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THE PROCESS OF CRIMINALIZATION:
AN EXAMINATION OF THE TREASON
AND SEDITION LAWS IN CANADA

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INTRODUCTION

Two schools of thought have dominated current writings regarding the function of law. The two schools have developed two sets of hypotheses referred to as "consensus" or "value-expression" and "conflict" or "interest-group" models. This study will examine these two schools of thought to determine their respective hypotheses concerning the function and evolution of law. Then the evolution of the Canadian laws on sedition and treason will be studied in an effort to determine the relationship between this evolution and the hypotheses held by each school.

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CHAPTER I

INTRODUCTION

Criminal laws have been thought to have been developed to protect the individual against the power of the state through the principles of nullum crimen sine lege and nulla poena sine lege. Criminal laws have also been thought to be implicitly designed for the protection of the state and its authority and ultimately, for the preservation of the status quo. They have been considered promulgated for the protection of the values cherished by the individual members of the state as a collective to ensure each and every one of them the quiet enjoyment of their lives. Yet, in countries undergoing drastic political and social change, the criminal law has been relied upon to promote this change and in countries bedeviled with political and social unrest to restore some semblance of order.

The historical and empirical analysis of legal changes has given birth to two contradictory schools of thought - the one claiming that law expresses essentially a compromise between conflicting interests and values and the other contending it to be the imposition of the dominant group effectively protecting its own interests.

This study seeks to shed some light on this controversy through the study of sedition and treason

laws in Canada. The laws dealing with the crimes of sedition and treason have the potential of being powerful tools wielded by the government in the stabilization of its power and in the suppression of any movements seeking to change the established order. These laws are not only implicitly, but also explicitly aimed at the protection of public authority. In the Canadian Criminal Code the offences of sedition and treason are classified as "Offences Against Public Order."

Because of the political nature of these offences, they have never been included in any listing of conventional crimes, and consequently have been excluded from the mainstream of criminological studies. They have not been the subject of close scrutiny by criminologists, yet, because they have the potential of being politically powerful tools wielded by the government, their study appears to be of vital importance for an understanding of crime as a social and political phenomenon, especially as it relates to the process of criminalization.

The process of criminalization comprises several sub-processes or dimensions. Each is important but nevertheless dependent upon the others. The process

could, however, be considered as comprising four aspects - the formulation of criminal definitions, the application of these criminal definitions, the occurrence of the behavior defined as criminal, and the impact that the formulation, the application and the occurrence has had upon society as a whole. These aspects will be studied as they relate to the laws of sedition and treason in Canada. In this connection, the evolution of the laws of sedition and treason in Canada from 1892 to 1976 will be analyzed, noting the changes that have occurred with special reference to a time frame-work based on consolidations and revisions to the Code.

Next, those reported cases in which persons were charged with sedition or treason and appeared before a Canadian court of criminal jurisdiction will be analyzed in an endeavour to ascertain how these laws were operationally defined and what impact the law had on these cases and the cases had on the law.

Third, the intent of the legislators in amending the laws in question will be explored. It is anticipated that examination of the legislative intent will reveal information regarding the social and political situation in Canada at the time of these changes -- the situation

4.

that necessitated the change. All this will be studied in the context of hypotheses developed from the review of the literature on the base and function of the law.

The literature review will be undertaken in Chapter II and will concentrate on the views that are currently held since it is in these terms that the analysis undertaken in this study will be made. Chapter III deals with the changes that occurred in the substantive law on sedition and the cases that were brought to court. The relevant information on treason is presented in Chapter IV. In Chapter V these changes are analyzed using the reasoning in parliamentary debates and in judicial judgments, taking into account the existing social conditions, to determine whether the changes lend support to the consensus or conflict theories.

CHAPTER IILAW: ITS BASE AND FUNCTIONS

What is the law? What are its functions? What are its origins? These questions have been debated among legal scholars and philosophers for centuries. In the twentieth century, especially since the birth of the school of sociological jurisprudence, a school of legal philosophy that drew its inspiration from early sociology, these questions have been the subject of debate among sociologists. Recent sociological and legal literature indicate the emergence and dominance of two main schools of thought - the 'consensus' or 'value-expression' and the 'conflict' or 'interest-group' models.

Roscoe Pound, a major spokesman for the consensus model for the study of law and a principal figure of the school of sociological jurisprudence, viewed law as a specialized form of social control that brings pressure to bear upon each man "in order to constrain him to do his part in upholding civilized society and to deter him from anti-social conduct..." (11, p. 18) Although this view of the law is conducive to the law being considered an autonomous element with society, Pound maintains that law is a reflection of society, influencing it nonetheless

at the same time, and thus constituting an integral part of society.

According to the consensus or value-expression theory, law represents the consciousness of the total society. An advocate of the consensus model described criminal law in the following way:

"... criminal law continues to be - as it should - a decisive reflection of the social consciousness of a society. What kind of conduct an organized community considers, at a given time, sufficiently condemnable to impose official sanctions impairing life, liberty, or property of the offender, is a barometer of the moral and social thinking of a community" (3; p.143).

Developed as a response to the needs of the well-ordered society, the law is seen as a form of 'social engineering' directed toward the broad and general goal of the improvement of society, which includes the "satisfying of human demands, securing interests or satisfying claims or demands, with the least of friction and the least of waste, whereby the means of satisfaction may be made to go as far as possible" (10; p.157). As the expectations and demands of all men could not be satisfied, the individual expectations must be rationally adjusted. This rational adjustment, it is claimed, "requires the force of a politically organized society

behind it in order to be effective" (13; p.19). Hence, law must serve these interests that are for the good of the whole society.

A third characteristic of the law, according to the consensus model, is the regulation of social behavior and the establishment of social organization. In this connection, law orders human relations by restraining certain individual actions and by settling disputes in social relations. One advocate of the consensus theory describes the situation thus: "Law functions first to establish the general framework, the rules of the game so to speak, within and by which individual and group life shall be carried on, and secondly, to adjust the conflicting claims which different individuals and groups of individuals seek to satisfy in society" (1; p.516). Pound also viewed the main function of law as adjusting and reconciling conflicting interests. He claimed:

"Looked at functionally, the law is an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests; or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh

most in our civilization, with the least sacrifice of the scheme of interests as a whole" (12; p.39).

Thus, the function of law is regarded by the advocates of the consensus model as the control of the diverse interests in society according to the requirements of the social order and the preservation of important social values from serious harm. Law must be used as an instrument that adjusts and reconciles conflicting and competing interests so that the social demands of as large a majority of the people as possible are protected and honored in a pluralistic society. Law must reflect the 'social consciousness' of a society. This goal of law is achieved not in an arbitrary manner but rather in " accordance with rational methods directed toward the discovery of just ends" (4; p.1).

In proclaiming his theory of law, Pound traced the historical development of the philosophy of law from early Roman law to the twentieth century theory of jurisprudence. He did this in an effort to provide a basic understanding of the dominant modes of thought of the different eras in civilization with respect to legal changes.

He points out in this connection, that in early

Roman society, the function of law was perceived as the maintenance of decency and decorum in men's outward acts. The Greeks had earlier looked upon law in a somewhat different light. Plato, in describing his ideal state, suggested that the law should preserve the existing political order and the harmony and unity of the community; the law should maintain the existing status quo (7; p.605). According to Plato's ideas, the individual was not to seek his own level in society by free competition with his fellow men, but rather, every member of the community was assigned to the class in which he demonstrated his capabilities. The argument was in support of authority even at the expense of the individual, all for a common good.

In Medieval juristic thought, the appeal to reason in support of authority gradually gave way to an appeal to reason against authority (7; p.611). At this time, the authority of the ruler was considered sacred, and the ruler was responsible for upholding justice and righteousness in the community. Hence, a person was not truly a ruler unless he governed his people righteously and with equity. This idea of justice and equity as elements in the law was developed in medieval political thought and, by the late Middle Ages, it had become important as a basis of a legal doctrine.

With the Reformation, the idea of the divine ruler emerged and with this emergence was associated the ascendancy of the right of the State. The legal system of this era rested on the authority of the divinely ordained ruler who did not represent the State on the basis of the authoritative universal laws used during Antiquity (7; p.611). As a result of this legal philosophy, the rights of the individual were suppressed to their maximum.

The seventeenth century witnessed the revolt of the people against the suppression of individual rights, and the subsequent emergence of reason as the basis of all obligations. Now the function of law was considered to "produce conformity to the nature of rational creatures" (7; p.617). Laws existed primarily to maintain and protect individual interests. What is a right became what is right (7; p.617). Toward the end of the seventeenth century, individual rights were viewed as "an outgrowth of social contract" (7; p.622). This view maintained that the social contract was made for the "better securing of pre-existing natural rights" (7; p.623). If the people demanded that their natural rights be honored, then the only means of securing these demands was through a social contract. According to this view, there would be no rights without social organization and there

would be no justice without political organization (7; p. 622).

The demand for adherence to individual, natural rights continued strong into the eighteenth century. The prevailing legal philosophy held rights and justice to be above the State as "permanent, absolute realities which the State was organized to protect" (7; p. 622). Hence justice and rights were not a result of the organization of the State. Rather, the State existed because there were rights and justice to be protected and secured.

In the nineteenth century, the idea of freedom and rights took on a new perspective. One of the early spokesmen in this connection was Kant, whose fundamental principle of philosophy of law rested on the notion of freedom of will. Pound had this to say of Kant:

"He conceived that the problem of law was to reconcile conflicting free wills. He held that the principle by which this reconciliation was to be effected was equality in freedom of will, the application of a universal rule to each action which would enable the free will of the actor to co-exist along with the free will of everyone else" (7; p. 728).

In contradiction to the earlier notion of justice, that of securing "absolute, eternal, universal, natural rights of individuals, determined with reference to

the abstract individual man," (7; p.628), Kant's notion of justice meant securing the freedom of man's will as long as it was consistent with the freedom of all other wills. With this change, Pound points out:

"... the transition was complete from the idea of justice as a maintaining of the social status quo to an idea of justice as the securing of a maximum of individual self-assertion" (7; p. 628).

Kant's writings in the early nineteenth century opened the way for other conflicting legal theories that sought to dominate the era. Kant's idea of the co-existence of the wills of men was further developed by Savigny and his followers. They claimed that freedom was and should be the ultimate desire of man, and developed the idea of general freedom of action and free-will for everyone into the practical consequence of civil liberty (8; p. 204). Thus, the function of law was seen as securing the greatest amount of liberty to individuals.

Another philosophy of law which rose to prominence in the nineteenth century involved the total rejection of the eighteenth century faith in reason. Hegel, explaining this new theory, maintained that:

"Law was a necessary evil; evil because it restricted liberty and liberty was a right, necessary because without a certain minimum of restriction, liberty was not possible in the conflict and overlapping of human desires ... The political interpretation demanded the holding down of legal order to the necessary minimum - to the least which was required to realize freedom in men's relations with each other" (10; p. 48).

Still another theory that flourished in the nineteenth century and influenced the concept of law, was the one known as the 'economic interpretation.' According to this theory, law had its basis in the maximum satisfaction of material wants, which superseded the "abstract dialectic of freedom" (10; p.93). This interpretation of the law saw judges, jurists and legislators viewed as spokesmen for the self-interest of the dominant class(10; p.112).

"This 'economic theory,' which, in effect was a theory of law in terms of the will for the time being of the socially and economically dominant class for the time being, with transitional status of hopeless internal conflict while one class is gaining the upper hand at the expense of its predecessor in the economic and social order, is more threatening to the general security than the eighteenth century theory of referring all things to the individual conscience as an ultimate arbiter, of which, in its nineteenth century form of philosophical anarchy, recent legislation has become so fearful" (10; p.112).

The historical development of the concept of the law, it would be appreciated, contained the elements of a second major theory - that of conflict. Attempts by legal scholars and sociologists to explain the dynamics of legal change focused on this element to produce the 'conflict' or 'interest group' theory. According to the followers of this school of thought, the law represents the wants and desires of those few people in society who are able to influence the legal system through socio-economic power.

Perhaps the best-known advocate of the conflict model is Richard Quinney, who maintains that this model is based on a conception of a society characterized by diversity, conflict, coercion and change rather than by consensus and stability. Although law may control interests, it is, according to Quinney, first of all created by the interests of certain segments in society. The interests of these certain persons and groups, who represent special interests and political power are incorporated into law. Seldom are laws the product of the whole society. Unlike the consensus model, law, according to Quinney's conflict theory, does not represent a compromise of the diverse interests in society, but supports some interests at the expense of others (14; p.35).

Quinney describes the position:

"Law is a form of public policy that regulates the behavior and activities of all members of a society. It is formulated and administered by those segments of society which are unable to incorporate their interests into the creation and interpretation of public policy... Law secures and perpetuates the interests of particular segments supporting one point of view at the expense of others... Finally, the formulation and administration of law in politically organized society are affected by changing social conditions. Emerging interests and increasing concern with the protection of various aspects of social life require new laws or interpretations of old laws. Consequently, legal changes take place within the context of the changing interest structure of society" (14; p. 40).

Quinney maintains that criminal definitions describe behaviors that conflict with the interests of those segments of society that have the power to shape public policy. In turn, these interests, based on desires, values and norms are incorporated into the criminal law.

"That criminal definitions are formulated is one of the most obvious manifestations of conflict in society. By formulating criminal law (including legislative statutes, administrative rulings, and judicial decisions), some segments of society protect and perpetrate their own

interests. Criminal definitions exist, therefore, because some segments of society are in conflict with others" (14; p.17).

The development of the laws of theft and vagrancy provide excellent illustrations of the formulation of a criminal law due to changing social conditions and emerging social interests. They support the conflict model of change, exposing the predominant role of an interest group in determining the content of the specific law.

The analysis of theft laws in the fifteenth and sixteenth century in English law (5), indicates that the interest group was the wealthy nobility. The same interest group is identified as influencing the changes in the law of vagrancy in a similar era (2). This interest group was apparently sufficiently influential and powerful to influence, in their favor, legislation. So powerful were they that judges and legislators never questioned the passing of laws that would benefit the wealthy members of that society. Because of this, there was never a need for the wealthy class to organize themselves or intervene publicly in the law-making process. They were always assured of favourable legislation.

In Hall's article, "Theft, Law and Society," the laws concerning theft are examined from 1473 to the seventeenth century. Hall employs what he terms, the 'institutional interpretation of history,' in which he emphasizes common and recurring modes of behavior, in an attempt to trace the social, economic, political and religious events in England that were responsible for the changes in the laws of theft. The relationship of the judges to the Sovereign in the late fifteenth century was such, Hall claims, that the Crown consulted the presiding judge about Crown cases. This practice continued until the mid-seventeenth century. Not only did consultation occur, but the ruling king would often dispatch royal letters ordering judges to favor members of the wealthy class in their judgments, resulting in the subserviency of the courts to the powerful nobility class and to the King, at that time, Edward IV. Special interests of the Crown were protected by the courts, especially in the area of commercial activities since Edward was himself a merchant (5; p. 16).

Economically speaking, England, during the fifteenth and sixteenth centuries, was moving from a purely agricultural and rural country to an industrial, manufacturing society. This new economic growth was accompanied, in turn, by a change from serfdom to a rising mercantile

class that had been largely responsible for the new, expanding, industrial society. The effect of this new commercial revolution in English society upon the political institution was an increase in legal favours bestowed upon a new class by the king in an effort to win their support (5; p.29).

Prior to the change in the theft law in 1473, the common law recognized no offence in a person who had come legally into possession of property and later converted it (5; p.31). This was the old medieval law which maintained that a merchant was responsible for hiring a trustworthy carrier. The law stated that a person in possession of property could not trespass upon that property. Thus, if an employee who was entrusted with property, had possession of that property, he could not be found guilty of larceny. However, with the emerging new political and economic conditions, the law placed the interests of the nouveau rich - the mercantile class - in jeopardy. Not being feudal lords, this group of people had to depend on those who had no personal loyalty to them. The gravity of the situation was driven home in the Carrier case whereby the accused had been hired to transport bales to a designated place in England. However, he transported the bales to a different location,

broke open the bales, and took the contents. When he was later charged with a felony, the judges departed from precedents provided at common law and rendered a decision whereby a person who came legally into possession of property and later converted it, became guilty of larceny (theft) (5; p.32).

In his study on vagrancy, Chambliss demonstrates how the perceived need for legal change resulting from changes in social conditions influences the existing statutes and results in their revision and reform (2; p.76).

The vagrancy statute of 1274, was amended in 1349 to outlaw the giving of alms to any unemployed person who was of sound mind and body (2; p. 68). Chambliss claims that the amendment had its roots in changes in the English social structure. One important event that caused drastic social changes within the country was the outbreak of the Black Death in England in 1348. The consequence of this epidemic was the near destruction of the labour force. It was estimated that at least fifty percent of the population died from the plague. The drastic reduction of the work force had a significant impact on the economy which, during the fourteenth century, was largely dependent upon cheap labour.

The supply of cheap labour was already posing a problem to landowners prior to the Black Death. Because the larger towns were becoming more industrialized, serfs were buying their freedom from the feudal lords and moving to the towns in search of increased wages, a higher standard of living and employment in the new weaving industry. Thus, the influential country landowner found himself in short supply of the cheap labour required to run his land. The vagrancy laws were consequently amended to make the migration of labour difficult and to force the peasants to remain in the country "in order to insure the landowner an adequate supply of labour at a price he could afford to pay" (2; p.69). Chambliss claims that these changes in the law occurred as a result of the change in the economic situation of the society. The powerful feudal lords did not want to compete for labourers with the rising mercantile class. They exerted pressure on the sovereign to reverse a social process that was well underway (2; p.72). However, the law at this time was fairly inconsequential as either a control mechanism or an enforced statute. "The process of change in the culture generally and the trend away from serfdom and into a 'free' economy obviated the utility of these statutes" (2; p. 71).

After the Peasants' Revolt in 1381, the focus of the vagrancy statutes shifted to criminal activities. Slowly the concern of the statute became the means of livelihood of able-bodied persons. A vagrant was no longer an able person with no means of livelihood but one who could not legally justify how he made a living. Persons charged more than once with the crime of vagrancy became felons. Clearly, the concern of the statute changed from the movement of labourers to the control of the behaviour of moving labourers. With the decline of feudalism the provision of cheap labour for the landowners was not a prime legislative concern. These landowners no longer were the powerful interest group in society. Later, in the fifteenth and sixteenth centuries, the economy was becoming dependent on commerce and industry; the transportation of goods required new laws that could guarantee their safety while being carried from one place to another. Provisions in this regard were included in the vagrancy laws which became less concerned with relief for the poor and more concerned with the "prevention of crime, the preservation of good order, and the promotion of social economy" (6; p.606).

Both the consensus theory and the conflict theory concede that changes in the law reflect changes in society. The consensus theory postulates compromise of conflicting interests while the conflict theory postulates the supremacy of dominant groups. Consensus theory draws its support from an analysis of the historical development of the philosophy of law. Conflict theory draws its support from the analysis of the development of specific laws such as those of theft and vagrancy.

The two theories can perhaps be considered as having their roots in different views of society - the one looking upon society as characterized by consensus and stability and the other by diversity, conflict, coercion and change. Both however, consider legal and social change as essential ingredients of society.

Conflict theory would view the process of criminalization:

"When the interests that underlie a criminal law are no longer relevant to groups in power, the law will be re-interpreted or altered to incorporate the dominant interests" (14; p.18).

Consensus theory would seek to alter this statement to read: When the interests that underlie a criminal law are no longer relevant to the majority, the law will be re-interpreted or altered to incorporate these interests.

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CHAPTER IIISEDITIONOUS OFFENCES

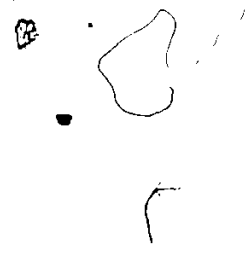
The offence of sedition involves the stirring up of discontent, resistance or rebellion against the government in power.

The Criminal Code of 1892 did not define the offence of sedition per se, but instead described three distinct offences related to sedition. There was sedition committed through libel, through words and through conspiracy, all connected to each other through the common and essential component of a seditious intention. Seditious words are 'words expressive of a seditious intention;' a seditious libel is 'a libel expressive of a seditious intention;' and a seditious conspiracy is an 'agreement between two or more persons to carry into execution a seditious intention' (1; ss. 123 (2) (3) (4)).

Prior to 1892, Canadian statutes contained no specific Act relating to the offence of sedition, although there was a statute entitled, "The Seditious Associations Act," enacted in 1860, part of which was included in the Criminal Code under the heading of "Seditious Offences." (8; c.10; see also 1; ss. 121, 122).

The section dealing with seditious words, libel and conspiracy had, as its source, the English Draft Code (E.D.C.) of 1879 (14). If section 103 of the E.D.C. is examined, it will be noted that the provisions for seditious words, libel and conspiracy are copied verbatim by the commissioners in charge of drawing up the Canadian Criminal Code.

In addition to these provisions, the Code of 1892 also describes those acts that are not considered to have a seditious intention. Any person who, 'in good faith,' intends to show that the sovereign was mistaken in her measures, or intends only to point out errors in the British or Canadian constitution, or the federal or provincial constitutions of Canada, or intends to lawfully alter any part of the administration of the state, will not be deemed to have a seditious intention. Furthermore, any person who points out any matter which is causing feelings of ill-will among classes of the sovereign's subjects is also, not guilty of having a seditious intention (1; s. 123(a) (b) (c)). This section is also derived almost verbatim from the E.D.C. (14; s.104).



The original provisions for the offence of sedition, drafted by the Canadian commission and presented to the House of Commons for discussion, included a section that defined the term 'seditious intention,' a section which was also taken from the E.D.C. It defined 'seditious intention' as:

"... an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs and successors, or the government and Constitution of the United Kingdom, as by law established, or either House of Parliament; or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter of state by law established; or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects" (14; s. 102).

In a note immediately following this definition, the English Royal Commissioners stated that it was as accurate a statement of the existing law as they could make. "On this delicate subject we do not undertake to suggest any alteration of the law" (14; p.298). The Canadian commissioners also used the same wording, with the addition of the phrase "or Canada" accompanying the words "United Kingdom."

When the bill was introduced in the House of Commons there was much discussion and a great deal of criticism concerning this definition. John Thompson, then Minister of Justice, introduced an amendment that would repeal the section. He stated:

"I think the amendment I propose will meet all views about sedition. I propose to strike out all words... so that we shall make no definition of seditious intention, but will simply go on to say what shall not be seditious, leaving the definition of sedition to common law" (15; col.4344-4345).

The amendment was agreed upon and it was decided to strike out the clause in its entirety.

In the Criminal Code of 1892, the law on sedition included provisions for those persons who administered or agreed to take any unlawful oath having as its intent a seditious purpose, as well as provisions for those persons who committed seditious acts through words, libel or conspiracy.

The penalty imposed for taking or administering oaths to commit any crime punishable by death or imprisonment for more than five years was fourteen years' incarceration. Those persons found guilty of taking or administering oaths for the purpose of binding the person to commit any seditious or mutinous act or disturb the public

peace were liable to seven years' imprisonment.

The Code described seditious words, libel and conspiracy and made provisions for persons found guilty of these offences to be subject to two years' incarceration.

It was also an indictable offence, liable to one year's imprisonment, to publish any false news likely to cause public mischief (1; ss. 125-126).

Finally, the Code contained a clause describing those acts which would not be considered as having a seditious intention. The Code did not include a clause defining the term 'seditious intention.'

If the sections presently included in the seditious offences section of the Criminal Code and those sections which were considered seditious offences during the past eighty-four years are examined, it will be seen that a categorization of the sections is possible as follows:

First, there are those sections which have not been altered at all. These are the sections that describe the three offences of a seditious nature - sedition committed through libel, sedition committed through words and seditious conspiracy, all connected through the essential component of a seditious intention.

Although re-numbered over the years, these three descriptions have not been altered since codification.

Second, are the sections which were introduced in 1892, but repealed sometime prior to 1976. Into this category fall the sections which deemed it an offence to administer or take any unlawful oath for the purpose of committing a seditious offence, as well as the section dealing with the publication of any libel tending to degrade a foreign Sovereign. These sections were repealed in 1954.

Third, are the sections that were taken out of the Code but reintroduced after a period of time. Into this category falls the section which described those acts not considered to have a seditious intention. In 1919, this section which became known as the 'saving clause,' was repealed but, in 1930, the section was re-instated and has remained in the Code since that time.

Fourth, are those sections introduced into the Code after 1892, and still remain on the statute books. Into this category falls the section defining 'seditious intention', introduced into the Code in 1936. Seditious intention was described as publishing, circulating, teaching or advocating the unlawful use of force to bring about any governmental change in Canada. The

original drafting of the Canadian Criminal Code included a section which defined the term in slightly different terms but, at that time, after much debate it was decided to delete the definition. In 1936, again after much debate, it was decided that a section defining 'seditious intention' should be included in the Code.

Also falling into this category are sections making it an indictable offence for any person to interfere with the loyalty of a member of the Royal Canadian Mounted Police or the Canadian Forces, as well as to publish or circulate any writing that urges the insubordination of members of the Forces. Persons found guilty of this offence were liable to five years' imprisonment. These sections were introduced in 1951.

Fifth, are those sections which have remained in the Code since 1892, but have been subjected to amendments over the years. Falling into this category are those sections which deal with the punishment for seditious words, libel and conspiracy. In 1892, the punishment was a possible two years' imprisonment. In 1919, it was increased to twenty years' imprisonment.

In 1930, the punishment was reduced to two years' imprisonment and in 1951, it was increased from two to seven years. Finally, in 1955, the punishment was again increased from seven to fourteen years' imprisonment.

Sixth are those sections that were originally included in the part of the Code dealing with sedition but later moved to another part. Into this category falls one section. This is the section which deemed it an indictable offence, subject to one year in prison, to knowingly spread false news that would likely cause public mischief. In the revision of the Code in 1954, this section was removed from the part dealing with seditious offences and placed in Part IV, entitled, "Sexual Offences, Public Morals and Disorderly Conduct," as section 166. Under this part of the Code, the penalty for spreading false news was increased from one year to two years' incarceration.

Finally, there is the seventh category which contains those sections that were concerned with the offence of sedition but which were introduced into other parts of the Code. In 1919, a special committee which was appointed to study sedition and seditious propaganda

in Canada suggested that three sub-sections dealing with seditious offences be added to the part dealing with unlawful assemblies. One of these sub-sections deemed it unlawful for any group to forcefully bring about any governmental, industrial or economic change within Canada. Another dealt with the offence of printing and circulating seditious literature, while the third made it an offence to circulate seditious material through the mail and to import seditious literature into Canada. These sections were repealed in 1936.

In addition to this, two other changes were made in 1919. First, the punishment for seditious words, seditious libel and seditious conspiracy was increased from two years' imprisonment to twenty.

Second, the section referred to as the 'saving clause' describing acts not considered to be seditious was repealed.

After 1919, several attempts were made to restore the sedition laws to their pre-1919 state. However, it was only in 1930 that something was done. In that year, the House agreed to restore the penalty for seditious words, libel and conspiracy to two years' imprisonment.

In addition to this, the 'saving clause,' repealed in 1919, was restored to its former place in the Code in 1930. An attempt made at this time to repeal the three sub-sections which were placed in the 'unlawful assembly' part of the Code was defeated. The attempt to repeal these sections met with success in 1936. The repeal however, was associated with the addition of a section defining the phrase 'seditious intention.' This section resulted in the criminalization of most of the behavior that was decriminalized by the repeal.

In 1951, a section was added to the Code to make it seditious to interfere with the loyalty of a member of the Royal Canadian Mounted Police or the Canadian Forces and to publish or circulate any writing that urged the insubordination of members of the Forces. The punishment for this offence was a possible five years' incarceration.

Also in 1951, the punishment for seditious words, seditious libel and seditious conspiracy was increased from two years' imprisonment to seven.

The next changes to the sedition laws came in 1954 when the Code was revised. At this time, several changes to the laws concerning sedition were made.

First, there was the repeal of three sections dealing with the taking or administering of unlawful oaths to commit a seditious offence, and the section dealing with the publication of any libel which tended to degrade a foreign Sovereign in the estimation of the people of that state. All four sections had been introduced into the Code in 1892. Second, that section which dealt with the offence of spreading false news likely to cause public mischief was moved from the sedition part to that part of the Code entitled 'Sexual Offences, Public Morals and Disorderly Conduct.' The final change made to the sedition laws in 1954, was that of increasing the penalty for seditious words, libel and conspiracy from seven to fourteen years' imprisonment.

In the period between 1892 when the codification of the criminal laws occurred and 1919 when the first changes to the sedition laws were made, there were seven recorded cases of sedition tried in Canadian courts.

In the first recorded case in 1907, the Supreme Court of the North-West Territories at Lethbridge in the province of Alberta, found George Hoaglin guilty of

spreading false news likely to cause injury to public interest, contrary to section 136 of the 1906 Code. The accused, an American, was alleged to have made copies of the following announcement with the intent of printing and circulating 500 copies:

"Americans not wanted in Canada;
investigate before buying land or
taking homesteads in this country"
(2; p.226).

The accused was found guilty and sentenced to a \$200.00 fine or three months' imprisonment.

In 1915, Oscar Felton was charged in Alberta with speaking seditious words contrary to section 134 of the Criminal Code, with the intent of raising disaffection and discontent among His Majesty's subjects.

The evidence against Felton was a single conversation held in an Alberta bar. Felton, born in the United States, but a naturalized British subject, made insulting references to Englishmen in language most of which the trial judge deemed unfit for repetition. Included in those remarks deemed publishable was the following phrase: "I hope to Christ the Germans cross the Channel and knock... out of old England" (3; p.213). He was convicted and his appeal rejected.

The third case occurred in 1916, when Albert Manshrick of Manitoba was charged on three counts and convicted on two. The first count alleged him to have said that he hoped none of the Canadian soldiers who were then fighting in the first World War would return (4; p.17). On this charge he was convicted. The second count alleged him to have said that had the Belgians let the Germans come through their country, the Belgians would not have suffered as they did. It also alleged him to have further stated that it would be acceptable to him if the Germans won the war, came to Canada, taxed the people fifty percent and took the farmland (4; p.17). He was found guilty on this second count also. The third count of the indictment concerned a statement that he wished he could have helped the Germans sink the ship 'Lusitania.' On this count, the jury found him not guilty (4; p.18). On appeal later in 1916, three of the judges of the Manitoba Court of Appeal believed there was sufficient evidence of seditious intent to convict Manshrick while two judges thought there was no evidence of a seditious intent. The appeal was quashed and the conviction was confirmed (4; p.19).

In March 1916, in the fourth case, George Cohen of Calgary was found guilty of speaking seditious words with the intent of raising disaffection among His Majesty's subjects, contrary to section 134. While reading a newspaper in a pool-hall he was alleged to have said to another man that he had just read some good news that the Canadians were getting badly beaten. He was further alleged to have stated that the Canadians who lost their lives in the war would make good fertilizer (21; p.334). The case was appealed on the grounds that since only one person heard his statement, there could be no intent to raise discontent among British subjects. However, the judges disagreed and stated that the words could "have a tendency to create dissension and even riots in such times as these" (21; p.335). The judges, in rendering their decision, stated:

"The words, spoken to an average man were... likely to weaken the firmness of the person addressed in his adherence to his country's cause" (21; p.335).

The appeal was dismissed.

In the fifth case, Ludwig Giesinger was found guilty in 1916, by a Saskatchewan court, of seditious libel contrary to section 134 of the Criminal Code.

Referring to two men who volunteered as soldiers, one half blind and the other deaf, Giesinger was alleged to have written, "...if these people, only in a dream at night, saw a German soldier, they would die of fright by morning" (22; p.596). On appeal he was acquitted as the words did not indicate a seditious intent on his part.

In the sixth case, Arthur Trainor was charged and convicted in 1916, in Alberta, for speaking seditious words (5; p.238). He was supposed to have been sitting at a desk in a drugstore when he learned that the 'Lusitania' had been sunk. He laughed joyfully, and went on to say that since it was war-time, the Germans could do whatever they pleased to defeat the British. He defended his position by pointing out that the British were killing women and children by trying to starve the Germans by employing blockades (5; p.234). On appeal, the conviction was quashed on the grounds that the words did not express a seditious intent.

Finally, in 1917, Bainbridge was charged with seditious words contrary to section 134. In this case, it was decided by the Supreme Court of Ontario that neither mere criticism of the government nor criticism of any proposed legislation constituted the crime of

sedition. Judge Riddell, in instructing the grand jury on a bill sent to them on the charge of sedition, stated:

"The subject has a right to free speech and a free press and before the measure is passed he has a perfect right to use every argument fair or unfair against it. But once an Act is passed and becomes the law of the land, no one has any right to urge or argue for resistance to it... to urge resistance to it, unless and until it is repealed, is seditious" (6; p.445).

He concluded by stating that "no jury has a right to condemn free speech and free press so long as there is nothing seditious or traitorous (6; p.446). The accused was acquitted.

After the amendments of 1919, there were five reported cases. One of them concerned statements made about the war. In this case, Barron was found guilty in Saskatchewan of uttering seditious words contrary to section 134, with the statement:

"Everyone who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop. The other country would beat this country if no one would give to the Red Cross" (23; p.262).

His conviction was upheld on appeal.

The other four cases involved labour unrest. In the first of these cases, in Manitoba, a man named

Russell was found guilty on six counts of seditious conspiracy. Actually, charges were laid against several persons but the Crown elected to proceed against only one of the accused - Mr. Russell (24; p.625). Although these other persons were not tried in court, they nevertheless were charged with seditious conspiracy and spent some time in Stony Mountain Penitentiary. Some of those charged were elected to the provincial legislature during their incarceration, one man (Queen) later became mayor of Winnipeg and two other men (Woodsworth and Heaps) became federal members of parliament (17; p.3699).

Russell was sentenced to two years' imprisonment for each of the six counts, the sentences to be served concurrently. The maximum punishment for seditious conspiracy in this particular case was two years' imprisonment.

In two of the cases, charges were laid against people in Winnipeg in 1919. Woodsworth, who later became an M.P. representing the Winnipeg area, was arrested and charged with sedition for having printed three articles written by a friend, F.J. Dixon. On a lecture tour in Winnipeg at the time of the strike of the labour press, Woodsworth had been asked to take charge when its editor was arrested. One of the articles deemed to be

sedition, Woodsworth had printed at the request of some of the leading businessmen in Winnipeg. The second article consisted of two passages from the Book of Isaiah. The last article contained quotes from a politician. Woodsworth's case was postponed sine die. The charges against him were never dropped, they remained with him until his death. Dixon was also charged with sedition, but he was acquitted. He was later elected to the provincial legislature in Manitoba (16; p.2408).

In the fourth case, James McLachlan was charged, tried and convicted in Nova Scotia on three counts of seditious libel in 1923. He was sentenced to two years' imprisonment on each count, to be served concurrently. McLachlan, secretary of the United Mine Workers of America, was accused of publishing a seditious libel concerning His Majesty's government in Nova Scotia and the Provincial Police. The letter, addressed to all members of the local union, stated that three locals were on strike to protest against the bringing in of provincial police and federal troops to intimidate the steel workers into continuing work at \$.32 per hour. In his letter, he described some of the brutal actions done to women and children by the police. He also

encouraged all steel unions in Nova Scotia to strike in protest of police brutality. The letter was published in two daily newspapers. On appeal, the conviction was confirmed on two counts and reversed on one by the Nova Scotia Supreme Court (12; p.1109).

After the amendments of 1930, there were four cases. In two of them, both in 1931, two groups of persons were charged with sedition in Montreal. These cases have been reported in a Canadian legal journal by a lawyer who feared that they would probably not be officially reported (20; p.756).

Both cases involved persons active in labour groups. In the first case, charges of speaking seditious words and unlawful assembly were laid against Engdahl and his companion who had been arrested while attending a labour meeting, the purpose of which was to organize a public protest against the manner in which the police had broken up two previous meetings called to formulate demands for unemployment relief. Engdahl was the secretary of the International Labour Defence League of New York and was the principle speaker of the meeting. His companion, Miss Bella Gordon, was chairman of the same meeting. At the trial, the charges of unlawful assembly were dropped and the jury found Engdahl and

Gordon not guilty of sedition (20; p.758).

In the other case, Chalmers and several others were charged with speaking seditious words, seditious conspiracy and unlawful assembly. One of the others charged was Fred Rose who, in 1948, was involved in a spy case. Chalmers and companions were speakers at a meeting called by the Unemployed Council of Montreal to discuss unemployment relief. During the trial, the charges of seditious conspiracy were withdrawn and consequently the accused were tried on the "rather curious charge of uttering seditious words while being members of an unlawful assembly" (20; p.759). All five men were found guilty and sentenced to one year with hard labour.

In the third case in 1934, George Brodie and his companions, all of whom were members of the religious sect, the Witnesses of Jehovah, were convicted in Québec of having been parties to a seditious conspiracy in that they distributed certain religious pamphlets. On appeal to the Supreme Court of Canada, the appeal was allowed and the indictment and conviction were quashed on the grounds that the indictment document was insufficient in detail and substance. The indictment merely stated

that the defendants were "parties to a seditious conspiracy and thereby did commit the crime, but alleged no facts of the crime charged" (7; p.289). This judgment contradicted that of the Québec Court of the King's Bench which refused to quash the indictment.

In the fourth case, Tim Buck and seven other persons were convicted in Ontario of being members of an unlawful association, of acting as officers of an unlawful association(s.98), and of being parties to a seditious conspiracy, contrary to section 133. The unlawful association referred to was the Communist Party of Canada, of which all of the accused were members, and of which Buck was leader. The conspiracy charged was the act of furthering the objectives and aims of the Communist Party; the objectives being of a seditious nature, intended to incite British subjects to attempt to unlawfully alter the government of Canada (13; p.99). Buck was found guilty and sentenced to five years' imprisonment. This was in 1931.

Between 1936 and the time of the next amendment to the sedition laws in 1951, there were five reported cases.

In 1938, in Québec, Duval and two other persons were charged with seditious conspiracy contrary to section 134, and found guilty. The three charged

were members of the Witnesses of Jehovah. They were alleged to have distributed, in Sherbrooke, Québec, pamphlets printed and published by the Watch Tower Bible Society. These pamphlets, it was alleged, were of a seditious nature, containing among others the following passage:

"... almost all the church organizations in the land whose leaders pose before the people as doing work in the name of the Lord God, are in fact workers of lawlessness... The clergy, the profiteers and the politicians are in an alliance to govern the peoples of the earth... Now the leaders amongst the Catholics, Protestants and Jews unite to declare that the League of Nations is the only light of the world. The League of Nations being made a substitute for God's kingdom under Christ, necessarily that League is an abomination in the sight of Almighty God (18; p.278).

The convictions were upheld on appeal.

Again in 1938, in Québec, Felix Lacasse and a man from Toronto were found guilty of seditious conspiracy in that they conspired together in the circulation and distribution of religious literature designed to arouse ill-will among His Majesty's subjects. The appeal was dismissed and the original conviction sustained (19; p.74). They were sentenced to six months' imprisonment. In this case too, the

accused persons belonged to the Witnesses of Jehovah religious group. All of the judges agreed with the decision reached in the Duval case and consequently dismissed the appeal of Lacasse.

In 1950, in the province of British Columbia, Lebedoff, a leader of the Doukhobor religious sect, and four other Doukhobors were found guilty of seditious conspiracy contrary to section 134 of the Criminal Code and sentenced to two years' imprisonment. The Crown based its case upon a document signed by the five accused of exhorting all Doukhobors to refuse to obey many of the laws of Canada including the registration of births, deaths and marriages. On appeal, the justices agreed that the document incited Doukhobors to act through unlawful means by encouraging them to refuse to obey some of the laws of Canada, and the conviction was upheld (25; p.899).

Again, in 1950, Aime Boucher, a member of the Jehovah's Witnesses religious sect, was charged and convicted in Québec of seditious libel. Boucher was alleged to have distributed pamphlets dealing with matters of religion and making reference to the judiciary and the State. The pamphlet recited at considerable

length, instances of destruction of Bibles and of mob violence that went unrestrained by the police who, instead of arresting the mobsters, arrested members of Jehovah's Witnesses. It is alleged that these Witnesses who were arrested were subjected to heavy fines, exorbitant bail, prison sentences and delays in the disposition of these charges (10; p.85).

The pamphlet noted the state of affairs in Québec in the late 1940's. It cited instances which revealed Québec's dislike for the Witnesses. In one case, an older man from Hull, E.M. Taylor, was sentenced to seven days in prison for distributing Bibles without a permit. Two other Jehovah's Witnesses were arrested for distributing pamphlets, charged with sedition and sentenced to sixty days' imprisonment or \$300.00. It also stated that members of the sect were being arrested daily. In 1946, there were 800 charges against members of the group in Montreal with property bail set at \$100,000.00, and cash bail at more than \$2,000.00. Court cases were adjourned several times to inconvenience and increase expenses for the Jehovah's Witnesses. In order to have their cases heard, some members had to appear in court on thirty-eight different occasions. The pamphlet also

charged of misconduct on the part of the provincial police and the R.C.M.P. (10; p.103).

On appeal, the Court of King's Bench in Québec did not agree on the existence of essential ingredients necessary to constitute the offence of seditious libel. Consequently, the appeal was quashed by a majority of the judges (9; p.97). The case was finally appealed to the Supreme Court of Canada. Here, it was decided by the majority of the judges that the conviction should be quashed. It was agreed by the majority that the subject matter of the pamphlet was one of religion, not the overthrow of the government by force (9; p. 85, 133).

In 1953, Carrier, a Witness of Jehovah, was charged with publishing false news with the intent of causing injury to the public interest, contrary to section 136 of the Criminal Code. Instead of entering a plea of guilty or not guilty, the accused pleaded autrefois acquit. He declared that he was charged with seditious libel under section 134 and legally acquitted of the offence earlier in 1951. The pamphlet in question was the same one in which Boucher was acquitted and which the Supreme Court of Canada decided had been published in good faith according to section 133A.

The court decided to sustain the plea of autrefois
acquit and the accused was acquitted (11; p.18).

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CHAPTER IVTREASON OFFENCES

Treason is the offence of attempting, by overt acts, to overthrow the government of the state to which one owes allegiance or to kill or injure the Sovereign or family of the Sovereign.

In 1892, the law concerning treason occupied sections 65 to 69 inclusive in the Criminal Code (1). Treason is herein defined as killing, wounding or imprisoning the Sovereign (s. 65(a)); forming and manifesting an intention to kill, wound or imprison the Queen (s.65(b)); killing the eldest son or Queen consort (s.65(c)); forming, and manifesting by an overt act, an intent to kill, wound or imprison the eldest son or Queen consort (s.65(d)); or conspiring to kill, wound or imprison the Sovereign (s.65(e)). It is also treason to levy war or conspire to levy war against the Queen with the intent to depose her (s.65(f)(i)); to forcefully compel her to change her measures; or to intimidate the House of Parliament of the United Kingdom or Canada to force the Sovereign to change her measures (s.65(f)(ii), s.65(g)). The offence of treason also includes forcefully

instigating any foreigner to invade the United Kingdom or Canada (s.65(h)); assisting, by any means whatsoever, any enemy at war with the Queen (s.65(i)); and violating a Queen consort or wife of the eldest son, whether with her consent or not (s.65(j)). Treason is considered an indictable offence, and those found guilty of committing treason are liable to suffer death (s.65(2)). Furthermore, in cases "where it is treason to conspire with any person, the act of conspiring is an overt act of treason" (s.66). As well, those persons who become an accessory after the fact to treason or those persons who fail to give information to a justice of the peace, knowing that a person is about to commit treason, are guilty of an indictable offence, punishable by two years' imprisonment (s.67(a)(b)). It is also an indictable offence, subject to the death penalty, for any subject of a foreign state at peace with the Queen to continue in arms against the Queen in Canada (s.68(a)); to commit a hostile act in Canada (s.68(b)); or to enter Canada with the intent to levy war against the Queen, or to commit any indictable offence in Canada for which any person in Canada would be liable to suffer death (s.68(c)). In this respect, it is also an indictable offence, subject to the death penalty, for any subject in

Canada to assist any foreigner whose country is at peace with the Queen to levy war against the Sovereign (s.68(a)); to enter Canada with such foreigners with the intent to levy war against the Sovereign (s.68(e)); or for any subject to join forces with any foreigner with the intent to aid and assist that foreigner to levy war against the Sovereign (s.68(f)). Finally, any person who forms an intention and conspires to carry out that intention either by an overt act or by publishing any matter to depose the Sovereign (s.69(a)); or to levy war against the Sovereign in order to forcefully compel her to change her measures or to intimidate either House of Parliament in the United Kingdom or Canada (s.69(b)); or to force any foreigner to invade the United Kingdom or Canada (s.69(c)), is guilty of an indictable offence and liable to life imprisonment.

The sources of the 1892 provisions for the offence of treason are: The Treason Act (19; ss. 1-9); The English Draft Code (14; ss.75-79); and the Statute of Treason (18).

The first amendment made to the Canadian Criminal Code with respect to the laws of treason occurred in 1894. This amendment included the addition of the word 'or'

between section 65(f)(i) and 65(f)(ii): See: (5)).

This change however, did not alter the meaning of the law. John Thompson, the Prime Minister and Minister of Justice at the time, referring to this amendment and others similar to it, remarked:

"Some of the amendments are not important as regards their effect, but arise in consequence, sometimes of typographical errors and sometimes of that very objectionable class called clerical errors" (15; p.3240).


In the first consolidation of the Code in 1906, there were no amendments to the laws concerning treason. The numbering of the sections was altered, so that what constituted sections 65 to 69 inclusive in the 1892 Code became sections 74 to 78 inclusive in the 1906 Code (2). Another minor change included the replacement of the phrase 'His Majesty' for the former phrase 'Her Majesty.' The ascension of King Edward VII after the death of Queen Victoria in 1901, necessitated this change.

An amendment to the treason laws occurred in 1915. The change here was the addition of a sub-section to the section dealing with accessories after the fact (6; s.76). The amendment made it an indictable offence, punishable by two years' imprisonment, for a person to assist any foreigner whose country is at war with the Sovereign

to leave Canada without the Crown's consent, unless the accused can prove that his assistance was neither intended nor rendered to permit the foreigner to engage in hostilities which were against the Sovereignty of this country(6; c.12).

The laws concerning treason remained unaltered until 1951 (7), though there was a consolidation of the Code in 1927 (3). In 1951, the section defining treason "as assisting any public enemy at war with His Majesty in such war by any means whatsoever"(s.74(i)), first included in the 1892 Code, was repealed and replaced by a section prohibiting any person from "assisting, while in or out of Canada, any enemy at war with Canada, or any armed forces against whom Canadian forces are engaged in hostilities whether or not a state of war exists between Canada and the other country" (7; s.74(i)).

At the time of the major revision of the Criminal Code in 1954 (4), the laws concerning treason were subjected to further changes. Sections were divided and regrouped, though the content remained unchanged. Sections were repealed and substantive amendments were made to other sections.



The sections that remained unchanged stipulated that an act of treason was committed by persons who, in Canada, or in the case of Canadian citizens, while in or out of Canada, kills, attempts to kill, or conspires to kill the Sovereign or to cause her any bodily harm (s.41(1)(a)(f)(2)); who levies war or conspires to levy war against Canada or does any act preparatory thereto (s.46(1)(b)(f)(2)); who assists or conspires to assist an enemy at war with Canada, or any armed forces against whom Canadian forces are engaged in hostilities "whether or not a state of war exists" between Canada and the other country (s.46(1)(c)(f)(2)); or who uses force for the purpose of over-throwing the government of Canada or a province (s.46(1)(d)(f)(d)). It is also deemed to be treason for any person to form an intention to do any of the above-mentioned acts or to manifest that intention by an overt act (s.46(1)(g)(2)).

The repeal of sections removed from the definition of treason the killing or forming an intention to kill the eldest son of the Sovereign or kill the Queen consort; the act of violating a Queen consort or wife of the eldest son of the regnant Sovereign; the instigation of any foreigner to invade the United Kingdom or Canada; the levying of war by a subject of a state at peace with

the Sovereign and the act of a British subject assisting the foreigner; the forming of an intention to depose the Sovereign or to levy war against the Sovereign or to stir any foreigner to invade the United Kingdom or Canada, and manifesting the intention into effect by an overt act by publishing any writing; and finally, becoming an accessory after the fact to treason.

The changes stimulated much debate in the House of Commons and several members expressed their concerns. One member stated that "all members of parliament had been bombarded with letters from the Canadian peace conference, and all sorts of other organizations interested in civil liberties and human freedom, criticizing the proposed changes in the treason (and sedition) laws" (17; p.3676). Another M.P., quoted in the publication, Saturday Night, stated:

"These amendments were quietly wrangled into the code with the least possible advance notice and were drafted very hastily; and upon the urgent instigation of the United States. They have been sharply criticized by many of the best liberal-minded lawyers of the country. They should be very carefully overhauled at the present time " (17; p.3679).

One of the proposed amendments to be discussed in the House of Commons was that dealing with the unlawful communication of military or scientific information to a foreign agent for

purposes prejudicial to the safety and defence of Canada. The Senate committee felt the provision was too broad and that such action did not warrant the definition of treason. As a result, the Senate proposed that the amendment be re-worded, removed from section 46 and inserted in the section dealing with assisting alien enemies (s.50). The removal of the amendment from section 46 involved the alteration of the punishment applicable to the offence from the death penalty or life imprisonment to fourteen years' imprisonment. When the Senate revision went before the special committee of the House for review, the special committee disagreed with the proposed change and altered it to the form in which it appeared in the 1954 Code.

This amendment had its roots in the deliberations of the Criminal Code revision commissioners appointed in 1947 to revise the Code of 1927. The commissioners "apparently considered that the Official Secrets Act, which provided a maximum punishment of fourteen years' imprisonment for a comparable offence was not adequate to deal with modern problems connected with the unlawful communication of information to agents of states other than Canada" (17; p.3666).

Although no amendment was proposed to the section introduced in 1951 which dealt with assisting enemies, there

was a phrase added to a section adopted in 1915 which dealt with assisting enemies. This section described the offence, liable to two years' imprisonment, of assisting an enemy alien whose country was at war with the Sovereign, to leave Canada without the consent of the Crown, unless the accused could prove that the assistance was not intended and did not amount to treason. In 1954, it was proposed that the section include assisting subjects of either a state at war with Canada or a state against which Canadian forces are engaged in hostilities whether or not a state of war exists between Canada and the other state, to leave Canada without the consent of the Crown, unless the accused could prove that the assistance to the state was not intended. It was also proposed that the penalty be raised to fourteen years' imprisonment.

Another section discussed dealt with levying war or forming an intention and manifesting that intention through an overt act of treason. Stanley Knowles, an opposition M.P., recalled an interesting incident involving the Minister of Justice, Mr. Garson, and questioned whether the actions of the Minister constituted the offence of treason. In 1943-44, a large meeting was held under the auspices of the Canadian-Soviet Friendship League in a Winnipeg auditorium.

The principle speaker was at that time, a military attaché with the Soviet embassy in Ottawa, who played a large part in subsequent spy trials in the late 1940's. The then premier of Manitoba, Mr. Stuart Garson, was chairman of that meeting. Knowles, opposing the proposed change to the treason law

stated: "I now ask the same Stuart Garson, who is not Minister of Justice, to look at the section of the code which he... is now piloting through this House... Does the overt act to which I have referred indicate that...the then premier of Manitoba and chairman of the meeting... had formed the intention to conspire with the special speaker on that occasion to do some of the things prohibited in this section" (17; p.3674).

Mr. Knowles continued in his criticism, to suggest that the above example is no more fantastic than the charge of sedition laid against J.S. Woodsworth for quoting passages from the Bible in 1919 (17; p.3675).

Finally, Knowles, in opposing the proposed legislation stated: "The legislation approaches 'thought control'; legislation that gets at people not for what they do but for what they think or what they intend to do... It reverses the course of history (it had developed from a concern for the person who wore the crown to a concern for society as a whole); instead of narrowing the offences, it broadens the section to include the "war measures" of 1951 and other new sections" (17; p.3675).

Many of the sections in the 1927 Code dealing with treason were combined in the 1955 Code. Those sections that

remained unchanged include treason committed by persons who, in Canada, or in the case of Canadian citizens, while in or out of Canada: kills, attempts to kill, or conspires to kill the Sovereign or to cause her any bodily harm (s.41(1)(a)(f)(2)); who levies war or conspires to levy war against Canada or does any act preparatory thereto (s.46(1)(b)(f)(2)); who assists or conspires to assist an enemy at war with Canada, or any armed forces against whom Canadian forces are engaged in hostilities, whether or not a state of war exists, between Canada and the other country (s.46(1)(c)(f)(2)); or who uses force for the purpose of overthrowing the government of Canada or a province (s.46(1)(d)(f)(2)). It is also deemed to be treason for any person to form an intention to do any of the above-mentioned acts or to manifest that intention by an overt act (s.46(1)(g)(2)).

The section dealing with punishments was also greatly altered. Those persons found guilty of killing or attempting to kill the Sovereign, of levying war against Canada, or of assisting an enemy are subject to the death penalty (2,47(1)(a)). Either the death penalty or life imprisonment is imposed on those persons found guilty of conspiring or forming an intention to commit any of these offences and those found guilty of using force, conspiring to use force or forming an

intention to use force to overthrow the government of Canada or a province (s.47(1)(b)). The same punishment was prescribed for those persons found guilty of communicating or conspiring to communicate or forming an intention to communicate information to a foreign agent when a state of war exists between Canada and the foreign state (s.41(1)(c)). If no state of war existed between Canada and a foreign state then a person found guilty of this offence is liable to be sentenced to fourteen years' imprisonment (s.47(1)(d)).

A third change that occurred at this time was that the laws of procedure concerning treason cases were moved from the procedural section of the Code and included in the treason section.

One of the sections was modified so that no proceedings for an offence of treason in which a person is charged with using force or violence for the purpose of overthrowing the government of Canada or a province can be commenced more than three years after the time when the offence is alleged to have been committed (s.48(1)). No proceedings will be commenced with respect to punishments concerning treason expressed through speech unless an information expressing the words used in the overt act is laid under oath before a justice within six days after the words are alleged to have been spoken; and unless a warrant for the

arrest of the accused is issued within ten days after the time when the information is laid (s.48(2)(b)).

Finally, no person can be convicted of treason upon the evidence of only one witness, "unless the evidence of that witness is corroborated in a material particular by evidence that implicates the accused" (s.47(2)).

In 1971, when there was a consolidation of the Code, no changes were made to the laws concerning treason.

In 1976, the laws on treason were amended as a result of a decision by the Canadian Parliament to abolish capital punishment (8). At this time, treason was divided to comprise high treason and treason. The offence of high treason was defined as being committed by anyone in Canada, or in the case of a Canadian citizen, while in or out of Canada, who kills or attempts to kill the Sovereign, or cause her any bodily harm, who levies war against Canada, or who gives assistance to an enemy at war with Canada or war against Canada, or who gives assistance to an enemy at war with Canada or any armed forces against whom Canadian forces are engaged in hostilities whether or not a state of war exists between the two countries (s.46(1)(a)(b)(c)(3)(a)). The penalty for those persons found guilty of high treason is life imprisonment (s.47(1)). It is a minimum sentence (s.47(4)).

The second part of the section deals with the offence of treason* (s.46(2)). It is treason to conspire or form an intention to commit an act of high treason (s.46(2)(c)(d)); to use force or violence or conspire to use violence or form an intention to use violence in order to overthrow either the government of Canada or a province while in or out of Canada (s.46(2)(a)(3)(b)); s.47(2)(a)); or to unlawfully communicate, conspire to communicate or form an intention to communicate military information to an agent of a foreign state knowing that the information may be used in a manner prejudicial to the safety of Canada, while a state of war exists in Canada (s.47(2)(b)(3)(b)). Those guilty of treason are liable to suffer life imprisonment (s.46(2)(b)(3)(b); s.47(s)(b)). Although it is treason to communicate information while no state of war exists the punishment prescribed in this case is fourteen years' imprisonment (s.47(2)(c)).

Although Parliament removed the death penalty from the Criminal Code, there still remain several offences against the National Defence Act which require a mandatory punishment of execution (9). These include holding communication with or giving intelligence to the enemy, disclosing information relating to the numbers, position, material, movements of any of Her Majesty's forces, spying, desertion or failure to encourage soldiers to fight

courageously (9; s.65(a)(b)(c)(j), s.68,s.69).

The most important reported case on treason was perhaps that of Joseph Snyder. It was alleged that Snyder incited and assisted four Austrian subjects to leave Canada and join the enemy's forces. During the case it was revealed that a member of the military was sent to make a bargain with Snyder to convey the four Austrians by boat across the Niagara River and thus trap him. Snyder agreed and accepted forty dollars from the undercover agent whereupon he was arrested by military authorities. The evidence also showed that the four men had no intention of leaving Canada and had no knowledge that Snyder was supposed to transport them across the river.

Counsel for the Crown did not ask for a conviction for treason, but for an attempt to commit treason. The jury found Snyder guilty of attempting to commit treason, but added the rider that he "did not realize the seriousness of his act" (18; p.318).

On appeal, it was held that there was no evidence that Snyder incited or assisted the men to leave Canada. According to the presiding judge, to assist another person involves the idea of a desire of a willingness to be assisted. However, the four men were unaware of the purpose of their

being taken to Snyder's home. Since this act of aiding an alien to leave the country did not amount to treason, the accused could not be found guilty of any violation of the Criminal Code. It was decided that the conviction should be quashed due to lack of evidence. The judge did not consider the situation desirable and expressed the hope that a provision would be enacted to cover such cases in the future (18; p.327).

In addition to the Snyder case, there have been only four cases of treason recorded legally in the history of Canada. All these cases occurred between 1915 and 1917. The first involves the violation of the section of the Criminal Code introduced in 1915 making it an indictable offence to assist foreign subjects whose country is at war with His Majesty, to leave Canada without the consent of the Crown (s.76(a)). This case which occurred in Saskatchewan in 1915 involved a man named Oma.

It was alleged that Oma, who knew of several foreigners who were desirous to go to the United States, made arrangements with an automobile firm to have ten Austrians transported to the Canada-U.S. border. For making these arrangements Oma received \$.25 per passenger and \$10.00 from the automobile company for procuring the passengers. The persons were arrested before they reached the border.

The jury found the accused guilty. On appeal, the conviction was confirmed. It was agreed that where a subject of a foreign state at war with His Majesty intended to leave Canada and started for the boundary line to carry out his intention, he was in the act of leaving Canada from the beginning of the journey. If the accused, knowing of such intention, did any act to further it, then he was guilty, whether or not the person assisted actually crossed the border (12; p.670).

The second case also involved violation of the same section. In 1916, Israel Schaefer of Quebec was found guilty of treason in violation of section 76(a) which prohibited the assisting of enemy aliens to leave Canada without the Crown's consent.

It was alleged that Schaefer, after the outbreak of the first World War in 1914, sold ten transportation tickets from Canada to Bulgaria and provided these ten people with document to further transport them to the boundary line between Romania and Austria-Hungary for the purpose of assisting the government of that country (11; p.23). The persons to whom the tickets were sold had resided in Canada for a few years and were considered 'alien friends' by the authorities. However, they were not arrested along with Schaefer.

On appeal, the conviction was upheld. The Appeal Court deemed that the essence of treason consisted in the intent with which things were done rather than the acts themselves. Therefore, it is not necessary that the overt acts, which must be set out in the indictment, should themselves be treasonable if a treasonable intent is alleged and proved. They claimed that though "in general the law takes no account of mere intent... it was not so in the case of treason. Here there are no accessories, all are principals, and it has been held that a bare conspiracy, the mere act of two or more in agreeing to effect a treasonable object, although nothing be done to carry it out, is a sufficient overt act" (11; p.22). In reaching its decision, the court noted that the indictment stated that the accused took means to send Austrian subjects into Austria-Hungary in order to aid the enemy, which was sufficient. Later in 1919, leave to appeal to the Supreme Court of Canada was also refused (14; p.492).

The third case occurred in Nova Scotia in 1916. In this case Gabor Fehr was convicted of treason in violation of section 74(i) of the Code. It was alleged that the accused loaned some money to a public enemy, thereby assisting a public enemy at war with His Majesty.

On appeal, counsel for the accused moved that the conviction be quashed since the indictment did not state any definite overt act of treason with which he was charged. It was further pointed out that the indictment failed to state the name of the public enemy that the accused was charged with assisting. The conviction was quashed (13; p.111).

The fourth case was that of John Bleiler of Alberta who was charged and convicted in 1917 by judge and jury of attempting to assist a public enemy, in violation of section 74(i) of the Code. It was alleged that Bleiler attempted to assist the Emperor of Germany by counselling an inventor to sell to the Emperor a device to be used against His Majesty's soldiers. Bleiler was also alleged to have written the German Emperor encouraging him to buy these devices (22; p.1462). In fact, these letters which were sent from the accused to the German Ambassador of the United States, expressed the loyalty of the accused to Germany and urged the investigation of the invention for the purpose of it being used in the interests of Germany in the war (22; p.1462). On appeal, the conviction was upheld (10; p.9). What Bleiler was charged with was the attempt to assist the enemy. Although the Code does not make provisions for an offence of attempting to commit treason, the presiding judge pointed out that the charge was in fact treason since

the attempt itself furnished the necessary overt act. The letters themselves were viewed as clearly overt acts evidencing the treasonable intention of Bleiler (22; p.1461).

In addition to these cases, there is a case that touches on the subject of treason. In 1917, Berger, the owner of property in Sarnia, Ontario, agreed to sell the property to Peter Glab, also of Sarnia who was acting on behalf of one Lampel.

Berger was Hungarian born and for many years was a resident of Michigan. He also maintained Austria-Hungarian citizenship. Before completion of the contract, Lampel ascertained that Berger had a family residing in Hungary to whom he sent money. Lampel, doubtful as to whether he could lawfully fulfil the contract, initiated court action (19; p.166).

It was decided by the court that Berger was not an enemy alien subject incapable of entering into a binding contract with a resident of Canada. The court further explained that a resident of Canada may trade with a person who is by birth a subject of Germany, if the latter resides in Canada or in some neutral territory, but not if he resides in a country which is at war with the Sovereign. It was also felt to be the duty of the court, which represents His Majesty, to impound the money resulting from the contract

and retain it in the Court to the credit of Berger until
the war ended (19; p.169)..

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CHAPTER VTHE CHANGING OF THE LAWS

The analysis of the changes that have occurred in the laws on sedition and treason and the motivation for these changes involve a consideration of the cases that were instituted, the fate of these cases and the reasoning preferred by the judges, together with the sentiments expressed by the members of the House of Parliament when the changes were wrought or when they were attempted. This analysis will be undertaken in this chapter.

Whatever the definition of sedition may have been, the earliest cases of sedition instituted in Canadian courts involved individuals who had allegedly made disloyal statements. The law had remained substantially the same since its codification in 1892, when the first case was instituted in 1907. That the gravity of the situation and the uncertainty of the times in which these statements were made contributed to their interpretation as sedition, there can be no doubt. This opinion has been expressed by Chief Justice Harvey of the Appellate Division of the Supreme Court of Alberta in his judgment in the Felton case. Here he observed.:

"...In this present day of the great war, when all our people are in a state of nervous tension and excitement, and intense feeling against the enemy due to the struggle in

which we are engaged, words which, in ordinary times, would have no outward effect in creating disorder, cannot be used now without much greater danger, and such words as those in question would likewise not be likely to be used now unless with some intent to stir up trouble" (2; pp. 212-213).

He, however, does suggest that the words are seditious irrespective of the time context. Conceding that the expression of the Code 'expressive of a seditious intention' was itself somewhat ambiguous in meaning and that there was uncertainty as to whether the essential element of the crime was the natural inference to be drawn from the words or the actual intent of the speaker, (2; p. 211) he concludes in favour of the former, observing:

"The words used were undoubtedly a slander on Englishmen, and a slander on the British Government, and the natural inference is that they were uttered with the intent that the hearers would accept the speaker's view, or for the purpose of insulting and annoying them. In the one case, there would be the intent to bring into hatred and contempt the Government, or in the other case, to promote ill-will with the probable consequence of a breach of the peace, either of which, according to the definitions, would be a seditious intention" (2; p.211).

This view, however, was not followed in later cases. Judge Brown of the Saskatchewan Supreme Court observed in the Giesinger case:

"The words...constitute a seditious libel if they are expressive of a seditious intention, and they are expressive of a seditious intention if they are both calculated (likely) and intended to stir up and excite

discontent and disaffection among His Majesty's subjects. If the words are not calculated to have the alleged effect, there is no libel, and if they are not intended to have that effect they are not seditious" (15; p.599).

This judgment, of course, tended to make convictions in sedition cases more difficult to secure. The position was made even more difficult by the judgment in the Trainor case in which Judge Stuart tried to distinguish between "entertaining disloyal and unpatriotic sentiments and giving utterance to them in a chance expression...and the crime of uttering seditious words" (3; p.239). He pointed out that in British legal history there was a long struggle to establish the principle that "to convict of treason - you must prove some overt act. So with sedition, it is not the disloyalty of the heart that the law forbids. Neither is it the utterance of a word or two which merely reveal the existence of such disloyalty that the law can punish under the name of sedition" (3; p.239).

Commenting on the words spoken by Trainor, Judge Stuart stated: "I am unable to see how the expression of such views...was calculated, or expressive of an intention either to promote feelings of ill-will...between... different classes of subjects or to incite disaffection against His Majesty's government" (3; p.240).

Motivating him to take this position perhaps was the fear that the sedition laws were being abused. In this case he observed:

"There have been more prosecutions for seditious words in Alberta in the past two years than in all the history of England for over 100 years and England has had numerous and critical wars in that time. The Courts should not... be asked to spend their time scrutinizing the foolish talk of men in bar-rooms and shops or a word or two evidently blurted out there impulsively and with no apparent deliberate purpose...What I fear in this case is that the accused is being punished for his mere opinions and feelings and not for anything which is covered by the criminal law" (3; pp.241-242).

In 1919, a special committee was appointed to study sedition and seditious propaganda in Canada because, as Mr. Guthrie, then Solicitor-General, stated:

"...the provisions of law (with respect to these offences) are not very definite. It is not very easy to find or to apply them... The law officers of the Department of Justice consider it doubtful whether the present sections of our Criminal Code adequately provide for all questions which might arise at this particular time" (5; p.1956).

However, this cannot be considered the sole motivation for the appointment of the special Commission. Such committees had been appointed in Great Britain and the United States of America and Guthrie felt that Canada should follow in their steps (5; p. 3284).

Another factor influencing the interest in sedition laws may have been the Winnipeg Strike of 1919, where workers sought changes in their working conditions. This led to outbreaks of violence by some workers and resulted

in the arrest of several persons for seditious words and seditious conspiracy. However, Guthrie, in urging his fellow members to accept the report on sedition submitted by the special committee, stressed that the recommendations were neither "inspired by nor the result of the Winnipeg strike" (5; p.3285). Furthermore, he claimed that the report was not intended to have any effect on recognized labour organizations, contrary to press editorials that were appearing in daily newspapers throughout the country.

Until 1919, Canada had not suffered any uprisings or acts of violence as a result of the actions of any groups. However, Guthrie warned that:

"...we must not permit ourselves to be lulled to rest in any state of fancied security... It is common knowledge ... that in Canada to-day there exist many associations and societies developed and organized for the purpose of carrying on a dangerous propaganda, and which, if permitted to pursue their purpose unhindered or unchecked, may ultimately prove a serious menace to our free institutions and to the authority of government in this country" (5; p.3286).

Guthrie continued to describe the government's position on the offence of sedition. His speech is very lengthy but several parts are important to note for purposes of the present study.

"The subject of sedition...offers a very wide field for legal investigation and research... Happily in Canada, that particular branch of our criminal law has up to the present time received very limited application... During a long number of peaceful years, there have been many occasions when language has been used and acts committed which...would have been deemed seditious. Yet the law has been rarely invoked in such cases in time of peace...Under the free and liberal usages and customs...in Canada...such technical breaches of the law have been allowed to pass largely unnoticed... The policy of passive inaction seems to have been established...in regard to sedition in times of peace. The law was certainly not dead, it was on the statute book but it was permitted to remain dormant. In normal, unwarlike times, the good common sense of the masses appeared a sufficient safeguard of the Throne, of the Constitution, of the institutions of the Country, and of the people" (5; pp. 3286-3287).

However, the situation had apparently changed. According to Guthrie, Canada was in the process of change; " a change probably attributable to the war which has recently been brought to a close," - a war which had "undoubtedly been the author of many changes in the social and political fabric of Canada" (5; p. 3287). The change, unfortunately, had in it a number of undesirable characteristics.

Guthrie continued to verbally paint a picture of the Canadian situation in 1919:

"There is being carried on in Canada... an organized, concerted, and sustained effort to spread false and pernicious doctrines, designed...to cause dissatisfaction amongst His Majesty's subjects, to set class against class, to hamper, injure or destroy the public service and designed in their ultimate end, to subvert constituted authority and to overturn government itself" (5; p.3287).

During the war a strong censorship had been maintained under the authority of Orders in Council. Included in these Orders were seditious enactments enforced as supplementary provisions of the Criminal Code and The War Measures Act. When the armistice was signed, all these supplementary provisions were rescinded (5; p.3287). With the repeal of the war-time measures came an increase in the efforts of "certain doubtful associations, and an increase in the circulation of seditious literature" (5; p.3287).

The proposed amendments of 1919 involved an increased criminalization both in the expansion of the body of behaviour defined as sedition and in the increase in punishment prescribed. Commenting on the suggested changes, Guthrie stated: "The report does not suggest any radical amendment to the present sections of the Criminal Code. Those sections are left intact, with the exception of two slight amendments... The 'saving clause'

should be removed because it operated as a cloak...causing a number of prosecutions to fail...in certain parts of the country" (5; p.3298). This perhaps was a reference to the Bainbridge, Trainor and Giesinger cases of 1916 and 1917. The other 'slight amendment' was a drastic increase in punishment, which Guthrie defended by stating that "the penalties imposed in the United States within the last year...are much higher than anything the committee has proposed in the report. The situation is grave" (5; p.3291).

The debate in the House of Commons following Guthrie's introduction of the committee's recommendations consisted of only one member of parliament presenting his views. The M.P., who was also a member of the special committee, contradicted Guthrie and advised the House that there was, among the members of the committee, "a very sharp division of opinion as to the necessity of amending the Criminal Code...An opinion prevailed that the present Criminal Code was ample to cover the class of cases" (5; p.3291). He also revealed that some persons had been charged with committing offences while the war measures were enforced. However, the government failed to continue proceeding although arrests were made and charges were laid. The war ended and the special war measures were rescinded. As a result, the government was now seeking ways to commence with and be successful in

these prosecutions (p.3292). The debate was short, and the motion was agreed to and passed third reading in one day.

Commenting on the changes that were made in 1919, Justice Minister Lapointe stated in 1931: "They were made in a moment of panic. The three readings of the bill took place one afternoon inside of half an hour...The fact that the statute has never served any purpose, because no proceeding has ever been instituted under it, shows it is not necessary to have it on the statute book" (6; p.2470). These changes were also decried as making the laws ones "which the trades and labour congresses of Canada, the brotherhoods of railway employees and all the other labour organizations are protesting against" (6; p.2305). In fact, Lapointe claimed that, "all the labour unions in Canada... have been asking since 1919 for the repeal of this legislation. They have come in delegations" (6; p.2470). One member of parliament went so far as to suggest when the repeal finally occurred that the repeal was attributable "to the undertaking which was given some two years ago that the statute would be repealed and which was embodied in a letter given by the Prime Minister to the Honourable member for Winnipeg North Centre, Mr. Woodsworth, and read in the House" (6; p.2469).

The legislation passed in 1919 generated much debate during the next eleven years before the act repealing these amendments was finally passed. Lapointe, introducing a bill to restore that part of the Criminal Code dealing with seditious offences to what it was prior to the amendments adopted in 1919, stated:

"The same bill...has passed this House six times to repeal certain sections introduced into the Criminal Code in 1919. This has been debated so many times that I presume I need not again give the purpose of these changes" (7; p.2741).

The legislation "had been adopted by the House five times, and in each case it had been rejected by the Senate" (6; p.2302).

The repeal bill would have the punishment for seditious words, libel and conspiracy restored to two years' imprisonment and would reinstate the 'saving clause;' that section allowing criticism of the government. It would also repeal those clauses dealing with the offence of sedition but which were placed in the 'unlawful assemblies' part of the Code. These changes were agreed to in the House of Commons in 1928, but only those amendments relating to the punishments and the 'saving clause' were granted royal assent in 1930. The three clauses dealing with unlawful assembly, known

as 'section 98, did not gain the consent of the Senate and consequently remained in the Code.

Senator Willoughby, discussing section 98, stated in the Senate:

"On five or six previous occasions this House has decided that section 98 should not be repealed. It has been felt that the section served a useful purpose in certain communities, particularly in places where there are foreigners who are not accustomed to our democratic form of government, and who come from countries where constitutional changes are brought about by means of revolution" (12; p.387).

The position taken by the Senate may well be due to the fact that only a certain class of people were liable to suffer under section 98. As Senator Dandurand explained: "No honourable member feels that he is in danger of coming within the provisions of this section. It is only the less influential people, those who are lower down on the social ladder, who fear oppression from a law that is so loose in its phraseology that it may permit abuses by the police and other officials" (12; p.390).

Section 98 was finally repealed in 1936. The repeal could perhaps be considered the result of popular demand. In the federal election of 1935, these sections of the Criminal Code were a part of the political platforms of both the conservative and liberal parties. As Lapointe, Minister of Justice and Attorney-General, stated when he spoke on the bill, "The repeal (of s.98 relating to seditious offences) was in the platform of all the political parties during the recent election campaign... If the vote

is analyzed it is obvious that the repeal of that section (s.98) has been recommended by a tremendous majority of the electorate of Canada" (9; p.3897). In that election, the conservatives were defeated and the liberals returned to power.

The repeal of the three clauses in section 98 was repeatedly sought, claimed one member of parliament, because "we believe it is dangerous to perpetuate in peace time, enactments which are war-time measures and designed to meet special emergencies due to some extent to the natural panic which exists in time of war" (9; p.3899). However, the proposal to repeal this section was associated with a proposal to add a sub-section which described those acts considered to have a seditious intent. Her 'seditious intention' was described as "publishing, circulating, teaching or advocating the unlawful use of force to bring about any governmental change in Canada" (1; c.29, s.4). Lapointe, in supporting the proposed amendment, felt that the definition of 'seditious intention' was not necessary but that the section was added:

"merely to make it clearer that nobody can by words or writing preach the use of force to bring about governmental changes. I do it because in some of the judgments the courts seem to have required that it must be proved that the words

or the teachings were strong enough to lead to disturbances of order and trouble. This is merely to make it absolutely clear that nobody should be allowed to teach the use of force to bring about change of government in Canada" (9; p.3901).

There was much opposition to the introduction of this sub-section. Mr. Heaps, an M.P., claimed:

"The word 'sedition' is not and cannot be defined and is not defined in any of our statutes. It is an undefinable offence; as has been stated time and time again in the House, sedition depends very largely upon the time and place the act is committed or the statement is made" (9; p.3914).

A similar opinion had been expressed in 1892 when an attempt had been made to include a definition of 'seditious intention' in the Criminal Code. One member of parliament felt that the definition should be left to common law which, he stated:

"...was justly elastic. It is made by the prudence and wisdom of judges, from time to time, and the juries acting under the guidance of the judges, to suit the development of the people and the constitution" (4; p.3834).

Some members felt that the procedure adopted by the Canadian legislature in 1892 of following the example set by England, should be adopted on this occasion, too. One member of parliament stated:

"After prolonged debate in the British parliament, it was decided that it would be better to keep the word 'sedition' not defined expressly but rather left there to meet all occasions and

and to apply to all cases where order is disturbed or where there may be danger in the land. When our own criminal code was enacted the same debate took place. There were some who wanted to define the offence of sedition more specifically but the parliament of Canada of that time, in its judgment, thought it better to follow the English practice and to remain with the common law operation in that regard" (9; p.3900).

Several members, however, felt that this addition put "back into the criminal code, a great deal of what has been taken out of it by the repeal of section 98" (9; p.3910). This point was most vociferously made by Mr. Woodsworth, an M.P. from Winnipeg, who charged that:

"The Minister (Lapointe) has taken the responsibility of urging the repeal of this section, but unfortunately...what he gives with one hand he partly takes away with the other...If (as Mr. Lapointe stated) we had sufficient protection...in the criminal code, I ask him why it is necessary to strengthen the criminal code at this time by proposing a new sub-section" (9; p.3905).

Another member supporting Woodsworth's position, stated that:

"The Minister of Justice (Lapointe) has gone a certain distance in amplifying section 133, (containing the proposed definition of 'seditious intention') so as to camouflage the results accruing from the repeal of section 98 (dealing with unlawful assembly)" (9; p.3910).

After the 1919 amendments the nature of the cases brought before the courts changed. Those who were charged with sedition were now persons who were involved in the

labour movement or were members of the Communist Party or members of unorthodox religious groups. In these cases, the judges did not show any reluctance to convict. In the Russell case, where the admissibility of documentary evidence consisting of letters written by and to Russell, who was secretary of the Socialist Party of Canada in Manitoba as well as secretary-treasurer of the Railway Machinists Union in Winnipeg, from members of the Socialist Party of Canada, of other publications of that party, and of labour organizations which were referred to in the course of the trial was questioned (16; p.544).

One of the appeal court judges, ruling it regular, stated that the conviction must be upheld since the persons who planned and brought about the general strike in Winnipeg in 1919, were not acting for the purpose of a trade agreement between masters and workmen (16; p.633). He pointed out that Russell, admittedly, was one of the leaders of the general strike, which had, during a period of six weeks, interrupted business, industry and the ordinary pursuits of civil life in Winnipeg and subjected the citizens to apprehension and terror, placing the city virtually in a state of siege. Persons who were willing to work were threatened and driven from work by the strikers. The supplies of food, water and other necessities were endangered. Riots took place, injury was done to

persons and damage was done to property. This was, however, not the justification for the conviction. The ultimate purpose of the Socialist Party in Winnipeg, as stated in their public speeches, was the overthrow of the existing form of government in Canada and the introduction of a form of socialist or soviet rule in its place (16; p.634). Such sentiment however, need not have been expressed. As one M.P. pointed out, the communists who were tried and convicted in Ontario in the early 1930's were not accused or convicted of any overt acts of violence, neither were they accused or convicted of advocating violence. They were accused of belonging to a certain political organization which was affiliated with an organization in Russia and which the Canadian government illegalized twice during the leadership of Buck. (8; p.3902).

In addition to this, any criticism of an established institution was also being interpreted as sedition. This was especially so in the case of religious groups. Judge Barclay of the Appeal Court of Québec, observed in the Duval case:

"I have refrained from dealing with those sections particularly aimed at the Roman Catholic Church, because the accusation is not one of having libelled that particular institution, nor is it one of blasphemy, but it may well be that

the jury was entitled to take into consideration the insulting nature of the statement made against that Church as a reason for coming to their conclusion that these writings were intended or calculated to excite ill-will between different classes of the King's subjects and to disturb the tranquillity of the State" (13; p.280).

He further commented:

"If, in fact...the pamphlets complained of are of a seditious nature; the sincerity of the belief of those publishing them is quite irrelevant. It is also quite irrelevant to the issue whether riots or disturbances followed the seditious publication. If the publications are seditious, the accused cannot escape the consequences of their distribution because the people amongst whom they were distributed may be too wise or too level-headed to indulge in excesses" (13; p.277).

This was also apparently the situation regarding persons involved in the labour movement. Scott, commenting on the two cases of sedition in Montreal, R. v. Engdahl et al. and R. v. Chalmers et al., notes:

"The present economic depression has intensified the activities of the more radical labour groups in Canada, and the sections dealing with sedition... are being frequently invoked by the police in their endeavour to prevent the spread of undesired propaganda...Canadian courts are being asked to define the limits within which the individual in this country may exercise his rights of free speech and assembly. Every decision of this nature becomes a precedent tending to increase or diminish the area of liberty according to whether there is an

acquittal or conviction". (14; p.756) .

Scott also warned that:

"These two trials suggest that if the law of sedition is not to degenerate into an instrument for police tyranny, the courts should be careful to exact full and correct reports of speeches...The jury should not look to isolated phrases, to a strong word here or an objectionable sentence there, but should judge upon the whole gist of the speech. The net result of Montreal's enforcement of the law of sedition is that men and women are being arrested, tried and sentenced solely on the evidence of semi-literate police constables who take down in longhand isolated remarks from speeches delivered in a language with which they are very imperfectly familiar" (14; p.760).

The next amendments to the laws on sedition came in 1951. These amendments were readily accepted by parliament. They did however, provoke some comment. Regarding the section dealing with the police and the armed forces, John Diefenbaker felt it did not go far enough. Instead, he suggested that not only the overt act, but attempts to commit the acts in question should also be included in the section (13; p.4659). Regarding the proposal to increase the prescribed punishment, a member of parliament, observed that the fact "we are living in dangerous times," did not justify the government's attempt to adopt "the suppressive laws of dictatorship to preserve democracy." He concluded by cautioning the government to "bear in mind that convictions or actions under these

sections are liable to be undertaken at times when the minds of people are disturbed, when we are living on the verge of hysteria" (10; p.4660).

Garson, defending the government's position explained: "The word 'sedition' will include everything from the utterances of Jehovah's Witnesses to the utterances upon which Mr. Tim Buck was convicted back in the 1930's...The reason why there is this range of penalty, which we think is proper under present conditions, is that it is one thing to commit the offence of sedition in the piping times of peace when sedition can be indulged in without any grave danger to the country, and it is an altogether different thing to commit the offence of sedition at the present time, and it would be even more serious if it were committed during war itself. For that reason we justify the provision that we have here" (10; p.4661)..

Defending the government's proposal to increase the punishment in the revision of 1954, Garson, the Minister of Justice, stated:

"It is a reflection of the hardening of public opinion that has been going on for some time, with reference to the seriousness of the offence of general sedition when it arises, and...this hardening is probably quite soundly based when we look about us and see so many countries... in which the overthrow of free government was accomplished by seditious methods" (11; p.3705).

Another member however, countered that it was:

"an insult to Canada and the people of Canada to increase a penalty in this case when no crimes have been committed

and when the reason for that increase is supposed to be to prevent crimes of this kind" (11; p.3705).

TREASON

The first real amendment to the laws on treason came in 1915. This amendment was apparently instigated by the 1915 case in Ontario in which Joseph Snyder was charged with committing treason by violating that section of the Criminal Code, dealing with giving assistance, by any means whatsoever, to an enemy at war with the Sovereign (s.74(i)).

Although Snyder was convicted on the original count, on appeal, it was held that there was no evidence that Snyder incited or assisted the men to leave Canada. The presiding judge contended that to assist another person involves the idea of a desire or a willingness to be assisted. In this case, the four men were unaware of the purpose of their being taken to Snyder's home. Since this act of aiding an alien to leave the country did not amount to treason, the accused could not be found guilty of any violation of the Criminal Code. The judge, however, did

not consider the situation desirable and expressed the hope that a provision would be enacted to cover such cases in the future (4; p.327).

During a debate in the House of Commons, reference to the Synder case was made:

There is also embodied in the bill a provision which is the result of a suggestion coming from one of the Chief Justices of one of the High Court Divisions of Ontario ...which he deemed it proper to make in view of the result of a prosecution instituted...against a person for aiding an individual of alien enemy nationality to leave the country" (1; p.1218).

The then Minister of Justice, Mr. C.J. Doherty, further contended that the change was to establish the offence of assisting an enemy without the prosecution having to establish any direct purpose of assisting the enemy. The onus of the proof would rest with the defence (1; p.1218). The debate however, was very short and the bill was passed.

The laws concerning treason thereafter remained unaltered until 1951, though there was a consolidation of the Code in 1927. In 1951, the amendment involved the section defining treason as "assisting any public enemy at war with His Majesty in such war by any means whatsoever" (s.74(i)), first included in the 1892 Code.

Until 1951, under the existing law, treason would

only be committed within Canada. The intent of the 1951 amendment in the law made treason an offence that could be committed anywhere in the world enabling the Canadian government "to deal with persons who go out of Canada and who...give aid and comfort to a country which would be described as an enemy, even though that country was not legally at war with Canada" (2;p.4639).

At the time of the proposed amendment, Canada was engaged in hostilities with China and Korea and the proposed legislation was apparently an attempt to prevent Canadians from fighting in Korea against the United Nations and Canadian Forces. This proposed amendment caused much debate in the House of Commons. John Diefenbaker; then leader of the opposition party, was opposed to the change. Although he felt the change was laudable, he claimed that its implications were dangerous.

In his argument, Diefenbaker stated that no other countries of the commonwealth had introduced provisions for treason that could compare to this one. No case, in four of five hundred years of legal interpretation of treason cases, went as far as this amendment. He questioned what authority there was for introducing such a law and whether or not the law officers of the Crown had concluded that such a course was lawful. He therefore suggested that the

House not pass the amendment because it was not within the powers and jurisdiction of Parliament (2; pp.4632, 4633).

Several instances were cited in which persons from Canada had gone behind the Iron Curtain and returned to glorify what they had seen. Other persons had gone to Korea to give comfort to the forces operating against the United Nations. Diefenbaker compared the proposed legislation to the Treachery Act passed in 1940 which was also passed under the exigencies of the moment. The purpose of the Treachery Act was to protect Canada from within. That Bill was rushed through Parliament very quickly and because it contained so many loopholes, it was never used during the entire period of the second World War. Referring to the proposed amendment to the laws on treason, Diefenbaker stated: "I feel that we are leaving a loophole through which any guilty Canadian could escape by simply saying: If I had assisted an enemy at war, I would have been guilty; but because of the fact that I was assisting a country against which Canada is engaged in hostilities by reason of her obligation under the United Nations, I am not guilty of any attempt because I did not assist the armed forces" (2; p.4646).

Further, Diefenbaker felt the intent of the proposed

legislation to be something different. He claimed:

"We want to make it a treasonable act for Canadians to use their citizenship in order to go abroad and there to assist the government of Korea or of any other nation with which, in the future, we may not be officially at war as a nation but will be in the position of a punitive agency under the United Nations. ...We want to deny to Canadians the opportunity to use their citizenship abroad in effect to destroy Canada's efforts in that regard and to endanger human lives, and the opportunity to say that by reason of the fact they do not directly assist the enemy they are guilty of no offence" (2; p.4646).

Changes were further proposed to the laws on treason in 1954. Members of parliament expressed their concern over the proposed changes mainly because of letters from the public. One such letter which reflected well the sentiment was written by people at Carleton College in Ottawa. It read:

"We do not question the right or the necessity of the crown to exercise vigilance in a time of international tension...What does 'assists' mean? Justice Minister Garson has said..."assisting means assisting in any way whatsoever"...This consideration aside, Saturday Night ... editorialized on this clause... "The extreme uncertainty and obscurity of the new definition of treason which makes it cover, not merely assistance to an 'enemy' but also assistance to 'any armed forces' against whom, etc.,... The existence of a state of war, and consequently of a defined enemy, is a matter of proclamation" (3; p.3676).

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CHAPTER VICONSENSUS OR CONFLICT

The difference between the consensus and conflict theories of legislation, it has been pointed out, lies in the fact that while consensus theory looks upon legislation as a compromise of conflicting interests in society, conflict theory postulates the supremacy of dominant groups. The analysis of the changes that have occurred in the Canadian laws on sedition and treason and the relationship of these changes to the social setting in which they emerge will now be examined to determine whether the changes support the conflict or consensus models.

As far as the laws on sedition are concerned there was an increase in criminalization in 1919. The increase, occasioned by the repeal of what has been called the 'saving clause', constitutes an expansion of the parameters of behavior deemed to be criminal.

The reinstatement of the 'saving clause' in 1930 was decreased criminalization in as much as it did limit the parameters of prescribed behaviour, although the offence of sedition was not altered per se.

The removal in 1954 of the section describing the offence of spreading false news likely to cause public mischief from the seditious offences part of the Code and its placement in that part dealing with sexual offences, public morals and disorderly conduct, cannot be considered a real change as it did not effect the prescribed behaviour.

The repeal in 1936 of three clauses describing seditious acts is a decrease in criminalization but in as much as it was produced by the introduction of another section which effectively negated the consequences of the repeal, the repeal cannot be considered one of decreased criminalization.

An increase in criminalization occurred in 1951, with the addition of the section that made it seditious to undermine the loyalty of the armed forces or the police.

The repeal in 1954 of the three sections dealing with the taking and administering of unlawful oaths for the purpose of committing a seditious offence and a fourth dealing with the unlawfully publishing of any libel tending to degrade a foreign Sovereign, is an instance of decreased criminalization.

Other changes that have been made deal with the prescribed punishment. Referring to this as penalization to distinguish it from the changes in the parameters of prescribed behaviour which has been termed criminalization, we find both increased and decreased penalization occurring over the years. 'Increased penalization' occurred first in 1919 with an increase in penalty for seditious words, libel and conspiracy from two years' imprisonment to twenty. There was a decreased penalization when, in 1930, the punishment was reduced from twenty years' imprisonment to two. There was increased penalization in 1951, with the change in punishment from two years' incarceration to seven and again in 1954, when the punishment was again changed from seven years' to fourteen years' incarceration.

At the time of the first change in 1919, there were three sets of factors that could have motivated the changes. First, there were the changes in sedition laws made in the United Kingdom and the United States. The Canadian laws on sedition were more or less the same as those in the United Kingdom and changes in the latter could have been conceived of as demanding changes in the former. Second, there were the cases of sedition in which judges thought the change amounted to an abuse of the law, suggesting the possibility that the wording of the law

was ambiguous and unclear. Third, there were the socio-economic conditions which tended to presage a change in the power structure of the country, demanding an alteration in the law to maintain the status quo.

It is clear that the changes wrought to the sedition laws in 1919, were not designed to remove ambiguity and increase clarity. They could however, reflect English and American changes. Even so, blind reflection could not be concluded. The likelihood is that the third set of factors played the potent part. Canada was going through a change in social conditions at this time. The first World War had ended in 1918, and the Russian Revolution, resulting in the establishment of a communist regime, had occurred just prior to this. There was a growing fear, the world over, that communism would spread and Canada was not immune to this fear. Aggravating the fear were the several labour strikes in Winnipeg staged by members of the newly formed Socialist Party of Canada.

The social setting in which the changes occurred suggest operation of the conflict model. This model is based on the idea of a society characterized by diversity and conflict, resolved through coercion and constraint, while the consensus model postulates the resolution of differences through compromise. Both models accept the fact of social change, of differences of opinion, of the

necessity for legal change and the essential reflection of the social changes in the legal changes. Both models are consistent with either increase or decrease in either criminalization or penalization in the face of either apparent social turmoil and turbulence or apparent peace and tranquility. Both models recognize the necessity for periodic re-alignments of interpersonal relations as well as periodic reaffirmations of existing patterns of interpersonal interactions. The crucial criteria consequently appears to be the presence or absence of popular demand for and popular protest against the changes on the one hand, and the consequences of the changes in peculiar disadvantages to which particular groups of people may become subjected.

Associated with the 1919 changes is an apparent absence of crucial criteria that would justify the conclusion of the operation of the conflict model. What could perhaps have been called the discriminatory prosecution of members of particular groups who made statements about the war ceased. However, members of certain other groups involved in the growing labour movement were being prosecuted. What is more, these persons were being voted into the federal and provincial legislatures even while they were imprisoned - a distinct expression of public disapproval of the legislation. These changes are suggestive of the operation of the conflict model.

The changes in 1930 repealed the 1919 amendments, and restored the sedition laws to their original form. What is interesting about these changes is that in the eleven intervening years, several attempts had been made to repeal the amendments in response to much expression of public dissatisfaction with the laws as they existed, but the changes were vehemently opposed by the Senate. This lends further support to the operation of the conflict model.

Although Canada in the early 1930s was not involved in or recovering from a war, she was in the throes of an economic depression and a severe unemployment situation existed in the country. There was in this context, as existed in 1919, groups of people whose behaviour was in conflict with and threatening the interests of yet another group. If the changes in 1919 are interpreted as an expression of the power of those seeking to preserve the existing order, then the changes of 1930 appear to be the expression of power of those seeking to change it.

The circumstances surrounding the change tend to indicate the operation of the conflict model. Supporting this conclusion even further was the fact that persons attempting to change the nature of Canadian society, such as Buck, founder and leader of the Communist Party of Canada and fellow party members were charged with seditious conspiracy as were

Brodie and a host of others, all members of the Witnesses of Jehovah. In both cases, it is perhaps important to note, the defendants were found not guilty due to lack of evidence to support an alleged intent to overthrow the government of Canada..

Concerning the addition of a sub-section defining the terms 'seditious intention', during the federal election of 1935, those sections in the Code dealing with seditious offences were included in the political platforms of both the conservative and liberal parties. The repeal of the clauses which deemed it unlawful for any society to forcefully bring about governmental, industrial or economic change within Canada and, prohibited the mailing and circulating of seditious material was made an issue by both parties and was endorsed by the electorate. The repeal was made as promised. Such a change would lend support to the consensus model which advocates that legal changes are brought about through popular demand. However, the repeal of the sections was associated with the enactment of another section which negated the effect of the repeal. This associated with the fact that the prosecution of several members of the Witnesses of Jehovah religious sect in Québec continued, supports the conflict theory with the consensus appearance utilized to obscure the magnitude of the conflict.

The next changes to the sedition laws occurred in 1951. At this point in time, Canada was engaged in hostilities with Korea although an official state of war did not exist. Although members of parliament vehemently promoted and vehemently opposed these changes, there was no public outcry and no prosecutions launched as a consequence.

The changes to the sedition laws in the 1954 Criminal Code revision promote an interpretation more or less similar to that made of the 1951 changes. There was at this time in the United States a tremendous fear of Communism spreading with a witch hunt now referred to as McCarthyism. It is quite conceivable that this fear swept northward into Canada. But, here again, there was no public demand, no public outcry and no prosecutions following the change.

In summary, the changes suggest the operation of the conflict model of law in which a powerful few maintain their advantaged position by using state power to coerce the mass of people into doing what is consistent with their best interests. Whenever there appeared to be a threat internal or external to society or a change in the social structure, there has been a re-examination of the law and a re-definition of the parameters of acceptable social behaviour, ostensibly in keeping with the interests of the majority but factually against the interests of particular groups.

The first change to the laws of treason occurred in 1915, when a section was added which deemed it an indictable offence, subject to two years' imprisonment, to assist an enemy alien to leave Canada without the Crown's consent. In extending the parameters of criminal behaviour it is an increase in criminalization.

An increase in criminalization also occurred in 1951, when the act of assisting an enemy at war with Canada or any armed forces against whom the Canadian Forces were engaged in hostilities was defined as treasonable. There were also an increase in criminalization at the time of the revision of the Code in 1954, when the treason laws were subjected to major changes. The increase in criminalization came with the addition of sections deeming it to be an act of treason first, to communicate military or scientific information to a foreign agent for purposes prejudicial to the safety and defence of Canada, second, being a Canadian citizen to do any of the acts considered to be treason, while in or out of Canada, and third, to assist either an alien enemy or a subject of a state whose forces are engaged in hostilities with Canadian Forces, whether or not a state of war exists between the two countries.

A decrease in criminalization also occurred at this time with the repeal of several sections such as those dealing with

the killing of the son of the sovereign, violating a Queen consort, instigating a foreigner to invade the U.K. or Canada, and waging war against the sovereign.

The amendment introduced in 1955, changing the treasonable act from waging war against the sovereign to waging war against Canada, constitutes no real change in criminalization.

An increase in penalization occurred in 1954, when the punishment for aiding alien enemies was increased to twenty years in prison, and when the penalty for failing to inform the authorities of an act of treason about to be committed was increased from two to fourteen years' imprisonment.

At this time, there was also a decrease in penalization. While overt acts of treason were still governed by the death penalty, that for conspiring or forming an intention to commit an overt act was decreased in some instances. Decreased penalization occurred again with changes in the death penalty. When it was no longer applicable to Criminal Code offences, those treasonable acts which were subject to the death penalty became punishable by imprisonment for life.

The first change in treason laws, an increase in criminalization, was obviously made to correct a flaw in the existing law. Made at a time when the country was involved in a war, without either public demand or public protest, it could perhaps be considered the operation of the consensus

model. The amendment resulted in the institution of a number of cases, all dealing with assistance rendered to an alien enemy. These cases, however, have not been prosecutions of members of any particular group but rather prosecutions of aliens who could have been considered unsympathetic to the British cause.

There was no public demand nor public outcry. Neither were there any prosecutions following the change.

The major changes in the treason laws were made in 1954. These changes apparently produced considerable public concern. References were made in the parliamentary debates to the enormous amount of correspondence received from members of parliament from constituents who were opposed to the proposed changes. M.P.'s were bombarded with letters from the Canadian peace conference and other organizations interested in civil liberties and human freedom. These groups were criticizing the proposed changes and asking to have these changes explained more specifically. The public was demanding that the extreme uncertainty and obscurity of the proposed definitions of treason be clarified before it was passed as law.

There is some indication that the Communist scare present in the United States in the 1950's played a role in the proposed legal changes. It was suggested that the

amendments were quietly wrangled into the Code with the least possible advance notice and were drafted very hastily and upon the urgent instigation of the U.S. With the Korean hostilities ended and the concern over the possible spread of communism, it is likely that the dominant power at the time altered these laws relating to the political order of the state in order to secure and protect their interests in the existing political order in an otherwise unstable period in Canada. These facts lend support to the conflict model of law. However, it must be pointed out that as a result of the changes, no prosecutions were launched.

The final changes to the treason laws occurred in 1976. Here, treason offences were divided into treason and high treason. The punishments were also altered to include imprisonment for life or fourteen years' incarceration. These amendments were instituted because the government at the time, wanted to abolish the death penalty for all criminal offences, for humanitarian reasons. It is difficult to determine what percentage of the public were in favour of the abolition of the death penalty and what percentage wanted it retained. Gallup polls indicated that more people favoured retention. The members of parliament were given a 'conscience vote', and the vote was close. It is difficult to determine which theory of law this amendment supports.

The changes to the laws of treason and the cases studied provide support for the conflict model of law. Not only is the formal process of criminalization conflictual in origin, it is conflictual in result as well.

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