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CRIMINAL APPEALS IN CANADA

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The governmental system of Canada, like that of the United States, is federal in nature. But the two systems are hardly mirror images. From an examination of the problems of judicial organization, the criminal law, and appellate review in the Canadian system, the student of American law may gain insights useful to the understanding of his own.

Unlike our federal government, the Canadian Dominion Government is limited not by defining its functions but by establishing an area of jurisdiction upon which it must not encroach. In contrast with the Tenth Amendment of the United States Constitution, the British North America Act delimits the powers of the subordinate governmental agencies, i.e., the provinces, and leaves the residue of power to the central government.¹ Among those powers exclusively vested in the Dominion Parliament is the authority over criminal legislation.² The provincial legislatures,

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1. 30-31 Vict., c. 3 (1867) [hereinafter cited as B.N.A. Act]. See also H. SMITH, *FEDERALISM IN NORTH AMERICA* (1923); W. KENNEDY, *THE CONSTITUTION OF CANADA* (1938); R. DAWSON, *THE GOVERNMENT OF CANADA* (1963); B. LASKIN, *CANADIAN CONSTITUTIONAL LAW: CASES, TEXT & NOTES ON DISTRIBUTION OF LEGISLATIVE POWER* 1 *passim* (1960).

2. B.N.A. Act § 91(27). See also LASKIN, *supra* note 1, at 823ff.

There is a provincial power to impose fine and imprisonment. Such law is commonly called "quasi-criminal," but, except for the need to preserve the constitutional division, it is indistinguishable from Dominion criminal law. Most provinces, for example, make it an offense to drive an automobile imprudently. Mere imprudence differs from recklessness in the theory of criminal responsibility, and so these provincial acts do not clash with the Criminal Code provisions banning reckless driving. *O'Grady v. Sparling*, 25 D.L.R. (2d) 145 (1960).

The provincial law must be based upon some class of subjects within the

however, are expressly empowered to legislate with respect to the administration of justice, including the maintenance and organization of the courts.³ The chief responsibility, thus, for the enforcement of the criminal law rests with the Attorney-General of each province, although the law itself is embodied in a Dominion code.⁴

This code is administered in a consolidated, unilinear court system which avoids the parallel federal and state jurisdictions

provincial field of jurisdiction and the power itself is not an independent source of legislation. If there is a clash, federal law prevails. But occasionally the idea of exclusive powers works out so that a provincial penal enactment will be held *ultra vires*, although it does not clash with a federal statute. V. MACDONALD, *CONSTITUTIONAL LAW: VALIDITY OF PROVINCIAL LEGISLATION* 3 (1951); LASKIN, *supra* note 1, at 71.

The Dominion, on the other hand, cannot by purporting to enact a criminal law under its admitted powers "appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority," and the courts have nullified such attempts. *Atty.-Gen. Ontario v. Reciprocal Insurers*, [1924] A.C. 328.

3. B.N.A. Act § 92(14).

Section 101 of the B.N.A. Act, which directs the Parliament of Canada to establish a general court of appeal, also enables it to provide for "the Establishment of additional Courts for the better Administration of the Laws of Canada." It is debatable whether the Parliament could establish courts for the ordinary administration of the criminal law in the provinces. *See Atty.-Gen. Ontario v. Atty.-Gen. Canada and Atty.-Gen. Quebec*, [1947] A.C. 127; LASKIN, *supra* note 1, at 803ff.

4. 1953-54 (Can.), c. 51.

Canadian courts like those of the U.S. are the appointed guardians of the Constitution, but the B.N.A. Act offers a much more limited scope for judicial interpretation than does the U.S. Constitution. *See, e.g.*, Haines, *Judicial Review of Legislation in Canada*, 28 HARV. L. REV. 565 (1915); Grant, *Judicial Review in Canada: Procedural Aspects*, 42 CAN. B. REV. 195 (1964). In practice, only one constitutional question ever comes before the Canadian courts, *i.e.*, the question of the distribution of legislative power between the Provinces and the Dominion. Thus, the "Dominion's Criminal Law power looms as an effective constitutional restraint on provincial laws that aim at circumscribing political and religious liberties." Russell, *The Supreme Court's Interpretation of the Constitution Since 1949*, in *POLITICS: CANADA* 76 (P. Fox ed. 1962). *See, e.g.*, *Saumur v. Quebec*, [1953] 2 S.C.R. 299, 4 D.L.R. 681; *Birks and Sons (Montreal) Ltd. v. Montreal*, [1955] S.C.R. 799; *Switzman v. Elbling and Atty.-Gen. Quebec*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337. But no Canadian statute, whether Dominion or provincial, can ever be declared invalid on the ground that it violates some principle which the Constitution has protected from all legislative interference.

In 1960, a Dominion Bill of Rights was provided for by statute. 8-9 Eliz. 2, c. 44. *But see* *R. v. Gonzales* (1961) 35 C.R. 155; *R. v. Steeves* (1964) 1 C.C.C. 266, 42 D.L.R. (2d) 335; *Re Williams v. Williams* (1961) 29 D.L.R. (2d) 107; *Wolfe v. Robinson* (1961) 31 D.L.R. (2d) 233 (1962) O.R. 132.

See also SCOTT, *CIVIL LIBERTIES AND CANADIAN FEDERALISM* (1959); SCHMEISER, *CIVIL LIBERTIES IN CANADA* (1964); LASKIN, *supra* note 1, at 938ff.

characteristic of American judicature.⁵ The superior court of record in each province is part of a unitary structure leading directly to the Supreme Court of Canada.⁶ There is no court of criminal appeal similar to that in England, but questions of law arising in a criminal trial may be reserved and brought before the provincial court of appeal, and if that court is not unanimous, appeal may be had to the Supreme Court.⁷

I. THE RIGHT OF APPEAL

The right to such an appeal, however, is regarded by Cana-

5. One of the principle advantages of this single system of judicial administration is greater legal uniformity than is common in the U.S. Inasmuch as the criminal law is under the jurisdiction of the federal Parliament, it is uniform throughout the Dominion. There is, however, a so-called "provincial criminal law" consisting of offenses created by the Provinces for the enforcement of provincial legislation. B.N.A. Act § 92(15). See generally Grant, *The Search for Uniformity of Law*, 32 AM. POL. SCI. REV. 1082 (1938); Willis, *Securing Uniformity of Law in a Federal System—Canada*, 5 U. TORONTO L.J. 352 (1944). But see note 11 *infra*.

6. Concerning the legal definition of "court of appeal" and the jurisdictions thereof, see CAN. CRIM. CODE § 2(9).

Since 1949, the Supreme Court of Canada has been the final Court of appeal for the Dominion. 1949 (Can.), 13 Geo. 6, c. 37; R.S.C. 1952, c. 259, § 54. Prior to that date, the Judicial Committee of the Privy Council, sitting in London, was the final appellate court in most Canadian cases. See *R. v. Bertrand* (1867) L.R. 1 P.C. 520, 530; *R. v. Coote* (1873) L.R. 4 P.C. 599. In 1888, a section of the Canadian Criminal Code prohibited criminal appeals to the Judicial Committee. But this section was declared *ultra vires* in 1926 on the grounds that its effective worth depended upon extraterritorial powers which a dominion statute could not have and because it was repulsive to the Privy Council Acts, applying to Canada and which Canada could not alter or repeal. *Nadan v. R.* [1926] A.C. 482. Cf. 23 & 24 Geo. V, c. 53, § 17; *British Coal Corp. v. R.*, (1935) 51 T.L.R. 508. See LASKIN, *supra* note 1, at 821ff.

Regarding contemporary Canadian sentiment concerning appeals to the Privy Council, see Raney, *Nations Within the Empire*, CANADIAN MAGAZINE, February, 1921, at 291; Tupper, *The Position of the Privy Council*, J. COMP. LEGISLATION (3d), v. iii, pt. iv; W.P.M. Kennedy in 13 CAN. B. REV. 621 (1935); and especially F.R. Scott in 15 CAN. B. REV. 485 (1937).

In addition to the Supreme Court of Canada, there is but one other federal court in the Canadian judicial system, the Court of Exchequer and Admiralty. See DAWSON, *supra* note 1, at 424-25.

7. The appellate provisions of the Canadian Criminal Code are contained in §§ 581-601, which are largely derived from §§ 1012-1022 of the former Code enacted in 1923. 1923 (Can.), c. 41. These sections were themselves generally dependent upon the British Criminal Appeal Act, 1907, Imp., c. 23. Although there are important differences between the Canadian Code and the Criminal Appeal Act, the two are so closely related that the decisions of the English Court of Criminal Appeal have very persuasive authority in Canada. See, e.g., *R. v. Lauzon*, 74 C.C.C. 37, [1940] 3 D.L.R. 606 (Que. C.A.), applying *Trimble v. Hill* (1880) 5 App. Cas. 342, 49 L.J.P.C. 49.

dian jurisprudence as "exceptional."⁸ Thus, no statute conferring or enlarging upon a right of appeal has ever been applied retroactively to permit an appeal from a decision rendered prior to the passage of the Act.⁹

A. *Right of Appeal of Person Convicted*

The present statutes allow a person convicted by a trial court to appeal to a court of appeal either against his conviction or against his sentence.¹⁰ An appeal against conviction may be had by the accused on any of the following grounds:

- (1) on a question of law alone;
- (2) on a question of mixed law and fact;
- (3) upon the certificate of the trial court that the case is a fit one for appeal; or,
- (4) upon any other ground which appears to the court of appeal to be a sufficient ground for appeal.

An appeal against sentence, however, can be had only in those cases where the sentence is not one fixed by law.¹¹

B. *Right of Appeal of Attorney-General*

That feature of Canadian criminal appeals which is most strikingly different from the criminal procedure common in the United States is the provision for appeals by the Attorney-General

8. *Welch v. R.* [1950] S.C.R. 412, 3 D.L.R. 641.

9. *R. v. St. Onge*, (1923) 26 Que. P.R. 4 (C.A.).

10. CAN. CRIM. CODE § 583.

11. As noted *supra* note 5, the Canadian system of judicial organization results in a high degree of uniformity of law. See also *R. v. Lee Kim* [1930] 2 W.W.R. 441, 42 B.C.R. 360. But with the great variety in circumstances and with the extensive discretion left in most cases as to punishment, it is practically impossible to achieve any uniformity as to sentences. *R. v. Gordon* (1924) 25 O.W.N. 572 (C.A.); *R. v. Young* [1933] O.W.N. 777 (C.A.); *R. v. Zizu Natanson* [1927] 2 W.W.R. 154, 49 C.C.C. 89 (Sask. C.A.). As O'Halloran, J.A., pointed out in *R. v. Switliff* [1950] 1 W.W.R. 913, 9 C.R. 428 (B.C. C.A.): "There is no such thing as a uniform sentence for a particular crime. No doubt in somewhat similar circumstances it is desirable to avoid marked disparity in sentences. But the individual himself and his surrounding conditions cannot be ignored." See also *R. v. Simpson* (1956) 114 C.C.C. 152 (Ont. C.A.); *R. v. Lemire and Gosselin* (1948) 5 C.R. 181, 92 C.C.C. 201 (Que. C.A.); *R. v. Carriere* (1952) 14 C.R. 391 (Que. C.A.). "There is also the question to what area should the attempt at uniformity extend? Winnipeg, Manitoba, or Canada?" *R. v. Jourdain and Kudyba* (1958) 28 C.R. 125, 25 W.W.R. 160, (Man. C.A.) (Coyne, J.A.). See also opinion of Stuart, J.A., in *R. v. Adams* [1921] 3 W.W.R. 854, 65 D.L.R. 211 (C.A.).

against a judgment of acquittal by a trial court, on any ground that involves a *question of law alone*, or against a sentence passed by a trial court, unless that sentence is one fixed by law.¹² This is not to say that the Crown, even though it may unearth new and crucial evidence, may institute new proceedings against a person who has been previously acquitted or convicted of the offense.¹³ Indeed, the initiation of a second jeopardy for the same offense is proscribed by sections 516-519 of the Criminal Code, dealing with the special pleas of *autrefois convict* and *autrefois acquit*.¹⁴ According to Haultin, C.J.S., writing in *R. v. Bayn*, the maxims set forth in sections 516-519, "state a fundamental rule of our criminal law, which does not permit a person to be put in jeopardy twice for the same offense."¹⁵

Problems, however, have arisen in Canadian jurisprudence in connection with attempts to set forth standards by which the identity of offenses may be tested. One test which has been suggested is whether the facts out of which the two prosecutions arose are the same.¹⁶ But this test was severely criticized by Lord Reading, C.J., in *R. v. Barron*.¹⁷ According to Lord Reading, the true test is the "substantial identity" of the offense with

12. Though former section 1013(4) conferred the right of appeal solely upon the Attorney-General of a Province, section 601 of the revised Code now confers an equal right of appeal upon the Attorney-General of Canada. *R. v. Gallant (Harry and Frank)* (No. 2) 83 C.C.C. 55, [1945] 1 D.L.R. 471 (P.E.I. C.A.); *R. v. Perry*, 18 M.P.R. 144, 84 C.C.C. 323, [1945] 4 D.L.R. 762 (P.E.I. C.A.); *R. v. Hodgson* (1927) 59 N.S.R. 202, 47 C.C.C. 171 (C.A.). Concerning who is an "Attorney General," see *R. v. Brewerton* [1936] 3 W.W.R. 433, 4 D.L.R. 703 (Alta. C.A.).

The contrary American rule is stated in *Kepner v. U.S.*, 195 U.S. 100 (1904) (Fifth Amendment double jeopardy protection prevents appeal by Government after verdict of acquittal). See also *Forman v. U.S.*, 361 U.S. 416 (1960); *U.S. v. Shotwell Mfg. Co.*, 355 U.S. 233 (1957); *Sapir v. U.S.*, 348 U.S. 373 (1955); *U.S. v. Evans*, 213 U.S. 297 (1909); *U.S. v. Sanges*, 144 U.S. 310 (1892).

13. *R. v. Sheen* (1827) 2 Car. & P. 634, 172 Eng. Rep. 287.

14. Canadian law correspondingly proscribes a second conviction for a related offense if both charges arise out of the same series of events or if the evidence necessary to sustain both charges is identical. *R. v. Georgieff and Dickemous*, [1955] Ont. W.N. 148, 20 C.R. 142 (C.A.); *R. v. Nugent*, [1955] Ont. W.N. 291, 20 C.R. 360 (C.A.); *R. v. Harper*, [1950] Ont. W.N. 791, 11 C.R. 31 (C.A.). The initial conviction constitutes a bar to prosecution for the related offense. *R. v. Harper*, [1950] Ont. W.N. 791, 11 C.R. 31 (C.A.).

15. [1932] 2 W.W.R. 113, 59 C.C.C. 89 (C.A.).

16. *R. v. King* [1897] 1 Q.B. 214, 18 Cox C.C. 447 (C.A.).

17. [1914] 2 K.B. 570, 10 Cr. App. R. 81. See also *R. v. Kendrick and Smith* (1931) 23 Cr. App. R. 1, 29 Cox C.C. 285 (C.A.); and *R. v. Blanchet* (1919) 30 Que. Q.B. 66, 61 D.L.R. 286 (C.A.).

which the accused is charged with that for which he was formerly acquitted or convicted, or of which he might have been convicted upon the former indictment.

Lord Reading's formulation, i.e., the test is the similarity of offenses and not the similarity of the facts that support the charges, is the rule currently followed in Canada.¹⁸ As a result, an acquittal is considered as an acquittal not only of the offense actually charged, but also of all other offenses of which the accused might have been found guilty under the former indictment. For example, since a jury may always on an indictment for murder, convict for manslaughter, an acquittal on a charge of murder will support a plea of *autrefois acquit* if the accused is later indicted for manslaughter with respect to the same homicide.¹⁹ On the other hand, if the offense charged in a subsequent prosecution is not one for which the accused could have been convicted under the former indictment, the plea of *autrefois acquit* or *autrefois convict* is inapplicable.²⁰ The basis of the special pleas is that the accused may not be placed in jeopardy twice for the same offense, and it must follow that if, in the first prosecution, he was not actually in jeopardy the special pleas are irrelevant.²¹

Thus, Canadian law prohibits the Crown from placing a criminal suspect in jeopardy with respect to the same offense more

18. R. v. Beechin (1958) 119 C.C.C. 182 (N.B. C.A.); R. v. Lamontagne [1945] O.R. 606, 4 D.L.R. 161 (C.A.); R. v. Brown [1945] O.R. 869, [1946] 1 D.L.R. 741 (C.A.). See also R. v. Logan (No. 1) [1944] 1 W.W.R. 101 (Alta. C.A.); R. v. Badiuk, [1930] 1 W.W.R. 210, 2 D.L.R. 318 (C.A.).

The American rule on successive prosecutions for similar offenses is discussed in *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (Brennan, J., concurring). See also *Gore v. U.S.*, 357 U.S. 386 (1958); *Ciucci v. Illinois*, 356 U.S. 571 (1958); *Blockburger v. U.S.*, 284 U.S. 299 (1931).

19. R. v. Ferguson [1945] 2 W.W.R. 230, 3 D.L.R. 535 (Sask. C.A.). See also R. v. Weiss and Williams (No. 1) (1913) 4 W.W.R. 1358, 13 D.L.R. 166; (No. 2) 5 W.W.R. 18, 13 D.L.R. 632; R. v. Cameron (1901) 4 C.C.C. 385 (Ont.).

The rule is the same in the U.S., *Green v. U.S.*, 355 U.S. 184 (1957); *Price v. Georgia*, 398 U.S. 323 (1970). But cf. *Stroud v. U.S.*, 251 U.S. 15 (1919); *Trono v. U.S.*, 199 U.S. 521 (1905).

20. R. v. Barron, [1914] 2 K.B. 570, 10 Cr. App. R. 82; R. v. Quinn (1905) 11 Ont. L.R. 242, 10 C.C.C. 412 (C.A.). The circumstances, however, may be such as to give rise to the doctrine of *res judicata*.

21. R. v. Schwartz, 15 M.P.R. 575, [1941] 2 D.L.R. 332 (N.S. C.A.) (Hall, J.); *Vaux's Case* (1591) 4 Co. Rep. 44, 76 Eng. Rep. 992 (C.A.).

See R. v. Dunn [1945] 2 W.W.R. 495, [1945] 4 D.L.R. 297 (C.A.) (the quashing of an indictment does not permit a plea of *autrefois acquit*); R. v. *Considine* (1885) 8 L.N. 307 (Que.) (the discharge of a jury without giving a

than once. But appeal by the prosecution upon a legal question from the trial of the first instance is considered to be a continuation of the original jeopardy not an initiation of a second jeopardy.

II. THREE PROBLEMS

Obviously the allowance for appeal by the prosecution from a decision dismissing a criminal charge is a deviation from the common law norm. As might be anticipated, Canada has experienced certain technical problems with the scheme. Two of the most critical difficulties have been definitional in nature, while a third involves the rules of evidence.

A. *Law or Fact?*

Apart from the appeal specially provided in capital cases,²² it is only on questions of law that there is any right of appeal without leave of the court of appeal.²³ An accused may appeal, with leave, either on any ground involving a question of mixed law and fact or on any other ground which appears sufficient to the court. But the Crown is not entitled to appeal against an acquittal in any case except on questions of law.²⁴ Attorneys-General, however, have at times succeeded in bringing appeals upon grounds which would seem at first glance to be questions of fact. For example, although a jury's finding of fact is not a question of law and cannot be reviewed on appeal by the Attorney-General, a conclusion of mixed law and fact, such as the guilt or innocence of the accused, may depend upon the legal effect of certain findings made by the judge or jury and as such has been held to be a question of law.²⁵ Thus, the question whether the

verdict is not equivalent to an acquittal); *R. v. Somers* [1929] 2 W.W.R. 366, 3 D.L.R. 772 (C.A.) (the withdrawal of an information before an accused is called upon to plead will not constitute an acquittal).

See also *Re R. v. Eicker*; *Re R. v. Fry*, 64 O.L.R. 1 [1929] 3 D.L.R. 760 (C.A.) (Riddell, J.A.); *R. v. Crystal Dairy Ltd.* [1938] 3 W.W.R. 470, 4 D.L.R. 427 (C.A.); *R. v. Rowat* [1928] 2 W.W.R. 633 (Sask.); *Blanchard v. Jenkins* (1930) 55 C.C.C. 77 (Man.).

22. CAN. CRIM. CODE § 597A grants an extraordinary right of appeal to the Supreme Court to a person convicted of a capital offense. He may appeal, without leave of the Court, either on law or on fact. See, e.g., *Lucas v. R.* (1963) 39 C.R. 101, appeal dismissed.

23. This is given to convicted persons by section 583(a)(i) and to the Attorneys-General by section 584(1)(a) of the CAN. CRIM. CODE.

24. Appeals against sentence, by either the accused or the Crown, require the leave of the Court of Appeal.

25. *Belyea v. R.*; *Weintraub v. R.* [1932] S.C.R. 279, 2 D.L.R. 88. *But cf.*

ground of appeal is a question of law or one of fact is of critical importance.²⁶

B. *What is an Acquittal?*

The legal definition of "acquittal" constitutes a second major problem in connection with appeals by the Crown. Being an exception to the common law rule, the right of appeal by the prosecution can be established only by very clear statutory language.²⁷ Under the present Criminal Code, Canadian Attorneys-General can appeal only in cases of acquittals, and Canadian courts have strictly confined this right of appeal to the language of the enactment creating it, refusing to allow the Crown to appeal from an order quashing an indictment.²⁸ But, where a magistrate did not dispose of the charge to which the accused had pleaded

R. v. Grotsky [1935] 3 W.W.R. 257, [1936] 1 D.L.R. 128 (Sask. C.A.); R. v. Ransley [1942] 1 W.W.R. 783, 2 D.L.R. 520 (Alta. C.A.); R. v. Bower [1941] O.R. 51, 2 D.L.R. 269 (C.A.).

26. For a particularly thorough discussion of the problem, see R. v. Ashcroft [1942] 3 W.W.R. 455, [1943] 1 D.L.R. 146 (B.C. C.A.).

It has been held that questions of admissibility of evidence are questions of law. R. v. Rasmussen, 9 M.P.R. 41, [1935] 1 D.L.R. 97 (N.B. C.A.). See *infra* concerning improper rulings on evidence as grounds for appeal.

On the other hand, if a trial judge rejects evidence of a confession, not on the ground that it has been illegally obtained, but merely because he is not satisfied that it was freely and voluntarily made, there is no question of law involved, and the Crown cannot appeal from a subsequent acquittal. R. v. Boisjoly (1955), 22 C.R. 19 (Que. C.A.); R. v. Marakami (1951), 1 W.W.R. (N.S.) 742, 12 C.R. 12, *aff'd on other grounds* [1951] S.C.R. 801, 4 D.L.R. 370; R. v. Dreher (1952), 5 W.W.R. 377, 14 C.R. 399 (Alta. C.A.).

But an appeal may be brought where a trial judge rejects a confession on a wrong principle of law. Dupuis v. R., [1952] 2 S.C.R. 516, 15 C.R. 309; R. v. Theriault (1953), 17 C.R. 1 (Que. C.A.).

See also R. v. Ferland (1968) 41 C.R. 1 (Que. C.A.). *But cf.* Rose v. R., [1959] S.C.R. 441, 31 C.R. 27; R. v. J., (1957) 21 W.W.R. 248, 26 C.R. 57 (Alta. C.A.); R. v. Davis and Toubret (1952), 29 M.P.R. 260, 14 C.R. 54 (N.S. C.A.); R. v. F.W. Woolworth Co., [1949] 1 W.W.R. 175 (B.C. C.A.).

27. Benson v. Northern Ireland Road Transport Bd. [1942] A.C. 520.

28. R. v. Gamble (1847) 16 M. & W. 384, 153 E.R. 1237 (C.A.); R. v. London, J.J. [1945] K.B. 528, 2 All E.R. 298 (C.A.); R. v. Hansher [1940] O.R. 247.

But cf. Lattoni and Corbo v. R., [1958] S.C.R. 603, 121 C.C.C. 317; R. v. Hayward (1957), 118 C.C.C. 365 (N.B. C.A.); R. v. Mattioli; R. v. Nadeau (1953), 17 C.R. 138 (Que. C.A.).

See also R. v. Harder [1947] 1 W.W.R. 461, 2 D.L.R. 593 (C.A.); R. v. Tremblay (1949), 8 C.R. 323, 95 C.C.C. 385 (Que. C.A.); R. v. Leveille (1959), 32 C.R. 98 (Que.); R. v. Orlin, [1945] R. L. 374 (Que. C.A.); R. v. Ballard, 5 M.P.R. 136, [1932] 4 D.L.R. 461 (N.S. C.A.); R. v. Hutchinson [1939] 1 W.W.R. 545, 71 C.C.C. 199.

guilty and convicted them instead of an offense with which they had not been charged, the court of appeal held that this result should be taken as equivalent to an acquittal on the original charge so as to enable the Attorney-General to appeal.²⁹

C. *Introduction of New Evidence on Appeal*

A third problem arises in Canadian criminal appeals with respect to the introduction of new evidence on appeal. Canadian courts of appeal are empowered to hear the evidence of further witnesses, but there are apparently no express provisions for receiving further evidence by affidavit or for the examination of witnesses abroad.³⁰ The Court of Criminal Appeal in England enjoys a similar power, which it exercises with extreme caution. Very exceptional circumstances must be shown before the court will reconsider a verdict in the light of new evidence not adduced at trial,³¹ and it is only upon the rarest possible instance that the court will act on evidence presented on appeal which could have been introduced at the trial. As Lord Alverstone, C.J., said in *R. v. Dutt*, "It would be impossible to conduct the business of this court if defendants set up one defence at the trial and another on appeal."³²

The principle upon which Canadian appellate courts will receive new evidence is similar to those upon which a new trial will be granted in a civil action because of the discovery of fresh evidence. A somewhat wider discretionary scope, however, is

29. *R. v. Blahut and Hannick*, [1954] Ont. W.N. 618, 19 C.R. 104 (C.A.). *Cf. U.S. v. Jorn*, — U.S. —, 91 S. Ct. 547 (1971).

The question of appeal after a plea of guilty is an interesting, if peripheral, issue. It has been held that, where an accused pleads guilty, judgment of guilt is pronounced not by a judge or jury but by the accused himself; therefore, the only appeal that will be permitted in such a case will be an appeal from sentence. *Boushard v. R.*; *Demers v. R.* (1930) 49 Que. K.B. 221 (C.A.). On the other hand, where affidavits disclose that a plea of guilty was entered by the accused under a misunderstanding and that he may have a good defense, leave should be granted to appeal from the conviction. *R. v. Hand*, [1946] 1 W.W.R. 421, [1946] 1 D.L.R. 128 (C.A.). But this ground will not be available if the accused pleaded guilty on the advice of experienced counsel. *R. v. Forde* [1923] 2 K.B. 400, 17 Cr. App. R. 99; *R. v. Dawson* (1924) 18 Cr. App. R. 111. *See also R. v. Deacon*, [1947] 1 W.W.R. 545, 3 C.R. 129; *R. v. German*, [1947] O.R. 385, 4 D.L.R. 68.

30. CAN. CRIM. CODE § 589(1)(b). *See, e.g., R. v. Sloane*, 1 M.P.R. 546, [1930] 4 D.L.R. 129 (N.S. C.A.).

31. *R. v. Mason* (1923) 17 Cr. App. R. 160.

32. (1912) 8 Cr. App. R. 51.

applied in criminal than in civil appeals, since the Crown is not in the position of a successful litigant with a vested interest in conviction.³³ Nonetheless, the court must be satisfied that the evidence could not by due diligence have been adduced at trial and also that, if admitted, the new evidence will apparently be determinative.³⁴ An application for leave to present new evidence, therefore, must be supported by an affidavit which: (a) indicates the evidence to be introduced; (b) sets forth the time and manner in which the accused was made aware of the existence of the evidence; (c) shows what efforts, if any, he made to introduce the evidence at trial; and (d) states that the accused is advised and believes that if the evidence had been introduced at the trial it might reasonably have resulted in a different verdict.³⁵

III. GROUNDS FOR ALLOWING APPEALS

There are four possible grounds on which the court of appeal may allow an appeal:

- (1) an unreasonable or unsupported verdict;
- (2) misdirection;
- (3) improper rulings as to evidence; or,
- (4) any other grounds involving a miscarriage of justice.³⁶

With respect to the first of these, the court, in granting an appeal must be satisfied that no reasonable man, given the evidence adduced at trial, could have arrived at the verdict given³⁷ or that

33. *R. v. Buckle*, [1949] 1 W.W.R. 833, 3 D.L.R. 418 (B.C. C.A.).

34. *R. v. Cumyow*, [1926] 1 D.L.R. 623 (C.A.); *R. v. Boss* (1921) 16 Cr. App. R. 71; *R. v. Schwanbeck*; *R. v. De la Gorgendierre* [1931] 3 W.W.R. 59, 3 D.L.R. 745 (Sask.).

In a like manner, where the new evidence could not have come to the knowledge of the accused until after the trial, *e.g.*, an unauthorized communication with the jury, it will be received on appeal. *Nogaret v. R.* (1931) 51 Que. K.B. 1888 (C.A.).

35. *R. v. Milligan* (1954) 35 M.P.R. 372, 21 C.R. 16 (N.B. C.A.); *R. v. Deacon* (No. 2), [1947] 1 W.W.R. 834, 3 C.R. 397 (C.A.); *Beaulieu v. R.* (1949), 8 C.R. 345 (Que. C.A.); *R. v. Popovich*, [1946] O.W.N. 929 (C.A.); *R. v. Grigoshenko and Stupka*, [1945] 3 W.W.R. 734, 85 C.C.C. 129 (Sask. C.A.); *R. v. Martin*, [1945] 1 W.W.R. 1, 1 D.L.R. 128 (C.A.); *R. v. Johnson and Creanza*, [1945] 3 W.W.R. 201, 4 D.L.R. 75 (C.A.); *R. v. Weisz* (1920), 15 Cr. App. R. 85; *R. v. Rowland*, [1947] K.B. 460, 32 Cr. App. R. 29.

36. CAN. CRIM. CODE § 592(1)(a).

37. *Taggart v. R.*, 38 M.P.R. 100, 23 C.R. 372 (N.S. C.A.); *Lefrancois v. R.*, 26 C.R. 370 (Que. C.A.); *Vaillancourt v. R.* (1954), 17 C.R. 422 (Que. C.A.); *R. v. Kohut and Bird* (1955), 111 C.C.C. 149 (B.C. C.A.); *R. v. Clancy*, 38 M.P.R. 89 (N.B. C.A.); *R. v. Malanik* (No. 2) 3 W.W.R. (N.S.) 577, 13

the evidence adduced at trial, though tending to support the verdict given, is insufficient to support the charge with requisite certainty.³⁸ This ground for appeal would seem unavailable to the Crown, since in Anglo-Canadian jurisprudence it is unnecessary to produce evidence to justify an acquittal.³⁹ Thus, it has been held that, if there be no misdirection, a verdict of acquittal rendered by a properly instructed jury involves only a question of fact, which the Crown may not appeal.⁴⁰ Misdirection, however, may be either to law or to fact, and misdirection as to law gives the Crown, as well as the accused, a ground for appeal.⁴¹

Appeals may also be granted on the ground of improper rulings on evidence, and the Crown is as entitled to appeal against the improper rejection of evidence as the accused is to appeal against its improper admission.⁴² The mere fact that evidence has been improperly admitted, however, is not determinative. It must be shown that some substantial injustice was occasioned thereby.⁴³ Thus, there have been cases in which the other evidence, apart from that improperly admitted, was conclusive, and it was held that there had been no miscarriage of justice.⁴⁴

C.R. 160 (Man. C.A.); *Holmes v. R.* (1950), 10 C.R. 231, 98 C.C.C. 224 (Que. C.A.); *R. v. Dobchuck*, [1944] 2 W.W.R. 319 (Man. C.A.); *R. v. Westgate*, [1944] 2 W.W.R. 353, 52 Man. R. 161 (C.A.); *R. v. Bercovitch and Somberg* (1946), 1 C.R. 200 (Que. C.A.); *R. v. Deacon* (No. 3), [1948] 1 W.W.R. 705, 3 D. L.R. 93 (C.A.).

38. *R. v. Brown* (1954), 36 M.P.R. 161, 21 C.R. 247 (*sub nom.* *Brown v. R.*) (N.B. C.A.); *R. v. Cannon and Egley* (1955), 111 C.C.C. 153 (B.C. C.A.); *Forget v. R.* (1954), 18 C.R. 233 (Que. C.A.); *R. v. McDonald* (1951), 4 W.W.R. (N.S.) 14, 101 C.C.C. 78 (B.C. C.A.). *Cf.* *R. v. Harrison* (No. 3) 2 W.W.R. (N.S.) 318, 12 C.R. 314 (B.C. C.A.); *R. v. Boyd*, [1953] O.R. 215, 16 C.R. 412 (C.A.); *R. v. Groulx and Nevers*, [1953] O.R. 337, 16 C.R. 145 (C.A.).

39. With respect to the grounds for allowance or dismissal of appeals, the general rule is that there is no distinction between the Crown's position and that of accused. *Cullen v. R.* [1949] S.C.R. 658, 3 D.L.R. 241; *R. v. George* [1960] S.C.R. 871.

40. *R. v. Gailant* (Harry and Frank) (No. 2) 83 C.C.C. 55, [1945] 1 D.L.R. 471 (P.E.I. C.A.).

41. *R. v. Cohen and Bateman* (1909) 2 Cr. App. R. 196. *See also* *R. v. Kervin* (1931) 5 M.P.R. 35, 57 C.C.C. 240 (N.S. C.A.). As for self-misdirection by the trial judge, *see* *Telmosse v. R.*, 83 C.C.C. 133, [1945] 1 D.L.R. 779 (S.C.C.); *R. v. Ellergodt* [1963] 2 C.C.C. 129 (B.C. C.A.).

42. *R. v. Rasmussen*, 9 M.P.R. 41, [1935] 1 D.L.R. 97 (N.B. C.A.).

43. *R. v. Woods* (1897) 5 B.C.R. 583, 2 C.C.C. 159 (C.A.); *R. v. Drummond* (1905) 10 Ont. L.R. 546, 10 C.C.C. 340 (C.A.).

The American "harmless error" rule is stated in *Chapman v. California*, 386 U.S. 18 (1967). *See also* *Harrington v. California*, 395 U.S. 250 (1969).

44. *R. v. Spain* [1917] 2 W.W.R. 465, 36 D.L.R. 522 (C.A.); *R. v. Barclay*,

But where inadmissible evidence has been admitted and that evidence *may* (not must) have influenced the jury in arriving at their verdict, that verdict must be quashed.⁴⁵

Furthermore, the administration of Canadian criminal law must not only be, "*but appear to be* in accordance with . . . basic concepts of justice."⁴⁶ Even the appearance of injustice at the trial is sufficient to set aside a verdict.⁴⁷ Among these so-called "other grounds" on which an appeal may be allowed are irregularities at trial,⁴⁸ incomplete defense, e.g., denial of full opportunity for cross-examination,⁴⁹ and prejudicial newspaper reports before the trial.⁵⁰

For an appeal to be granted on any of these grounds, however, it must be clear that a "substantial wrong or miscarriage of justice" has occurred.⁵¹ Obviously the appellate provisions of the Canadian Criminal Code are not based upon the principle that criminals must go free because of some trivial error of no material consequence.⁵² But once an error of consequence has been dem-

36 Ont. W.N. 351, [1930] 1 D.L.R. 489 (C.A.); *R. v. Pavalini* [1942] 1 W.W.R. 74, [1941] 4 D.L.R. 183 (C.A.).

Cf. Harrington v. California, 395 U.S. 250 (1969).

45. *R. v. Frechette* (1920) 46 Ont. L.R. 610, 51 D.L.R. 246 (C.A.); *White v. R.* (1924) 38 Que. K.B. 195 (C.A.); *R. v. Ortinsky* [1927] 1 W.W.R. 957, 2 D.L.R. 973 (C.A.); *R. v. Pepper* [1937] 1 W.W.R. 62, 1 D.L.R. 517 (C.A.); *R. v. Buck* [1940] O.R. 444, [1941] 1 D.L.R. 302 (C.A.). *See also Allen v. R.* (1911) 44 S.C.R. 331, 18 C.C.C. 1, *disapproving in part R. v. Woods* (1897) 5 B.C.R. 583, 2 C.C.C. 159 (C.A.); *Cassidy v. R.*, 50 Que. K.B. 388, [1931] 4 D.L.R. 192 (C.A.).

46. *Vescio v. R.*, [1949] S.C.R. 139, 149 (Rand, J.).

47. *R. v. Darlyn* [1947] 1 W.W.R. 449, 3 D.L.R. 480 (C.A.).

48. *R. v. Petrie* (1890) 20 O.R. 317 (C.A.); *R. v. Wong Yip Lan and Lee Lung* [1936] 1 W.W.R. 478, 2 D.L.R. 403 (C.A.).

49. *R. v. Swinamer* (1951) 26 M.P.R. 197, 12 C.R. 211 (N.S. C.A.) *Cf. U.S. CONST. amend. VI; Dutton v. Evans*, 400 U.S. 74 (1970).

50. *R. v. Bannister*, 10 M.P.R. 391, [1936] 2 D.L.R. 795 (N.B. C.A.); *R. v. Koufis*, 15 M.P.R. 459, [1941] 1 D.L.R. 609 (N.S. C.A.); *cf. R. v. McDonald* [1940] O.R. 7, [1939] 4 D.L.R. 377 (C.A.).

With respect to American practice in this matter, *see Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965).

51. CAN. CRIM. CODE § 592(1)(b)(iii). Concerning the meaning of the phrase, *see* opinion of Stuart, J.A., in *R. v. Picariello and Lassandro* [1923] 1 W.W.R. 644, 1 D.L.R. 979.

Cf. Harrington v. California, 395 U.S. 250 (1969) (untainted evidence against petitioner was "overwhelming"), and *Chapman v. California*, 386 U.S. 18 (1967) (before error can be held harmless, the court must be able to declare its belief that the error was harmless beyond a reasonable doubt).

52. *Chibok v. R.*, 24 C.R. 354, 116 C.C.C. 241. *See also Lawries v. Muir* [Scot. 1950] Just. Cas. 19; *People v. Defore*, 242 N.Y. 13 (1926) (Cardozo, J.).

onstrated, the burden is on the Crown to satisfy the court of appeal that this has not occasioned a miscarriage of justice.⁵³ Thus, for example, if the court cannot say that no substantial wrong or injustice has resulted from the improper admission of evidence, it is not enough for the Crown to show that without the inadmissible evidence the verdict would probably have gone the same way.⁵⁴

IV. APPEALS TO THE SUPREME COURT

The Court of Appeal's disposition of a case is usually final, for, although an appeal may in some instances be taken to the Supreme Court of Canada, that court's authority in criminal matters is limited. Either an accused whose conviction has been affirmed by the court of appeal or an Attorney-General may appeal to the Dominion Supreme Court on any question of law on which an appellate judge dissents or, if leave to appeal is granted by the Supreme Court, on any other question of law.⁵⁵ In other words, except for the extraordinary appeals in capital cases, the Supreme Court's criminal appellate jurisdiction is limited to questions of law alone.⁵⁶ No appeal from sentence, therefore, lies to the Supreme Court, even though the court of appeal may have, on appeal of the Crown, increased the sentence imposed at the

53. *Brooks v. R.*, [1927] S.C.R. 633, [1928] 1 D.L.R. 268; *Schmidt v. R.*, [1945] S.C.R. 438, [1945] 2 D.L.R. 598; *Thomas v. R.*, [1952] 2 S.C.R. 344, 15 C.R. 1.

54. *R. v. Berry*, [1957] O.R. 249, 26 C.R. 218 (C.A.); *Parent v. R.* (1947) 4 C.R. 127 (Que. C.A.); *R. v. Barris*, [1946] 1 W.W.R. 328, 2 D.L.R. 655 (Alta. C.A.); *R. v. Parker*, (1960) 45 Cr. App. R. 1.

Regarding the effect of comment on the failure to testify, *cf. R. v. Darlyn* (No. 2), [1947] 2 W.W.R. 872 (B.C. C.A.); *R. v. McNulty and Courtney*, [1948] Ont. W.N. 827 (C.A.); with *R. v. Steinberg*, [1931] O.R. 222 (C.A.); *R. v. Schwartzenhauer*, [1935] 2 W.W.R. 146, 2 D.L.R. 739.

The "harmless error" standard in the United States is stated in *Harrington v. California*, 395 U.S. 250 (1969) and *Chapman v. California*, 386 U.S. 18 (1967). Concerning the American law on prosecutorial comment, *see Griffin v. California*, 381 U.S. 957 (1965).

Cf. CAN. EVID. ACT, R.S.C. 1952, c. 307, § 5, with U.S. CONST. amend. V.

55. CAN. CRIM. CODE §§ 597-598.

In the case of an appeal by the accused from the affirmance of a conviction by the Court of Appeal, the Attorney-General is entitled to file a cross-appeal. *Howard Smith Paper Mills Ltd. v. R.*, [1957] S.C.R. 403, 8 D.L.R. (2d) 449.

56. *R. v. McEwan and Lee*, [1932] 3 W.W.R. 564, 59 C.C.C. 75 (Alta. C.A.). *See also Canada International Paper Co. v. Cour de Magistrat*, [1938] S.C.R. 22, 1 D.L.R. 194.

trial.⁵⁷ Nor may new evidence be introduced upon appeal to the Supreme Court.⁵⁸

V. CONCLUSION

From this brief survey of the Canadian law of criminal appeals it should at least be evident that, procedurally and substantively, Canadian practice is both unique and complex. Nonetheless, Canadians are proud of their system, and their satisfaction is not unfounded. The existing division of jurisdiction over the criminal law, whereby Parliament creates it and the provinces enforce it, has worked quite well. It does away, for example, with all those questions of extradition that can arise between states in the U.S.⁵⁹ It guarantees local control of the police, which is a well-approved British device to forestall a nation-wide tyranny, and at the same time it hampers the excesses of legislation to which parochial lawmakers are too often prone.⁶⁰ As for the wisdom and effect of the allowance for appeals by the Crown, it is perhaps best to rely on the testimony of Peter J.T. O'Hearn, Q.C., an eminent Canadian constitutional lawyer and political philosopher:

In the United States . . . protection against double jeopardy is provided in federal cases by the Fifth Amendment. The wording is construed to prevent appeals by the prosecu-

57. *Goldhar v. R.*, [1960] S.C.R. 60, 31 C.R. 374; *Goldhammer v. R.*, [1924] S.C.R. 290, 3 D.L.R. 1009. For the Supreme Court's interpretation of the distinction between a question of law and a question of fact, see *R. v. Fitton*, [1956] S.C.R. 958, 6 D.L.R. (2d) 529.

58. *Liscombe v. R.* (1962) 36 W.W.R. 665, 37 C.R. 7 (Alta. C.A.).

59. P. O'HEARN, PEACE, ORDER AND GOOD GOVERNMENT 162 (1964).

It also eliminates the so-called "two sovereignty" problem which the United States Supreme Court has encountered in interpreting the application of the double jeopardy protection in a federal system. See *Bartkus v. Illinois*, 359 U.S. 121 (1959); *Abbate v. U.S.*, 359 U.S. 187 (1959).

60. But, of course, Canada does have, in addition to the provincial and municipal police forces, a national law enforcement agency, the Royal Canadian Mounted Police. See C. REITH, THE BLIND EYE OF HISTORY ch. 10 (1952), for an historical summation of the reasons for local control in the case of the police.

The chief complaints against the present Canadian system of criminal law administration have been that nation-wide laws do not always meet local needs and that the courts of different provinces diverge in their construction of the law. These complaints have resulted in proposals to substitute the principle of supremacy for that of exclusiveness in law-making, in order to "enable the provinces to pass police measures without any question of exceeding their powers." See O'HEARN, *supra* note 59, at 147-48.

The principle of supremacy is, of course, the solution which has been adopted in the United States. U.S. CONST. art. VI. *But cf.* U.S. CONST. amend. X.

tion. We have not followed it in the ordinary application of the principle. In Canada, the prosecution is entitled to appeal from errors in law Our appeal system works well and is actually beneficial to the accused, because trial judges know that any errors they make in favor of the accused can be corrected and are not so prone to determine questions in favour of the prosecution⁶¹

61. O'HEARN, *supra* note 59, at 235-38.