the colonies of British Honduras, the Gold Coast, Grenada and St. Lucia.¹¹¹ Jamaica did not use Wright’s code because, although the code was accepted by the Jamaican Legislative Council, its usage was disallowed by the Colonial Secretary.

The Colonial Office promoted Wright’s code through an essay written by Sir Henry Taylor (1800-1886), a civil servant in the Colonial Office with Benthamite views on the colonial codification of the criminal law. His essay was “appended to *Drafts for a Criminal Code and Code of Criminal Procedure for the Island of Jamaica*, presented to Parliament . . . 9 August 1877.”¹¹² Taylor referred not only to Wright’s code but also to

¹⁰⁷Ibid.

¹⁰⁸Ibid.

¹⁰⁹Ibid.

¹¹⁰Martin Friedland, “R.S. Wright’s Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law” (Winter, 1981) Vol. 1, No. 3 Oxford Journal of Legal Studies 307 at 307.

¹¹¹H.L. Stephen, supra, note 72 at xi.

¹¹²Friedland, supra note 110 at 308.

other models for a criminal code such as Edward Livingston's draft Louisiana Code (1828), Dudley Field's New York Code (eventually implemented in 1881), and Macaulay's Indian Penal Code¹¹³ and admonished the government to codify the criminal law of one or more of the colonies where it "is not likely to be needlessly obstructed"¹¹⁴ as happened in England itself. In addition, he recommended that capital punishment be rationalized according to arguments presented by Bentham and Beccaria who debated long-term penal punishment as opposed to the frequent use of capital punishment. Taylor also requested a broad review of the purpose of punishment, its effect on the individual being punished, and the effect of punishment on the public interest.¹¹⁵

Wright retained the distinction between felonies and misdemeanours whereas Sir James Fitzjames Stephen referred in his draft English code to indictable and non-indictable offences although only indictable offences appeared in Stephen's code. Wright's code was more exhaustive than either Stephen's code or that of the royal commissioners of which Stephen was a member.¹¹⁶ "Wright . . . eliminated all common law crimes and attempted to be exhaustive as to defences."¹¹⁷ Similarly, the English draft code of 1879 removed common law offences, in a reversal of Stephen's earlier approach,

¹¹³Sir Henry Taylor, "Some Considerations preliminary to the Preparation of a Penal Code for the Crown Colonies" 20 May 1870, Colonial Office fonds, CO 885/3, Miscellaneous No. 11, National Archives of the United Kingdom.

¹¹⁴*Ibid.* at 8.

¹¹⁵*Ibid.* at 11.

¹¹⁶Friedland, *supra* note 110 at 326.

¹¹⁷*Ibid.*

and retained many common law defences.¹¹⁸

In another attempt at providing model codes for British crown colonies, the Colonial Office asked H.L. Stephen to prepare a ‘draft criminal code’ in 1901. Prepared in the decade after codification in several self-governing colonies, Stephen’s purpose was “to encourage Crown Colonies to consolidate their Ordinances . . . in an orderly and scientific manner . . . [and to] . . . reduce . . . their Statute Law to . . . one or two . . . volumes.”¹¹⁹ Like his predecessor, Sir Henry Taylor, Stephen thought that this would work in a colonial environment better than in the Imperial Parliament.¹²⁰ His draft code included only substantive law and no procedure and used “the arrangement of the English code . . . [prepared by his father].”¹²¹ In his view, anyone wishing to codify English criminal law would need to consult a variety of sources including the English Consolidation Acts of 1861 and such codes as his father’s Criminal Code Bill of 1879, the work of the Royal Commission to codify the criminal law, the Queensland Code and the Indian Penal Code.¹²² H.L. Stephen’s draft code was not adopted for the remaining British colonies and “Wright’s code was eventually replaced in 1925 by Albert Ehrhardt’s Colonial Office model based on Samuel Griffith’s Queensland Code.”¹²³

¹¹⁸Ibid.

¹¹⁹H.L. Stephen, supra note 72 at iii.

¹²⁰Ibid.

¹²¹Ibid. at viii.

¹²²Ibid. at vi.

¹²³Wright, supra note 3 at 26.

Criminal Law Codification in the 'Self-Governing' Jurisdictions

While the imposed British imperial codes were not favoured in former British colonies, there was a strong interest in codification of the criminal law in the self-governing jurisdictions. These jurisdictions needed to reform the criminal law to prevent abuses in the administration of justice and to make more effective use of received laws from England in combination with local amendments which had been written to take account of the specific requirements of a given colony. Jurisdictions like Canada regarded the criminal law as a tool to help secure the new state, defending it against potential enemies both internal and external.

There were three self-governing jurisdictions of the British Empire which codified their criminal law in fairly quick succession at the end of the nineteenth century including Canada in 1892, New Zealand in 1893 and Queensland in 1899. In both Canada and New Zealand, the primary external reference for codification of the criminal law was the draft English code of Sir James Fitzjames Stephen.

Conclusion

The revolutionary ideas of Jeremy Bentham to banish the common law, codify penal law and limit judicial discretion in the name of modernity influenced codifiers such as R.S. Wright but such ideas gradually gave way to a restoration of the traditional thought on English criminal law as expressed by William Blackstone in his *Commentaries on the Laws of England*. Momentum against codification gained in intensity as the century advanced and by the end of the 1850s an English Criminal Code was no longer feasible. The project to codify English penal law was replaced by the

simpler technique of consolidating statutes. The common law and judicial discretion remained as touchstones of English law.

Codification of the criminal law had much more success in common law jurisdictions outside England. Both Macaulay and Wright produced codes which were viable for dependent colonies. In the case of three self-governing jurisdictions, Canada, Queensland and New Zealand, codification occurred not as an imposition by the mother country or indeed through England's active encouragement but through the efforts of these independent colonies to ensure that they were prepared for the exigencies of the modern state. James Fitzjames Stephen's draft English code was the primary external reference on Canada's code and Canada was the first self-governing jurisdiction to achieve codification in 1892 although the process of achieving criminal law codification had started several decades earlier. Chapters three and four will trace the journey to codification of the criminal law in Canada starting in 1850 with William Badgley's ill-fated draft criminal code and criminal procedures bills in the Province of Canada.

Chapter Three

William Badgley

Introduction

At the time of the formation of the Province of Canada in 1841 through the union of Upper Canada (as Canada West) and Lower Canada (as Canada East), there were “two standards of justice and two systems of punishment . . . in one jurisdiction. . . [and the inhabitants were] subjected arbitrarily to one or the other, depending on [their] geographical location.”¹²⁴ While retaining its French civil law through the Quebec Act, 1774, Lower Canada also “retained, almost unchanged, the vast number of cruel English statutes [which it had received in] ... 1763. The Act of Union [1841] did not alter this.”¹²⁵ By contrast, Upper Canada had received English criminal laws as they had stood in 1792 and then subsequently adopted Peel’s consolidations of English criminal laws in 1833 with the result that Upper Canada had reduced the number of capital offences from over two hundred to just eleven, a remarkable improvement.

Having more severe criminal laws in Canada East than in Canada West became untenable and consolidation of the criminal law in these two parts of the Province took place in 1841 through legislation. The result was a reduction in the number of capital offences in Canada East from over two hundred to the same number as in Canada West (eleven) thereby improving the criminal laws of Canada East and rendering the criminal law the same everywhere. Further amendments in 1851 and in 1859 addressed other

¹²⁴Brown, Genesis, supra note 2 at 56.

¹²⁵Ibid.

inconsistencies in the substantive and procedural laws of the Province. However, there was no codification of the criminal law during this period¹²⁶ and no further reduction of capital offences from the eleven in both Canada East and Canada West until Confederation and Sir John A. Macdonald's consolidations of 1868-1869 which were derived from Greaves' 1861 English consolidation of the criminal law.

In between the consolidation of the criminal law of the Canadas in 1841 and further consolidations in the next decade, William Badgley proposed to codify the criminal law and he introduced bills on the criminal law and procedures in the legislature in 1850. If his codification legislation had been accepted by the legislature, Badgley's code would have been the first one in the whole of the British Empire after Macaulay's Indian Penal Code of 1837 (which, however, did not become law in India until 1860). Badgley may have thought that codification was a reasonable improvement over consolidation and that, through codification, further legal reforms could be made to the criminal law to reduce its reliance on the death penalty for a variety of offences, ensure that reformed and codified English criminal law was used both in Canada East and Canada West and reduce the need for common law offences and defences.

William Badgley was a lawyer, judge and, briefly, a politician. He studied law in Montreal, founded the law firm of Badgley & Abbott,¹²⁷ was appointed a circuit court judge from 1844 to 1847 and was named a Queen's Counsel in 1847.¹²⁸ He received an

¹²⁶ Ibid.

¹²⁷ Assemblée nationale du Québec. <http://www.assnat.qc.ca>

¹²⁸ J. Douglas Borthwick, Historical and Biographical Sketches from Borthwick's Gazetteer of Montreal to the Year 1892 (Montreal: John Lovell & Son, 1892) at 190.

honorary title of Doctor of Civil Law from McGill College (later university) in 1843¹²⁹ where he was both a professor of law and Dean of the Faculty of Law from 1853 to 1855.¹³⁰ He was also, for a time, a professor of criminal law at the University of Laval.¹³¹ Following a short political career, he was appointed a puisné judge of the Superior Court of Lower Canada, 1855 to 1862, an Assistant Judge of the Court of Queen's Bench and in 1866, a puisné judge of that court. He retired on a pension in 1874."¹³²

Constitutional Association

One of Badgley's abiding interests was the protection of the English-speaking population of Canada East and he championed their rights through political and legal action. In 1834, he "assisted in the reorganization of the constitutional association . . . as the exponent of the British party"¹³³ supporting Quebec anglophones and opposing Louis-Joseph Papineau's party.¹³⁴ An address from the constitutional association stated that just

¹²⁹The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men, Quebec and the Maritime Provinces Volume (Chicago: American Biographical Publishing Company, 1881) at 106. Early Canadiana Online. <http://www.canadiana.org.proxy.library.carleton.ca> 2009

¹³⁰Elizabeth Gibbs, "William Badgley", in eds., John English and Réal Bélanger, Dictionary of Canadian Biography Online, 1881-1890, Volume XI. <http://www.biographi.ca/009004-110.01> 2009

¹³¹Maximilien Bibaud, styled Bibaud, jeune, Dictionnaire historique des hommes illustres du Canada et de l'Amérique (Montréal: Bibaud et Richer, 1857). Early Canadiana Online. <http://www.canadiana.org.proxy.library.carleton.ca> 2009

¹³²Borthwick, supra note 128 at 190.

¹³³ Henry J. Morgan, Sketches of Celebrated Canadians and Persons Connected with Canada from the Earliest Period in the History of the Province down to the Present Time (Montreal: R. Worthington, 1865) at 493.

¹³⁴ Francis Joseph Audet, Les Députés de Montréal: villes et comtés, 1792-1867; études biographiques, anecdotiques et historiques (Montréal: Les Études des Dix, 1943) at 295.

as the French- speaking population of Lower Canada, numbering “four hundred thousand souls retained every characteristic of a distinct people; . . . Your Majesty’s subjects who have come and settled in the Province . . . now amounting to about ‘a hundred fifty thousand souls’ have retained a character equally distinct.”¹³⁵ These words amounted to a clash of cultures between two ‘distinct peoples’ and was expressed as differing political and legal needs.

The anglophone community petitioned to obtain laws in the English legal tradition and sought changes to the administration of justice to serve their interests. In 1835, a petition to the King expressed their gratitude for “constitutional freedom and security of [the] person and property.”¹³⁶ At the same time, however, they complained that the rights of British subjects were endangered by the French-speaking majority in the Legislative Assembly of Lower Canada which diminished their security and that of their property by withholding the expenditure of government revenues to assist them. They also claimed that the administration of justice had been diminished by the dependence of the judiciary on the Legislative Assembly for its continued employment. In their view, judges should exercise their judicial duties “during good behaviour . . . [with] their salaries being provided for.”¹³⁷ They also observed that the administration of justice was ineffective for

¹³⁵Neilson Collection, drafts of a petition to the King by the Constitutional Association of Lower Canada, Manuscript Group 24, B 1, vol. 16, at 198, microfilm reel C-15772, Library and Archives Canada.

¹³⁶Petition to the King by the Constitutional Association of Lower Canada, Manuscript Group 24 B 142, 4 pages, at 1, Library and Archives Canada.

¹³⁷Ibid. at 3.

persons living at a distance from them.¹³⁸ This latter complaint may have stemmed from an observation that the influence of the British population in the townships had been suppressed.¹³⁹ In addition, Badgley and Moffatt presented an address to the Queen in 1838 complaining of “antiquated French laws”¹⁴⁰ on the conveyance of lands.

United Province of Canada

Members of the constitutional association engaged in “public and private correspondence, . . . writings in . . . public journals, and . . . addresses”¹⁴¹ to promote their interests. An address to the Queen requested the “re-union of the provinces, gradual introduction of the English language in all legislative and judicial proceedings, and redistribution of constituencies [to] give the British portion their fair representation.”¹⁴² In an address to Lord Durham, the new Governor-in-Chief of the British North American colonies, dated April 1838, representatives of the association, George Moffatt, from the English language business community of Montreal, and Badgley, made the case for the unification of Upper and Lower Canada with a single governing body. Durham had accepted his appointment in January 1838 but did not leave the British Isles until 24 April 1838 and was able to receive the address of Moffatt and Badgley while they were in

¹³⁸Ibid.

¹³⁹John George Lambton, the Earl of Durham fonds, Letter from George Moffatt to Lord Durham, 16 April 1838, Manuscript Group 24, A 27, vol. 7, at 211, microfilm reel C-1849, Library and Archives Canada.

¹⁴⁰Ibid. Address to the Queen, at 219, reel C-1849.

¹⁴¹Morgan, Sketches of Celebrated Canadians, supra note 133 at 493.

¹⁴²Earl of Durham fonds, supra note 139, Address to the Queen, at 222, reel C-1849.

England.¹⁴³ The anglophones wanted the Legislative Council to act as a buffer between the Executive and Assembly¹⁴⁴ to promote English commercial interests.

During the early years of the Legislative Assembly in the Province of Canada, from 1841 to 1854, so-called moderate members from Canada East were opposed on the left by Louis-Joseph Papineau's group and on the right by the politics of which Badgley was a proponent.¹⁴⁵ However, in the larger environment of a united Province of Canada, members of the Tory contingent of politicians began to support other parties or groups on various issues with "the ultimate result, probably inevitable in a predominantly French-Canadian section, . . . the extinction of this Lower Canadian Tory group as an effective unit in the Legislative Assembly."¹⁴⁶

During this period, Badgley embarked upon a political career in the Legislative Assembly in 1847 as Attorney General for Canada East in the government of William Henry Draper and Denis-Benjamin Papineau.¹⁴⁷ He represented the County of Missisquoi until 1851 after which he was returned as the Member for Montreal. During this administration and in the following one of Henry Sherwood, there was "a decidedly Tory

¹⁴³Between January and April 1838, Lord Durham consulted a number of Canadians in England including Badgley and Moffatt. See: Fernand Ouellet, "Lambton, John George, 1st Earl of Durham", in eds., John English and Réal Bélanger, Dictionary of Canadian Biography Online, 1836-1850, Volume VII. <http://www.biographi.ca/00904-119.01>. 2009.

¹⁴⁴Earl of Durham fonds, supra note 139, at 209-211, reel C-1849.

¹⁴⁵Paul G. Cornell, The Alignment of Political Groups in Canada, 1841-1867 (Toronto: University of Toronto Press, 1962) at 3.

¹⁴⁶Ibid.

¹⁴⁷Gibbs, supra note 130.

Executive Council.”¹⁴⁸ But Tory influence ended with the defeat of the government by the Reformers under Robert Baldwin and Louis-Hippolyte LaFontaine in March 1848.¹⁴⁹

Badgley may have been inspired to start writing his draft code while he was in office as the Attorney General. The final document was nearly two hundred printed pages in length and may have taken several years to research and write. However, it was not presented to the Legislature until after the Tory influence in the Legislative Assembly had waned.

Badgley’s political career ended in 1854 with an electoral defeat.

Badgley’s Codification Bill of the Criminal Law in the Province of Canada

Badgley presented two bills in the Legislative Assembly of the Province of Canada on 21 May 1850 to both codify the criminal law and establish a code of criminal procedure. Badgley’s draft criminal code was one of a number of legal projects which he had undertaken to retain a strong link in British North America with English legal and cultural traditions. Other examples included “reforming such French institutions as the registration of land and the seigneurial system of land tenure.”¹⁵⁰ For instance, he drafted legislation to have seigneurial tenure abolished in Lower Canada and that legislation was subsequently sent by the Colonial Office to Lord Durham as governor in chief for his consideration.¹⁵¹

In the Legislative Assembly, Badgley sought support for his bills by explaining

¹⁴⁸Ibid.

¹⁴⁹Ibid.

¹⁵⁰Ibid.

¹⁵¹Morgan, Sketches of Celebrated Canadians, *supra* note 133 at 494.

that they were created “from our own statutory enactments, . . . English law, and the codes of some of the neighbouring States [and] would apply equally to both portions of the province.”¹⁵² He hoped that by identifying this project as one which could claim credibility as part of a larger process of law reform internationally, he could garner support for it. But, any real support was weak as shown by his inability to get a second reading of the bills within a reasonable time frame. Instead, second reading of the bill was postponed repeatedly. On 11 July 1850, opposition to the bills was finally made very clear when LaFontaine objected to a second reading of the bills because they would “pledge the House to the principle of the bill, which was voluminous.”¹⁵³ By contrast, Papineau, who opposed Attorney General LaFontaine and his party, asserted that Badgley should be commended for his extensive work and that the bills deserved a second reading. Papineau also approved of Badgley’s proposed abolition of the death penalty under certain circumstances.¹⁵⁴ But, second reading of both of his bills was indefinitely postponed during this session of the legislature.¹⁵⁵

Badgley reintroduced the measures in the Hincks-Morin administration in 1851.¹⁵⁶

¹⁵²Elizabeth Gibbs, gen. ed., Debates of the Legislative Assembly of United Canada, 1841-1867, Volume IX, Parts 1 and 2, 1850 (Montreal: Centre de recherche en histoire économique du Canada français, 1977) at 1141.

¹⁵³ Ibid. at 1139.

¹⁵⁴ Ibid. at 1140.

¹⁵⁵ Ibid. at 1139 to 1142.

¹⁵⁶ Sir Francis Hincks (1807-1885) was a partner with Robert Baldwin and LaFontaine in 1841 in the creation of the Reform Party. He replaced Baldwin as leader in 1851. See: David Mills, “Sir Francis Hincks” in ed., James H. Marsh, The Canadian Encyclopedia (Toronto: McClelland & Stewart Inc., 2000) at 1076.

This time, the bills received a second reading and were then directed to a select committee of the House which praised Badgley's work.¹⁵⁷ But, members of the committee cautiously refrained from accepting the bills as presented to them. Instead, they recommended "the appointment of a Commission . . . to have the Bill to amend and consolidate the Criminal Laws, and the Bill to establish a Code of Criminal Procedure, . . . referred to the said Commission."¹⁵⁸ However, no further action was taken on Badgley's bills.

Badgley's criminal law bills failed to become law possibly for the reason identified in the *Debates*: that the bills were 'voluminous' and the House did not have the time to deal with them. However, his own political timing and the political time period were wrong for the introduction of such legislation. His political timing was wrong because he was no longer the Attorney General of Canada East and therefore did not exert any political influence. The political time was wrong because the Baldwin-LaFontaine administration was occupied with major political change which included the introduction of Responsible Government and political upheaval caused by the Rebellion Losses Bill. In addition, a worldwide depression which had started in 1847 was causing commercial dislocation in Canada and impeding Canada's export trade. Annexationist sentiment towards union with the United States was being viewed by some as a way to alleviate the commercial woes of Canadians.

Of particular importance was the Rebellion Losses Bill of 1849 which was

¹⁵⁷ Brown, *Genesis*, *supra* note 2 at 85.

¹⁵⁸ Alfred Todd, *General Index to Journals of the Legislative Assembly of Canada, 1st to 3rd Parliaments, 1841-1851* (Montreal: J. Lovell, 1855) at 50. Early Canadiana Online. <http://www.canadiana.org.proxy.library.carleton.ca> 2009.

introduced by the Reform Ministry to compensate persons who had sustained property losses in Lower Canada during the Rebellion of 1837-1838. This bill, which provided assistance for mostly French Canadians who had suffered property losses a decade earlier,¹⁵⁹ was opposed by, and caused unrest amongst the Tory opposition, of which Badgley was a leading member. Riots in Montreal followed assent to the bill by the Governor General, Lord Elgin, who accepted that the bill had been passed by a majority in the Legislative Assembly.

The following excerpt from a letter written by Francis Augustus Grant at Montreal in 1849 provides some insight into the serious and prolonged nature of the disruption caused by the Rebellion Losses Bill and gives testimony to the violence and upheaval of the period which amounted to clashes between English and French cultures. Francis Grant (1829-1854), was a young military officer stationed in Canada with the 79th Regiment of Foot (Cameron Highlanders) who had been relieved of his military duties, over the objections of his commanding officer, to act as an aide-de-camp in 1848 to Grant's uncle, James Bruce, 8th Earl of Elgin, and Governor General of Canada. Writing to his father in Scotland on 1 May 1849, Grant made mention of the British Party whose activities exacerbated the unrest.

I have been an eye witness to all the disturbances. It is about the Rebellion Losses bill, that is that a certain sum of money from the public purse is to be devoted to the payment of private persons for property lost or destroyed during the rebellion of 1837 & 1838. In Upper Canada this has already been done and Lower Canada asks for it now. This bill was carried in parliament

¹⁵⁹Lower Canada Rebellion losses claims, RG19-E-5-b, (Record Group) Library and Archives Canada. The online finding aids for these records indicate that there was a preponderance of francophone claimants.

by 60 votes to 20 . . . His excellency drove in state to parliament with his A. D. C.s on horseback, a guard of honour, etc., to give his assent to a number of bills and he gave it to the Rebellion losses amongst the rest.

That night . . . the parliament houses were on fire. We . . . found the sky red with the blaze. Whilst the members were sitting, stones came flying through the windows, presently the door was broken in and a number of people rushed in, one sat on the speaker's chair, another ran off with the mace and the remainder smashed everything in the room and almost simultaneously fire broke out on all sides. . . ; in a quarter of an hour the whole building was in flames and not a leaf of the finest library in North America . . . never can be replaced . . . During the next day, there were crowds in the streets, guards were put on the Government House, the jail, etc. . . , and when night came they set fire to the stables, etc., of Mr. LaFontaine, the Attorney General, and ransacked the inside of his house, and when everything was destroyed in it they tried to burn it. . . but did not succeed. Fortunately, LaFontaine had guessed their intentions and sent away his family during the day. Crowds continued to collect about the Government House daily [and] about 500 French Canadians [were armed] with pistols and cutlasses which exasperated the British party more than ever as it was arming one party against another.¹⁶⁰

Since Badgley's British Party was involved in the rioting and destruction, it is probable that members of the British Party, including William Badgley, would not have enjoyed the confidence of the government in the creation of any new laws. Moreover, codification of the criminal law was not a part of the government's legislative agenda.

Some Features of Badgley's Criminal Code

William Badgley did not draft his criminal code in a vacuum. "Whether settling novel or well-worn issues, judges and lawyers. . . [had access] to the available law reports, any relevant statutes, and, most importantly, criminal law treatises."¹⁶¹ As a lawyer and judge, Badgley proposed legislation that was heavily supported by law reports, statutes,

¹⁶⁰ Francis Augustus Grant collection, letter no. 24 from F.A. Grant to his father, 1 May 1849, Manuscript Group 24, A 53, volume 2, Library and Archives Canada.

¹⁶¹ Smith, *supra* note 29 at 66.

and criminal law treatises. Many of the sources consulted are listed at the beginning of his draft code, and then listed liberally throughout the text of the code, to indicate the authorities that he consulted for specific sections and sub-sections of each chapter. These eighty-seven sources date, approximately, from the sixteenth to the nineteenth century, and include, for example, Hale's *Pleas of the Crown*,¹⁶² Blackstone's eighteenth-century *Commentaries on the Laws of England*, Foster's *Crown Cases* (1762), Hawkins' *Pleas of the Crown* (1795), Edward Hyde East's *Pleas of the Crown* (1803) and William Oldnall Russell's *Treatise on Crimes and Misdemeanours* (1819). Russell's treatise on the criminal law was regarded as having supplanted East's work and "carried forward into the nineteenth century the combined virtues of Blackstone's general theory of 'persons capable of committing crimes' and East's accessible distillation of institutional works, reinforced by a digest of hitherto generally unavailable judgments."¹⁶³

In addition to his heavy reliance on contemporary legal treatises, Badgley designed his criminal code in a manner which suggests that it was in part based on the Indian Penal Code written by Lord Thomas Macaulay and he included some of Macaulay's definitions, legal framework and other matters. Badgley's general legal framework was referred to as 'General Preliminary Provisions' and included stipulations regarding degrees of crime which are broadly called felonies or misdemeanours, information on the capacity for

¹⁶²Hale was an English legal scholar who was both a judge and a jurist. His *History of the Pleas of the Crown* was "one of the principal authorities on the common law of criminal offences." Written in the seventeenth century, it was not published until 1736. See: David Eryl Corbet Yale, "Sir Matthew Hale (1609-1676)" *Encyclopaedia Britannica Online*. <http://www.britannica.com>. Oct. 2009.

¹⁶³Smith, supra note 29 at 72.

committing crime, parties to a crime, accessories after the fact, criminal injuries, the natural and probable consequences of an offence and punishments to be administered for specific types of offences depending on the severity or degree of the crime, etc. The following is an example of the General Preliminary Provisions relating to punishment:

Where any person is convicted of any indictable offence punishable under this Act for which imprisonment generally may be awarded, it shall be lawful for the Court to sentence the offender in addition thereto, to be kept to hard labour in the common gaol or house of correction; and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labour, not exceeding one month at any time, and not exceeding three months in any one year; as the Court in its discretion shall seem meet. (Chapter I, Section III, No. IX).

This section of the code regarding punishment is similar to the wording of Macaulay's Indian Penal Code including solitary confinement and hard labour as usual aspects of punishment for more serious offences. By linking the length of incarceration with the seriousness or degree of the crime, e.g., a term of ten years, not more than one year with hard labour, not less than seven years, ten to twenty years, life, death, etc., Badgley was following the example of Lord Thomas Macaulay in the Indian Penal Code whose "punishment rationale complemented (his) aim of grading offences predominantly on the basis of the demonstrable culpability . . . of actors . . ."¹⁶⁴

Chapter One of Badgley's criminal code provided definitions that were applicable to the entire code. Some of them were similar or identical to definitions which Macaulay used. Badgley's definition of a woman is identical to that of Macaulay and is a rather unusual definition: "A woman is any female human being, whatever may be her age."

¹⁶⁴Ibid. at 142.

(Badgley's Code, Chapter I, Section II, No. VIII). Unlike Macaulay, however, Badgley did not think that it was necessary to define the meaning of 'man'.

In the arrangement of chapters, there were some similarities between the structure of the two criminal codes. After definitions, general principles and explanations, both codifiers identified offences against the state - chapter II in Badgley's code and chapter VI in Macaulay's work. Moreover, there is a very detailed chapter on Homicide in both codes: Macaulay's chapter sixteen and Badgley's chapter fifteen titled *Of Offences Affecting the Human Body*, and *Homicide and Other Offences Against the Person* respectively. The homicide chapters contain a similar although not identical set of offences ranging from murder to various forms of physical imperilment to the human person. Badgley's chapter on homicide is less complex than Macaulay's chapter because he omitted many offences which were not likely to occur in a small, colonial setting even though these offences were likely to occur in a very much older society with very different cultural norms such as India. William Badgley's second bill for criminal procedures was also based on previous codification initiatives of the nineteenth century and was "modelled after Edward Livingston's unenacted 1826 *Louisiana Code of Criminal Procedure* [and] filtered through David Dudley Field's 1849 *New York Code of Criminal Procedure*."¹⁶⁵

As mentioned earlier, Louis-Joseph Papineau praised Badgley's code for its reduction in the usage of capital punishment. It appears that only two chapters in

¹⁶⁵Blaine Baker, "Strategic Benthamism: Rehabilitating United Canada's Bar Through Criminal Law Codification, 1847-1854" in eds., Jim Phillips, R. Roy McMurtry, and John T. Saywell *Essays in the History of Canadian Law: A Tribute to Peter N. Oliver* (Toronto: Osgoode Society for Canadian Legal History, 2008) at 257.

Badgley's code require the death penalty. The second chapter on treason required the death penalty for persons found guilty of treason, and life in prison for those who aid them to evade capture. Chapter Fifteen required the death penalty for murder in the first degree and also for 'malicious injuries to the person . . . with intent to commit murder' (Chapter XV, Section V). With only about three reasons for the usage of the death penalty, Badgley's code was a major attempt to make the criminal law more humane than contemporary criminal law in the Province of Canada for which the death penalty was the result of the commission of some eleven offences.

Although Badgley does not refer to the usage of the common law in his draft code, the chapter on homicide includes a number of common law defences under the heading 'Justifiable Homicide'. It includes, for example, homicide for self-preservation. (Chapter XV, Section XVII). This may indicate that Badgley was seeking to absorb the common law into his code as it pertains to the criminal law.

Bibaud's Critique of Badgley's Criminal Code Bill

Badgley's bills for codification of the criminal law provoked controversy among jurists including Maximilien Bibaud (1823-1887)¹⁶⁶ an author who often identified himself as 'Bibaud, jeune' to avoid confusion with his father, Michel Bibaud, a journalist, author and historian. Also known as François-Maximilien Bibaud, he was a francophone lawyer and professor of law specializing in the study of legislation who was one of a group of jurists who wanted to "professionalize the Lower Canadian civil-law system by

¹⁶⁶"Fonds François-Marie-Maximilien Bibaud, Revue critique du Code criminel de l'Honorable William Badgley," Montréal, 1852, P14,S1,D1 at 224. Bibliothèque et Archives nationales Québec.

proposing measures such as [its] codification, [and] the institutionalization of legal education . . . ”¹⁶⁷ Basically, he sought to modernize French civil law and legal traditions rather than abandon them to English models. As an alternative, he founded a law school at the Jesuit institution, Collège Sainte-Marie. Bibaud authored and published many major works of an encyclopedic or biographical nature. His essays included *Essai de logique judiciaire* in 1853 on “different types of logical arguments as they apply to the interpretation of law.”¹⁶⁸ His *Commentaires sur les lois du Bas-Canada, ou Conférences de l’école de droit*, demonstrated his “remarkable mastery of the manifold sources from which the Quebec law of the period derived, whether Roman or canonical law, customary, English, French, or Canadian law.”¹⁶⁹ As a scholar of Roman, German, French and English law, he critically analysed the works of others, including Badgley’s criminal code.

Bibaud had published a critique of Badgley’s bills in the newspaper *La Minerve* in 1851. In the following year, he revised that analysis ostensibly to correct errors in the published version of his essay.¹⁷⁰ But, in fact, he had become alarmed at the possibility that Badgley’s bills might actually become law since they had received a second reading.¹⁷¹ Written under the name François-Marie-Maximilien Bibaud, his exposition on

¹⁶⁷Brian Young, “Dimensions of a Law Practice: Brokerage and Ideology in the Career of George-Étienne Cartier” in Carol Wilton, dir., *Essays in the History of Canadian Law, Vol. 4, Beyond the Law: Lawyers and Business in Canada* (Toronto: Butterworths, 1990) at 98.

¹⁶⁸Yvan Lamonde and André Morel, “Maximilien Bibaud”, *Dictionary of Canadian Biography Online*. <http://www.biographi.ca/009004-119.01-e.php>. 2009.

¹⁶⁹*Ibid.*

¹⁷⁰Fonds Bibaud, *supra* note 166, Avant Propos.

¹⁷¹*Ibid.* at 3.

the criminal law bills was extensive at more than two hundred handwritten pages in French.

Bibaud noted that Badgley was the first person in the Canadas to introduce codification legislation of the criminal law.¹⁷² Rather dramatically, he observed that the possible imposition of a criminal code based on English law and traditions was for him “a question of life or death, of liberty or of slavery for my compatriots.”¹⁷³ His belief that a criminal code based entirely on English law would be excessively harmful to the people of Quebec¹⁷⁴ was possibly more of a reflection on Bibaud’s negative view of English jurisprudence rather than specifically on Badgley’s code. Symbolic of his disdain for English legal traditions was his dislike of the late, revered legal theorist Jeremy Bentham who, he conceded, offered many useful suggestions for legal reform but who lacked any real humanity or compassion for people as demonstrated by Bentham’s belief that silence was always an indication of guilt. To illustrate his point, Bibaud referred to an incident where Bentham disagreed with the suspension of an execution of a woman who had declared herself pregnant.¹⁷⁵

Bibaud’s main objection to the use of English criminal law as the basis for a code was its severity despite the reform work of Sir Robert Peel earlier in the century. He

¹⁷²Ibid. at 218.

¹⁷³Ibid. Text translated here into English.

¹⁷⁴Ibid. Bibaud demonstrated his fear of English law by the reference on his title page in which he quotes Sir James Marriott’s published Plan of Laws for the Province of Quebec, “The English laws in their institution, seem to have been made for the terror of a daring people.” Also at 44-45 of Bibaud’s text.

¹⁷⁵Ibid. at 5.

believed that the traditional severity of English law had negatively influenced Badgley's criminal code particularly in the use of capital punishment even though, in reality, the use of capital punishment is rare in Badgley's code. In addition, Bibaud disagreed with some of the fundamental principles of English law permeating the code which had been fostered by William Blackstone, particularly the concept of the foresight of the consequences of criminal action. Quoting Blackstone, Bibaud wrote: "If a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend in general, his want of foresight will be no excuse."¹⁷⁶ Bibaud's view was that a person could only be convicted upon his actual intention and not upon the unintended secondary effects of his crime.¹⁷⁷

Bibaud criticized the criminal code bill at both a general and specific level. He disagreed with the order of the chapters of the bill, the arrangement of information in the code as illogical, and with fundamental assumptions of who is or is not capable of committing a crime. Although persons under seven years of age cannot be considered to be able to commit a crime, persons between the ages of 7 and 14 would not normally be seen to be capable of committing a crime unless the contrary is proved (Chapter I, Section IV, No. I, Parts 1-2). Bibaud examined this statement noting that Blackstone had argued that a child of ten years of age could be hanged if it were proved that he or she had the capacity to commit a serious crime and had done so. Bibaud regarded this as an example

¹⁷⁶Ibid. at 52.

¹⁷⁷Ibid. at 52-53.

of the severity of English criminal law and the coldness of Blackstone.¹⁷⁸

He also had many problems with Badgley's terminology, for example, the word 'woman' which Badgley labelled as anyone of the feminine gender, at any age (Chapter I, Section II, VIII). Bibaud thought that this definition did not conform to the English grammatical meaning of the word.¹⁷⁹ He was also critical of Badgley's highly detailed and precise writing of the various chapters and sections of his codified law. Such laws would lack flexibility and be incapable of taking account of unforeseen situations in the future which would otherwise be covered by the code. He regarded this as a generalized failure of English law.¹⁸⁰ His criticism of the inflexibility of an English criminal code leads one to wonder if he approved of the English common law which was vaunted for its flexibility.

Bibaud concluded that Badgley's bills should be the work of a group of people as, for example, a commission formed expressly for the purpose, perhaps presided over by Mr. Badgley.¹⁸¹ In this suggestion, Bibaud was not alone: the select committee of the Legislative Assembly formed to study Badgley's bill also wanted a commission to prepare the criminal code. Bibaud may also have believed that Badgley's English code was undesirable since it was, he thought, founded on the severity of traditional English punitive measures. Perhaps he would have preferred French-based criminal law codification and, with it, the full restoration of French law and not just French civil law for

¹⁷⁸Ibid. at 47-48.

¹⁷⁹Ibid. at 61.

¹⁸⁰Ibid. at 222-223.

¹⁸¹Ibid. at 220.

private law relations. Bibaud may have interpreted Badgley's unexpected introduction of codification and criminal procedure bills based on English law and jurisprudence as an attempt to impose English legal culture on francophones in Canada East.

Bibaud referred to the Hon. Robert Mackay's analysis of Badgley's bills which appeared in the *Montreal Herald*.¹⁸² Mackay's insights had not been incorporated into Bibaud's essay because Mackay's article appeared in print after Bibaud had written his essay. He recommended Mackay's assessment of the criminal law bill to the reader even where there was a difference of opinion between him and Mackay,¹⁸³ because of his accomplishments in the field of law.¹⁸⁴

Conclusion

Badgley probably reasoned that codification of the criminal law in the Province of Canada was an improvement over consolidation, providing greater clarity and precision on the nature of offences and punishment. Moreover, he used this opportunity to try to reduce the usage of capital punishment and eliminate some of the common law for the greater certainty of codified law. He thought that reformed English criminal law was of value to Canada East and he placed great faith in English reformed law. However, he was

¹⁸²I have been unable to locate copies of the *Montreal Herald* for the years 1851 and 1852.

¹⁸³Fonds Bibaud, *supra* note 166 at 224.

¹⁸⁴Mackay had been called to the Bar of Lower Canada in 1839 and had held the office of 'batonnier' or president of the Montreal Bar Association. He was later appointed in 1856 as one of the commissioners to consolidate the public general statutes of Lower Canada and Canada. He was appointed a judge of the Superior Court of Quebec in 1868, and subsequently, a judge of the Court of Queen's Bench in November of 1868. See: The Canadian Biographical Dictionary and Portrait Gallery of Eminent and Self-Made Men, . . ., *supra* note 129 at 214.

a member of a party in opposition when he presented his bills to the Legislative Assembly at a time when the introduction of responsible government granted by the British had resulted in “a transfer of authority within the executive from the governor to the council or ‘cabinet’ ”¹⁸⁵ whose membership was selected from among the politicians of the majority party in the Assembly.¹⁸⁶ In practical terms, this meant that Badgley’s bills were not part of the political agenda of the ruling party.

Secondly, he attempted to have the criminal law of the Province of Canada codified during a period of conflict between English and French legal cultures. On the one hand, Maximilien Bibaud was one of a group of francophone jurists seeking to ‘professionalize’ the system of Quebec’s civil law by instituting formal legal education for its practitioners. On the other hand, anglophones who adhered to the constitutional association were complaining to British authorities about ‘antiquated French laws’. Moreover, Badgley did not reckon with the cultural importance of French legal heritage in the form of Quebec’s civil law. Entrenched by the Quebec Act, 1774, “the Lower Canadian civil-law system [became]. . . a bastion of. . . Quebec’s ‘distinct society’ . . . (b)y the first decade of the nineteenth century, francophone intellectuals were presenting their civil-law traditions as a [part] of their national baggage.”¹⁸⁷

Bibaud’s intense criticism of Badgley’s criminal law bills may have been an

¹⁸⁵Ian Radforth, “Sydenham and Utilitarian Reform” in eds., Allan Greer and Ian Radforth, Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada (Toronto, University of Toronto Press, 1992) at 95.

¹⁸⁶Ibid., Allan Greer and Ian Radforth, “Introduction” at 7-8.

¹⁸⁷Young, supra note 167 at 98.

expression of fear at the possible imposition of an alien system of criminal law. In opposition to such a possibility, Bibaud regarded English criminal law as a cruel system despite its extensive reform early in the nineteenth century. Bibaud's essay on the subject may have symbolized the hopes of mid-century francophones seeking to complement Quebec's civil law with French criminal law instead of English criminal law. Bibaud's criticisms of Badgley's codification bill appear, in some respects, to be exaggerated. Calling Badgley's code a 'bloody code' does not stand up to a close scrutiny of the bill. Punishments for most offences had been established based on degrees of gravity of an offence, and in the vast majority of crimes, no death penalty. Capital punishment was notable only for crimes associated with treason and homicide.

Badgley's draft code had a solid foundation in seventeenth to nineteenth century legal scholarship in both England and the United States and he had acknowledged the use of their work throughout the code where specific sections of certain chapters were written with the assistance of these reports. So, for example, he wrote the chapter on libel with the aid of Holt's work on libel as well as other works on libel, and the sections on evidence, with the aid of reports by a number of experts in that specialized field. Moreover, he had consulted statute law in England, Canada and the United States, as well as Roman law. His expertise in law may have, in fact, been a match for the scholarly and gifted Bibaud who was also an expert in Roman law.

William Badgley's codification bill would have found favour with English legal theorist Jeremy Bentham because of its simple language. Bentham wanted to ensure that the text of a penal code was clear and unequivocal so that there would be no need for the

judiciary to have to interpret the meaning of specific texts and this is clearly the case with Badgley's code. However, Bentham would have criticized the latitude offered to the judiciary in sentencing because Badgley's identification of punishments to be administered to a guilty offender reduced but did not eliminate the need for judicial discretion on sentencing. For many offences, Badgley had specified a range of periods of time in prison depending on factors associated with the offence. However, Bentham would have appreciated Badgley's limited usage of capital punishment and his effort to absorb the common law into the code.

Several years after Badgley's bills had been introduced into the provincial legislative assembly and then set aside there were continuing complaints about the sorry state of laws in the Canadas, prompting the Attorney General of Canada West, John A. Macdonald, to appoint six lawyers to scrutinize and consolidate the statutes of Upper Canada in 1856. Commissioners were also appointed in Lower Canada and Judge James Robert Gowan and James B. Macaulay revised and corrected the resulting drafts of consolidated laws which those commissioners produced.¹⁸⁸ The final result was "the publication of the Consolidated Statutes of Canada and its companion volumes for Upper Canada in 1859 and Lower Canada in 1860, [and] the statute-book took on its modern form."¹⁸⁹ The commissioners also improved criminal procedure.

The consolidations in the Canadas "reduce(d) the bulk of the law and arranged it

¹⁸⁸Brown, *Genesis*, *supra* note 2 at 89.

See also: James Robert Gowan fonds, the "Legal and Financial Matters, 1823-1909" series on Gowan's achievements with Sir James Macaulay, 1858-59, on the consolidation of laws which were subsequently approved by the legislature. Gowan finding aid, Library and Archives Canada.

¹⁸⁹*Ibid.*

systematically . . .[and]. . . increased the accessibility and readability of the law.”¹⁹⁰ James Gowan played a central role in this law reform. Gowan was to continue to advise leading politicians on law reform for many decades until codification of the criminal law was achieved in the last decade of the nineteenth century. The next chapter deals primarily with his contribution to Canadian law reform.

¹⁹⁰Ibid. at 91.

Chapter Four

The Judiciary and the Development of the Canadian Criminal Code

Introduction

The question of criminal law consolidation or codification became more acute at Confederation when the British North America Act (1867) placed jurisdiction for criminal law with the new dominion government. Federal powers over criminal law, as well as defence, were crucial to the ability of the new dominion government to respond to threats to a fragile new union and were a marked departure from the American model of federalism with its decentralized criminal law jurisdiction. The fact that criminal law had been placed under a single legislative authority as well as the challenge of creating uniform criminal law for all provinces of the dominion also made it more likely that the criminal law would eventually be codified.

To create a united body of federal criminal law quickly, pre-confederation systems of colonial criminal law in the former colonies were replaced with the English consolidated criminal law prepared by Charles Greaves. This consolidation solved the immediate need for a unified criminal law under federal authority. However, Greaves' Criminal Consolidation Acts (1861) did not conform to the federal-provincial split of constitutional responsibilities as laid out in the British North America Act. Moreover, the Imperial Acts contained "enactments that were not in the colonial statutes . . . , for Greaves's Acts were intended to regulate a much larger, urban and commercial population [in England]."¹⁹¹ As a consequence of using a body of law designed for another country,

¹⁹¹Ibid. at 93.

Canada's criminal law required numerous amendments after 1869 to make it conform to specific Canadian conditions.

In the 1880s, Sir John A. Macdonald began to consider additional consolidation and then codification as a result of the entreaties of his old friend, Sir James Robert Gowan, from whom a plethora of letters on the subject of codification had been received over a long period of time. As a first step, there was "a new consolidation as part of the Revised Statutes of Canada in 1884."¹⁹² This process was temporarily halted by the onset of the North West Rebellion but the security and defence issues which arose as a result of the rebellion motivated politicians to pursue law reform.

Judges Gowan and Taschereau are the two key judicial figures in the Canadian criminal law reform debates of the second half of the nineteenth century. Their positive role in seeking the codification of the criminal law stands in stark contrast to English judicial intervention which inhibited codification of the criminal law. Both before and after Confederation, Gowan was an associate of Sir John A. Macdonald and conferred regularly with him on matters of law, the administration of justice, and criminal law codification.

Judge Sir James Robert Gowan (1815-1909)

James Robert Gowan emigrated to Canada with his parents and sisters in 1832 and became a student of law at Osgoode Hall in 1834.¹⁹³ While studying law in Toronto he joined the Militia and was appointed a lieutenant in the 4th North York Regiment, serving

¹⁹²Wright, supra note 3 at 34.

¹⁹³Gowan Family Collection, Accession 980-2, Extract from the Upper Canada Gazette, 24 June 1834, at 97-98, Simcoe County Archives.

during the Rebellion of 1837 at ‘Gallows Hill’ in 1838.¹⁹⁴ He became a Barrister at Law¹⁹⁵ in August 1839 and practised law in partnership with Attorney General, Hon. James E. Small, for four years. Appointed a Judge of the District of Simcoe in 1843¹⁹⁶ at the young age of 27 under the Baldwin-LaFontaine Ministry, he “organized the judicial system in the newly created District of Simcoe, the largest jurisdiction in the colony.”¹⁹⁷ Serving continuously for a period of forty-one years in a judicial capacity, he was also appointed as a local judge of the High Court of Justice for Ontario in 1882.¹⁹⁸ In 1883, he resigned as a judge to focus on his private law practice. Subsequently, he was appointed by Sir John A. Macdonald to the Senate in 1885.¹⁹⁹

Gowan’s professional career was directed to law and the administration of justice. In this connection he established the *Upper Canada Law Journal* in 1855 and contributed to it regularly. In addition, he participated in a “commission of enquiry into the constitution and jurisdiction of the several courts of law and equity in Ontario.”²⁰⁰

¹⁹⁴Henry J. Morgan, The Canadian Men and Women of the Time: A Handbook of Canadian Biography (Toronto: W. Briggs, 1898) at 394. Early Canadiana Online. <http://www.canadiana.org.proxy.library.carleton.ca>, 2009.

¹⁹⁵Gowan Family Collection, supra note 193, Diploma at E 30.

¹⁹⁶Morgan, The Canadian Men and Women of the Time...., supra note 194 at 394.

¹⁹⁷Desmond H. Brown, “James Robert Gowan” in ed., James H. Marsh, The Canadian Encyclopedia, Year 2000 Edition (Toronto: McClelland & Stewart, 1999) at 997.

¹⁹⁸Gowan Family Collection, supra note 193, Letter from Undersecretary of State, Edward J. Langevin, regarding Gowan’s oath of office as a Judge of the High Court of Ontario dated 10 July 1882.

¹⁹⁹Ibid. Letters patent summoning Gowan to the Senate of Canada, 29 Jan. 1885.

²⁰⁰Morgan, The Canadian Men and Women of the Time...., supra note 194 at 395.

Described as “Sir John A. Macdonald’s unofficial legal draftsman, he sat on several royal commissions”²⁰¹ and participated in the reform of statute law. This included “the consolidation of the statute law of Upper Canada . . . ; the statute law of Canada to 1859; the Ontario Consolidation of 1877; . . . the Criminal Law Consolidation Acts of 1869 . . . and . . . the . . . Criminal Code for Canada.”²⁰²

Since his connection to the political affairs of the nation hinged upon legal or judicial matters Gowan steadfastly dismissed political appointments offered to him in favour of his judicial work in Simcoe County. He was not a politician himself unless one takes into account his appointment to the Senate of Canada at age sixty-nine where he promoted legal objectives such as the codification of the criminal law. Based on a reading of letters written by Gowan to various political leaders, most notably Macdonald and Thompson, it appears that he limited his political participation to counselling them on matters of law. In particular, he sought out politicians of any party where he believed he might be able to advance the cause of codification of the criminal law. Following Macdonald’s departure as Prime Minister in the wake of scandal, Gowan approached other leaders on the subject of codification including Edward Blake, the Justice Minister in the incoming Liberal administration. Gowan “offered Blake his services . . . and also offered to lend him documents . . . including a copy of Wright’s completed code. Unfortunately, Blake resigned shortly after receiving Gowan’s letter, and the work was left in limbo.”²⁰³

²⁰¹Brown, Biographical Sketch, supra note 197.

²⁰²Morgan, The Canadian Men and Women of the Time..., supra note 194 at 395.

²⁰³Brown, Birth, supra note 37 at 29.

The question of the origins of the movement to codify Canadian criminal law was first posed by legal historian Graham Parker who thought that it was ‘folklore’ that Sir John A. Macdonald wanted “a federal criminal law . . . [to] unify the country, [and that he had] no immediate plans for a federal code.”²⁰⁴ As for Judge Gowan, the long-time confidant of Macdonald, Parker stated that “there is no evidence that Macdonald took much notice of [his] advice [on a criminal code].”²⁰⁵ According to Parker, not only did Gowan have little influence on Macdonald but we do not know what the influences were which precipitated the eventual codification of the criminal law, nor when they occurred.²⁰⁶

There are approximately five hundred references to written communications between Macdonald and Gowan²⁰⁷ spanning a period from circa 1855 to 1891 in the archival papers of Sir John A. Macdonald and more than one hundred references to correspondence with Macdonald in the microfilmed Gowan papers housed in Library and Archives Canada. Such a quantity of correspondence is documentary evidence of a long and intimate acquaintance between the two men starting when Macdonald was Attorney General of Canada West. However, although the vast majority of the Gowan letters relate, in one way or another, to Canadian law, the administration of justice, and to Gowan’s family life, only a fraction of them pertains to the reform of the criminal law. Moreover,

²⁰⁴Parker, *supra* note 1 at 252.

²⁰⁵*Ibid.*

²⁰⁶*Ibid.* at 259.

²⁰⁷Consult the Prime Ministers Archival Database on line at Library and Archives Canada. <http://www.collectionscanada.ca>

some letters are very brief, merely acting as a record of conversations between the two men without explicitly enlarging upon their conversations. However, there are several letters which point to Gowan's influence and the trust which existed between the two men. The following are passages in two such letters from Gowan to Macdonald regarding the consolidation of criminal laws and then codification. On 28 January 1862, Gowan wrote:

I know your wish about assimilating the laws of U.C. and L. Canada [Upper Canada and Lower Canada]. You must begin with the criminal law - it is the easiest and least debatable branch. Now the recent English Act consolidating the Criminal Law will be a capital basis to work upon.²⁰⁸

On codification, Gowan writes on 29 May 1868:

The project you have in view with reference to the assimilation of the laws is one of great importance and I agree with you that the task should be well executed . . . The responsibility of selecting fit and proper persons to carry out your views in respect to the measure under consideration is one of no ordinary magnitude and your intention to include your own name in the list of codifiers appears to me to be indispensable.²⁰⁹

According to the first letter, consolidation was definitely under consideration by 1862 and probably well before that time since it is probable that the two men discussed it from time to time during their long acquaintance. The 1862 letter also indicates that Gowan influenced Macdonald to use Greaves' work to create a consolidated body of criminal law in Canada. As for codification, the second letter, written in 1868, indicates not only that Macdonald had the intention of codifying the criminal law but that he had planned to take part in the process of developing a code, an intention which was overtaken by his onerous duties as Prime Minister, as well as Minister of Justice and Attorney

²⁰⁸Sir John A. Macdonald fonds, Manuscript Group 26 A, volume 221, at 94249-94256, microfilm reel C-1600, Library and Archives Canada.

²⁰⁹Ibid., volume 230, microfilm reel C-1659, at 99449-99452.

General, from 1867 to 1873.²¹⁰

When codification of the criminal law did not occur in the 1860s Gowan expressed his disappointment with Macdonald's apparent change of heart on the matter. A codification bill was finally drafted under the auspices of Sir John Thompson and Gowan urged him to "go slowly to avoid problems [that] Codes in other countries had [experienced]".²¹¹ Gowan wanted "the whole body of the criminal law - common law and statutory - in one enactment."²¹² Consolidation had been viewed by him as an initial step towards the codification of Canadian criminal law in the form of what he referred to as "a scientific code [which] cleared away a good deal of extraneous matter . . ."²¹³

Gowan was familiar with other codes, such as Wright's code. As for the Criminal Code of Germany, the French Code and the Indian Penal Code he must have been familiar with them because he observed that they are "the only National Codes I know of having the inherent authority of a legislative act . . . but in some respects incomplete."²¹⁴ Gowan weighed these codes against what could be achieved in Canada.

As a lawyer and judge in the English legal tradition, Gowan followed English

²¹⁰Guide to Canadian Ministries since Confederation, July 1, 1867-April 1, 1973 (Ottawa: Information Canada, 1974) at 3.

²¹¹Sir John Thompson fonds, Manuscript Group 26 D, microfilm reel C-9253, p. 15552, Library and Archives Canada.

²¹²Sir James Robert Gowan fonds, Letter from Gowan to Thompson, 20 May 1892, Manuscript Group 27 I E 17, microfilm reel M-1938, Library and Archives Canada.

²¹³Ibid., Senate speech in series 'Additional Legal and Financial Matters', reel M-1939 at 5.

²¹⁴Thompson fonds, supra note 211, Letter from Gowan to Thompson, 21 April 1892, microfilm reel C-9257, at 19033-19036.

criminal law reform debates in the legal literature of the time as well as through visits to England to observe the progress of law reform. In contrast to this active interest and participation in law reform discussions, his concept of a 'modern country' was premised on the civil and property rights of its citizens and reflected his status as a member of the propertied 'class.' In a letter to Sir John Thompson, Judge Gowan observed that

there is no sound objection that can be urged to a proper codification of the law which defines and punishes crimes, and collects and methodizes the rules of procedure in criminal cases . . . for without proper safeguards, property and civil rights would be of little value - the blessings of true liberty, and the undisturbed enjoyment of property and civil rights.²¹⁵

Gowan viewed the criminal law as "an adjunct of private law . . . concerned primarily with the definition and protection of private rights and interests."²¹⁶ This was not a Benthamite concept which viewed the "criminal law [as] a species of public law in the modern sense that it codifies the relation between state and citizen as a political relation,"²¹⁷

Judge Gowan may have been influenced somewhat by Jeremy Bentham's concept of a science of legislation when he referred to a criminal code as a scientific code. He also shared Bentham's frustration with the common law and preferred to have the Criminal Code absorb all related common law or dismiss it entirely rather than have the criminal law comprised of a code with a separate body of common law. Gowan expressed his dissatisfaction with seven hundred years of English common law, in a more general sense, in an 1892 letter to Thompson:

²¹⁵Ibid. at 19313.

²¹⁶Farmer, supra note 10 at 400.

²¹⁷Ibid.

The rules and doctrines of the Common Law in relation to crimes have to be sought in . . . digests and abridgements all demanding to be laboriously considered, to ascertain what are the principles, with the possibility of being misled by a non-exhaustive examination. A code would supersede the necessity for elaborate research of the kind, in stating the true general rules deducible from these authorities in a few words. . . The consolidation of 1869 was a great step toward facilitating the establishment of a Code, and not without design.²¹⁸

In a Senate speech of considerable length, he renewed his concern with the common law by quoting the words of Sir James F. Stephen in his published book, *A History of the Criminal Law*.

The Crim [Criminal] Law of England has been described . . . as consisting of three parts - the old Common Law adapted to a state of society long since passed away; secondly a mass of unsystematic and ill arranged acts of Parliament rendered necessary by the defects of this system, unconnected with each other, passed at different times, written in different styles intended for different purposes, and finally consolidated into a small number of acts faithfully preserving the confusion and intricacy of the materials from which they were put together; thirdly, a vast number of cases deciding isolated points of law as they happened to arise, totally unarranged, glancing at innumerable questions which they do not solve, and which will never be solved till some circumstance occurs to call for their solution.²¹⁹

He praised the Code bill for its basis in existing law without reference to legal abstract ideas, writing that “the bill is not a congregation of laws constructed out of philosophical theories, not a system which Bacon likened to the stars which give little light because they are so high - on the contrary it is an eminently practical measure.”²²⁰ And, should anyone be in any doubt as to what the judge wanted in a criminal code, he stated it

²¹⁸Thompson fonds, supra note 211, microfilm reel C-9257, at 19313.

²¹⁹Gowan fonds, supra note 212, Senate speech, microfilm reel M-1939, 18 pages. Gowan did not acknowledge that he was quoting the words of Sir James Stephen.

²²⁰Ibid.

quite clearly: “It is the old familiar law of England and of our own country admirably put together and conveyed by an eminently practical lawyer - well and faithfully rendered, clearly and intelligently expressed.”²²¹

Gowan viewed the modern state in a nationalistic manner and the Canadian federation as one which could set an example for the world. He wanted Canada to provide the leadership on codification that England had not provided, and the Canadian federation to adapt “to modern times and (the) exigencies of a new country.”²²² When codification legislation had finally been prepared, he wrote to Sir John Thompson on 22 April 1892:

So the material is prepared, the time opportune for Canada to take a place amongst the nations of the world, as a country possessing a reorganized and complete system of Criminal law - a body of law, not a philosophical conceit, but founded on existing laws and employing them.²²³

Gowan also thought that Canada could provide leadership on criminal law to the United States and rather naively thought that Canada’s criminal law codification would also affect English jurists:

I venture to forecast that before our Canadian Criminal Code is a year old, they will be copying it in every state of the U.S. and it is beyond question that the hands of the great jurists of England, who have so long striven for such a measure there, will be strengthened by the fact of such a measure having passed in a great colony like ours. . . . It will not be the first occasion on which Canada has led the way and left old England in the wake in beneficial law improvements.²²⁴

²²¹Ibid.

²²²Ibid., Notes for a Senate speech, microfilm reel M-1939, at 11.

²²³Thompson fonds, supra note 211, microfilm reel C-9257, 3 pages.

²²⁴Ibid., Letter to Thompson, 21 April 1892, microfilm reel C-9257, 4 pages.

Gowan was very satisfied with the code's narrow construction along the lines drafted by Sir James F. Stephen. And unlike an earlier jurist, Maximilien Bibaud, he was not interested in drawing upon the criminal codes of any national legal systems beyond the English and American ones. Instead, he expressed his interest in law reform entirely within the orbit of Anglo-American jurisprudence. Gowan was not critical of the defects of the Canadian Criminal Code and he did not criticize the fact that the common law had not been abrogated since "most of the common law pertaining to crime had been incorporated in Bill 32."²²⁵ Gowan's response to the Criminal Law bill was a political one which looked for the best possible compromise for success in developing criminal law legislation.

Judge Sir Henri-Elzéar Taschereau (1836-1911)

As seen in the previous chapter, Maximilien Bibaud aspired to modernize the law while retaining the character of laws derived from the French legal system. In contrast, Sir Henri-Elzéar Taschereau sought a balance between the two legal cultures in Canada to draw upon the strengths of both the English common law and the French civil law. Such was his command of both legal systems that "(h)e frequently turned to common law for guidance in resolving cases in civil law [and] . . . to civil law for . . . solutions to problems in common law . . . to keep a dialogue going between Canada's two great legal traditions."²²⁶ Taschereau's expertise and scholarship in the two traditions has been described as a type of "legal cosmopolitanism [which] was . . . common among the legal

²²⁵Brown, *Genesis*, *supra* note 2 at 126.

²²⁶David Howes, "Sir Henri-Elzéar Taschereau," in eds., John English and Réal Bélanger, *Dictionary of Canadian Biography On Line*, 1911-1920, Volume XIV (Toronto: University of Toronto/Université Laval, 2000) <http://www.biographi.ca/009004-110.01>. 2009.

élite of the mid 19th century, . . .”²²⁷ Like Badgley, he was a judge who also had a short political career. Taschereau served as the member for Beauce in the Legislative Assembly of Canada from 1861 to 1867 in which year he was defeated in an election.

Educated at the Petit Séminaire de Québec and Laval University, he was called to the bar in 1857 and practiced law in Quebec City.²²⁸ Named a Queen’s Counsel in 1867, he was raised to the bench as a puisné judge of the Superior Court of Quebec in 1871. He was appointed to the Supreme Court of Canada on 7 October 1878 and became its Chief Justice on 21 November 1902, retiring in 1906. A member of the Faculty of Law at the University of Ottawa, he was appointed dean of the faculty in 1895 following the death of the previous dean, Sir John Thompson.²²⁹ In 1904 Taschereau was elevated to the Judicial Committee of the Privy Council.²³⁰

He began publishing legal texts after Confederation on Canadian criminal law and Quebec civil law following his appointment to the Superior Court of Quebec.²³¹ He started with the ground-breaking legal reform in Canada: *The Criminal Law Consolidation and Amendments Acts of 1869* which was published in 1874 and republished in 1888 under the title of *The Criminal Statute Law of the Dominion of Canada, relating to Indictable Offences: . . . re-arranged and enlarged*. In 1876, he published *Le Code de procédure*

²²⁷Ibid.

²²⁸Supreme Court of Canada. www.scc-csc.gc.ca. 2008.

²²⁹Morgan, The Canadian Men and Women of the Time ... supra note 194 at 998.

²³⁰Howes, supra note 226.

²³¹Supreme Court of Canada, supra note 228.

civile du Bas-Canada tel qu'en force le 1er août 1876 : comprenant les autorités citées par les codificateurs . . ., and in 1893, *The Criminal Code of the Dominion of Canada, as amended in 1893, with commentaries, annotations, precedents of indictments, etc., etc.*, as a third edition of his work on the criminal statute law. This third edition was needed after criminal code legislation came into force in 1893.

In a letter dated 23 October 1889 to Sir John Thompson, the Minister of Justice, Taschereau offered his services to the Government of Canada to prepare a criminal code after previous discussions on the matter. Taschereau wrote that he was now formally offering his services in the “preparation and drafting of a Code, to be introduced by you in Parliament and subsequently referred to a special committee wherein it could be discussed.”²³² Taschereau’s offer coincided with the growing interest of the Conservative government in this project. His scholarly knowledge of the criminal law as attested to by the literature that he published on the subject, as well as his expert knowledge of Quebec’s civil law and culture, indicated that Taschereau might have been the best candidate for this undertaking. However, Thompson preferred to have someone undertake the codification project who had not been a Liberal appointee to the Court and therefore he appointed other people to undertake to draft a code.²³³ Following the passage of the Criminal Code bill through Parliament and before the law came into force the following year, (July 1893), Taschereau sent two letters to Thompson which included a lengthy open letter of criticism of the code and a letter of apology for not having “present[ed] my views, . . . when the

²³²Thompson fonds, supra note 211, Letter of 23 October 1889, microfilm reel C-9246, vol. 94 at 10758.

²³³Brown, Genesis, supra note 2 at 120.

measure was under consideration [in Parliament].”²³⁴

Taschereau’s Open Letter on the Criminal Code of Canada

The twenty-nine page, printed, open letter was dated 20 January 1893. Few copies of it appear to have survived the passage of time. The copy of Taschereau’s open letter preserved in the records of the Department of Justice is probably the one which was sent to the Minister of Justice, Sir John Thompson, since it does not appear to have been included in Thompson’s private papers. A copy of the document is also preserved in the papers of Sir Charles Fitzpatrick, a former Chief Justice of the Supreme Court. The document was unidentified in any way and was found only by chance during the course of an exploratory search of these poorly organized and conserved papers.²³⁵

Taschereau offered the vaguely worded observation that the code bill was “replete of contradictory clauses, of redundant enactments, of clumsy, needlessly minute and irrational or repugnant provisions . . .”²³⁶ as well as the more pointed statement that the “General Part was [lacking a definition of] the necessary mental elements of a crime (the mens rea) and . . . defences such as intoxication.”²³⁷ Taschereau noted that the passage of

²³⁴Thompson fonds, supra note 211, microfilm reel C-9261, vol. 174, at 21838-21839.

²³⁵The most elementary of archival tasks, such as unfolding letters, removing rusty metal pins and dirt, and labelling of every file folder has not been done, as of the date of writing this thesis, even though the Fitzpatrick fonds has been held by the Archives for decades.

²³⁶Hon. Mr. Justice Allen M. Linden, “Recodifying Criminal Law” (1989) 14, Queen’s Law Journal at 7. Judge Linden (1934 -) was called to the Bar of Ontario in 1960; was a professor of law at Osgoode Hall Law School, 1961-1978; appointed a Queen’s Counsel in 1974; President of the Law Reform Commission of Canada from 1983 to 1990; specialized in tort law; appointed a Judge of the Supreme Court of Ontario in 1978 and a Judge of the Federal Court of Canada, Appeals Division, etc.

²³⁷Ibid.

the Criminal Code bill ignored “needed reforms to reduce the bulk of the law. . . .”²³⁸ In addition, the code contained mistakes because of the reliance of the codifiers on Sir James Stephen’s erroneous draft code²³⁹ which had failed, in its time, to satisfy English legislators. However, his statement regarding the reliance of the codifiers entirely on the English draft code can be challenged since the “Criminal Code as finally enacted in 1892 was comprised of 983 sections of which 736, or seventy-five per cent, were new or from Canadian models.”²⁴⁰ The vast majority of the code’s provisions were based on Canadian requirements, bringing together former provincial and federal statutes relating to the criminal law.

In form and substance, Taschereau’s open letter resembled Lord Cockburn’s earlier letter criticizing the English draft criminal code. Like Cockburn, he argued that “the main purpose of the codification of the law is utterly defeated by leaving the code to be supplemented by reference to statutes, and what is still worse, to parts of statutes which are still to remain in force, but are not embodied in [the Code].”²⁴¹ These words are almost identical to those of Lord Cockburn in the latter’s devastating critique of the English draft code. But are these words true? Did the Canadian Criminal Code omit certain offences? At three hundred pages, the Code contained both indictable and summary offences of the Dominion unlike the English draft code which consisted only of indictable offences. It

²³⁸Sir Charles Fitzpatrick fonds, Open Letter from Taschereau to Thompson, Manuscript Group 27 II C 1, volume 116, unidentified file folder, at 4, Library and Archives Canada.

²³⁹*Ibid.* at 6.

²⁴⁰Brown, *Genesis*, *supra* note 2 at 142.

²⁴¹Fitzpatrick fonds, *supra* note 238, at 1.

also contained “the considerable bulk of dominion and provincial criminal law condensed, refined, and rewritten.”²⁴²

In rather complicated and circuitous prose, Taschereau criticized the new Code for not eliminating common law provisions that related to the criminal law and he referred to Cockburn’s observations about the English draft code to support his observations regarding the perceived weaknesses of the Canadian code:

Our 1892 code is more deficient in respect of completeness, to a still greater degree than that one in reference to which the Lord Chief Justice so expressed his views on the essential requisites of a codification that, whilst the latter superseded all the common law, the former leaves all of it in force, with . . . important enactments scattered all over the statute book. So that, anyone desirous of ascertaining what is, on a given point, the criminal law of the country will have to refer first, to the common law, secondly, to our unrepealed statutory law, thirdly, to the case law, fourthly, to the Imperial special statutory enactments on the subject in force in Canada, not even alluded to in the code, and fifthly, the code.²⁴³

Taschereau’s observation that the Canadian Criminal Code was incomplete because it did not supersede the relevant common law was somewhat artificial. The politics of the passage of the Canadian Criminal Code through Parliament required that Thompson refrain from abrogating the common law in Bill 7 in order that the Liberal opposition would have one less reason to obstruct its passage into law. Thompson’s political sleight of hand was also overlooked. “Once that legislation was enacted, such provisions [as were contained in the Act] became statute law, and, *ipso facto*, the common law doctrine on the subject was [automatically] abrogated.”²⁴⁴

²⁴²Brown, Genesis, supra note 2 at 126.

²⁴³Ibid.

²⁴⁴Ibid.

Taschereau was mistaken to state that the ‘latter’, the English draft code, had absorbed all of the common law since, according to Cockburn, it had not done so. Cockburn had criticized the English draft code because it did not supersede relevant common law which was allowed to co-exist with the code, a serious defect according to Cockburn. Ironically, then, both of these eminent judges were in agreement that codified criminal law should not co-exist with common law offences and defences and that they should be absorbed into the code so that all relevant information on specific criminal laws are found in the one place.

In their respective jurisdictions, Cockburn and Taschereau concluded that the codification attempts were inadequate and should not become law as written. Although Cockburn wrote that he believed that the English draft code bill could be made serviceable with certain improvements, Taschereau concluded, to the contrary, that the Canadian Criminal Code could not be redeemed. In this context, he wrote: “I now have . . . grave doubt on the subject [of a code]. A revision and consolidation . . . would, perhaps, be all that is necessary . . . to supply the present needs of the administration of justice in Canada.”²⁴⁵ His comment that consolidation might be adequate for the ‘present needs of the administration of justice in Canada’ might indicate that he still hoped for codification of the criminal law in the future. In 1893, however, he preferred the use of consolidation as a method of unifying the criminal law only because the codification effort was so unsatisfactory that he concluded that only consolidation would work adequately.

Taschereau’s expert knowledge in the field of Canadian criminal law and Quebec

²⁴⁵Ibid. at 6.

civil law and his serious misgivings about the criminal code did not cause a delay in the promulgation of the criminal law legislation in 1893 and had no appreciable effect on the public's acceptance of the code. However, another member of the Canadian judiciary, Judge Gowan was very candid in his remarks about Taschereau's attempt to have the codification law dismissed. Gowan explained that Bill 7 had been scrutinized by the judiciary and other distinguished members of the legal profession as well as by the politicians and was

improved . . . embodying much that was suggested by Judges and others competent to form an opinion - It was . . . introduced early in the session of 1892 - referred to a formal committee of the House of Commons composed of the very ablest men in both House (sic) who went over the measure with great care . . . (U)p to the last moment this committee of experts would have welcomed suggestions from any quarter - It appears to us passing strange that the Honourable Judge did not . . . offer a single suggestion upon the first bill, or the amended bill, to the Minister of Justice, or to the joint committee during the long time it was before them . . . nearly every member of the committee was a lawyer . . . to whom he could have communicated such comments and suggestions as he desired to offer . . . (M)any of the most distinguished jurists in Ontario . . . did not hesitate . . . to offer suggestions and point [out] omissions or defects with a view to making the code as complete as possible, the measure being so important and gigantic...²⁴⁶

Judge Gowan also criticized Taschereau's insistence on having a perfect code but did admit that there were errors that would require amendment.²⁴⁷

Subsequently, Judge Taschereau revised his book on the criminal statute law of the Dominion of Canada indicating that a third edition of his book was needed because of

²⁴⁶Gowan fonds, supra note 212, 'Miscellaneous Legal Memoranda on the Criminal Code Amendments and Taschereau's open letter', microfilm reel M-1939, 10 pages, at 1-2.

²⁴⁷Ibid. at 8.

“(t)he coming into force . . . of the Criminal Code”²⁴⁸ [on 1 July 1893]. Taschereau’s book contained the complete text of the Canadian Criminal Code as it existed in 1893 and such pertinent information as: the English draft code tabled in the Imperial Parliament in 1880, imperial statutes applying to Canada, unrepealed Canadian statutes that supplemented the Criminal Code, extracts from published works on the criminal law, a synopsis of the new code indicating new or amended information and additions, and other related matters.

The Code was prepared by successive deputy ministers of justice - George Burbidge and Robert Sedgwick.²⁴⁹ First introduced in the House of Commons on 12 May 1891 as Bill 32 by the Minister of Justice, Sir John Thompson, the “bill was . . . founded on the Draft Code prepared by the [British] Royal Commission . . . , Stephen’s *Digest of Criminal Law*, . . . Burbidge’s *Digest of the Canadian Criminal Law* of 1889, and the *Canadian Statute Law*.”²⁵⁰ In amended form, it was re-introduced on 8 March 1892 as Bill 7. After a second reading of Bill 7 on April 12, it was sent to a joint committee of the House of Commons and Senate consisting of thirty-one members, all of whom were lawyers.²⁵¹ Of this number, twenty-four persons had been appointed from the House of

²⁴⁸Henri-Elzéar Taschereau, The Criminal Code of the Dominion of Canada, as amended in 1893. With commentaries, annotations, precedents of indictments, &c., &c. (Toronto: Carswell, 1893) at iii.

²⁴⁹Mr. Justice Allen M. Linden, “Toward a New Criminal Code for Canada” in ed., Patrick Fitzgerald, Crime, Justification and Codification: Essais à la mémoire de Jacques Fortin/Essays in commemoration of Jacques Fortin (Toronto: Carswell, 1986) at 169-170.

²⁵⁰Elizabeth Bennett, “Common Law Inroads into the Criminal Code” in eds., Hon. Mr. Justice Josiah Wood and Richard C.C. Peck, Q.C. 100 Years of the Criminal Code in Canada: Essays Commemorating the Centenary of the Canadian Criminal Code (Ottawa: Canadian Bar Association, 1993) at 96.

²⁵¹Ibid. at 137.

Commons.²⁵² The bill was discussed by a committee of the whole and passed both Houses, receiving royal assent on July 9, 1892. It came into force on July 1, 1893.”²⁵³

The Criminal Code in the Twentieth Century

For many years, the Canadian Bar Association urged the Canadian government to revamp the Canadian Criminal Code. The government finally set up a royal commission for this purpose and its membership consisted of persons in the legal profession including judges, lawyers and personnel from the Department of Justice. A revised code was the result of this endeavour in 1955. The twentieth century overhaul of the Criminal Code was driven by the legal profession but it was the politicians who accepted their work and steered the legislation through Parliament.

Subsequently, a Canadian Law Reform Commission consisting of judges and lawyers with considerable experience was formed for the purpose of making recommendations on Canadian law. Its existence harkened back to nineteenth-century English law reform attempts through James Fitzjames Stephen and a royal commission. It is also reminiscent of an attempt to codify the criminal law in 1850 in the Province of Canada where a legal scholar, Maximilien Bibaud, as well as a parliamentary committee, recommended that codification be carried out through an appointed commission. The modern Law Reform Commission members observed that the Criminal Code, despite its complete overhaul in 1955, “remains much the same in structure, style and content as it

²⁵²Senate of Canada fonds, Sessional Records, 2nd Session, 7th Parliament, Record Group 14, E 1, vol. 1963, File: *Messages from the House of Commons*, Library & Archives Canada. Note: Senate sessional records of this joint committee are found only in volumes 1962 & 1963. Most of them were destroyed by fire in 1916.

²⁵³George H. Crouse, *supra* note 31 at 562-563.

was in 1892. It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled by the judiciary.”²⁵⁴ Their criticisms are not dissimilar to those of Judge Taschereau in 1893.

The twentieth century also offered the voices of individual members of the judiciary on the subject of codification. Mr. Justice Allen M. Linden, referred to the redundancy and archaic nature of the Criminal Code as no longer reflecting the exigencies of a modern state²⁵⁵ and observed that the Code “did not even attempt to address the basic and fundamental concerns of Mr. Justice Taschereau.”²⁵⁶ There will undoubtedly be other voices in the twenty-first century concerned to update the code. But this will not be done without the active participation of federal politicians as was the case in the nineteenth century and twentieth centuries. The judiciary has been a partner with the Canadian political process in law reform in the two previous centuries. Will this continue into the twenty-first century?

Conclusion

There is adequate surviving documentation to indicate that Sir James Robert Gowan exercised an influence at the highest levels of political power in the reform of the criminal law both before and after Confederation whether in terms of its consolidation or codification. Gowan carried out the usual duties of a judge in a court of law but he also offered his considerable knowledge and expertise in the law to Canadian politicians with

²⁵⁴Law Reform Commission of Canada, Recodifying Criminal Law, Report 31, Revised and Enlarged Edition of Report 30 (Canada, 1987) at 1.

²⁵⁵Mr. Justice Allen M. Linden, supra note 249 at 171.

²⁵⁶Ibid.

the aim of making Canada a 'modern country' which, in his estimation, included modernized criminal law. His interest in law reform was somewhat influenced by Jeremy Bentham particularly with regard to common law and codification of the criminal law but Gowan was satisfied with the codification of Canadian criminal law based on the cautious English draft code. He referred to the Canadian Criminal Code as having a reassuring resemblance to the old laws and traditions of England. This would not have been satisfactory for Jeremy Bentham. Gowan's response to the successful passage through Parliament of the codification legislation was a political response in which he aligned himself with Sir John Thompson, offering him advice on ways and means to ensure a successful political result. He did not engage in philosophical musings about what should appear, ideally, in a criminal code and he understood that it was a political necessity not to abrogate the common law.

Sir Henri-Elzéar Taschereau demonstrated an affinity for the judicial traditions of England by replicating the behaviour of Lord Chief Justice Cockburn in sending an open letter to the cabinet minister responsible for the criminal law with the objective of preventing the Criminal Code from coming into force just as Cockburn wanted the English draft code to be revised before becoming law. Taschereau's recommendation that Canada be satisfied with consolidated criminal law could be interpreted as meaning that he agreed with the English judiciary that consolidation was preferable to codification of the criminal law. But we underestimate Judge Taschereau if we conclude that he was a legal traditionalist without any real vision of legal reform. It was Taschereau's offer to codify Canada's criminal law which galvanized the Minister of Justice into action on this project.

Taschereau's request that the Minister of Justice revert to consolidated law did not mean that he favoured consolidation but rather that the actual criminal code produced for Canada was entirely unsatisfactory and was not an improvement on the previous consolidation of the criminal law. For this reason alone, he asked that the Canadian Criminal Code be set aside.

Although both Gowan and Taschereau were in agreement on the need for criminal law codification as a means of modernization in the new Dominion, their views on how to codify were different. Gowan exhibited nationalist ideas and concerns that Canada should take its place in the modern world through law reforms but he wanted that law reform to be based on English substantive law without the common law. On the other hand, Taschereau wanted a more complete codification of the criminal law than was available through the model of the English draft code. This undoubtedly reflects upon their backgrounds: Gowan as a lawyer and judge steeped in English law and Taschereau as a judge who was fluent in English and in French legal systems.

Chapter Five

Thesis Questions

I have asked what was the influence of the judiciary in Canada's successful codification during a time when English judges strongly and effectively opposed proposals to codify the criminal law in England itself. Were there specific members of the Canadian judiciary who encouraged the codification of Canada's criminal law in the nineteenth century? It appears that there were three judges who actively sought codification of the criminal law in Canada during the nineteenth century. There may have been other members of the Canadian judiciary who either fostered the development of a criminal code or opposed this type of legal reform but there is insufficient archival primary source material available about the nineteenth century judiciary in Canada to make such a determination. All three of these judges, William Badgley, Sir James Robert Gowan and Sir Henri-Elzéar Taschereau, had brief political careers and, in the case of William Badgley and Sir James Robert Gowan, used their brief time in political office to promote legal reforms - Badgley as a Member of the Legislative Assembly of the Province of Canada, and Gowan as a Senator.

As to the relative influence of the judiciary on the success of codification of the criminal law, William Badgley's codification bill of 1850 was not regarded as a political priority when it was introduced into the Legislative Assembly of the Province of Canada where perplexed political leaders in the lower house refused to entertain Badgley's bill for the amendment of the criminal laws of Canada East and Canada West. Ironically, Badgley's bill was a reasonably well written one for its time and was based on sound legal authorities. Badgley's codification bill had been influenced by legal philosophers who

wanted to replace the death penalty as a norm for incarceration as the new norm.

Badgley's bill demonstrated a certain degree of enlightened humanism since penalties for the vast majority of offences in his code consisted of imprisonment for varying periods of time according to the gravity of the offence and/or fines. Capital punishment was rare and was reserved for certain forms of homicide and treason. It is likely also that Badgley was influenced by Jeremy Bentham's demand for the abolition of the common law. Although he does not mention the common law in his draft criminal code, he does incorporate certain common law defences into the chapter on homicide, suggesting that perhaps he assumed that any good code would absorb related common law.

Sir James R. Gowan believed that the abolition of the common law and the codification of the criminal law was related to the requirements of a modern state and that the Dominion of Canada needed to move from its colonial status to that of a 'modern country'. While there is little clarification of the meaning of 'modern country,' it can be assumed that he was referring to the requirements of a new country like the Dominion of Canada and the need of an older country like England to update its legal traditions. He believed, ultimately, that England would succeed in codifying its criminal law but that since Canada had already attained that goal, it would provide leadership as a modern country where England had failed. This may suggest that Gowan had been influenced by modernization ideals similar to what is described in Max Weber's theory of legal rationality in the modern state. Weber was perplexed by England's continued usage of the common law and described the English state as 'premodern' in its indifference to codification.

It is difficult to measure Gowan's relative success as a judge in convincing political

leaders to codify the criminal law except to state that he had convinced Sir John A. Macdonald of its importance in the 1860s and that his continued consultations on codification over the next two decades came to a climax when politicians found an important political purpose for codification of the criminal law: the safeguarding of a fledgling nation against internal and external enemies, particularly after the Northwest Rebellion.

The participation of judges in debates on law reform raises questions about judicial independence and neutrality. Should members of the Canadian judiciary advise politicians on the use of the law to strengthen the state? What does this tell us about the role of judges as political actors and the realities behind the formal claims of the rule of law? Judicial independence had been sought in Lower Canada where, prior to the Act of Union in 1841, judicial appointments were made subject to ‘royal pleasure’ and senior judges were routinely included in government executive councils. One of the complaints addressed to Lord Durham by Messrs. Moffatt and Badgley had been the dependence of the judiciary for their livelihood on the government. In Upper Canada, a similar situation prevailed and the “process of achieving judicial independence was gradual and . . . [it] developed as part of the impassioned struggle for responsible government.”²⁵⁷ Therefore, once judges came to hold tenure according to good behaviour and were excluded from participating in government cabinets, it was imperative that they be seen to be free from political influence.

On the flip side, parliamentary sovereignty required that Parliament exercise “the right to make or unmake any law whatever; and further, that no person or body [be] recognized by the law . . . as having a right to override or set aside the legislation of

²⁵⁷Oliver, supra note 40 at 457.

Parliament.”²⁵⁸ Writing in 1885, Albert Dicey stated that this constitutional convention applied to England and equally to the common law jurisdictions, including Canada.²⁵⁹ Dicey further noted that judges are “concerned with seeing that the law is strictly carried out”²⁶⁰ and that judge-made law “is . . . subordinate legislation, carried out with the assent and subject to the supervision of Parliament.”²⁶¹ Judges were expected to operate entirely outside the realm of political decision-making and policy development. Judges apply and interpret the existing law.

Therefore, one might question whether or not Messrs. Badgley, Gowan and Taschereau acted within the bounds of a constitutional convention of which they were very much aware. Strictly speaking all three of the learned judges went well beyond Dicey’s understanding of the role of judges within his framework for the rule of law. None of them confined their judicial duties to the courts of law. All three of them endeavoured to influence policy development but remained outside the realm of political decision-making except during periods when they were active participants in the political process as members of the Legislative Assembly or the Senate.

As Attorney General for Canada East, William Badgley would have taken a leadership role in political decision-making and in the development of public policy. Judge Badgley presented his codification bill to the Legislative Assembly while he was a lawfully elected member of that assembly and therefore acted within reasonable bounds. Once his

²⁵⁸A.V. Dicey, Introduction to the Study of the Law of the Constitution, 8th ed. (London: MacMillan & Co., Ltd., 1920) at 38.

²⁵⁹Ibid. at xxv.

²⁶⁰Ibid. at xxxix.

²⁶¹Ibid. at 58.

political career was finished, he made no further such attempts. Judge Gowan's advice to political leaders on matters of law and the administration of law was always done in an informal matter through personal communications and written letters. This advice was appreciated and encouraged by political leaders at the highest levels of power, i.e., Sir John A. Macdonald and Sir John Thompson, as indicated by the correspondence which Gowan received from them. However, Gowan took an active part in the drafting of legislation as well as in the consolidation of laws while he was a judge and therefore went well beyond what Dicey had described as the role of the judiciary. As a Senator, Gowan took an active part in matters of legal policy and used formal methods of communication on matters of law, such as Senate speeches, only when he was a member of the Senate.

Judge Taschereau's offer in 1889 to write a criminal code for the Conservative government and its Minister of Justice, Sir John Thompson, was made in good faith and was based on Taschereau's self-evident and superior knowledge and expertise to undertake such a task. It was the government's prerogative to accept or refuse such an offer, and if accepted, to supervise the project. Since the government rejected Taschereau's offer, it was his prerogative to offer constructive criticisms of the criminal code bill at the time when the judiciary had been asked for their expert advice and while the bill was under consideration by a parliamentary committee. However, Judge Taschereau offered his criticisms only after the criminal code bill had completed its journey through Parliament and shortly before its debut as law of the land in 1893. In a personal letter, he advised the Minister of Justice of his concerns and this letter was followed by an 'open letter' asking that the criminal code act be set aside in favour of criminal law consolidation. Had the Minister of Justice taken the advice of this judge of the Supreme Court of Canada, a

constitutional convention on the supremacy of Parliament to make and unmake laws without recourse to other authorities may have been in jeopardy. The following is a passage from Taschereau's letter to Thompson in which he signs himself as 'H.E.

Taschereau, Judge, Supreme Court'. The letter is dated 20 January 1893.

I, myself, though at one time, of opinion that a code of criminal law would be of great advantage to Canada, . . . am free to admit that I, now have, to say the least, grave doubts on the subject. A revision and consolidation, not a mere compilation, of the statutory law, would perhaps, be all that is necessary in that direction to supply the present needs of administration of justice in Canada. Should Parliament, however, not determine to withdraw the present one, temporarily at least, I suggest that the ends of justice might perhaps require that the date of its coming into force should be postponed.²⁶²

Taschereau attempted to emulate the open letter of the English Lord Chief Justice Cockburn. In England, in the nineteenth century, "the participation of the Lord Chancellor and Lord Chief Justice of the King's Bench . . . was natural and expected."²⁶³ Moreover, in England, "the judiciary perceived itself, and was viewed by many others of high authority, as the pivotal, referential point for changes in the criminal law, whether through a parliamentary or common law route."²⁶⁴ No such similar exalted authority existed among the Canadian bench even at its highest levels. Therefore, his open letter to the Canadian Minister of Justice was met mostly with silence. Taschereau had ventured into the area of lawmaking and endeavoured to overturn the will of Parliament.

In Canada, codification became a possibility with the federation of four colonies into a single country in 1867 even if it did not happen until the last decade of that century.

²⁶²Brown, *Birth*, *supra*, note 37 at 249.

²⁶³Smith, *Lawyers, Legislators and Theorists*, . . ., *supra* note 105 at 61.

²⁶⁴*Ibid.* at 63.

Since the federal government was constitutionally responsible for criminal law, Canada would be in a position to achieve the goal of codification. Additionally, Canada was encouraged to do so by senior members of the judiciary who were in a position to know the benefits of codification and would be able to advise on the process. These judges did not confine themselves to the role which Dicey had identified as the specific duties of judges - to interpret and apply existing law. Therefore, the boundaries between law and politics are less clear than is often assumed. This blurred boundary was carried over into the twentieth century where judicial participation in the process of revamping the Criminal Code continued, on a more organized and larger scale.

Canadian judges were, to an extent, influenced by the legal thinkers of the time, and were also deeply attentive to the legal reforms which did take place in England, even if these reforms did not, ultimately, include codification of the criminal law. Jeremy Bentham's writings on the 'science of legislation' and on codification were, perhaps, the most influential. It is also possible that the conceptualization of the modern state as viewed through the writings of Max Weber were also influential, particularly views on English legal traditions as being 'pre-modern'. Ultimately, as Gowan stated, codification of the criminal law was a 'practical measure' based on English law. Gowan always assumed that England would eventually succeed in codifying its criminal law.

The principal persons in this essay include Maximilien Bibeaud and Sir Henri-Elzéar Taschereau, on the one hand, and William Badgley and James Robert Gowan on the other hand, all striving to modernize criminal law within the Canadian environment with its two legal cultures. Their efforts were influenced by legal reformers and thinkers of the eighteenth and nineteenth centuries including English, French, European and American

ones. Against the mix of legal ideas in England, France, Europe and the United States, law reform in Canada was ultimately decided by Canadian politicians as and when law reform became useful to political policy.

Canadian judges were actively involved in legal and political issues in the nineteenth century but they tended to advance ideas on law reform on a one-to-one basis, informally with Canadian politicians. In the twentieth century, judicial interest in public policy, particularly with regard to the reform of the Canadian Criminal Code involved many judges and lawyers who were organized and who worked formally with the political process to achieve legal benefits. Their concerns with the archaic nature of the criminal code reflected Taschereau's concerns and were openly expressed in the same terms as Taschereau. Twentieth-century judicial interest in law reform, however, is the subject of another thesis.

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