Law Reform Commission of Canada
Commission de réforme du droit du Canada

CRIMINAL LAW

# crimes against the state

Working Paper 49

Canada

# Reports and Working Papers of the Law Reform Commission of Canada

## Reports to Parliament

1. *Evidence* (December 19, 1975)
2. *Guidelines — Dispositions and Sentences in the Criminal Process** (February 6, 1976)
3. *Our Criminal Law* (March 25, 1976)
4. *Expropriation** (April 8, 1976)
5. *Mental Disorder in the Criminal Process** (April 13, 1976)
6. *Family Law** (May 4, 1976)
7. *Sunday Observance** (May 19, 1976)
8. *The Exigibility to Attachment of Remuneration Payable by the Crown in Right of Canada** (December 19, 1977)
9. *Criminal Procedure — Part I: Miscellaneous Amendments** (February 23, 1978)
10. *Sexual Offences** (November 29, 1978)
11. *The Cheque: Some Modernization** (March 8, 1979)
12. *Theft and Fraud** (March 16, 1979)
13. *Advisory and Investigatory Commissions** (April 8, 1980)
14. *Judicial Review and the Federal Court** (April 25, 1980)
15. *Criteria for the Determination of Death** (April 8, 1981)
16. *The Jury* (July 28, 1982)
17. *Contempt of Court** (August 18, 1982)
18. *Obtaining Reasons before Applying for Judicial Scrutiny — Immigration Appeal Board* (December 16, 1982)
19. *Writs of Assistance and Telewarrants* (July 22, 1983)
20. *Euthanasia, Aiding Suicide and Cessation of Treatment** (October 11, 1983)
21. *Investigative Tests: Alcohol, Drugs and Driving Offences** (November 10, 1983)
22. *Disclosure by the Prosecution* (June 15, 1984)
23. *Questioning Suspects* (November 19, 1984)
24. *Search and Seizure* (March 22, 1985)
25. *Obtaining Forensic Evidence* (June 12, 1985)
26. *Independent Administrative Agencies* (October 23, 1985)
27. *Disposition of Seized Property* (1986)

## Working Papers

1. *The Family Court** (1974)
2. *The Meaning of Guilt: Strict Liability** (1974)
3. *The Principles of Sentencing and Dispositions** (1974)
4. *Discovery** (1974)
5. *Restitution and Compensation** (1974)
6. *Fines** (1974)
7. *Diversion** (1975)
8. *Family Property** (1975)
9. *Expropriation** (1975)
10. *Limits of Criminal Law: Obscenity: A Test Case* (1975)
11. *Imprisonment and Release** (1975)
12. *Maintenance on Divorce** (1975)
13. *Divorce** (1975)
14. *The Criminal Process and Mental Disorder** (1975)
15. *Criminal Procedure: Control of the Process** (1975)
16. *Criminal Responsibility for Group Action** (1976)
17. *Commissions of Inquiry: A New Act** (1977)
18. *Federal Court: Judicial Review** (1977)
19. *Theft and Fraud: Offences* (1977)
20. *Contempt of Court: Offences against the Administration of Justice* (1977)
21. *Payment by Credit Transfer* (1978)
22. *Sexual Offences** (1978)
23. *Criteria for the Determination of Death** (1979)
24. *Sterilization: Implications for Mentally Retarded and Mentally Ill Persons* (1979)
25. *Independent Administrative Agencies** (1980)
26. *Medical Treatment and Criminal Law* (1980)
27. *The Jury in Criminal Trials** (1980)
28. *Euthanasia, Aiding Suicide and Cessation of Treatment** (1982)
29. *The General Part: Liability and Defences* (1982)
30. *Police Powers: Search and Seizure in Criminal Law Enforcement** (1983)
31. *Damage to Property: Vandalism* (1984)
32. *Questioning Suspects* (1984)
33. *Homicide* (1984)
34. *Investigative Tests* (1984)
35. *Defamatory Libel* (1984)
36. *Damage to Property: Arson* (1984)
37. *Extraterritorial Jurisdiction* (1984)
38. *Assault* (1985)
39. *Post-seizure Procedures* (1985)
40. *The Legal Status of the Federal Administration* (1985)
41. *Arrest* (1985)
42. *Bigamy* (1985)
43. *Behaviour Alteration and the Criminal Law* (1985)
44. *Crimes against the Environment* (1985)
45. *Secondary Liability* (1985)
46. *Omissions, Negligence and Endangering* (1985)
47. *Electronic Surveillance* (1986)
48. *Criminal Intrusion* (1986)

The Commission has also published over seventy Study Papers on various aspects of law. If you wish a copy of our catalogue of publications, please write to: Law Reform Commission of Canada, 130 Albert Street, Ottawa, Ontario K1A 0L6, or Suite 310, Place du Canada, Montréal, Québec, H3B 2N2.

* Out of print. Available in many libraries.

# CRIMES AGAINST THE STATE

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada
K1A 0L6

or

Suite 310
Place du Canada
Montréal, Québec
H3B 2N2


Catalogue No. J32-1/49-1986
ISBN 0-662-54241-X

Law Reform Commission
of Canada

Working Paper 49

# CRIMES AGAINST THE STATE

1986

# Notice

This Working Paper presents the views of the Commission at this time. The Commission's final views will be presented in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

Secretary
Law Reform Commission of Canada
130 Albert Street
Ottawa, Canada
K1A 0L6

# Commission

Mr. Justice Allen M. Linden, President
Mr. Gilles Létourneau, Vice-President
Ms. Louise Lemelin, Q.C., Commissioner
Mr. Joseph Maingot, Q.C., Commissioner
Mr. John Frecker, Commissioner

## Acting Secretary

Harold J. Levy, LL.B., LL.M.

## Co-ordinator, Substantive Criminal Law

François Handfield, B.A., LL.L.

## Special Adviser

Patrick Fitzgerald, M.A. (Oxon.)

## Principal Consultant

Oonagh Fitzgerald, B.F.A., LL.B.

## Consultant

Martin L. Friedland, Q.C., B. Com., LL.B., Ph.D.

# Table of Contents

*The sun no longer shows*
*His face; and treason sows*
*His secret seeds that no man can detect;*
*Fathers by their children are undone;*
*The brother would the brother cheat;*
*And the cowled monk is a deceit ....*
*Might is right, and justice there is none.*

Walthar von der Vogelweide, c. 1170 - c. 1230
*Millennium* [Translated by Jethro Bithell]

# CHAPTER ONE

## Introduction

Having completed our studies of Offences against the Person and Offences against Property, we now turn to the third major group of crimes: Offences against Society and the State. These consist of acts threatening the general peace and order of society and acts threatening the security of the State and its basic institutions.

In this Paper we will deal with only the most serious crimes of this third category, that is, only those that threaten the security of the State itself and its institutions. Accordingly, the main groups of crimes we will examine are (1) treason, intimidating Parliament, sedition and sabotage, presently found in Part II of the *Criminal Code*; and (2) espionage and leakage, currently dealt with in the *Official Secrets Act* (hereinafter referred to as the *O.S.A.*). Offences against *society*, such as riot, unlawful assembly and so on, which generally threaten law and order, will be dealt with in a separate but related study.

Though rarely committed and even more rarely charged, crimes against the State are some of the most serious offences in the whole *Criminal Code*. This is because such conduct jeopardizes the security and well-being of the whole nation and its inhabitants.

# CHAPTER TWO

## History

In Canada the present crimes against the State are found either in the *Criminal Code* or in the *O.S.A.*. Those in the latter Act derive from the English *Official Secrets Acts* of 1920, 1911 and 1889. Those in the *Code* derive in part from legislation, such as the 1892 Canadian *Criminal Code* (and subsequent amendments), the 1886 *Treason Act*,[1] and before that the 1351 *Statute of Treasons*, and in part from the English common law, feudal, Roman and early Germanic law.

We can roughly divide the two-thousand-year history of offences against the State into three periods: (1) the early period before and up to the enactment of the *Statute of Treasons*; (2) the middle period following that statute and preceding the Canadian treason legislation of 1886; and (3) the modern era in Canada, from the *Treason Act* and the first *Criminal Code* to the present day.

### I. The Early Period

Early Germanic law recognized only two types of treason. One was betrayal of one's tribe by aiding its enemies or by cowardice in battle. The other was betrayal of one's lord.[2]

By contrast, the Roman law of treason, or *crimen laesae majestatis*, which was imposed by Rome upon the vanquished Germanic peoples, was more complex and inclusive.[3] Since the time of Augustus (63 B.C. to 14 A.D.) the Roman Emperor was thought to embody all the sovereign rights of the Roman State, and *crimen laesae majestatis* protected both the person and authority of this sovereign. It developed into a very extensive concept, including such major offences as taking up arms against the State, delivering provinces or towns from Roman rule, sedition or insurrection, plotting against the life of the Emperor or his principal officers, and lesser acts such as destroying the statutes of the Emperor or insulting the memory of a deceased Emperor.[4]

1. A consolidation of earlier treason statutes.
2. Pollock and Maitland, 1895: 501.
3. Vitu, 1973: para. 8.
4. *Ibid.*

After the fall of Rome, *crimen laesae majestatis* was for a while lost to the West.[5] Instead, treason came to be focused around feudal obligations. As Roman law was forgotten, the early Germanic treasons of assisting the enemies of one's tribe and betraying one's lord were revived and assimilated to the worst breaches of the vassal's pledge of fealty.[6] The words "treason" and "sedition" were used interchangeably to describe this type of conduct, and at this stage mere treasonable or seditious words were considered sufficient for liability.[7]

In the feudal system treason could be committed against one's lord whether or not he was actually king.[8] Medieval kings were after all only feudal lords rather than absolute sovereigns. As feudal lords they were bound, as it were, by a pact with their vassals, who were entitled to rebel if the lord persistently denied justice to them.[9] This right is in stark contrast to Roman law, under which such rebellion would clearly have been *crimen laesae majestatis*.

In the eleventh century, Roman law was reintroduced to Western Europe.[10] This coincided with the consolidation of power in the hands of absolute or near-absolute kings. These kings readily adopted the Roman concept of *crimen laesae majestatis* as a model for their offences against the State.[11] In France the result was the broad crime of *lèse-majesté* which thrived until the French Revolution.[12] In England, the treason offence came to focus on the king only, (that is, not the lesser lords) and came to include not just acts against him but also endeavouring, plotting or compassing such acts.[13] At this time there was no developed general law of attempts or conspiracy, and in fact these inchoate offences have their roots in the early law of treason, in compassing the king's death. To kill the king was considered so serious that even the intent or attempt to kill the king was itself treason.[14] Later, general principles of inchoate liability would evolve so as to apply to virtually every offence.[15]

5. *Id.*: para. 9.
6. *Ibid.*; Pollock and Maitland, 1895: 502.
7. Hale, 1736: 111-9; South African Law Commission, 1976: 6. The word "sedition" derives from the latin "*seditio*" meaning uprising or insurrection. See *Oxford English Dictionary*.
8. Pollock and Maitland, 1895: 501-2.
9. *Id.*: 503-5.
10. De Zulueta, 1923: 173.
11. Vitu, 1973: para. 10.
12. *Ibid.*
13. Pollock and Maitland, 1895: 501-2.
14. Hale, 1736: 107-8.
15. For a description of the development of the law on secondary liability see Canada, LRC, 1985b.

The 1351 *Statute of Treasons*, England's first codification of the law of treason, bears witness to the various influences on the development of this crime.[16] Germanic, feudal and Roman influence is evident in the two central offences of compassing the king's death, and adhering to the king's enemies. Slaying of the king's justices is reminiscent of one of the forms of *crimen laesae majestatis*, as is the crime of levying war against the king. This latter form of treason also indicates the demise of feudalism and the feudal king because it abolished the feudal right of the vassal to wage war on an unjust lord. As a result treason could no longer be viewed merely as a breach of feudal duties,[17] but, just as in the times of Augustus, it had become a crime against the person and authority of the sovereign in whom the State was embodied.

Passed at the height of Edward III's power and confidence in an effort to limit the ambit of treason, the *Statute of Treasons* was a lean and lenient enactment.[18] It contained three main offences: (1) compassing the death of the king (or his queen or heir); (2) levying war against the king in his realm; and (3) adhering to the king's enemies in his realm or elsewhere. The statute also contained various ancillary provisions which tended to support the three central crimes, such as violating the king's companion, eldest daughter or eldest son's wife; counterfeiting the king's seal or his money; and killing the chancellor, treasurer or the king's justices. However, it made no provision for lesser acts of violence against the king or violent disturbances that did not amount to levying war.[19]

16. *The Statute of Treasons* provided:

> Whereas divers opinions have been before this time in what case treason shall be said, and in what not; the King, at the request of the lords and of the commons, hath made a declaration in the manner as hereafter followeth, that is to say; When a man doth compass or imagine the death of our Lord the King, or of our Lady his Queen or of their eldest son and heir; or if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir; or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm, or elsewhere, and thereof be proveably attainted of open deed by the people of their condition; And if a man counterfeit the King's great or privy seal, or his money; and if a man bring false money into this realm, counterfeit to the money of England as the money called Lushburgh, or other, like to the said money of England, knowing the money to be false, to merchandise or make payment in deceit of our said Lord the King and of his people; and if a man slay the chancellor, treasurer or the King's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places, doing their offices: And it is to be understood, that in the cases above rehearsed, that ought to be judged treason which extends to our Lord the King, and his royal majesty: And of such treason the forfeiture of the escheats pertaineth to our sovereign Lord, as well of the lands and tenements holden of other, as of himself.

17. Pollock and Maitland, 1895: 503-5.

18. Stephen, 1883: 250; Bellamy, 1970: 1-101; Friedland, 1979: 9-10.

19. *Ibid.*

## II. The Middle Period

In the following centuries, at times of crisis, English monarchs enacted more detailed and oppressive laws to clothe the bare, skeletal *Statute of Treasons*,[20] but these temporary additions were more in the nature of orders given by a military commander in times of war than principled reforms of the law of treason.[21]

As well, the scope of the 1351 statute was judicially enlarged by generous construction of its words. By this method "compassing the king's death" was held to apply in cases where the king was in no actual physical danger[22] and included plotting to depose him,[23] conspiring with a foreign prince to levy war on the realm, and in general intending anything which might have a tendency to expose the king to personal danger or deprivation of any of the authority incidental to his office.[24] "Levying war" against the king was held to include everything from riot to revolution, that is to say, any amount of violence with a political object.[25]

It was during this middle period that sedition developed as a crime distinct from treason. Although there was already in 1275 a statute codifying the offence of defaming public figures *(scandalum magnatum)*,[26] it was really the invention of the printing press which sparked the State's interest in controlling the expression of critical ideas and eventually led to the development of the law of sedition.[27] The Star Chamber quickly recognized the political power of the printing press, and jealously coveted jurisdiction over all matters relating to publishing. Accordingly, they began to assert that words alone could not amount to treason, triable by judge and jury in the ordinary courts, but should be tried by the Star Chamber itself.[28] Thus, in the 1606 case of *De Libellis Famosis*[29] in which the Star Chamber held that it was an offence to defame the deceased Archbishop of Canterbury, we find the origin of the present crime of sedition. Later, with the abolition of the Star Chamber by the Long Parliament in 1641, it fell to the ordinary courts to develop this offence,[30] and this they did, holding in 1704 that it was a crime to defame the government.[31]

---

20. *Ibid.*
21. Stephen, 1883: 255-62; Hale, 1736: 108-29.
22. *R.* v. *Maclane* (1797), 26 Howell's State Trials 721.
23. *R.* v. *Henry and John Sheares*, 27 State Trials 255.
24. Stephen, 1883: 276-7.
25. *Id.*: 266-9; see also U.K., Law Commission, 1977: 8 ff.; Leigh, 1977: 131.
26. Holdsworth, 1925: vol. 3, 409.
27. Stephen, 1883: 302.
28. *Ibid.*; see also Holdsworth, 1925: vol. 8, 336.
29. 5 Co. Rep. 125a; 77 E.R. 250 (Star Chamber).
30. Holdsworth, 1925: vol. 8, 336-46.
31. *The Case of Tutchin* (1704), 14 State Trials 1095; Stephen, 1883: 300-1.

Towards the end of the eighteenth century permanent statutory additions were also made to the offences against the State. *Fox's Libel Act*,[32] the first statute dealing with sedition, was passed in 1792. An Act was passed in 1795[33] which gave statutory weight to the judicial constructions of the words "compass or imagine" in the *Statute of Treasons* while leaving the 1351 Act intact, and which also made it treason to levy war against the king in order to force him to change his measures or counsels or to intimidate Parliament or to stir any foreigner to invade the king's realm. And in 1797, as a response to the mutiny at Nore, an Act[34] was passed creating the felony of inciting soldiers or sailors to mutiny.

This wave of legislative activity continued into the nineteenth century, gaining momentum with each passing year. In 1820 *An Act for the support of His Majesty's Household and, of the Honour and Dignity of the Crown of the United Kingdom of Great Britain and Ireland*, the first statute to forbid unlawful drilling, was passed, and the first legislation explicitly to prohibit certain lesser insults to the sovereign, such as firing pistols in her presence, *An Act for providing for the further Security and Protection of Her Majesty's Person*, was passed in 1842-3. During the Continental revolutions of 1848, the *Treason Felony Act* was passed as a preventative measure. It repealed 36 Geo. 3, c. 7 and 57 Geo. 3, c. 6 except with respect to compassing or imagining harm to the person of the sovereign, and provided that the other conduct covered by these two Acts was to be treated as felony rather than as treason.

In 1879 the English Law Commissioners, in Part V of their *Draft Code*,[35] proposed a consolidation of the many statutes and a codification of the many common law rules relating to crimes against the State, with some minor substantive improvements to the law. Their proposals were to have a major impact on the shape and substance of the offences against the State in Canada's first *Criminal Code*.

The Law Commissioners proposed that killing the sovereign and conspiring to levy war against Her Majesty should more sensibly be treated as treason in their own right, instead of as overt acts evidencing the compassing of the sovereign's death, which was treason under the 1351 Act.[36] As well they deleted the previous high treasons of killing the Lord Chancellor or a superior court judge, and violating the king's eldest daughter.[37] But they preserved the substance of the provisions of the *Treason Felony Act* of 1848 (s. 79) and the 1842-3 Act relating to insults to the person of the sovereign (s. 80), and, with some misgivings, preserved the evidence rule requiring two witnesses to prove treason.[38]

32. An Act to remove doubts respecting the functions of juries in cases of libel.
33. 36 Geo. 3, c. 7, continued in 1817 by 57 Geo. 3, c. 6.
34. 37 Geo. 3, c. 70, made permanent in 1817 by 57 Geo. 3, c. 7.
35. U.K., English Law Commissioners, 1879.
36. *Id.*: 19 (of *Report*).
37. *Ibid.*
38. *Ibid.*

Thus, high treason, defined in ten subsections to section 75, consisted in killing, harming or restraining Her Majesty, or conspiring or manifesting by an overt act an intention to do so; killing the eldest son of the queen or the queen consort of the king, or manifesting by an overt act an intention to do so; violating a queen consort or the wife of the heir apparent to the throne; levying war or conspiring to levy war against Her Majesty; instigating a foreign invasion; or assisting an enemy at war with Her Majesty. There was a three-year time limitation for founding indictments for high treason (s. 76), except where the treasonous conduct involved harming the Queen personally, in which case there was no time-limit (*ibid.*).

Part V of the *English Draft Code* also contained indictable offences ancillary to high treason, proscribing being an accessory after the fact to treason (s. 78), failing to prevent treason (*ibid.*), inciting mutiny (s. 82), unlawful drilling (ss. 92, 93) and sedition (ss. 102, 103, 104).

## III. The Modern Era in Canada

The Canadian *Treason Act* of 1886, which consolidated earlier Canadian legislation on treason, summarized (in s. 9) the judicial and statutory extensions of the 1351 *Statute of Treasons* without attempting to supersede that Act. The 1886 Act was also designed to deal with the particularly Canadian problem of rebellions and uprisings aided or instigated by foreigners and non-residents.

The *Treason Act* set out two types of treasonable conduct, both punishable by death: the first (in s. 1) was compassing the Queen's death, any bodily harm to or restraint upon her, and expressing such intention by writing or overt act; the second (in s. 2) was committed by any member of Her Majesty's army who corresponded with or gave advice or intelligence to any rebel or enemy of the Queen. As well, the Act made it a felony to compass to deprive the Queen of her imperial Crown, or to levy war against her within the United Kingdom or Canada in order to force her to change her measures or to intimidate Parliament, or to stir any foreigner to invade the United Kingdom or any of the dominions (in s. 3); and to conspire to intimidate any provincial legislative body (in s. 4). Section 5 of the Act set time-limits of six days for laying of an information and ten days further for issuing an arrest warrant where the intention to commit the act specified in section 3 was expressed by "open and advised speaking." In sections 7 and 8 the Act provided for the court-martialling and execution of citizens of foreign States at peace with Her Majesty, and British subjects joining with them, who entered Canada with intent to levy war against Canada.

Canada enacted its first *Official Secrets Act* in 1890, copying it almost verbatim from the English *Official Secrets Act*[39] of 1889, which had also applied to Canada. The object of this legislation was to deal with those who improperly used secret government information. The 1890 Act (ss. 1, 2), like its English prototype (ss. 1, 2), dealt

39. For the background to this Act, see: Aitken, 1971; and Williams, 1965.

with wrongfully obtaining or communicating information and breaches of official trust, but the most serious conduct covered was that of communicating to a foreign State information that in the public or State interest ought not to be disclosed.[40]

Two years later, the provisions of the Canadian *Official Secrets Act* were transferred to Canada's first *Criminal Code* (ss. 77, 78). The remaining offences against the State found in the 1892 *Code* derived from two main sources: the *Treason Act* of 1886 and the *English Draft Code* of 1879, and, of course, underlying both of these, was the 1351 *Statute of Treasons*. Thus, the 1892 *Code* provisions respecting treason (ss. 65, 66), treasonable offences (s. 69), accessories after the fact to treason (s. 67(*a*)), failing to prevent treason (s. 67(*b*)), assaults on the sovereign (s. 71), and inciting armed forces to mutiny (s. 72) were all derived from the *Draft Code*. The sedition sections of the *Draft Code*, except the definition of seditious intention, were also adopted by the drafters of the Canadian *Code* (ss. 123, 124). The 1892 *Code* provisions dealing with rebellions and invasions led by foreigners or Canadian subjects (s. 68), and conspiracies to intimidate provincial legislative bodies (s. 70) had their source in the *Treason Act* of 1886.

As the First World War approached, there was concern in England that the espionage sections of the 1889 *Official Secrets Act* were inadequate to deal with flagrant acts of spying by German agents.[41] In 1911 the British Parliament passed a new *Official Secrets Act* creating a number of presumptions in the Crown's favour relating to assisting a foreign State (s. 1(2)), and making it an offence with a three-year minimum penalty to obtain or communicate any information which might be useful to an enemy (s. 1). The new Act specified that it applied to the dominions overseas as well, and we find it listed in the 1912 Statutes of Canada as one of the Imperial Acts applicable to Canada.

In the heat of the Winnipeg General Strike of 1919, provisions were introduced into the *Code* criminalizing illegal associations,[42] and the sedition offences were amended to increase the penalty from two to twenty years and to remove the proviso excepting certain lawful activities from punishment as sedition.[43] These last two changes were reversed in 1930, when the two years punishment and definition of what was not sedition were reintroduced into the *Code*.

The sections respecting illegal associations were abrogated in 1936. At the same time a partial definition of seditious intention was added to the *Code*, providing that seditious intention would be presumed of one who teaches or advocates, or publishes or circulates any writing that advocates the use, without authority of law, of force as a means of accomplishing governmental change in Canada.[44]

40. Subsection 1(3) and paragraph 2(2)(*a*) of the Canadian Act, and subsection 1(3) and paragraph 2(*a*) of the English Act.

41. Williams, 1978: 159-60; Williams, 1965: 23-4; Bunyan, 1976: 7-8.

42. S.C. 1919, c. 46, s. 1, introducing ss. 97A and 97B to the *Code*. Also see: McNaught, 1974; Lederman, 1976-77; MacKinnon, 1977.

43. S.C. 1919, c. 46, repealing s. 133.

44. S.C. 1936, c. 29, adding s. 133(4).

The British government introduced further changes to the *Official Secrets Act* in 1920, but these did not apply to Canada. In 1939 the Canadian Parliament enacted a new *O.S.A.* to consolidate the 1911 and 1920 English Acts, and make them the law of Canada. Section 15 of the new Act repealed the *Code* sections dealing with communicating government information[45] and breaches of official trust[46] and the 1911 English Act insofar as it was already part of the law of Canada. There have been no changes to the substance of the 1939 Act and in fact the two main offences of spying (s. 3) and wrongfully communicating, using or retaining information (s. 4), and the ancillary offences of impersonation and forgery (s. 5), interfering with security personnel at a prohibited place (s. 6), and harbouring spies (s. 8) remain intact. However, the maximum penalty for offences under the *O.S.A.*, set at seven years in 1939, was increased to fourteen years in 1950,[47] during the Cold War.

There were some substantial amendments made to the *Code* offences against the State in 1951, a year after Canada first became involved in the policing activity in Korea. The offence of treason was amended to include assisting any armed forces against whom Canadian Forces were engaged in hostilities whether or not a state of war existed between Canada and the country whose forces they were.[48] A new offence of sabotage was added to the *Code* requiring that (1) the accused commit a "prohibited act" (defined, basically, as destroying or impairing the usefulness of property) (2) for a purpose prejudicial to the security or interests of Canada or the security of foreign armed forces legitimately present in Canada.[49] There were also amendments to the sedition offence: first, the penalty was increased to seven years imprisonment,[50] and second, a new offence was created of interfering with, advising or counselling disloyalty or insubordination in members of the Canadian Armed Forces, foreign forces legally present in Canada, or the R.C.M.P.[51] As well, section 82, dealing with assisting deserters and those absent without leave from the Canadian Forces was amended to apply only in peacetime with a reduced penalty,[52] and section 84 was amended to apply only to members of the R.C.M.P. who desert.[53]

In 1953 there were extensive revisions made to the *form* of the *Code* offences against the State as well as some minor *substantive* amendments.[54] The most anachronistic aspects of the law of treason — such as violating with or without her consent a queen consort or the wife of the heir apparent — were abolished. Sections 74 and 75 (defining treason), section 77 (levying war), and section 78 (treasonable offences)

45. Section 85 of R.S.C. 1927, c. 36.
46. Section 86 of R.S.C. 1927, c. 36.
47. S.C. 1950, c. 46, s. 3.
48. S.C. 1951, c. 47, s. 3, amending s. 74.
49. S.C. 1951, c. 47, s. 18, creating s. 509A.
50. S.C. 1951, c. 47, amending s. 134.
51. S.C. 1951, c. 47, creating s. 132A.
52. S.C. 1951, c. 47.
53. S.C. 1951, c. 47.
54. S.C. 1953-54, c. 51.

were replaced by one section (s. 46) redefining treason to include only: killing, wounding or restraining Her Majesty; levying war against Canada; assisting an enemy at war with Canada or assisting armed forces engaged in hostilities with Canadian forces; using force to overthrow the government; and communicating to a foreign agent information likely to be used in a manner prejudicial to the safety or defence of Canada. Section 46 also made it treason to conspire or intend to commit the other acts of treason listed in the section. The inclusion of espionage as a form of treason no doubt came as a result of the Gouzenko trials and the general Cold War concern about disclosure of highly sensitive military information to agents of communist countries. However, this amendment did little more than repeat what was already an offence under the *O.S.A.*

The punishments for treason, set out in section 47, were as follows: the death penalty for killing or harming Her Majesty, levying war and assisting the enemy; death or life imprisonment for using force to overthrow the government, committing espionage during wartime, and for certain conspiracies and intentions; and fourteen years imprisonment for espionage during peacetime.

The ancillary crimes against the State were also amended in 1953. The offence of alarming Her Majesty was reworded in more general terms and the punishment was increased to fourteen years although the power to order whippings was abrogated (s. 49). The offence of assisting a subject of an enemy State to leave Canada without the consent of the Crown, introduced during the First World War, was expanded to include inciting or assisting a subject of a State engaged in hostilities with Canada to leave Canada (s. 50(1)(*a*)). The special provision for accessories after the fact to treason was dropped; henceforth they were to be dealt with under the general offence in section 23. However, it was still a specific offence to fail to inform the authorities about or prevent anticipated acts of treason (s. 50(1)(*b*)). The offences of intimidating legislative bodies were revised and combined so as to treat intimidation of Parliament or a provincial legislature alike and to make no mention of conspiracy (s. 51). The sabotage provisions were replaced by section 52, which changed the wording from "security or interests of Canada" to "security or defence of Canada," in line with the new espionage provision in paragraph 46(1)(*e*). Also exceptions were added to clarify that legitimate trade union activity would not be considered to be sabotage (s. 52(3), (4)). The crime of inciting or assisting desertion from the Canadian Forces was altered only to criminalize aiding and harbouring deserters (s. 54), and the offence of interfering with force discipline was amended to exclude the R.C.M.P. force (s. 63).

Since the 1953-54 amendments there has been little change to either the *Code* offences against the State or the *O.S.A.* There were minor stylistic changes to the *O.S.A.* in the 1970 Revision of Statutes, and in 1973 the wiretapping section was added,[55] but basically, the Act today is the same as the 1939 *O.S.A.* The only change to the *Criminal Code* offences since the 1953 amendments resulted from the abolition of capital punishment in 1975.[56] Thereafter, the *Code* distinguished between high treason (acts formerly

55. S.C. 1973-4, c. 50, s. 6, since repealed by s. 88 of the *Canadian Security Intelligence Service Act.*
56. S.C. 1974-75-76, c. 105, s. 2.

punished as capital offences) now subject to a mandatory life sentence,[57] and treason (acts formerly punished by anywhere from fourteen years imprisonment to death) now subject to life imprisonment,[58] except espionage in peacetime which still has a fourteen-year maximum sentence (s. 47(2)(*c*)).

57. Definition in s. 46(1); punishment in s. 47(1).

58. Definition in s. 46(2); punishment in s. 47(2).

# CHAPTER THREE

## The Present Law

Turning to the statute books of today we find that the crimes against the State are set out in two places: the more traditional offences against the State are found in Part II of the *Criminal Code*, and most of the newer espionage-related offences are found in the *O.S.A.* These two collections of offences form mini-codes of substantive and procedural law relating to crimes against the State. Although they operate independently these mini-codes follow a similar basic structure. First, each centres around a primary, most serious offence — treason in Part II of the *Code*, and spying in the *O.S.A.* Each code then provides ancillary offences to support and enforce the central prohibition. Last, there are special rules of procedure and evidence applicable to the actual prosecution of these offences.

### I. The *Criminal Code*

#### A. High Treason and Treason

Section 46 of the *Code* sets out the primary crimes against the State. Subsection (1) dealing with high treason is really an updated version of the three central offences under the 1351 *Statute of Treasons*:

> **46.** (1) **[High treason]** Every one commits high treason who, in Canada,
>
> (*a*) kills or attempts to kill Her Majesty, or does her any bodily harm tending to death or destruction, maims or wounds her, or imprisons or restrains her;
>
> (*b*) levies war against Canada or does any act preparatory thereto; or
>
> (*c*) assists 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 country whose forces they are.

Subsection 46(2) deals with treason and contains the more recent additions to this area of law as well as special conspiracy and intention rules that have developed from the original notion of "compassing" and which are applicable only to section 46 crimes:

(2) **[Treason]** Every one commits treason who, in Canada,

(*a*) uses force or violence for the purpose of overthrowing the government of Canada or a province;

(*b*) without lawful authority, communicates or makes available to an agent of a state other than Canada, military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial to the safety or defence of Canada;

(*c*) conspires with any person to commit high treason or to do anything mentioned in paragraph (*a*);

(*d*) forms an intention to do anything that is high treason or that is mentioned in paragraph (*a*) and manifests that intention by an overt act; or

(*e*) conspires with any person to do anything mentioned in paragraph (*b*) or forms an intention to do anything mentioned in paragraph (*b*) and manifests that intention by an overt act.

Subsection 46(3) gives extraterritorial scope to the treason offences where they are committed abroad by someone owing allegiance to Canada:

(3) **[Canadian citizen]** Notwithstanding subsection (1) or (2), a Canadian citizen or a person who owes allegiance to Her Majesty in right of Canada,

(*a*) commits high treason if, while in or out of Canada, he does anything mentioned in subsection (1); or

(*b*) commits treason if, while in or out of Canada, he does anything mentioned in subsection (2).

Subsection 46(4) gives some explanation as to what is meant by a "overt act":

(4) **[Overt act]** Where it is treason to conspire with any person, the act of conspiring is an overt act of treason.

Section 47 of the *Code* specifies the punishment for treason and high treason, and the requirement of corrobation of evidence.

**47.** (1) **[Punishment for high treason]** Every one who commits high treason is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(2) **[Punishment for treason]** Every one who commits treason is guilty of an indictable offence and is liable

(*a*) to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(*a*), (*c*) or (*d*);

(*b*) to be sentenced to imprisonment for life if he is guilty of an offence under paragraph 46(2)(*b*) or (*e*) committed while a state of war exists between Canada and another country; or

(*c*) to be sentenced to imprisonment for fourteen years if he is guilty of an offence under paragraph 46(2)(*b*) or (*e*) committed while no state of war exists between Canada and another country.

(3) **[Corroboration]** No person shall be convicted of high treason or 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.

(4) **[Minimum punishment]** For the purposes of Part XX, the sentence of imprisonment for life prescribed by subsection (1) is a minimum punishment.

Section 48 sets time limitations for the commencement of proceedings in respect to certain acts of treason:

**48.** (1) **[Limitation]** No proceedings for an offence of treason as defined by paragraph 46(2)(*a*) shall be commenced more than three years after the time when the offence is alleged to have been committed.

(2) **[Information for treasonable words]** No proceedings shall be commenced under section 47 in respect of an overt act of treason expressed or declared by open and considered speech unless

(*a*) an information setting out the overt act and the words by which it was expressed or declared is laid under oath before a justice within six days after the time when the words are alleged to have been spoken, and

(*b*) a warrant for the arrest of the accused is issued within ten days after the time when the information is laid.

## B. Ancillary *Code* Crimes against the State

The rest of the *Code* offences against the State are really supportive of the main crime of treason. Thus, section 49 makes it an offence to do anything intending to alarm or harm Her Majesty.

**49.** **[Acts intended to alarm Her Majesty or break public peace]** Every one who wilfully, in the presence of Her Majesty,

(*a*) does an act with intent to alarm Her Majesty or to break the public peace, or

(*b*) does an act that is intended or is likely to cause bodily harm to Her Majesty,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 50 sets out two secondary crimes: first, assisting a subject of an enemy State to leave Canada without the Crown's consent, and second, failing to prevent or inform the authorities about anticipated acts of treason:

**50.** (1) **[Assisting alien enemy to leave Canada, or omitting to prevent treason]** Every one commits an offence who

(*a*) incites or wilfully assists a subject of

(i) a state that is at war with Canada, or

(ii) a state against whose forces Canadian Forces are engaged in hostilities, whether or not a state of war exists between Canada and the state whose forces they are,

to leave Canada without the consent of the Crown, unless the accused establishes that assistance to the state referred to in subparagraph (i) or the forces of the state referred to in subparagraph (ii), as the case may be, was not intended thereby; or

(*b*) knowing that a person is about to commit high treason or treason does not, with all reasonable dispatch, inform a justice of the peace or other peace officer thereof or make other reasonable efforts to prevent that person from committing high treason or treason.

(2) **[Punishment]** Every one who commits an offence under subsection (1) is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 51 sets out the offence of doing violent acts to intimidate Parliament or a provincial legislature:

**51. [Intimidating Parliament or legislature]** Every one who does an act of violence in order to intimidate the Parliament of Canada or the legislature of a province is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Section 52 specifically criminalizes acts of sabotage intended to jeopardize the safety, security or defence of Canada:

**52.** (1) **[Sabotage]** Every one who does a prohibited act for a purpose prejudicial to

(*a*) the safety, security or defence of Canada, or

(*b*) the safety or security of the naval, army or air forces of any state other than Canada that are lawfully present in Canada,

is guilty of an indictable offence and is liable to imprisonment for ten years.

(2) **["Prohibited act"]** In this section, "prohibited act" means an act or omission that

(*a*) impairs the efficiency or impedes the working of any vessel, vehicle, aircraft, machinery, apparatus or other thing, or

(*b*) causes property, by whomsoever it may be owned, to be lost, damaged or destroyed.

(3) **[Saving]** No person does a prohibited act within the meaning of this section by reason only that

(*a*) he stops work as a result of the failure of his employer and himself to agree upon any matter relating to his employment,

(*b*) he stops work as a result of the failure of his employer and a bargaining agent acting on his behalf to agree upon any matter relating to his employment, or

(*c*) he stops work as a result of his taking part in a combination of workmen or employees for their own reasonable protection as workmen or employees.

(4) **[Idem]** No person does a prohibited act within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information.

The crimes of sedition in *Code* sections 60 to 62 also may be considered as ancillary to treason in that they prohibit spoken words, writings and conspiracies that have a tendency to encourage others to commit treasonable acts or other crimes against the State.

**60.** (1) **[Seditious words]** Seditious words are words that express a seditious intention.

(2) **[Seditious libel]** A seditious libel is a libel that expresses a seditious intention.

(3) **[Seditious conspiracy]** A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

(4) **[Seditious intention]** Without limiting the generality of the meaning of the expression "seditious intention", every one shall be presumed to have a seditious intention who

(*a*) teaches or advocates, or

(*b*) publishes or circulates any writing that advocates,

the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

**61.** **[Exception]** Notwithstanding subsection 60(4), no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,

(*a*) to show that Her Majesty has been misled or mistaken in her measures;

(*b*) to point out errors or defects in

(i) the government or constitution of Canada or a province,

(ii) the Parliament of Canada or the legislature of a province, or

(iii) the administration of justice in Canada;

(*c*) to procure, by lawful means, the alteration of any matter of government in Canada; or

(*d*) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

**62.** **[Punishment of seditious offences]** Every one who

(*a*) speaks seditious words,

(*b*) publishes a seditious libel, or

(*c*) is a party to a seditious conspiracy,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

Part II of the *Code* also contains a series of secondary crimes against the State designed to preserve the monopoly of the State over the use of military force in Canada. These offences prohibit inciting mutiny in the Canadian Forces (s. 53), assisting a deserter from the Canadian Forces (s. 54), inciting desertion and assisting a deserter from the R.C.M.P. force (s. 57), interfering with loyalty or discipline of a member of a force (s. 63), and drilling of private armies (s. 71):

**53.** **[Inciting to mutiny]** Every one who

(*a*) attempts, for a traitorous or mutinous purpose, to seduce a member of the Canadian Forces from his duty and allegiance to Her Majesty, or

(*b*) attempts to incite or to induce a member of the Canadian Forces to commit a traitorous or mutinous act,

is guilty of an indictable offence and is liable to imprisonment for fourteen years.

**54.** **[Assisting deserter]** Every one who aids, assists, harbours or conceals a person who he knows is a deserter or absentee without leave from the Canadian Forces is guilty of an offence punishable on summary conviction, but no proceedings shall be instituted under this section without the consent of the Attorney General of Canada.

**57.** **[Offences in relation to members of R.C.M.P.]** Every one who wilfully

(*a*) persuades or counsels a member of the Royal Canadian Mounted Police to desert or absent himself without leave,

(*b*) aids, assists, harbours or conceals a member of the Royal Canadian Mounted Police who he knows is a deserter or absentee without leave, or

(*c*) aids or assists a member of the Royal Canadian Mounted Police to desert or absent himself without leave, knowing that the member is about to desert or absent himself without leave,

is guilty of an offence punishable on summary conviction.

**63.** (1) **[Offences in relation to military forces]** Every one who wilfully

(*a*) interferes with, impairs or influences the loyalty or discipline of a member of a force,

(*b*) publishes, edits, issues, circulates or distributes a writing that advises, counsels or urges insubordination, disloyalty, mutiny or refusal of duty by a member of a force, or

(*c*) advises, counsels, urges or in any manner causes insubordination, disloyalty, mutiny or refusal of duty by a member of a force,

is guilty of an indictable offence and is liable to imprisonment for five years.

(2) **["Member of a force"]** In this section, "member of a force" means a member of

(*a*) the Canadian Forces, or

(*b*) the naval, army or air forces of a state other than Canada that are lawfully present in Canada.

**71.** (1) **[Orders by Governor in Council]** The Governor in Council may from time to time by proclamation make orders

(*a*) to prohibit assemblies, without lawful authority, of persons for the purpose

(i) of training or drilling themselves,

(ii) of being trained or drilled to the use of arms, or

(iii) of practising military exercises; or

(*b*) to prohibit persons when assembled for any purpose from training or drilling themselves or from being trained or drilled.

(2) **[General or special order]** An order that is made under subsection (1) may be general or may be made applicable to particular places, districts or assemblies to be specified in the order.

(3) **[Punishment]** Every one who contravenes an order made under this section is guilty of an indictable offence and is liable to imprisonment for five years.

## II. The *Official Secrets Act*

### A. Spying

In rough parallel to the layout of Part II of the *Criminal Code*, the *O.S.A.* also contains both primary and secondary crimes against the State. The central offence under this Act is that of spying, which is described at length in sections 3 and 4:

**3.** (1) **[Spying]** Every person is guilty of an offence under this Act who, for any purpose prejudicial to the safety or interests of the State,

(*a*) approaches, inspects, passes over, or is in the neighbourhood of, or enters any prohibited place;

(*b*) makes any sketch, plan, model or note that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power; or

(*c*) obtains, collects, records, or publishes, or communicates to any other person any secret official code word, or pass word, or any sketch, plan, model, article, or note, or other document or information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

(2) **[If purpose prejudicial to safety of State]** On a prosecution under this section, it is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case, or his conduct, or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the State; and if any sketch, plan, model, article, note, document or information relating to or used in any prohibited place, or anything in such a place, or any secret official code word or pass word is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, it shall be deemed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State unless the contrary is proved.

(3) **[Communication with agent of foreign power, etc.]** In any proceedings against a person for an offence under this section, the fact that he has been in communication with, or attempted to communicate with, an agent of a foreign power, whether within or outside Canada, is evidence that he has, for a purpose prejudicial to the safety or interests of the State, obtained or attempted to obtain information that is calculated to be or might be or is intended to be directly or indirectly useful to a foreign power.

(4) **[When deemed to have been in communication]** For the purpose of this section, but without prejudice to the generality of the foregoing provision

(*a*) a person shall, unless he proves the contrary, be deemed to have been in communication with an agent of a foreign power if

(i) he has, either within or outside Canada, visited the address of an agent of a foreign power or consorted or associated with such agent, or

(ii) either within or outside Canada, the name or address of, or any other information regarding such an agent has been found in his possession, or has been supplied by him to any other person, or has been obtained by him from any other person;

(*b*) "an agent of a foreign power" includes any person who is or has been or is reasonably suspected of being or having been employed by a foreign power either directly or indirectly for the purpose of committing an act, either within or outside Canada, prejudicial to the safety or interests of the State, or who has or is reasonably suspected of having, either within or outside Canada, committed, or attempted to commit, such an act in the interests of a foreign power; and

(*c*) any address, whether within or outside Canada, reasonably suspected of being an address used for the receipt of communications intended for an agent of a foreign power, or any address at which such an agent resides, or to which he resorts for the purpose of giving or receiving communications, or at which he carries on any business, shall be deemed to be the address of an agent of a foreign power, and communications addressed to such an address to be communications with such an agent.

**4.** (1) **[Wrongful communication, etc., of information]** Every person is guilty of an offence under this Act who, having in his possession or control any secret official code word, or pass word, or any sketch, plan, model, article, note, document or information that relates to or is used in a prohibited place or anything in such a place, or that has been made or obtained in contravention of this Act, or that has been entrusted in confidence to him by any person holding office under Her Majesty, or that he has obtained or to which he has had access while subject to the Code of Service Discipline within the meaning of the *National Defence Act* or owing to his position as a person who holds or has held office under Her Majesty, or as a person who holds or has held a contract made on behalf of Her Majesty, or a contract the performance of which in whole or in part is carried out in a prohibited place, or as a person who is or has been employed under a person who holds or has held such an office or contract,

(*a*) communicates the code word, pass word, sketch, plan, model, article, note, document or information to any person, other than a person to whom he is authorized to communicate with, or a person to whom it is in the interest of the State his duty to communicate it;

(*b*) uses the information in his possession for the benefit of any foreign power or in any other manner prejudicial to the safety or interests of the State;

(*c*) retains the sketch, plan, model, article, note, or document in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it or fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(*d*) fails to take reasonable care of, or so conducts himself as to endanger the safety of the sketch, plan, model, article, note, document, secret official code word or pass word or information.

(2) **[Communication of sketch, plan, model, etc.]** Every person is guilty of an offence under this Act who, having in his possession or control any sketch, plan, model,

article, note, document or information that relates to munitions of war, communicates it directly or indirectly to any foreign power, or in any other manner prejudicial to the safety or interests of the State.

(3) **[Receiving code word, sketch, etc.]** Every person who receives any secret official code word, or pass word, or sketch, plan, model, article, note, document or information, knowing, or having reasonable ground to believe, at the time when he receives it, that the code word, pass word, sketch, plan, model, article, note, document or information is communicated to him in contravention of this Act, is guilty of an offence under this Act, unless he proves that the communication to him of the code word, pass word, sketch, plan, model, article, note, document or information was contrary to his desire.

(4) **[Retaining or allowing possession of document, etc.]** Every person is guilty of an offence under this Act who

(*a*) retains for any purpose prejudicial to the safety or interests of the State any official document, whether or not completed or issued for use, when he has no right to retain it, or when it is contrary to his duty to retain it, or fails to comply with any directions issued by any Government department or any person authorized by such department with regard to the return or disposal thereof; or

(*b*) allows any other person to have possession of any official document issued for his use alone, or communicates any secret official code word or pass word so issued, or, without lawful authority or excuse, has in his possession any official document or secret official code word or pass word issued for the use of some person other than himself, or on obtaining possession of any official document by finding or otherwise, neglects or fails to restore it to the person or authority by whom or for whose use it was issued, or to a police constable.

## B. Ancillary *O.S.A.* Crimes against the State

*O.S.A.* sections 3 and 4 are supported by the following ancillary provisions: sections 5 and 6 which are directed at catching persons attempting to gain access to or interfering with the security at a prohibited place; section 8 which makes it an offence to harbour spies; and section 9 which imposes full liability on those who incite or attempt commission of any offence under the Act.

**5.** (1) **[Unauthorized use of uniforms; falsification of reports, forgery, personation and false documents]** Every person is guilty of an offence under this Act who, for the purpose of gaining admission, or of assisting any other person to gain admission, to a prohibited place, or for any other purpose prejudicial to the safety or interests of the State,

(*a*) uses or wears, without lawful authority, any military, police or other official uniform or any uniform so nearly resembling the same as to be calculated to deceive, or falsely represents himself to be a person who is or has been entitled to use or wear any such uniform;

(*b*) orally, or in writing in any declaration or application, or in any document signed by him or on his behalf, knowingly makes or connives at the making of any false statement or any omission;

(*c*) forges, alters, or tampers with any passport or any military, police or official pass, permit, certificate, licence or other document of a similar character, (hereinafter in this section referred to as an official document), or uses or has in his possession any such forged, altered, or irregular official document;

(*d*) personates, or falsely represents himself to be a person holding, or in the employment of a person holding, office under Her Majesty, or to be or not to be a person to whom an official document or secret official code word or pass word has been duly issued or communicated, or with intent to obtain an official document, secret official code word or pass word, whether for himself or any other person, knowingly makes any false statement; or

(*e*) uses, or has in his possession or under his control, without the authority of the Government department or the authority concerned, any die, seal, or stamp of or belonging to, or used, made, or provided by any Government department, or by any diplomatic or military authority appointed by or acting under the authority of Her Majesty, or any die, seal or stamp, so nearly resembling any such die, seal or stamp as to be calculated to deceive, or counterfeits any such die, seal or stamp, or uses or has in his possession, or under his control, any such counterfeited die, seal or stamp.

(2) **[Unlawful dealing with dies, seals, etc.]** Every person who, without lawful authority or excuse, manufactures or sells, or has in his possession for sale any such die, seal or stamp as aforesaid, is guilty of an offence under this Act.

**6. [Interference]** No person in the vicinity of any prohibited place shall obstruct, knowingly mislead or otherwise interfere with or impede any constable or police officer, or any member of Her Majesty's forces engaged on guard, sentry, patrol, or other similar duty in relation to the prohibited place, and every person who acts in contravention of, or fails to comply with, this provision, is guilty of an offence under this Act.

**8. [Harbouring spies]** Every person who knowingly harbours any person whom he knows, or has reasonable grounds for supposing, to be a person who is about to commit or who has committed an offence under this Act, or knowingly permits to meet or assemble in any premises in his occupation or under his control any such persons, and every person who, having harboured any such person, or permitted any such persons to meet or assemble in any premises in his occupation or under his control, wilfully omits or refuses to disclose to a senior police officer any information that it is in his power to give in relation to any such person, is guilty of an offence under this Act.

**9. [Attempts, incitements, etc.]** Every person who attempts to commit any offence under this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under this Act, is guilty of an offence under this Act and is liable to the same punishment, and to be proceeded against in the same manner, as if he had committed the offence.

Section 13 gives extraterritorial scope to the *O.S.A.* offences in certain situations:

**13. [Offences committed outside Canada]** An act, omission or thing that would, by reason of this Act, be punishable as an offence if committed in Canada, is, if committed outside Canada, an offence against this Act, triable and punishable in Canada, in the following cases:

(*a*) where the offender at the time of the commission was a Canadian citizen within the meaning of the *Canadian Citizenship Act*; or

(*b*) where any code word, pass word, sketch, plan, model, article, note, document, information or other thing whatever in respect of which an offender is charged was obtained by him, or depends upon information that he obtained, while owing allegiance to Her Majesty.

The punishment for *O.S.A.* offences is set out in section 15(1):

**15.** (1) **[Penalties]** Where no specific penalty is provided in this Act, any person who is guilty of an offence under this Act shall be deemed to be guilty of an indictable offence and is, on conviction, punishable by imprisonment for a term not exceeding fourteen years; but such person may, at the election of the Attorney General, be prosecuted summarily in the manner provided by the provisions of the *Criminal Code* relating to summary convictions, and, if so prosecuted, is punishable by a fine not exceeding five hundred dollars, or by imprisonment not exceeding twelve months, or by both.

# CHAPTER FOUR

## Shortcomings

The offences against the State found in Part II of the *Code* and the *O.S.A.* are riddled with defects of both form and content.

We can identify three subcategories of *formal* shortcomings:

(1) poor arrangement resulting in overlapping of, and inconsistency between, provisions;

(2) excessive complexity and detail; and

(3) uncertainty as to scope and meaning.

With respect to *content*, the three major defects are:

(1) the provisions are out of date and lacking in principle;

(2) there is overcriminalization; and

(3) some of the sections may very well infringe the *Canadian Charter of Rights and Freedoms*.

### I. Form

#### A. Poor Arrangement

*Ad hoc* amending techniques, poor legislative drafting, and Parliament's failure ever to deal with crimes against the State as a whole have resulted in these crimes being arranged in two separate mini-codes (the *O.S.A.* and Part II of the *Criminal Code*) whose provisions overlap and are inconsistent with each other, with the rest of the *Criminal Code*, and with other federal statutes.

(1) Overlapping

First there is the problem of overlapping between the offences against the State in the *O.S.A.* and Part II of the *Code*. The main example of this is the overlapping of the espionage-related offences in paragraph 46(2)(*b*) of the *Code* and sections 3 and 4 of the *O.S.A.* A second example is the repetition of the duty to disclose suspected acts of spying to the authorities, found in paragraph 50(1)(*b*) of the *Code* and section 8 of the *O.S.A.*

Next, turning to the *O.S.A.*, the main problem of overlapping encountered within that Act itself is found in sections 3 and 4. Both sections criminalize espionage-related conduct but are so widely drafted as to result in considerable repetition. There are many examples of this but one will suffice to show the nature of the problem. Paragraph 3(1)(*c*), which makes it an offence for any person who, for a purpose prejudicial to the safety or interests of the State, communicates information to any other person if the information might be useful to a foreign power, overlaps with paragraph 4(1)(*a*), which makes it an offence for any person having possession of any such information to communicate it to any person other than a person to whom it is in the interests of the State to communicate it.

There are also examples of overlapping among the provisions of Part II of the *Code*. Thus, bearing in mind that the common law definition of "levies war" (s. 46(1)(*b*)) is doing any act of violence with a political object,[59] it would seem that the relatively new head of treason, using force or violence for the purpose of overthrowing the government (s. 46(2)(*a*)), covers much of the same ground again. Surely one carefully worded provision could, with the assistance of the inchoate offences of conspiracy and attempt, more than adequately deal with the problem of violent rebellion.

The same problem arises with respect to the crimes against the Queen personally. Paragraph 46(1)(*a*) makes it high treason to kill or attempt to kill her, or cause her any bodily injury tending to her death, to maim or wound her, imprison or restrain her. Paragraph 49(*b*) makes it an offence to do any act intended or likely to cause bodily harm to her. There is considerable overlapping between the two provisions, with section 49 operating as a special "attempt" offence for paragraph 46(1)(*a*). When first enacted in 1842-43 this offence of alarming or harming the Queen filled a gap in the law because the *Statute of Treasons* only protected the sovereign from deadly assaults.[60] Now that high treason has been enlarged to include causing bodily injury to the Queen, and now that there are generally available inchoate offences (*Code* ss. 24, 422, 423), section 49 seems to be redundant.

---

59. Mewett and Manning (1985: 434), described levying war as meaning not war declared in the international law sense, but the use of armed forces by a large number of people against the lawful Government of Canada in order to achieve some public or general, as opposed to private, objective. See also: *Halsbury's Laws of England*, 1976: 479-80; Turner, 1964; 211-2; Stephen, 1883: 268-71; U.K., Law Commission, 1977: 11-2.

60. Stephen, 1883: 250.

Another example of overlapping within Part II of the *Code* is found in sections 53 and 63, both of which deal with inciting or counselling a member of the Canadian Forces to disloyalty or mutiny. While there are differences between the two provisions[61] the broad area of overlap suggests that at least one of these sections is unnecessary.

There is overlapping between Part II of the *Code* and other *Code* provisions as well. One problem that has already been adverted to is the failure of the drafters of the offences against the State to make use of the generally applicable rules as to attempt (s. 24), incitement (s. 422) and conspiracy (s. 423). Instead we find the treason sections riddled with specific attempt and conspiracy offences. See, for example, paragraphs 46(1)(*a*) and (*b*), and paragraphs 46(2)(*c*), (*d*) and (*e*). As well, because of the narrow construction placed on the sedition offences by the Supreme Court in the *Boucher* case,[62] it would seem that sedition completely overlaps with the general offences of incitement and conspiracy as they apply to other Part II offences, such as, for example, inciting violent revolution.

Two obvious cases of overlapping with other *Code* sections are paragraph 46(1)(*a*) and section 49 because both of these sections deal with conduct that would fall within the general *Code* provisions dealing with offences against the person.

Last of all, we also find that the provisions of the *O.S.A.* and Part II of the *Code* overlap with offences created in the *National Defence Act*. Thus, the *National Defence Act* contains: espionage offences (ss. 65, 68) dealing with similar conduct to *Code* paragraph 46(2)(*b*) and *O.S.A.* sections 3 and 4; offences of assisting the enemy (ss. 65, 256, 257) covering the same ground as *Code* paragraph 46(1)(*c*); an offence of inciting mutiny (s. 71) that duplicates *Code* sections 53 and 63; an offence of sedition

---

61. Section 63 also relates to interfering with members of foreign armed forces lawfully present in Canada, and carries a penalty of five years imprisonment, as opposed to the fourteen years penalty under section 53. There are differences in wording as well, but the substance of both sections is very similar.

62. Stephen (1877) conveniently summarized the law of sedition as it stood in his day in Article 93:

> A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of her Majesty, her heirs or 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 in Church or 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 such subjects.
>
> An intention to show that her Majesty has been misled or mistaken in her measures, or to point out errors or defects in the government or constitution as by law established, with a view to their reformation, or to excite her Majesty's subjects to attempt by lawful means the alteration of any matter in Church or State by law established, or to point out, in order to their removal, matters which are producing, or have a tendency to produce feelings of hatred and ill-will between classes of her Majesty's subjects, is not a seditious intention.

See also Turner, 1964: 216. Stephen's definition was qualified by *Boucher* v. *The King*, [1951] S.C.R. 265, which held that neither language calculated to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence against constituted authority or to create a public disturbance or disorder against such authority (*per* Kerwin J., p. 283, and Kellock J., p. 301).

(s. 72) that duplicates *Code* subsection 60(4); and an offence of "conniving at desertion" (s. 79) which seems to cover some of the same conduct as *Code* section 54. Surely it is unnecessary to have special offences of espionage and assisting the enemy in the *National Defence Act*, if the *Code* already criminalizes such conduct. On the other hand, the offences relating to discipline in the forces are more appropriately dealt with in the *National Defence Act* than in the *Criminal Code* which is meant to contain only crimes of *general* application.[63]

(2) Inconsistency

Problems of inconsistency are found within the *Code* itself, and between the provisions of the *O.S.A.* and Part II of the *Code*.

There are many internal inconsistencies in the *Code*, particularly in relation to section 46. One instance of this is the lack of a uniform standard of *mens rea* for treason and high treason. Although most of the conduct probably has to be committed intentionally, there are notable exceptions, for example, paragraph 46(1)(*a*): "does [the Queen] any bodily harm tending to death or destruction..." which might also cover reckless conduct, and paragraph 46(2)(*b*) which imports either a standard of recklessness or negligence.

A second source of inconsistency within section 46 is the fact that it contains three different standards of liability for incomplete conduct. Thus, paragraph 46(1)(*a*) makes it high treason to kill or *attempt* to kill the Queen; paragraph 46(1)(*b*) makes it high treason to levy war against Canada or *do any act preparatory thereto*; and paragraph 46(2)(*d*) makes it treason *to form an intention* to commit high treason *and manifest that intention by an overt act*. This inconsistency is made worse by the fact that paragraph 46(2)(*d*) piggybacks on section 46, and thereby makes it treason to form an intention to attempt to kill the Queen, and manifest that intention by an overt act. The problem is further exacerbated by section 24 which provides a general rule of liability for attempts, and which, if applied literally, would add another layer of piggybacking, making it an offence to attempt to form an intention to attempt to kill the Queen. Considering the difficulties already encountered in determining what is meant by "attempt" in section 24,[64] it would seem that the three additional standards in section 46 only serve to increase confusion and uncertainty.

There are also problems of inconsistency between section 46 and the other *Code* offences against the State. One example of this is that section 49 (acts intended to alarm or harm the Queen) deals with some of the same conduct as paragraph 46(1)(*a*) (killing, harming or restraining the Queen) but has no extraterritorial scope. Second, although paragraph 46(2)(*a*) (using force or violence to overthrow the government) and section 51 (doing an act of violence in order to intimidate Parliament) cover similar conduct, the more serious offence, paragraph 46(2)(*a*), which is punishable by life

63. For an examination of the proper scope for criminal law, see Canada, LRC, 1976.

64. See: *R.* v. *Cline* (1956), 115 C.C.C. 18, 24 C.R. 58 (Ont. C.A.); Meehan, 1984: 5-6.

imprisonment, has a three-year time limitation on prosecutions (s. 48 (1)) whereas there is no time limitation respecting section 51. In the same way it seems inconsistent that there is a sixteen-day limitation period for treason prosecutions based on spoken words (s. 48(2)) but there is no time limitation on liability for speaking seditious words (s. 62) which is a less serious offence.

The inconsistencies between the *O.S.A.* and Part II of the *Code* centre around the espionage offences — (*Code* s. 46(1)(*b*); *O.S.A.* s. 3). First of all, the mental elements for the *Code* and *O.S.A.* offences appear to be different. *O.S.A.* section 3 refers to doing something "for any purpose prejudicial...," suggesting full *mens rea*, whereas *Code* paragraph 46(2)(*b*), in using the phrase "without lawful authority communicates ... information ... that he ... ought to know may be used by that state for a purpose prejudicial ..." seems to impose a standard of only recklessness or even negligence. Secondly, it is peculiar that both sections use the expression "for ... purpose prejudicial to the safety" of Canada, but in the *O.S.A.* it is the accused who must have the prejudicial purpose, whereas in *Code* paragraph 46(2)(*b*) it is the foreign State that has the prejudicial purpose, not the accused. Also the *O.S.A.* speaks of "safety or interests of the State," suggesting that economic information would also be protected by that Act, whereas *Code* paragraph 46(2)(*b*) refers to "safety or defence of Canada," and therefore would not protect economic information. As an aside, it is perplexing to note that the sabotage offence in section 52 of the *Code* uses yet another variation of the same expression, "purpose prejudicial to the safety, security or defence of Canada."

The physical elements of the *Code* and *O.S.A.* espionage offences differ as well. Thus, paragraph 46(2)(*b*) simply proscribes communicating or making available "military or scientific information or any sketch, plan, model, article, note or document of a military or scientific character that he knows or ought to know may be used by that state for a purpose prejudicial ...." Contrast this with the long and detailed lists of proscribed conduct set out in sections 3 and 4 of the *O.S.A.*

Another point of inconsistency between these two Acts, is the extraterritorial scope for the espionage offences. Subsection 46(3) of the *Code* provides that the paragraph 46(2)(*b*) offence can be committed abroad by a Canadian citizen or anyone owing allegiance to Her Majesty in right of Canada. On the other hand, section 13 of the *O.S.A.* provides that the sections 3 and 4 espionage offences can be committed abroad by a Canadian citizen or by anyone who, at the time he obtained the information, owed allegiance to Her Majesty. This inconsistency means that where a person situated outside of Canada, has given up allegiance to Canada at the time he communicates the information, he cannot be prosecuted for treason under the *Code* but he is still liable under the *O.S.A.* And, if a person obtains information while he is not a Canadian citizen or does not owe allegiance to Canada, then assumes allegiance to Canada, and subsequently communicates the information, he will not be liable under the *O.S.A.* but will be subject to prosecution for treason.

Finally, the punishment for espionage under the *Code* and the *O.S.A.* is different. Under section 15 of the *O.S.A.* the punishment may range from twelve months in jail

or a five-hundred-dollar fine to fourteen years imprisonment. Under section 47 of the *Code* the punishment for espionage is either a maximum of fourteen years imprisonment in times of peace, or life imprisonment in times of war.

## B. Excessive Complexity and Detail

The problem of excessive complexity and detail is one that pervades the entire scheme of offences against the State, as well as the individual provisions. The most obvious and serious defect of this kind is the fact that Parliament has created two separate but overlapping codes of offences, each complete with its own rules of procedure and evidence, to deal with one relatively limited subject. Clearly it would have been simpler to put all these offences in one place. It is also questionable whether there is a need for special evidentiary and procedural rules for these offences, such as the corroboration requirement and special time limitations for treason, when there are already general rules of evidence and procedure that could be applied.

Excessive detail and complexity can be found within the individual sections of the *Code* and the *O.S.A.* as well. Turning to the *Code* first, we find in sections 46 and 47 examples of needlessly complex drafting. Subsection 46(2) (treason) piggybacks on itself and on subsection 46(1) (high treason) in that paragraphs 46(2)(*c*) and (*d*) define two of the heads of treason as conspiring or forming an intention "to do anything that is high treason or that is mentioned in paragraph (*a*)." Then section 47, in listing the punishments for treason, simply refers to subsection numbers in section 46, so that it is necessary to trace backwards through subsections 46(2) and 46(1) to understand what punishment applies to what conduct. Surely this could be drafted more simply and clearly.

The worst examples of complexity and excess detail, however, are to be found in the *O.S.A.*, an Act which can fairly be condemned as one of the poorest examples of legislative drafting in the statute books. The Act only deals with leakage- and espionage-related offences: section 3, the spying offence proper, contains a long list of proscribed conduct; section 4 deals at length with wrongful communication or use of information, and then sets out three additional specific offences; sections 5, 6, 8 and 9 create further spying-related offences. All of these provisions are long-winded, some with sentences of over one hundred and fifty words in length, and many are incomprehensible. The *O.S.A.* devotes several pages and over a thousand words to espionage-related offences whereas the *Criminal Code* manages to say perhaps all that needs to be said about the offence of spying in one short paragraph (s. 46 (2)(*b*)). Despite all the detail and complexity, the *O.S.A.* espionage offences are no more precise than paragraph 46(2)(*b*) of the *Code*; indeed, their exact scope remains unclear.[65]

65. See *infra*, pp. 33-4. The *O.S.A.* presented no serious impediments to the prosecution of Morrison (Long Knife) because of the strong evidence against him: he had confessed his crime in a television interview. On January 23, 1986, he pleaded guilty to violating *O.S.A.* paragraph 3(1)(*c*). See also *Re Regina and Morrison* (1984), 47 O.R. (2d) 185 (Ont. H.C.), appeal dismissed October 17, 1984.

## C. Uncertainty

The problem of uncertainty as to the meaning of certain words and expressions used in the *O.S.A.* and Part II of the *Code* is a particularly serious one because of the extreme severity of the punishments for these offences. In some cases it is just a question of an obscure phrase that throws the meaning of the section into doubt; in other cases Parliament has failed to define the offence at all. We will consider first uncertainties in Part II of the *Code*; second, uncertainties common to both the *Code* and the *O.S.A.*; and third, uncertainties specific to the *O.S.A.*

Turning to the *Code* then, we find that section 46 has several defects of ambiguity. First of all, it is unclear what is meant by "levies war" in paragraph 46(1)(*b*). Is it meant only to apply to internal rebellions by Canadians, or would it include foreign invaders present in Canada?[66] It would seem strange to include the latter group in the offence of treason. Treason is based on the fundamental notion of betrayal, and an enemy soldier at war with Canada can hardly be said to betray Canada since he owes no duty to Canada. Second, the phrase "assists an enemy" in paragraph 46(1)(*c*) is vague in that it does not specify whether the assistance has to be related to the war effort and whether it must be substantial. Such restrictions on the meaning of this phrase would only be reasonable, although at least one Canadian court has not read the words so narrowly.[67] Third, because of the uncertainty as to the meaning of paragraphs 46(1)(*b*) and 46(2)(*a*) there is some doubt as to whether a unilateral act of secession by a province or a municipality would constitute treason, as being either levying war against Canada or using force to overthrow the government. While it would be reasonable to interpret these two sections as including forceful or violent action aimed at secession, mere non-violent actions, such as a unilateral declaration of independence or secession legislation, are less obviously to be included. In our view, however, these matters are best resolved through the political process, rather than by resorting to the blunt instrument of the criminal law.

Aside from section 46, there are other poorly defined offences in Part II of the *Code*. First, there is uncertainty as to the meaning intended by the proscription in section 51 against doing an act of violence in order to intimidate a legislative body. Is it enough that the actor's intention is to frighten the legislators without more, or must he intend to cow them into taking or refusing to take certain measures? Section 51 does not specify, but section 381, setting out the general offence of intimidation, does contain this latter restriction: that the intimidation have a further purpose of influencing the

66. Mewett and Manning, 1985: 434; *Halsbury's Laws of England*, 1976: vol. 11, 479-80; U.K., Law Commission, 1977: 11-2. In fact, it is well settled that a foreign invader or "open enemy," present within Canada, does not commit treason because he is not within the protection nor therefore within the allegiance of the Crown: *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347, p. 368 *per* Lord Jowitt L.C.

67. In *Lampel* v. *Berger* (1917), 38 D.L.R. 47 (Ont. S.C.), Mulock C.J. Ex., indicated that the payment of money to an enemy alien residing in neutral territory, knowing some of the money would be sent by the alien to his wife and family still living in enemy territory, would be assisting the enemy, and therefore treason.

behaviour of the victim. Section 51 ought to have been similarly restricted. Surely legislators are not such a fearful lot that merely frightening them, without more, should be a separate crime, additional to the crime of doing an act of violence.

Another example of uncertainty is found in section 71. This section deals with "unlawful drilling," but gives no actual definition of the offence. Section 71 just leaves it to Cabinet to decide on an *ad hoc* basis, by Order in Council, what the offence will be, where it shall apply, and to whom. Clearly, this is an unsatisfactory way to legislate criminal law.

The seditious offences in sections 60, 61 and 62 provide yet another example of uncertainty in the *Code*. For example, the three offences of speaking seditious words, publishing a seditious libel and being a party to a seditious conspiracy, each require that there be a "seditious intention," but this phrase is not defined. Subsection 60(4) tells us what will be presumed to be a seditious intention and section 61 tells us what will not be treated as a seditious intention, and yet nowhere in the *Code* is there a conclusive definition of what is in fact a seditious intention. Instead we have to turn to the common law to find its meaning, but the common law definition is also vague and uncertain.[68]

There are some defects that Part II of the *Code* and the *O.S.A.* have in common. We find the ambiguous phrase "for a purpose prejudicial to the safety or defence of Canada" in *Code* paragraph 46(2)(*b*), "for a purpose prejudicial to the safety, security or defence of Canada" in *Code* section 52, and "for any purpose prejudicial to the safety or interests of the State" in *O.S.A.* sections 3, 4 and 5. These phrases do not make it clear: (1) whether the accused must know his purpose is prejudicial or whether it suffices that the court finds it so; and (2) whether the existence of such a prejudicial purpose is a matter to be determined by the Crown in the exercise of its prerogative power or by the jury.

The answers to these questions have had to be provided by the courts. As no Canadian court has addressed these issues directly[69] the leading authority on these points is the English case of *Chandler* v. *Director of Public Prosecutions*,[70] in which the House of Lords took the position that in order to find someone liable under subsection 1(1) of the English *Official Secrets Act* of 1911 it was first necessary to determine what was the accused's immediate purpose (as opposed to his ultimate purpose or motive), and then decide whether that purpose was prejudicial to what the Crown, in the exercise of its Royal prerogative, considered to be the interests of the State. The recent acquittal of Clive Ponting by an English jury,[71] however, casts grave doubt on

68. *Boucher* v. *The King*, [1951] S.C.R. 265. For an explanation as to why the definition was omitted, see Friedland, 1979: 17.

69. This question is discussed superficially in *Rose* v. *The King* (1946), 88 C.C.C. 114, pp. 154-6, where it is said that the existence of a prejudicial purpose is an issue of fact for the jury to decide. It is not clear whether this means that the jury determines what is prejudicial, as well as whether the accused has such a purpose.

70. [1962] 3 All E.R. 142 (H.L.).

71. L. Plommer, "U.K. Civil Servant Found Not Guilty of Secrecy Breach," *The Globe and Mail*, 12 February, 1985, p. 1.

the enforceability of this rule because the jury decision amounted to a conclusion that what the government of the day considered to be prejudicial to the interests of the State was not necessarily so.

Whatever may be the merits of the House of Lord's decision to resolve the ambiguities of the phrase "purpose prejudicial" in favour of the Crown prerogative, it would seem that since the enactment of the Charter, and the Supreme Court decision in *Operation Dismantle Inc.* v. *Canada*,[72] this easy solution is not available in Canada because the exercise of Royal prerogative is now reviewable by the courts. On the basis of the *Operation Dismantle* case, a person charged with communicating secret information to a foreign State under *Code* paragraph 46(2)(*b*) or *O.S.A.* section 3 could argue that the government's assessment of the prejudicial nature of his purpose was wrong because the governmental policy underlying that assessment violated the rights and freedoms guaranteed to Canadians by the Charter. Thus, the meaning of the phrase "purpose prejudicial" in Canada remains entirely uncertain.

Another source of some uncertainty found in both the *Code* and the *O.S.A.* is the use of a duty of allegiance to Her Majesty as a criterion for determining the extraterritorial scope of liability for offences against the State (see *Code*, s. 46(3); *O.S.A.*, s. 13). In what circumstances and by whom allegiance is owed is not an easy question, and we must turn to the case-law for answers. The only decision on point is the rather astonishing case of "Lord Haw Haw,"[73] in which an American citizen, living in Germany and broadcasting Nazi propaganda, was found to owe allegiance to the King of England because he had previously obtained a British passport and never relinquished it.

While this decision went too far, and is best attributable to the high feelings running in post-war England, it would be too restrictive to limit the extraterritorial application of the offences against the State to Canadian citizens. What about landed immigrants and other aliens who have been permitted to live in Canada and have been given the protection of this State? Surely they should be criminally liable if they commit these acts in Canada, while enjoying the protection of this State. So why should they be able to do the same things with impunity when outside Canada? Instead of relying on the artificial concept of allegiance, it might be better if the legislators would focus on the underlying reason for imposing liability on someone for offences against the State committed abroad. That reason is expressed in the notion of reciprocity whereby, in exchange for the protection and shelter afforded by the State, a person has an obligation not to do things that will threaten the security of the State. We will examine more closely this concept of reciprocity in the next chapter.

Finally there are specific problems of uncertainty that arise only in the *O.S.A.* Two examples will suffice. Foremost is the difficulty in ascertaining whether the Act is meant to apply only to secret and official information or to any kind of information. The statute itself offers conflicting possibilities. Legislative history suggests that the Act was not meant to be limited to secret and official information and that the words

72. *Operation Dismantle Inc.* v. *Canada* (1985), 59 N.R. 1 (S.C.C.).

73. *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347 (H.L.).

"secret official" were not meant to qualify the entire list of items protected, but only "code word" and "password."[74] On the other hand, the title of the Act and the fact these two words appear at the beginning of the list of items ("*secret official* code word, or password, or any sketch, plan, model, article, or note, or other document or information") covered in the Act, suggest that only secret official information was meant to be protected by the Act. It is an indication of the uncertainty as to the intended meaning of the *O.S.A.* that the Québec Court of Appeal held that it applied to secret and official information only,[75] whereas the Franks Committee concluded that the English Act had much wider application, with the words "secret and official" only qualifying "code word or password," and not the other items listed.[76] Clearly, this is a matter of such critical importance that it should only be settled by Parliament, not the courts.

The last (and equally unresolvable) example of the problem of uncertainty is found in section 8 of the *O.S.A.*, which rather cryptically makes it an offence to "wilfully omit or refuse to disclose to a senior police officer" certain information that one has about suspected spies. The phrase "wilfully omit ... to disclose" is ambiguous. Does it impose an affirmative duty to seek out and inform the senior police officer, or is one only bound to disclose information if one is actually being questioned? Clearly, such an exceptional duty to inform the police about suspected criminals should be worded in unequivocal language, so that people can know the extent of their criminal liability.

## II. Content

### A. Laws That Are Out of Date and Lacking in Principle

The first substantive defect to be considered relates to the failure of the authors of these two mini-codes to recognize the values that underlie these offences; and to update the provisions so as to adjust to changes in these values over time. The most obvious illustrations of this point are found in Part II of the *Code*.

74. The words "secret official" did not appear in England in the 1889 or 1911 U.K. Acts. They were, in fact, added by a Schedule at the end of the 1920 Act and were referred to in the Act itself as "minor details," *Official Secrets Act*, 1920, s. 10. No one suggested that by adding these words they were changing the meaning of the 1911 Act. That Act had been introduced in part to control the activities of German agents who were openly collecting information that was clearly not secret or official information (for example, sketching harbours). (See Williams, 1965: 23-4; Bunyan, 1976: 7-8.) When Canada enacted the *O.S.A.* in 1939 there was no indication that a substantial departure from the 1911 and 1920 English legislation was intended.

75. *Boyer* v. *The King* (1948), 94 C.C.C. 195 (Qué. C.A.). See also *Biernacki* (1961) (unreported Judgment No. 5626 of the Court of Preliminary Inquiry, District of Montréal); *Spencer* (1966) (discussed in Canada, Commission of Inquiry ..., 1966), and *R.* v. *Toronto Sun Publishing Limited* (1979), 24 O.R. (2d) 621 (Prov. Ct.)).

76. U.K. Departmental Committee ..., 1972: Appendix III, 125.

The language, general layout and substance of the treason offence (*Code*, s. 46) show signs of being out of date. Indeed, section 46 is embalmed in language that was first enacted in 1351. Three examples will suffice to illustrate this point. First of all, despite six hundred years of political evolution in England and Canada, during which the power and importance of the monarchy was completely eclipsed by Parliament, section 46, the central offence against the State, nonetheless starts off in exactly the same way as the original *Statute of Treasons*, with killing or attempting to kill the sovereign. The second example concerns the archaic expression "levies war," found in paragraph 46(1)(*b*), which is taken directly from the statute of 1351. Not only does the phrase have an old-fashioned ring to it, but it is used in an unfamiliar sense as well. Instead of meaning the actual declaring and waging of war by a foreign enemy State, as might be understood by a modern reader (and which surely is not treason, anyway), it is intended to describe mere insurrection or rebellion by Canadians.[77] Third, the special provisions respecting the forming of an intention to commit treason and manifesting that intention by an overt act (found in s. 46(2)(*d*) and (*e*)), stem from the medieval concern with criminalizing attempts to commit treason.[78] In those days there was no general law of attempts, so it was necessary to provide specifically that compassing or imagining the king's death was itself treason.[79] Now that *Code* section 24 makes it a crime to attempt to commit any offence the continued existence of these special rules is both anachronistic and redundant.

The offence of sedition provides another example of an outdated and unprincipled law. The original aim of the crime of sedition was to forbid criticism and derision of political authority, and as Fitzjames Stephen pointed out,[80] the offence was a natural concommitant of the once prevalent view that the governors of the State were wise and superior beings exercising a divine mandate and beyond the reproach of the common people. With the coming of age of parliamentary democracy in the nineteenth century, government could no longer be conceived as the infallible master of the people, but as their servant, and subjects were seen to have a perfect right to criticize and even dismiss their government.[81] Indeed it is essential to the health of a parliamentary democracy such as Canada that citizens have the right to criticize, debate and discuss political, economic and social matters in the freest possible manner. This has already been recognized by our courts[82] and now the *Canadian Charter of Rights and Freedoms* provides additional guarantees of political freedom of expression (see ss. 2, 3). Is it not odd then that our *Criminal Code* still contains the offence of sedition which has as its very

77. See Mewett and Manning, 1985: 434; *Halsbury's Law of England*, 1976: 479-80; U.K., Law Commission, 1977: 11-2.

78. Hale, 1736: 107-19, 613; Fletcher, 1978: 205-18.

79. The general law of attempts developed later in the Star Chamber through such decisions as *The Case of Duels* (1615), 2 State Trials 1033, and afterwards was adopted by the Court of King's Bench in *R.* v. *Scofield* (1784), Cald. Mag. Rep. 397 and *R.* v. *Higgins* (1801), 2 East 5, 102 E.R. 269. For a description of this development see Canada, LRC, 1985b.

80. Stephen, 1883: 298-395.

81. *Id.*: 299-300.

82. *Boucher* v. *The King*, [1951] S.C.R. 265, p. 288, *per* Rand J.; *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299; *Switzman* v. *Elbling and Attorney-General of Quebec* (1957), 7 D.L.R. (2d) 337 (S.C.C.); *Reference re Alberta Statutes*, [1938] S.C.R. 100.

object the suppression of such freedom? In the *Boucher* case,[83] the Supreme Court of Canada tries to deal with this inconsistency by taking a narrow view of the common law definition of a seditious intention. Applying their narrow definition, there no longer seems to be a need for a separate offence of sedition, because the only conduct that would be proscribed by it could just as well be dealt with as incitement (*Code*, s. 422), conspiracy (*Code*, s. 423), contempt of court, or hate propaganda (*Code*, ss. 281.1, 281.2). Clearly, *legislative* revision is in order as well.

A further example of offences against the State being out of step with the times is the continued inclusion in the *Code* of the offence of counselling desertion and aiding or harbouring deserters from the Royal Canadian Mounted Police force (s. 57). From the beginnings of the R.C.M.P. force in 1873, its personnel, structure and orientation gave it more the character of a military force (with its members having the additional powers of peace officers), rather than an ordinary civilian police force.[84] Thus it was probably thought to be necessary to include an offence of assisting desertion from the R.C.M.P., to parallel the offence respecting aiding deserters from the Armed Forces (now s. 54). But over the years the role of the R.C.M.P. has become more and more that of a civilian force, and it no longer seems appropriate to give them the special protection afforded by section 57 when it is denied to other police forces, such as the Québec and Ontario provincial police who perform the same tasks as do the R.C.M.P. in other provinces.[85]

The last two examples in this category of defects are cases where it is not so much that the law is out of date but that it is simply lacking in principle. One instance of this problem is the imposition of time limitations of sixteen days for the prosecution of treason when evidenced by spoken words and three years for the prosecution of treason committed by using force to overthrow the government (*Code*, s. 48). Presumably one of the original purposes of the sixteen-day limitation was to avoid the difficulties of witnesses trying to recollect treasonable words that they had overheard, but with today's electronic means of recording speech, this justification loses much of its force; and anyway, there is no similar rationale for the three-year time-limit. With this possible justification now obsolete, the continued existence of these provisions seems to suggest one of two things: either the conduct (that is, treason) is not really criminal at all because, unlike other serious crimes, it loses its reprehensibleness merely by the passage of a little time; or treason is a political crime that loses its criminality when the political winds change. This latter view is neatly phrased in the old adage:

> *Treason doth never prosper:*
> *What's the reason?*
> *For if it prosper,*
> *None dare call it treason.*[86]

83. [1951] S.C.R. 265.

84. Canada, Commission of Inquiry..., 1981: 49 ff.

85. *Id.*: 50.

86. Sir John Harington, *Epigrams*, bk. iv, No. 5, "Of Treason."

But surely if something is worth criminalizing at all, and especially if it is considered to warrant punishment by life imprisonment, as is treason, it should not lose its criminal character either because time has passed (certainly not so brief a time as sixteen days), or because the political leaders have changed.

The last example of unprincipled law is found in the *O.S.A.* The problem there is that the Act deals with both espionage and espionage-related crimes *and* breaches of confidence by Crown employees, without differentiating between the two. Certainly there may be cases in which a civil servant exploits his security clearance to obtain secret information and communicate it to a foreign State, but not every case of breach of trust involves international espionage. The *O.S.A.*, however, always treats the loquacious public servant and the secret agent alike: both may be charged under the same section (s. 4), the punishment is the same, and, more importantly, the terrible stigma of prosecution under the *O.S.A.* is identical for both, because the public and the news media are unable to discern whether it is a case of calculated espionage or careless retention of documents.[87]

## B. Overcriminalization

The preceding discussion of the problems with the current offences against the State has no doubt indicated to the reader that one of the worst defects in this area of the law is that many of the offences overreach the acceptable limits of criminal law. A few examples will confirm this impression.

Some of these examples of overcriminalization are already familiar. First, the negligence standard for treasonous espionage in *Code* paragraph 46(2)(*b*) is entirely inappropriate for an offence punishable by life imprisonment. Second, the offence of sedition infringes on basic rights of expression. Third, it seems excessive to make it a *Criminal Code* offence to counsel a member of the R.C.M.P. to desert.

There are other examples of overcriminalization as well. For instance, besides treating absent-minded civil servants in the same way as enemy spies, the *O.S.A.*, according to the British interpretation at least, contains no limitation as to materiality, substance or public interest,[88] and is so wide as to make it a crime to report the number of cups of tea consumed per week in a government department![89]

87. An example of this was the prosecution of Peter Treu for wrongfully retaining and failing to take proper care of NATO documents, contrary to *O.S.A.* paragraphs 4(1)(*c*) and (*d*). The fact that the trial was held *in camera* only served to add to the mystery surrounding the case. Treu was finally acquitted by the Québec Court of Appeal (1979), 49 C.C.C. (2d) 222, but the controversy about his prosecution continues to this day.

88. U.K. Departmental Committee ..., 1972: para. 17.

89. Williams, 1978: 160-1, referring to a comment by former British Attorney-General Sir Lionel Heald, Q.C.

Another example is *Code* paragraph 50(1)(*a*) which makes it an offence to assist an enemy alien to leave Canada without the consent of the Crown. The section is not of general application but is limited to times when Canada is at war or engaged in armed hostilities. Even then, this conduct does not seem serious enough to warrant criminalization,[90] and surely could be left to War Measures regulations instead of cluttering up the *Code*.

Another instance of overcriminalization is the creation of offences of failing to inform the authorities about suspicious conduct. Paragraph 50(1)(*b*) of the *Code* makes it an offence to fail to report to the authorities or prevent anticipated acts of treason, while section 8 of the *O.S.A.* makes it an offence to omit to disclose to a peace officer information about anyone that one believes is about to commit or has committed an offence under that Act. Nowhere else in the criminal law is there an affirmative duty to warn the authorities when crimes are about to be committed, not even for murder. Nor is there a general duty to prevent the commission of other serious crimes. Canadians may now be ready to accept a general duty to prevent serious bodily harm befalling others,[91] but it is not so clear that they would be prepared to shoulder the additional burden of actively helping the police fight those who commit the various crimes against the State. Indeed, it is at least arguable that the existence of these unusually coercive provisions only serves to foster public suspicion that these are really "political crimes" designed to serve the ruling party at all costs. Nevertheless some (but certainly not all) of the crimes sought to be prevented by *Code* paragraph 50(1)(*b*) and *O.S.A.* section 8 involve such a serious risk to the whole State that it may be justifiable to extend the duties of the private citizen in those cases. In the next chapter we will have to consider whether a strictly limited version of these duties is in fact necessary to protect the legitimate interests of the State.

The last example of overcriminalization is the inclusion in the *Code* of crimes pertaining to discipline in the Canadian Forces. There are three offences of this kind: inciting mutiny or treachery (s. 53), interfering with loyalty or discipline (s. 63), and assisting or harbouring a deserter (s. 54). Only in times of war or violent insurrection would such conduct become serious enough to warrant criminalization, but even then it would be better dealt with in emergency War Measures legislation rather than in the *Code*. In times of peace, harbouring a deserter (s. 54) is too benign an act to be considered criminal, and respecting sections 53 and 63, the public interest in the free expression of opinions by civilians should prevail over the inviolability of army discipline.

## C. Infringement of the *Canadian Charter of Rights and Freedoms*

Not only are the existing offences against the State out of date, complex, repetitive, vague, inconsistent, lacking in principle and overinclusive, but there is reason to suspect

90. For example, see *R.* v. *Snyder* (1915), 24 C.C.C. 101 (Ont. C.A.); and *Re Schaefer* (1918), 31 C.C.C. 22 (Qué. C.A.).

91. Canada, LRC, 1985.

that some of the sections offend the provisions of the *Canadian Charter of Rights and Freedoms* as well. There are two main areas of concern in this regard: one is the possibility of unconstitutional limitations on freedom of expression as protected by paragraph 2(*b*) of the Charter; the other is the possibility of infringement of the paragraph 11(*d*) right to be presumed innocent until proved guilty.

The most probable sources of conflict with freedom of expression are the sedition offences in *Code* sections 60, 61 and 62. Although freedom of expression is not unlimited[92] — for example, incitement of crime clearly is not protected speech — it may be that the courts would find that the limitations on expression imposed by the sedition offences go too far to be considered "reasonable limits" within section 1 of the Charter. There are at least two grounds upon which the courts could reach this conclusion: first, freedom to criticize government and express political opinions is essential for the effective exercise of the democratic right to vote guaranteed by section 3 of the Charter;[93] and second, the seditious offences are so vague and uncertain that they needlessly "chill" legitimate expression.[94]

With respect to the right to be presumed innocent guaranteed by paragraph 11(*d*) of the Charter, a likely source of conflict is the reverse onus in paragraph 50(1)(*a*) of the *Code*, which requires that the accused prove that he did not intend by his actions to assist an enemy State. Although the exact meaning of the paragraph 11(*d*) right has not been settled yet by a decision of the Supreme Court, two appellate courts have recently provided some guidance as to how the section applies. In one case, *R.* v. *Carroll*,[95] the Prince Edward Island Supreme Court *in banco*, held that section 8 of the *Narcotic Control Act* offended paragraph 11(*d*) of the Charter. The test they applied in reaching this decision was as follows: a persuasive presumption requiring the court to convict unless the accused can rebut the presumption on the balance of probabilities (as opposed to merely raising a reasonable doubt) infringes paragraph 11(*d*). In the

92. *Boucher* v. *The King*, [1951] S.C.R. 265, p. 277, *per* Rinfret C.J.:

> I would not like to part this appeal, however, without stating that to interpret freedom as licence is a dangerous fallacy. Obviously pure criticism, or expression of opinion, however severe or extreme, is, I might almost say, to be invited. But, as was said elsewhere, "there must be a point where restriction on individual freedom of expression is justified and required on the grounds of reason, or on the ground of the democratic process and the necessities of the present situation." It should not be understood from this Court — the Court of last resort in criminal matters in Canada — that persons subject to Canadian jurisdiction "can insist on their alleged unrestricted right to say what they please and when they please, utterly irrespective of the evil results which are often inevitable."

Section 1 of the Charter itself sets "reasonable limits" on freedom of expression. See Manning, 1883: 205.

93. Pre-Charter cases espousing this view are set out *supra*, note 82. See also, *Yates* v. *U.S.*, 354 U.S. 298 (1957). Dealing with voting rights under section 3 of the Charter, Taylor J. said: "That 'discussion and the interplay of ideas' are to form the basis of our electoral process is confirmed, I think, by the Charter, in particular by adoption in s. 1 of the 'free and democratic society' as its constitutional model." *Re Jolivet and R.* (1983), 7 C.C.C. (3d) 431, pp. 434-5.

94. This argument has been used in the United States. See: *Winters* v. *New York*, 333 U.S. 507 (1948); *Connor* v. *Birmingham*, 257 A.L.A. 588 (1952); *Scull* v. *Virginia ex rel. Committee on Law Reform and Racial Activities*, 359 U.S. 344 (1959).

95. (1983), 4 C.C.C. (3d) 131 (P.E.I. C.A.).

second case, *R.* v. *Oakes*,[96] the Ontario Court of Appeal reached the same conclusion but the standard that they applied was somewhat more stringent than that in the *Carroll* case: a reverse onus clause would infringe the Charter if there were no rational connection between the facts as actually proved, and the fact to be presumed. It is fair to say that *Code* paragraph 50(1)(*a*) would not pass the tests of constitutionality suggested by either court.

The numerous presumptions in *O.S.A.* section 3 may run afoul of Charter paragraph 11(*d*) as well. These presumptions were scrutinized and restricted by the Ontario Court of Appeal long before the Charter came into force. In *R.* v. *Benning*[97] the Crown attempted to found a charge under *O.S.A.* paragraph 3(1)(*c*), upon the presumptions in subsections 3(3) and (4) and the mere fact that the accused was a social acquaintance of a foreign agent. The Ontario Court of Appeal rejected the suggestion that these presumptions could be used to establish all the elements of the offence. Robertson C.J.O. held that notwithstanding subsections (3) and (4) the accused must be presumed innocent until the Crown provides evidence that he in fact committed the crime charged. Robertson C.J.O. reasoned, if Parliament had intended to shift the whole burden of proving innocence onto the accused, then simply upon the Crown establishing that the accused had been in communication with an agent of a foreign power, Parliament would have said just that. That conclusion seems to ignore what was fairly obviously Parliament's intention all along, but the result was laudable because the court effectively took the bite out of the section 3 presumptions. As well, if the *Carroll* and *Oakes* cases are any indication of the correct interpretation of paragraph 11(*d*), it would seem that a Charter challenge to the section 3 presumptions would almost certainly succeed.

96. (1983), 2 C.C.C. (3d) 339 (Ont. C.A.). The Supreme Court of Canada dismissed an appeal from this decision on February 28, 1986 (not yet reported).

97. [1947] 3 D.L.R. 908 (Ont. C.A.).

# CHAPTER FIVE

# A New Approach

## I. The Challenge

We have seen that the present offences against the State have fallen out of step with Canada's constitutional development in that they overemphasize the monarchy and fail to recognize important political rights. Simply in terms of form, the sections are complex, inconsistent and vague; some use archaic language, and some are even otiose.

Despite all the defects of the present sections we cannot do away with these kinds of crimes entirely. The conduct proscribed by the most serious of these offences strikes at the very core of the security and well-being of this nation and its inhabitants.

The problems identified in the last chapter suggest that although there is merit in the basic substance of many of the present offences, the form and detail of the existing sections are badly in need of re-examination, so that the appropriate course to take at this point is a fresh start — a reformulation of these offences based on fundamental principles applicable in the present Canadian context.

## II. The Rationale: Reciprocal Obligations of the State and the Individual

The present Canadian context is that we live in (1) a society organized into (2) a State of (3) a democratic nature. These are the three key concepts in ascertaining the underlying rationale for offences against the State, and therefore deserve some explanation.

"Society" is a rather uncertain term meaning, generally, a group of human beings bound together for self-maintenance and self-perpetuation, sharing their own institutions and culture. The concept denotes continuity and large-scale, complex social relations.[98]

98. Aberle *et al.*, 1950: 101.

Next, the word "democracy" literally means rule by the people, but in contemporary usage it has several different meanings. The one that is most applicable to Canada is as follows: a form of government in which the right to make political decisions is exercised by the citizens through representatives chosen by and responsible to them, and in which the powers of the majority are exercised within a framework of constitutional restraints designed to guarantee minorities the enjoyment of certain individual or collective rights, such as freedom of speech and religion. This is constitutional representative democracy, as we know it in Canada.[99]

Next, the word "State" has a wide spectrum of meanings ranging from the political organization of society, or body politic, to the narrower interpretation as the institutions of government. In addition it usually has a connotation of physical territory delineated by geographical boundaries. On a broad reading, the word "State" can be used to encompass "society" and "democracy,"[100] but in this part of the Paper we will try to use the term in its narrower sense (that is, institutions of government), in contradistinction to both society and democracy, in order to analyse more carefully what interests should be protected by the criminal law.

Crimes against the State should be concerned primarily with protection of the State and democracy, as defined. Society *per se* is also in need of protection but this is a matter more appropriately dealt with as crimes against public order (currently the subject of a draft Working Paper), and so, will be excluded from the present discussion. Nevertheless the concept of "State" includes important aspects of the notion of "society" so that we will see that the offences against the State, designed to protect the State and democracy, will in fact serve to protect Canadian society as a whole as well.

Thus, there are many facets of the State that deserve protection. First, the people who make up the society that is the State should be protected from violent attack, whether by foreign invaders or internal revolutionaries. Second, the formal State institutions such as the legislative, executive and judicial branches of government should be protected from violence and coercion. Third, the democratic character of the State and its institutions should be protected from destruction.

But there are limits to what can legitimately be protected by the criminal law in a democratic State. For example, to use the criminal law to secure the government of the day from non-violent political opposition, which is the very life-blood of a democracy, would clearly be going too far.

Of course, history shows that this kind of suppression of political opposition was often the object of such crimes as treason, *lèse-majesté* and sedition.[101] Indeed, conflict theorists would say this is the only purpose of offences against the State.[102] Thus, these

99. *Encyclopaedia Britannica*, 1973-1974: *Micropaedia*, vol. 3, 458; vol. 14, 715.

100. See M. Fried, defining "state" in Sills, 1972: vol. 15, 143.

101. For an analysis of the Canadian experience, see McNaught, 1974; and MacKinnon, 1977. The British experience is well documented by Stephen, 1883: 250-80.

102. Reedie, 1978; Brickey, in Greenaway and Brickey, 1978: 6-8; Rich, 1979: 53-70.

theorists usefully highlight the potential for oppressive State use of criminal law, which has largely been ignored by those who view society and the State as the product of a consensus of the people.

However, the conflict theorists overlook the fact that there are other valid reasons for having offences against the State. In particular, they fail to recognize that the very existence of a State requires a certain minimum consensus as to the need for general peace, order and non-violence, and that this minimum consensus can legitimately be reflected in crimes against the State.[103]

Surely, the first object of political association is to establish and maintain a state of peace so that the various pursuits of life may be carried on without interruption by violence.[104] There has to be a certain amount of ordering of society and conformity to law so that the State can provide the people with what is really essential, that is, peace and freedom to pursue their individual aspirations.[105] Criminal laws that aim at upholding the minimum conditions of social life are obviously justifiable and, indeed, essential.[106]

If State institutions succeed in securing peace and freedom for the individuals living within the territory of the State, a relationship of reciprocity develops between the individual members of the State and between each of them and the State.[107]

The reciprocal relationship between the individual and the State involves, on the part of the State, protection of the individual from violent invasion and oppression, and, on the part of the individual, a concomitant obligation to uphold the State and not betray it. Thus if the State affords such protection to the individual, betrayal of the State by the individual would be wrongful and deserving of criminal sanction. On the other hand, if the State fails to protect the individuals, if they are not secure from violence and oppression and live in fear for their lives, they may not be obliged to uphold that State. Indeed, in extreme circumstances, they may be justified in revolting and taking whatever measures were necessary in order to re-establish a safe and free society.[108]

Hart explains the relationship between the individuals in these words:

> [P]olitical obligation is intelligible only if we see what precisely this is and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it. In its bare schematic outline it is this: when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority

103. Canada, LRC, 1975: 43-4. The consensus theory is explained in Chambliss, 1975: 5-6.

104. Stephen, 1883: 241.

105. Canada, LRC, 1975: 21.

106. *Id.*: 22. This is the theory of Jeremy Bentham and the Utilitarians.

107. Williams, 1948: 56-7; Hart, 1955: 185-6.

108. Hart, 1955: 186; Wasserstrom, 1968: 300-4; Hart, 1961: 203-7; Jenkins, 1980: 194, 210.

> to enforce obedience and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is *due* to the co-operating members of the society, and they have the correlative moral right to obedience.[109]

From this we see that the relationship between State and individual and between individuals is one of reciprocity with obligations on all sides.[110] If the State utterly fails to take steps to protect its citizens from violence by foreign invaders or rebels, the citizens can hardly be said to be under a reciprocal duty to protect and uphold their State. On the other hand if the State does offer such protection, the individuals surely should uphold their State and do their part to maintain peace. If an individual chooses to betray the State and the other inhabitants by dragging the country into war or violent revolution, the State and the other inhabitants have the right to treat him as a criminal.

These theoretical observations could be tested against the reality of existing States. And it would be fair to say that in any State, certainly in any democratic State, one would find a consensus that there exist these minimal reciprocal obligations of State and individual.

Applying this theory to Canada then, we find that the Constitution[111] and in particular, the *Canadian Charter of Rights and Freedoms* help to explain what the notion of reciprocity means in the Canadian context, and thus provide us with guidance as to the kinds of activities which ought to be offences against the State here. These documents inform us that Canadian society is to function freely and democratically.[112] The rights to participate in government and freely express one's opinions are given constitutional protection in the Charter (ss. 1, 2, 3). This suggests that there are limits to what Canadians will accept in the way of restrictions on their freedom, and that there are limits on what the State can do in order to preserve itself and prevent violent upheaval or invasion.

Thus, while there is a common interest in maintaining peace within the State, Canadians will not accept peace at all costs. The State cannot legitimately maintain peace and preserve itself by prohibiting political debate, dissent, and agitation for governmental or constitutional change, or by taking away the right to participate in government. These activities are protected by the Charter (in ss. 1, 2, 3) and are part of the notion of democracy shared by Canadians.[113]

On the other hand, if the State were to criminalize activities that threaten or destroy our democratic institutions, this would be legitimate insofar as it would accord with

109. Hart, 1955: 185.

110. Coke described the relationship as *Protectio trahit subjectionem, et subjectio protectionem* — Protection draws allegiance and allegiance draws protection: Steinhaus, 1956: 265.

111. Canada, Department of Justice, 1983.

112. For example, see the Preamble and section 17 *et seq.* of *The Constitution Act, 1867*, and sections 1, 3, 4 and 5 of the Charter.

113. *Ibid.* See also *Reference re Alberta Statutes*, [1938] S.C.R. 100, pp. 132-5, *per* Duff C.J.

the consensus of Canadians as to the importance of these institutions (perhaps evidenced by our Constitution and the Charter), and the notion of reciprocity between State and individual as understood in Canada. We would feel obligated to comply with these restrictions on freedom so long as they were minimal, ensured free exercise of our democratic rights and permitted us to go about our day-to-day lives to pursue our personal goals.[114]

In summary then, the reciprocal duties of State and subject are such that in order to create an obligation of fidelity and obedience on the part of the inhabitants of a State, the State should protect them and their institutions from the threat of violent attack by foreign invaders and internal revolutionaries. While the scope of offences against the State is strictly limited by the rights and freedoms of the individual, nevertheless such crimes are necessary because they help to preserve a state of affairs in which these individual rights and freedoms may be exercised.

## III. The New Scheme of Crimes against the State

Having ascertained the rationale that underlies crimes against the State, we now turn to the task of redrafting these crimes.

Chapter Four demonstrated that the existing offences against the State are sorely in need of rewriting; none the less, some of the existing crimes are of such central importance that they should form the basis of our new scheme. Other crimes presently grouped with the offences against the State would fit better in different parts of the *Code*, or could be dealt with under the general rules found in the *Code*'s General Part. Still other offences should be removed from the *Code* entirely because they lack the gravity appropriate to criminal law.

Thus our new scheme would retain the substance of the following *Code* provisions: paragraphs 46(1)(*b*) (levying war against Canada); 46(1)(*c*) (assisting an enemy at war with Canada); 46(2)(*a*) (using force or violence to overthrow the government); 46(2)(*b*) (communicating or making available to an agent of a foreign State military or scientific information that could be used for a purpose prejudicial to Canada); 50(1)(*b*) (failing to report or prevent anticipated acts of treason); section 51 (doing an act of violence in order to intimidate Parliament or a provincial legislature); and, to some extent, paragraph 52(1)(*a*) (doing a prohibited act for a purpose prejudicial to the safety, security or defence of Canada).

The new scheme would also retain the basic thrust of section 3 of the *O.S.A.* (espionage). As well, we may want to retain a leakage offence, that would derive in substance (but not form) from section 4 of the *O.S.A.*

114. Here, the notion of obligation is serving an evaluative as well as a reporting function, that is: people would feel a moral as well as a strictly legal obligation to obey such just and essential laws (see Smith, 1976: 144).

The redrafted crimes against the State would thus combine offences now found in the *O.S.A.* and Part II of the *Code* into one mini-code contained in the Special Part of the new Criminal Code. This would effectively eliminate the many problems of overlapping, complexity, and inconsistency encountered in the present legislation. In addition, locating all the crimes against the State within the new Code would serve first, as a reminder to Parliament that only very serious conduct should be treated as crimes against the State, and second, as a reminder to Canadians generally that this kind of conduct must be proscribed in order to ensure a peaceful, ordered and democratic society.

## A. The New Crimes against the State

### (1) Primary Crimes against the State: Treason

We favour continuing to use the title of "treason" to describe the primary crimes against the State because it is a term that is familiar to Canadians as meaning the crime of betraying one's country. We propose that the revised crime of treason should comprise:

(1) engaging in war or armed hostilities against Canada;

(2) assisting anyone engaged in such war or armed hostilities (including communicating classified national security information to a State engaged in war or armed hostilities against Canada, or its agent);

(3) using force or violence for the purpose of overthrowing the constitutional government of Canada or a province; and

(4) communicating or making available classified national security information to another State not engaged in war or armed hostilities against Canada, or its agent.

**RECOMMENDATION**

**1. That the Special Part of the *Criminal Code* contain a new mini-code of Crimes against the State, providing as follows:**

**(1) [Engaging in war] It would be an offence intentionally to engage in war or armed hostilities against Canada.**

**(2) [Assisting the enemy] It would be an offence intentionally to assist anyone engaged in war or armed hostilities against Canada.**

**(3) [Using force or violence to overthrow the government] It would be an offence to use force or violence for the purpose of overthrowing the constitutional government of Canada or a province.**

**(4) [Espionage] It would be an offence:**

**(a) without having received lawful authorization, intentionally to communicate or make available *classified national security information* to another State or its agent, other than a State engaged in war or armed hostilities against Canada, or**

**(b) to obtain, collect or record *classified national security information* for the purpose of committing the offence in (a).**

The crimes of engaging in war and assisting the enemy are modelled on existing paragraphs 46(1)(*b*) and (*c*) respectively. Basically, the conduct proscribed is initiating or assisting violent conflict with Canada, for example violent invasion of Canada. This kind of fundamental betrayal of Canada in times of national emergency clearly breaches the reciprocal obligation on the individuals enjoying Canada's protection, to maintain peace within the State.[115] As will be explained later, the offence of engaging in war can only be committed by those persons under a reciprocal duty to protect Canada, and so does not apply to foreign armies. Also it should be noted that the crime of assisting the enemy is quite different from secondary liability for assisting the commission of a crime. When a person aids an enemy at war with Canada, he does not aid the commission of a crime because it is not a crime under domestic law for an enemy to wage war against Canada. Thus, the offence of assisting the enemy is a primary offence, just like the offence of engaging in war.

Espionage committed in times of war for an enemy State would be just as threatening to the security of the State as other forms of assisting the enemy, and accordingly would be dealt with in the same way, as assisting the enemy.[116] However, this does not exclude the possibility that communicating other *unclassified information* to the enemy may also constitute the crime of assisting the enemy.

Similarly the use of force or violence for the purpose of overthrowing constitutional government breaches the obligation to maintain peace within the State. In addition it is a direct attack upon the democratic institutions and principles upon which this State is founded.[117] This offence aims more at the enemy within the country than the traitor without, although a clear line cannot be drawn between external and internal threats to national security. Again, the precedent for the offence is found in *Code* paragraph 46(2)(*a*).

Nowadays espionage presents an ongoing threat to national security, threatening both the physical safety of the State and the integrity of its democratic institutions,

115. *R.* v. *Casement*, [1917] 1 K.B. 98.

116. A similar approach is adopted by the U.S. National Commission on Reform of Federal Criminal Laws (1971: s. 1112(2)).

117. Canada, LRC, 1975: 43-4. In Canada, Commission of Inquiry ..., 1979: 15, para. 38, the McDonald Commission identified two aspects of State security deserving of protection: "The first is the need to preserve the territory of our country from attack. The second concept is the need to preserve and maintain the democratic processes of government. Any attempt to subvert those processes by violent means is a threat to the security of Canada."

even where no state of war or armed hostilities exist. This is truly the modern form of treason. We propose that giving State secrets to an enemy should be dealt with simply as assisting the enemy, and that giving State secrets to any other State should be dealt with under the new espionage offence.

We have combined the essence of the espionage offences presently found in section 3 of the *O.S.A.* and paragraph 46(2)(*b*) of the *Code*, but have abandoned the numerous modes of commission set out in the *O.S.A.*, and the requirement of proving that the accused had a "purpose prejudicial" to the State. Instead, espionage would be committed simply if someone *intentionally* communicates or makes available classified national security information to another State or its agent, without lawful authorization to do so, and there would be no necessity to show a further purpose. This approach is only possible because we make the additional proposal that the espionage offence be founded on a clear, uniform system of classification.[118]

We are not in a position to make specific, detailed recommendations about this classification scheme. Therefore, we only suggest general principles that might be useful in devising such a scheme. First, in order to avoid arbitrariness it might be advisable to subject the new scheme to Parliamentary scrutiny. Second, each of the various classifications should be clearly defined so as to avoid uncertainty concerning the application of the scheme. Third, there would have to be uniform procedures for classifying, authorizing disclosure of, and declassifying information. Fourth, to ensure that the classification/declassification procedures are being followed, the appropriateness of the classification of a particular piece of information should be reviewable by the courts. Finally, wherever possible classified information should be clearly marked as such so as to give notice to those handling the information.

Thus, the espionage offence would only be committed if the information communicated was "classified national security information." In general terms, this classification should encompass any matter with respect to which secrecy is required in the interests of national safety, security or defence. On a charge of espionage, the appropriateness of the classification of the information in question should be open to review by a court; and if it were found that the information was improperly classified, this should provide a defence to the spying charge.[119]

---

118. There is support in the Solicitor General's office for an improved classification system so as to eliminate the abuses of overclassification that commonly occur under the existing scheme. In Canada, Commission of Inquiry ..., 1979, the McDonald Commission, made a similar proposal. See Recommendations 31 through 38. In U.S., National Commission ..., 1971: ss. 1112-1114, the Brown Commission recommended that espionage offences be founded on a well-defined classification system. *Our* recommendation in this regard is contrary to the McDonald Commission (Canada, Commission of Inquiry ..., 1979: 15), Recommendation 4, which proposed to prohibit disclosure of "information whether accessible to the public or not, either from government sources or private sources, if disclosure is, or is capable of being, prejudicial to the security of Canada."

119. Although no such defence is specified under the present *O.S.A.*, this defence was recognized by Walsberg, Prov. Ct. J. in *R. v. Toronto Sun Publishing Limited* (1979), 24 O.R. (2d) 621. In Canada, Commission of Inquiry ..., 1979, the McDonald Commission included a similar proposal in their Recommendation 10.

Because of the difficulty in catching a spy in the act of communicating secret information to a foreign agent, it is necessary to criminalize preparatory acts as well. Therefore we would include an offence of obtaining, collecting or recording information for the purpose of so communicating it. This would catch preparatory acts that might not amount to an actual "attempt" to commit espionage, but which nevertheless pose a serious threat to national security.[120]

(2) Secondary Crimes against the State

The mini-code of crimes against the State should also contain secondary or ancillary offences that tend to support the objectives of the primary offences. This is the approach taken in the existing legislation, and the principle commends itself to us, although we would reject the excessive detail and triviality found in some of the present secondary offences against the State.

There are five matters proscribed, at least to some extent by existing law, that are worth considering as secondary offences: (a) using force to intimidate State institutions; (b) harming or killing the Queen; (c) sabotage; (d) failing to prevent or inform the authorities about offences against the State; and (d) leakage of government information.

(a) *Intimidating Organs of State*

We have seen that there are valid reasons of principle for making it an offence to use force for the purpose of overthrowing constitutional government, but what about lesser conduct that does not necessarily threaten the entire political order but which none the less presents a grave threat to the proper functioning of State institutions? Section 51 of the *Code* attempts to deal with this problem by prohibiting acts of violence done in order to intimidate Parliament or a provincial legislature. Although we have seen that this provision is vague and therefore virtually unusable, it contains a kernel of value. Accordingly, we propose to clarify what is meant by intimidation and to create a somewhat wider offence proscribing violent or forceful conduct that threatens the functions of all branches of government — judicial and executive as well as legislative.[121] We would move away from the vague notion of intimidation, and instead, focus on the concrete objective of the acts of violence. The new offence might be as follows:

**RECOMMENDATION (*Cont.*)**

**(5) [Intimidating organs of State] It would be an offence to use force or violence for the purpose of extorting or preventing a decision or measure of a federal or provincial legislative, executive or judicial organ of State.**

120. This is consistent with Recommendation 5 of the McDonald Commission (Canada, Commission of Inquiry ..., 1979: 16), except that our recommendation does not require proof of knowledge of a "purpose prejudicial."

121. Similar offences are found in: section 99 of the *Norwegian Penal Code* of 1902 as amended 1961; Chapter 18, section 1 of the *Swedish Penal Code*, as amended January 1, 1972; and sections 395 and 396 of the *German Draft Penal Code* E. 1962.

(b) *Harming or Killing the Sovereign*

Two other matters that are possible candidates for being crimes against the State are killing or harming the sovereign (presently *Code* ss. 46(1)(*a*) and 49) and sabotage (presently *Code* s. 52). Both of these acts have dual aspects, and in order to determine whether they should be treated as offences against the State one has to ascertain their dominant characteristics.

First, acts that harm the Queen have two features: they threaten her personal safety, and they may also threaten the safety and security of the State.[122] Today, because of the development of our Constitution, it is inaccurate to identify the physical security of the sovereign with the security of the State. One can no longer treat protection of the person of the sovereign as the central focus of the crimes against the State. Thus we propose to exclude acts of killing or harming the sovereign from the mini-code. Similarly, we would not want to make it a special crime against the State to kill or harm any other person who is important to the State. The crimes of assault, homicide and using force or violence to overthrow the constitutional government or to intimidate organs of State are more than adequate to deal with politically motivated crimes of violence. However, because of the historic and continuing symbolic significance of the monarchy, we propose that the chapter of the *Code* dealing with offences against the person should specifically provide that the killing or assaulting of the sovereign is aggravated homicide or assault, respectively.[123]

(c) *Sabotage*

Next, sabotage also has two main aspects. In one sense it is just an offence against property, with the additional feature of jeopardizing the safety of the State. As such it might be dealt with in the Part of the *Code* relating to property offences, as an aggravated form of vandalism and arson.[124] In another sense, however, sabotage is primarily an offence of jeopardizing the safety of the State, and it is just secondary that the means used is damaging property. Viewed as such, sabotage should be treated as an offence against the State. This is in fact what the present *Code* does, and we too would tend to favour this approach in spite of the fact that it may seem to disturb the symmetry of the *Code*'s property offences.[125]

**RECOMMENDATION (*Cont.*)**

**(6) [Sabotage] It would be an offence intentionally to jeopardize the safety, security or defence of Canada by:**

122. U.K., Law Commission, 1977: 37-9.

123. The U.K. Law Commission, 1977: 39, reached a similar conclusion.

124. In Canada, LRC, 1984a: 31, the Commission defines vandalism as damaging or destroying property or rendering property useless by tampering with it. In Canada, LRC, 1984: 29, the Commission defines arson as causing a fire or explosion resulting in damage to or destruction of property.

125. 18 U.S. C.S., Chapter 105 defines sabotage as an offence against national security rather than merely as a property damage offence.

**(a) damaging, destroying or disposing of property, or**

**(b) rendering property useless or inoperative, or impairing its efficiency.**

Alternatively, sabotage could be treated as an aggravated form of vandalism and arson.

### (d) *Failing to Prevent, or Inform the Authorities about, Crimes against the State*

The next offence to be considered is that of failing to prevent or to inform the authorities about the commission of crimes against the State. Historically, the common law offence of misprision of treason was directed at similar conduct.[126] Today, both *O.S.A.* section 8, in its muddled way, and paragraph 50(1)(*b*) of the *Criminal Code* deal with such conduct. Thus, despite the obvious anomaly of this kind of an offence we cannot just dismiss it without pausing for thought.

It must be admitted that we have heard strong arguments on both sides of this issue. Some of those with whom we consulted would like to see the duty to warn about or prevent crime extended to other serious crimes such as murder. Others called for the repeal of the provisions on the grounds of excessive State interference with personal liberty.

We have been torn by these arguments and in the end have taken a compromise position. We propose to limit the duty to warn about and prevent crime to wartime situations. The duty would only apply to two offences: first, engaging in war or armed hostilities against Canada; and second, assisting anyone engaged in war or armed hostilities against Canada.[127]

It would seem that if this duty were only invoked in times of national emergency, when the security of the State was in immediate danger, this would be consistent with the principle of reciprocal obligations between State and individual. Surely, in times of war there should be a duty on the citizen to take reasonable steps to inform the authorities about anticipated acts of treason or acts of treason that have already been committed, and to try to prevent such crimes where reasonably possible.

On the other hand, it would seem that in times of peace, the threat to the State presented by, for example, espionage, an act of sabotage, or even using force to overthrow the government, is not so immediate as to justify imposing a duty on the citizen actively to take steps to warn the authorities or prevent the crime. In this situation the rights of the individual to be left alone should take precedence over the State interest

126. *Halsbury's Laws of England*, 1976: para. 819; U.K., Law Commission, 1977: 26-7.

127. In U.K., Law Commission, 1977: 40, the authors were also inclined to limit the offence to wartime situations. The Brown Commission (U.S., National Commission ..., 1971: s. 1118) proposed an offence of harbouring that has much wider application.

in effectively combatting crime. Therefore, we do not propose a specific duty in this situation. Of course, this is not to say that there may not be a general duty to rescue people that one knows are in instant and overwhelming danger. But that topic is the subject of another Working Paper entitled *Omissions, Negligence and Endangering*, and cannot be explored here.[128]

The duty that we propose would also fill gaps in the existing law. First, there would be a duty to inform the authorities even when the crime has already been committed. Second, instead of having alternative duties — either to report or prevent the crime — we favour a requirement that a person do both where the crime is about to be committed. In most cases it would be rash for an ordinary citizen to try to prevent such a serious crime, but if he can do so without undue risk to human safety, he should have to do so. If he cannot safely prevent the crime himself he should take reasonable steps to inform the authorities so that they can prevent it. In this situation the act of informing the authorities would satisfy both duties. Where he does take steps to prevent the crime the authorities still need to know about its intended commission, so he should have to take reasonable steps to inform them as well.

In the result we propose the following offence:

**RECOMMENDATION** ***(Cont.)***

**(7) [Failure to inform authorities or prevent wartime treason] Notwithstanding anything else in the *Code*,**

**(a) where a person knows that an offence of engaging in war or assisting the enemy is about to be committed, it would be an offence for him to fail to take reasonable steps to prevent the commission of the offence when he is capable of doing so without serious risk to himself or another. Taking reasonable steps to inform a peace officer of the offence may be, in the circumstances, sufficient to satisfy the duty to prevent the offence; and**

**(b) where a person knows that an offence of engaging in war or assisting the enemy is about to be or has been committed, it would be an offence for him to fail to take reasonable steps to inform a peace officer of the offence as soon as practicable.**

This proposal effectively eliminates *O.S.A.* section 8 and only creates a duty respecting espionage if it is committed in wartime. Basically it re-enacts *Code* paragraph 50(1)(*b*) but with several differences already noted. As well, the proposal is drafted to be consistent with the reasonable limits on the duty to rescue that are suggested in *Omissions, Negligence and Endangering*.[129]

128. Canada, LRC, 1985.

129. *Id.*: 20, where it was recommended:

> 6. That the Special Part provide that everyone commits a crime who fails to take reasonable steps to assist another person whom he sees in instant and overwhelming danger, unless he is incapable of doing so without serious risk to himself or another or there is some other valid reason for not giving assistance.

(e) *Leaking Government Information*

Finally, we come to the question whether the leaking of government information (presently dealt with in section 4 of the *O.S.A.*) should be considered an offence against the State. Again, we find ourselves confronted by forceful arguments on both sides.

In favour of criminalizing such conduct, one can make the following points. First, government today possesses enormous quantities of information about private individuals living in Canada, that, if released, could be extremely detrimental to these people.[130] Surely, civil servants should not be able to exploit their ability to gain access to this information for their own interests, with only the threat of disciplinary action to deter them.[131] Second, government requires a certain level of secrecy in order to function effectively. For example, bargaining positions in federal-provincial negotiations would be jeopardized if civil servants could disclose confidential information with impunity. Another example is that of criminal investigations that require secrecy in order to be effective.[132] When the stakes are high, the disciplinary process is an inadequate means of redress against talkative civil servants.

Arguments against the criminalization of leaking government information are as follows: First, the government does not want to be seen as using strong-arm tactics to protect itself (cover up) and to keep secrets from the public.[133] Second, the public has a right to know whatever it can get its hands on, and a leakage offence would be inconsistent with the policy of freedom of information behind the *Access to Information Act*. Third, the administrative process — disciplinary measures and dismissal, and the civil process — injunctions and suing for damages, are the appropriate remedies for such wrongdoing.[134] Fourth, it is argued that there may be situations in which the well-being of the nation actually depends on the immediate public disclosure of classified information.

---

130. See for example, the conclusions reached by Brown, Billingsley and Shamai, 1980: 177-95.

131. In Canada, Commission of Inquiry ..., 1979: 27-8, the McDonald Commission recommended that mere negligence by a civil servant in handling secret government information not be criminalized but should be left to vigilant administration and disciplinary action. However, intentional, wanton or reckless disregard for the lives or safety of other persons or property should be criminalized. In U.K., Departmental Committee ..., 1972: 75-6, the Franks Report recommended that communicating official information for private gain should be an offence.

132. In Canada, Commission of Inquiry ..., 1979: 24-5, the McDonald Commission recommended that the new leakage offence should prohibit disclosure of government information relevant to the administration of criminal justice that would adversely affect investigation of crime; gathering of criminal intelligence; security in prisons; or which might otherwise help in the commission of crime.

133. For example, consider the uncertainty with which the government has dealt with Richard Price, the civil servant who leaked a cabinet document outlining cuts in federally funded native programmes; and the impression created by the British government's prosecution of Clive Ponting. See P. Cowan, "B.C. Halts Charges against Public Servant," *The Citizen*, 6 September 1985, p. 1; L. Plommer, "U.K. Civil Servant Found Not Guilty of Secrecy Breach," *The Globe and Mail*, 12 February 1985, p. 1.

134. U.K., Departmental Committee ..., 1972: 27-30, 39-40.

Our consultations with government experts in the field of national security have indicated some ambivalence about criminalizing such acts. However, it would seem to be generally agreed that:

(1) it is wrong to leak national security information to anyone, not just foreign States;

(2) some government policies require at least short-term secrecy; and

(3) some information about private individuals that is held by government also requires secrecy.

Therefore we put forward the following proposal for a leakage offence:

**RECOMMENDATION** (*Cont.*)

**(8) [Leakage] It would be an offence:**

**(a) without having received lawful authorization, intentionally to communicate or make available *classified national security information* to anyone other than another State or its agent, or**

**(b) to obtain, collect or record *classified national security information* for the purpose of committing the offence in (a);**

**(c) without having received lawful authorization, intentionally to communicate or make available *classified personal or government information* to anyone other than another State or its agent, or**

**(d) to obtain, collect or record *classified personal or government information* for the purpose of committing the offence in (c).**

To be protected, information would have to be classified as:

(1) national security information;

(2) personal interest information, requiring secrecy in the interests of the security, privacy or economic well-being of a person; or

(3) government interest information, requiring secrecy in the interests of the proper functioning or development of a government policy or programme.

This proposal avoids the tortuous detail of section 4 of the *O.S.A.* and yet covers all important matters. It also distinguishes leakage from espionage, treating it as a less serious crime. We distinguish between leakage of classified national security information and other classified information and recommend that the latter be punished less severely than the former because it does not involve such grave dangers to national security.

It must be stressed, however, that such a provision could only work fairly if the government undertook to create a clear and well-defined system of classification of

information, and had effective procedures for authorizing disclosure and declassifying information once the need for secrecy had passed.[135] Without these systems, any leakage offence is open to abuse by government and will prove a real threat to open and accessible government.[136] We have suggested three classifications of documents: (1) national security information; (2) personal interest information; and (3) government interest information. We are not in a position to propose the exact definitions for each class but we do suggest that in every case classification should be based on there being real injury to the protected interest if the information were to be publicly disclosed. As with espionage, it should be open to an accused charged with leakage to raise the defence that the information in question should not have been classified.

The general rule proposed then, is that unauthorized disclosure of the listed information is prohibited, regardless of the informant's motive. The offence does not include explicitly any exception for leakage committed with "good intentions." However, a defendant might be able to avail himself in appropriate circumstances of a defence of necessity, as defined in the Law Reform Commission's *Proposal for a New Criminal Code*, or, more probably, of the general rule set out in that Paper, to the effect that there is no liability for a person who has a defence "required by principles of fundamental justice."[137] The case of the well-intentioned informant is one for which the *Proposed Code* wisely preserves the possibility of judicial creativity.

## B. Application of the Crimes against the State

Since the crimes against the State are based on reciprocal obligations between the individual and his State, it naturally follows that only persons bound by such obligations can be liable for these offences. For example, a foreign soldier belonging to an invading enemy army, who is captured by Canadian soldiers, should not be tried in Canada for the domestic crime of engaging in war with Canada, because he owes no duty to uphold or protect Canada; and although he is present in Canada, he could hardly be said to be enjoying its protection.[138]

A question also arises as to the applicability of the crimes against the State to foreign diplomats present in Canada. By the terms of the *Vienna Convention on Diplomatic Relations*[139] it would seem that they are immune from the criminal jurisdiction of Canada, as receiving State. This does not mean that the conduct is not criminal

135. On p. 48, we have suggested principles to guide in the creation of a new classification scheme. In Canada, Commission of Inquiry ..., 1979: 22-3, the McDonald Commission illustrates how the present leakage offence, section 4 of the *O.S.A.* is susceptible to abuse. Similar problems exist under section 2 of the United Kingdom *Official Secrets Act*. See Williams, 1978: 160-1.

136. U.K., Departmental Committee ..., 1972: 18, 37-9.

137. Canada, LRC, 1985a: clause 12.

138. U.K., Law Commission, 1977: 22; U.S., National Commission ..., 1971: comment, 79.

139. *Vienna Convention on Diplomatic Relations*, 1961, C.T.S. 1966, No. 29, Article 31; and the *Diplomatic and Consular Privileges and Immunities Act*, which gives to much of this *Convention* the force of law in Canada.

when committed by a foreign diplomat. It simply means that unless this immunity is waived, the foreign diplomat cannot be tried in Canada for crimes against Canadian law. Despite the practical inability to prosecute criminally a foreign diplomat for Canadian crimes against the State, diplomatic means, such as declaring a spy to be a *persona non grata* under Article 9 of the *Convention*, are available to control this kind of conduct.

The general rule for applicability of crimes against the State committed in Canada should be as follows:

**RECOMMENDATION** (*Cont.*)

**(9) [General application] Subject to the *Vienna Convention on Diplomatic Relations*, anyone voluntarily present in Canada and benefiting from Canada's protection (whether he is a Canadian citizen, landed immigrant, visitor, and so forth) would be liable for these crimes committed in Canada.**

Liability for these crimes committed outside Canada should be based on the same principles of protection and reciprocity. Thus, a Canadian citizen abroad, or any other person who continues to benefit from the protection of Canada while physically absent from this country, should be liable for offences against this State, committed abroad.[140] *A fortiori* these persons should be liable for treasonous acts committed abroad after war or armed hostilities break out because it is then that Canada most needs the allegiance of its peoples.[141]

Therefore, we propose the following general rule respecting the extraterritorial application of the offences against the State.

**RECOMMENDATION** (*Cont.*)

**(10) [Extraterritorial application]**

**(a) [General] The following persons would be liable for these crimes if committed outside of Canada:**

140. In U.S., National Commission ..., 1971: s. 1101, the Brown Commission required that an accused be a "National of the United States" in order to be liable for treason. This term was defined as meaning persons domiciled in the United States, unless exempt by treaty or international law, and citizens of the United States.

141. This is also the position in the United States. In *Chandler* v. *United States*, 171 F. 2d 921 (1st Cir. 1948), the Circuit Court of Appeals said at p. 944:

> When war breaks out, a citizen's obligation of allegiance puts definite limits upon his freedom to act on his private judgment. If he trafficks with enemy agents, knowing them to be such, and being aware of their hostile mission intentionally gives them aid in steps essential to the execution of that mission, he has adhered to the enemies of his country, giving them aid and comfort, within our definition of treason.

Also see *R.* v. *Lynch*, [1903] 1 K.B. 444 (U.K.).

**(i) any Canadian citizen;**

**(ii) any other person who continues to benefit from the protection of Canada.**

A question may arise as to how the criminal law should deal with persons who give up their Canadian citizenship after war or armed hostilities have broken out. Presently, section 18 of the *Citizenship Act* provides that the Governor in Council may refuse an application to renounce Canadian citizenship when refusal is in the interests of national security. The Governor in Council might find this provision useful in wartime to prevent anyone attempting to cancel his reciprocal duty to protect Canada.

As well, there are hard questions as to how the law should deal with a Canadian citizen who is also a citizen of a State that is at war with Canada, and who commits treason against Canada, while he is physically absent from this country. It may be that he does the act of treason as a member of the armed forces of the enemy State of which he is also a citizen, in which case any refusal by him to do the act might amount to treason under the law of that enemy State. The difficulties of divided loyalty that face these dual citizens are too complex and varied to be resolved by the criminal law. The *Criminal Code* is painted with a broad brush and can only set out broad prohibitions meant for general application. Surely these dilemmas are best settled by including special provisions in the *Citizenship Act* to deal with dual citizenship in wartime, permitting exemptions from Canada's offences against the State in appropriate circumstances.[142]

The nature of the offences of espionage, leakage and assisting the enemy by giving State secrets necessitates special treatment with respect to acts done outside Canada, again based on the principles of protection and reciprocity. Information can be obtained by someone while he is enjoying the protection of Canada, and then disclosed at a time when he no longer enjoys Canada's protection. Should he be able to do this without incurring criminal liability? Clearly, he should not, and the reason is that he is still under a reciprocal obligation to Canada that forbids such unauthorized disclosure.[143] Although he can, as a rule, renounce his citizenship in times of peace, he cannot renounce this obligation. The rule should be as follows:

**RECOMMENDATION** ***(Cont.)***

**(b) [Extraterritoriality for assisting the enemy, espionage and leakage] In addition to the persons referred to in (a), anyone who was a Canadian citizen or who benefited from the protection of Canada at the time he**

142. Such a provision was found in the *Canadian Citizenship Act* of 1946, in section 17.

143. In Canada, Commission of Inquiry ..., 1979, the McDonald Commission recommended that the substance of section 13 of the *O.S.A.* be retained. This differs from our proposal only in that we replace the concept of allegiance with that of protection, and extend liability for espionage to situations in which a person who was an alien at the time he obtained the information subsequently comes under Canada's protection and then, while abroad communicates the information to a foreign State.

**obtained classified national security information (which information subsequently became the subject of an act of assisting the enemy, espionage or leakage) would be liable for assisting the enemy, espionage or leakage (as the case may be), relating to that information, committed outside Canada.**

## C. Exclusions from the New Crimes against the State

This, then, is the extent of our proposed mini-code of Crimes against the State. It is readily apparent that some of the ancillary offences found in the present *Code* have been excluded from our new scheme. This is because we have based our proposed offences on principle, limiting them to only serious breaches of fundamental values generally shared by Canadians.

Thus, we found that the broad, undefined seditious offences are partly insupportable and partly unnecessary. First, sedition is in part unnecessary because counselling or inciting treason, violent overthrow of the government, or breaches of public order is already criminalized under the *Code*'s General Part rules on secondary and inchoate liability (ss. 21, 22, 24, 421-424); and advocating hatred is specifically prohibited in the *Code* by the offence of hate propaganda (ss. 281.1, 281.2). By repealing sedition we are not condoning incitement of offences against the State or hate propaganda; we are simply being more explicit about the types of conduct that should be condemned by the criminal law.

Second, the offence of sedition is in part insupportable because it interferes with constitutionally protected democratic rights and freedom of expression. The Charter, by enshrining these rights, indicates that it would be unacceptable for government to use the criminal law to suppress political opinions, however unpopular they may be. Of course, freedom of expression is not unbounded. As we have seen it does not go so far as to protect hate propaganda or incitement of crime. But the history of sedition in Canada shows that the offence has been used to impose unjustified limitations on the expression of controversial opinions and to control conflict between the ruling class and dissenting subjects.[144] We have rejected this history as a model for our proposed offences against the State. Rather, we would limit such offences to those that can be based on the minimum level of consensus necessary in any society. Clearly, in a constitutional democracy, that consensus would permit some limitations on free expression, as outlined above, but would not extend to criminalizing the expression of dissenting political views. For both reasons of unconstitutionality and redundancy, then, the present seditious offences should be repealed.[145]

144. McNaught, 1974; Lederman, 1976-77; MacKinnon, 1977; Reedie, 1978.

145. In U.K., Law Commission, 1977: 46-8, the Law Commission also concluded that there was no need for a separate offence of sedition.

There are quite a number of other offences that we would reject as not being serious enough to warrant treatment as crimes against the State, or even as criminal offences at all. On this basis we would exclude the following offences from the *Criminal Code*. Paragraph 50(1)(*a*) (assisting an alien enemy to leave Canada) should be repealed, so that such conduct would only be criminal if it could be characterized as assisting the enemy. Section 57, which deals with offences in relation to the R.C.M.P. also has no place in the *Code*. Indeed such conduct would probably not even warrant treatment as a regulatory offence under the *Royal Canadian Mounted Police Act*. Similarly the offences relating to members of the Canadian Armed Forces (ss. 53, 54, 63) should be removed from the *Code*, to be dealt with under the *National Defence Act*. Finally, we would exclude the notion of being near a "prohibited place" from our proposed espionage offence because it is more in the nature of a regulatory trespass offence than a true crime against the State. Besides, it would seem that the two espionage offences we have proposed, plus the rules on secondary liability and attempt, are adequate to catch anyone trying to pass secrets to a foreign State.

There are other crimes found in the present offences against the State which, although deserving of criminalization, would none the less be out of place in the new mini-code of Crimes against the State. We have already seen that offences in relation to the Queen's person are better dealt with as aggravated offences in the *Code* chapter on offences against the person. Second, unlawful drilling may result in serious breaches of public order but does not present an immediate threat to national security. For that reason we would leave it to be dealt with in the separate but related *Code* chapter on public order offences. Third are the two offences relating to interfering with foreign armed forces lawfully present in Canada (ss. 52(1)(*b*), 63). Such acts, especially sabotage of property of friendly foreign forces, may cause Canada serious international embarassment, but cannot fairly be characterized as an offence against the State of Canada. Therefore we would exclude them from our mini-code and instead, consider including them in a special *Code* chapter on international offences.

Fourth, and finally, the special provisions respecting attempts and conspiracies found in *Code* section 46 would be excluded from our new scheme because all forms of inchoate and secondary liability for crime would be adequately dealt with through the new General Part provisions on furthering crime.[146] In addition the proposal, contained in the Working Paper on *Secondary Liability*,[147] to define "attempt" as substantially furthering the commission of a crime, would seem to eliminate the need for the variety of "attempt" formulations currently found in *Code* section 46.

## RECOMMENDATIONS

**2. That the following sections of the *Criminal Code* and the *O.S.A.* be replaced by the new chapter of Crimes against the State, located in the Special Part of the *Criminal Code*:**

146. Canada, LRC, 1985a.

147. Canada, LRC, 1985b.

*Code* **ss. 46 and 47 (high treason and treason), 50 (assisting an alien enemy to leave Canada or failing to prevent treason), 51 (intimidating Parliament), and 52 (sabotage);**

*O.S.A.* **ss. 3 (spying), 4 (wrongful communication or use of information), and 13 (extraterritorial application).**

**3. That the following sections of the *Criminal Code* be removed from the chapter dealing with Crimes against the State and dealt with elsewhere in the *Code*:**

**ss. 46(1)(a) and 49 (killing or harming the Queen)** [the offences of homicide and assault would be aggravated if the person killed or assaulted was the sovereign]; **[Alternative] s. 52 (sabotage)** [the offences of vandalism and arson would be aggravated if the conduct jeopardizes the safety, security or defence of Canada]; **s. 71 (unlawful drilling)** [to be dealt with as an offence against Public Order]; **ss. 52(1)(*b*) (sabotage in relation to foreign forces lawfully present in Canada) and 63 (with respect to interference with foreign forces lawfully present in Canada)** [to be considered for inclusion in a chapter of the *Code* covering international offences].

**4. That the following sections of the *Criminal Code* and the *O.S.A.* be repealed:**

*Code* **ss. 48 (time limitations for treason), 57 (offences relating to the R.C.M.P.)** [to be dealt with, if at all, in the *Royal Canadian Mounted Police Act*]; **ss. 60, 61 and 62 (seditious offences), 53 (inciting mutiny), 54 (assisting a deserter), 63 (interfering with discipline in military forces)** [we recommend that the *National Defence Act* should be reviewed to determine whether there is a need for the various treason-like offences it presently contains and whether there is a need to prohibit conduct such as inciting mutiny, assisting a deserter or interfering with discipline when it is committed by a civilian. We have not as yet fully consulted with the Department of National Defence but we plan to do so before finalizing our views on crimes against the State];

*O.S.A.* **s. 8 (harbouring spies).**

**5. That the *Code*'s General Part rules on secondary liability apply to the crimes against the State.**

# CHAPTER SIX

## Summary of Recommendations

**1. That the Special Part of the *Criminal Code* contain a new mini-code of Crimes against the State, providing as follows:**

### Primary Crimes against the State: Treason

**(1) [Engaging in war] It would be an offence intentionally to engage in war or armed hostilities against Canada.**

**(2) [Assisting the enemy] It would be an offence intentionally to assist anyone engaged in war or armed hostilities against Canada.**

**(3) [Using force or violence to overthrow the government] It would be an offence to use force or violence for the purpose of overthrowing the constitutional government of Canada or a province.**

**(4) [Espionage] It would be an offence:**

**(a) without having received lawful authorization, intentionally to communicate or make available *classified national security information* to another State or its agent, other than a State engaged in war or armed hostilities against Canada, or**

**(b) to obtain, collect or record *classified national security information* for the purpose of committing the offence in (a).**

**NOTE:** ***"Classified national security information"*** means any information that has been classified according to the *classification scheme* as being a matter with respect to which secrecy is required in the interests of the safety, security or defence of the nation, and which has not been declassified according to the appropriate *declassification procedure*.

### Secondary Crimes against the State

**(5) [Intimidating organs of State] It would be an offence to use force or violence for the purpose of extorting or preventing a decision or measure of a federal or provincial legislative, executive or judicial organ of State.**

**(6) [Sabotage] It would be an offence intentionally to jeopardize the safety, security or defence of Canada by:**

**(a) damaging, destroying or disposing of property, or**

**(b) rendering property useless or inoperative, or impairing its efficiency.**

**(7) [Failure to inform authorities or prevent wartime treason] Notwithstanding anything else in the *Code*,**

**(a) where a person knows that an offence of engaging in war or assisting the enemy is about to be committed, it would be an offence for him to fail to take reasonable steps to prevent the commission of the offence when he is capable of doing so without serious risk to himself or another. Taking reasonable steps to inform a peace officer of the offence may be, in the circumstances, sufficient to satisfy the duty to prevent the offence; and**

**(b) where a person knows that an offence of engaging in war or assisting the enemy is about to be or has been committed, it would be an offence for him to fail to take reasonable steps to inform a peace officer of the offence as soon as practicable.**

**(8) [Leakage] It would be an offence:**

**(a) without having received lawful authorization, intentionally to communicate or make available *classified national security information* to anyone other than another State or its agent, or**

**(b) to obtain, collect or record *classified national security information* for the purpose of committing the offence in (a);**

**(c) without having received lawful authorization, intentionally to communicate or make available *classified personal or government information* to anyone other than another State or its agent, or**

**(d) to obtain, collect or record *classified personal or government information* for the purpose of committing the offence in (c).**

NOTE: "***Classified personal or government information***" means any information that has been classified according to the *classification scheme* as being a matter with respect to which secrecy is required in the interest of (i) the security and privacy of any person, or (ii) the proper functioning of a government programme, and which has not been declassified according to the appropriate *declassification procedure*.

## Application

**(9) [General application] Subject to the *Vienna Convention on Diplomatic Relations*, anyone voluntarily present in Canada and benefiting from Canada's protection (whether he is a Canadian citizen, landed immigrant, visitor, and so forth) would be liable for these crimes committed in Canada.**

**(10) [Extraterritorial application]**

**(a) [General] The following persons would be liable for these crimes if committed outside of Canada:**

**(i) any Canadian citizen;**

**(ii) any other person who continues to benefit from the protection of Canada.**

**(b) [Extraterritoriality for assisting the enemy, espionage and leakage] In addition to the persons referred to in (a), anyone who was a Canadian citizen or who benefited from the protection of Canada at the time he obtained classified national security information (which information subsequently became the subject of an act of assisting the enemy, espionage or leakage) would be liable for assisting the enemy, espionage or leakage (as the case may be), relating to that information, committed outside Canada.**

## Other Recommendations

**2. That the following sections of the *Criminal Code* and the *O.S.A.* be replaced by the new chapter of Crimes against the State, located in the Special Part of the *Criminal Code*:**

***Code* ss. 46 and 47 (high treason and treason), 50 (assisting an alien enemy to leave Canada or failing to prevent treason), 51 (intimidating Parliament), and 52 (sabotage);**

***O.S.A.* ss. 3 (spying), 4 (wrongful communication or use of information), and 13 (extraterritorial application).**

**3. That the following sections of the *Criminal Code* be removed from the chapter dealing with Crimes against the State and dealt with elsewhere in the *Code*:**

**ss. 46(1)(a) and 49 (killing or harming the Queen)** [the offences of homicide and assault would be aggravated if the person killed or assaulted was the sovereign]; **[Alternative] s. 52 (sabotage)** [the offences of vandalism and arson would be aggravated if the conduct jeopardizes the safety, security or defence of Canada]; **s. 71 (unlawful drilling)** [to be dealt with as an offence against Public Order]; **ss. 52(1)(*b*) (sabotage in relation to foreign forces lawfully present in Canada) and 63 (with respect to interference with foreign forces lawfully present in Canada)** [to be considered for inclusion in a chapter of the *Code* covering international offences].

**4. That the following sections of the *Criminal Code* and the *O.S.A.* be repealed:**

***Code* ss. 48 (time limitations for treason), 57 (offences relating to the R.C.M.P.)** [to be dealt with, if at all, in the *Royal Canadian Mounted Police Act*]; **ss. 60, 61 and 62 (seditious offences), 53 (inciting mutiny), 54 (assisting a deserter), 63 (interfering with discipline in military forces)** [we recommend that the *National Defence Act* should be reviewed to determine whether there is a need for the various treason-like offences it presently contains and whether there is a need to prohibit conduct such as inciting mutiny, assisting a deserter or interfering with discipline when it is committed by a civilian. We have not as yet fully consulted with the Department of National Defence but we plan to do so before finalizing our views on crimes against the State];

***O.S.A.* s. 8 (harbouring spies).**

**5. That the *Code*'s General Part rules on secondary liability apply to the crimes against the State.**

# Bibliography


Aberle *et al.* (1950) «The Functional Prerequisites of a Society» 60 *Ethics* 100.

Aitken, J. (1971) *Officially Secret*. London: Weidenfeld & Nicolson.

Bellamy, J.G. (1970) *The Law of Treason in England in the Later Middle Ages*. Cambridge: Cambridge University Press.

Brown, M., B. Billingsley and R. Shamai (1980) *Privacy and Personal Data Protection* (Ontario Commission on Freedom of Information and Individual Privacy Research Publication 15). Toronto: Queen's Printer.

Buchheit, L.C. (1978) *Secession: The Legitimacy of Self-determination*. New Haven, Conn.: Yale University Press.

Bundu, A.C. (1978) «Recognition of Revolutionary Authorities: Law and Practice of States» 27 *Int'l & Comp. L.Q.* 18.

Bunyan, T. (1976) *The Political Police in Britain*. New York: St. Martin's.

Canada, Commission of Inquiry concerning Certain Activities of the Royal Canadian Mounted Police (1979) Mr. Justice D.C. McDonald, Chairman. *Security and Information* (First Report). Ottawa: Supply and Services.

Canada, Commission of Inquiry concerning Certain Activities of the Royal Canadian Mounted Police (1981) *Freedom and Security Under the Law* (Second Report — Volume I). Ottawa: Supply and Services.

Canada, Commission of Inquiry into Complaints Made by George Victor Spencer (1966) *Report of the Commissioner*. Ottawa: Supply and Services.

Canada, Department of Justice (1983) *A Consolidation of the Constitution Acts 1867 to 1982*. Ottawa: Supply and Services.

Canada, Law Reform Commission (1975) *Limits of Criminal Law* [Working Paper 10]. Ottawa: Supply and Services.

Canada, Law Reform Commission (1976) *Our Criminal Law* [Report 3]. Ottawa: Supply and Services.

Canada, Law Reform Commission (1984) *Damage to Property: Arson* [Working Paper 36]. Ottawa: Supply and Services.

Canada, Law Reform Commission (1984a) *Damage to Property: Vandalism* [Working Paper 31]. Ottawa: Supply and Services.

Canada, Law Reform Commission (1985) *Negligence, Omissions and Endangering* [Working Paper 46]. Ottawa: LRC.

Canada, Law Reform Commission (1985a) *Proposal for a New Criminal Code* (Internal LRC Paper).

Canada, Law Reform Commission (1985b) *Secondary Liability: Participation in Crime and Inchoate Offences* [Working Paper 45]. Ottawa: LRC.

Chambliss, W.J. (ed.) (1975) *Criminal Law in Action*. New York: Wiley.

de Smith, S.A. (1966) «Southern Rhodesia Act 1965» 29 *Modern L.Rev.* 301.

De Zulueta, F. (1923) «The Science of Law» in C. Bailey (ed.) *The Legacy of Rome*. Oxford: Oxford University Press.

Edwards, P. (ed.) (1972) *The Encyclopaedia of Philosophy*. London: Collier-Macmillan.

*Encyclopaedia Britannica* (1980) 15th ed. Chicago: Encyclopaedia Britannica Inc.

Fletcher, G.P. (1978) *Rethinking Criminal Law*. Boston: Little, Brown and Co.

Friedland, M.L. (1979) *National Security: The Legal Dimensions* (Study for the Commission of Inquiry concerning Certain Activities of the Royal Canadian Mounted Police). Ottawa: Supply and Services.

Friedland, M.L. (1984) *Offences against the Security of the State* (Unpublished LRC Paper).

Greenaway, W.K. and S.L. Brickey (1978) *Law and Social Control in Canada*. Scarborough, Ont.: Prentice-Hall.

Hale, M. (1736) *Historia Placitorum Coronae: The History of the Pleas of the Crown*. Reprinted London: Professional Books, 1980.

*Halsbury's Laws of England* (1976) 4th ed. Vol. 11. London: Butterworths.

Hart, H.L.A. (1955) «Are There Any Natural Rights?» 64 *Philosophical Rev.* 175.

Hart, H.L.A. (1961) *The Concept of Law*. Oxford: Clarendon Press.

Hepple, B.A. (1966) «Rhodesian Crisis — Criminal Liabilities» [1966] *Crim. L.Rev.* 5.

Holdsworth, W. (1925) *A History of English Law*. London: Sweet and Maxwell.

Jenkins, I. (1980) *Social Order and the Limits of Law: A Theoretical Essay*. Princeton, N.J.: Princeton University Press.

Laskin, B. (1975) *Canadian Constitutional Law*. 4th ed. Toronto: Carswell.

Lederman, P.R. (1976-77) «Sedition in Winnipeg: An Examination of the Trials for Seditious Conspiracy Arising from the General Strike of 1919» 8 *Queen's L.J.* 3.

Leigh, L.H. (1977) «Law Reform and the Law of Treason and Sedition» [1977] *Public Law* 128.

MacKinnon, P. (1977) «Conspiracy and Sedition As Canadian Political Crimes» 23 *McGill L.J.* 622.

Manning, M. (1983) *Rights, Freedoms and the Courts: A Practical Analysis of the* Constitution Act, 1982. Toronto: Emond-Montgomery.

McNaught, K. (1974) «Political Trials and the Canadian Political Tradition» 24 *U. Toronto L.J.* 149.

Meehan, E. (1984) *The Law of Criminal Attempt — A Treatise*. Toronto: Carswell.

Mewett, A.W. and M. Manning (1985) *Criminal Law*. 2d ed. Toronto: Butterworths.

Pollock, F. and F. Maitland (1895) *The History of English Law before the Time of Edward I*. Vol. 2. Cambridge: Cambridge University Press.

Reedie, P. (1978) «The Crimes of Treason and Sedition in Canada» 11 *Laurentian U. Rev.* 17.

Rich, R.M. (1979) *The Sociology of Criminal Law: Evolution of Deviance in Anglo-American Society*. Toronto: Butterworths.

Sills, D.L. (ed.) (1972) *International Encyclopaedia of the Social Sciences*. London: Collier-Macmillan.

Simon, W.G. (1961) «The Evolution of Treason» 35 *Tulane L. Rev.* 669.

Smith, J.C. (1976) *Legal Obligation*. Toronto: University of Toronto Press.

South African Law Commission (1976) *Report on the Codification of the Common Law Relating to the Crimes against the State*. Pretoria: The Government Printer.

Steinhaus, R.Z. (1956) «Treason, A Brief History with Some Modern Applications» 22 *Brooklyn L.Rev.* 254.

Stephen, J.F. (1877) *A Digest of the Criminal Law (Crimes and Punishments)*. London: MacMillan.

Stephen, J.F. (1883) *A History of the Criminal Law of England*. Vol. 2. Reprinted New York: Burt, 1964.

Turner, J.W.C. (ed.) (1964) *Russell on Crime*. 12th ed. London: Stevens.

U.K., Departmental Committee on Section 2 of the *Official Secrets Act 1911* (1972) Vol. 1: *Report of the Committee*. Cmnd. 5140. London: HMSO.

U.K., English Law Commissioners (1879) *English Draft Code* (Report of the Royal Commission appointed to consider the Law Relating to Indictable Offences with an appendix containing a Draft Code embodying the Suggestions of the Commissioners). London: HMSO.

U.K., Law Commission (1977) *Codification of the Criminal Law: Treason, Sedition and Allied Offences* [Working Paper 72]. London: HMSO.

U.S., National Commission on Reform of Federal Criminal Laws (1970) *Working Papers*. Vol. 1. Washington: U.S. Government Printing Office.

U.S., National Commission on Reform of Federal Criminal Laws (1971) *A Proposed New Federal Criminal Code (Title 18, United States Code)* (Final Report). Washington: U.S. Government Printing Office.

Vitu, A. (1973) «Crimes et délits contre la sûreté de l'état» *J.C.P.* Fasc. II.

Wasserstrom, R.A. (1968) «The Obligation to Obey the Law» in R.S. Summers (ed.) *Essays in Legal Philosophy*. Oxford: Basil Blackwell.

Williams, D.G.T. (1965) *Not in the Public Interest: The Problem of Security in Democracy*. London: Hutchinson.

Williams, D.G.T. (1978) «Official Secrecy and the Courts» in P.R. Glazebrook (ed.) *Reshaping the Criminal Law*. London: Stevens.

Williams, G. (1948) «The Correlation of Allegiance and Protection» 10 *Cambridge L.J.* 54.

# Table of Statutes

## Canada



## United Kingdom

*Official Secrets Act*, 1889, 52 & 53 Vict., c. 52.
*Official Secrets Act*, 1911, 1 & 2 Geo. 5, c. 28.
*Official Secrets Act*, 1920, 10 & 11 Geo. 5, c. 75.
*Scandalum Magnatum*, 1275, 3 Edw. 1, c. 34.
*Statute of Treasons*, 1351, 25 Edw. 3.
*The Constitution Act, 1867*, 30 & 31 Vict., c. 3.
*Treason Felony Act*, 1848, 11 & 12 Vict., c. 12.

# Table of Cases

## Canada



## United Kingdom

*De Libellis Famosis* (1606), 5 Co. Rep. 125a; 77 E.R. 250 (Star Chamber).
*Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347 (H.L.).
*R.* v. *Casement*, [1917] 1 K.B. 98 (C.A.).
*R.* v. *Higgins* (1801), 2 East 5, 102 E.R. 269.
*R.* v. *Lynch*, [1903] 1 K.B. 444.
*R.* v. *Maclane* (1797), 26 Howell's State Trials 721.
*R.* v. *Scofield* (1784), Cald. Mag. Rep. 397.
*R.* v. *Henry and John Sheares*, 27 State Trials 255.
*The Case of Duels* (1615), 2 State Trials 1033.
*The Case of Tutchin* (1704), 14 State Trials 1095.

## United States

*Chandler* v. *United States*, 171 F. 2d 921 (1st Cir. 1948).
*Connor* v. *Birmingham*, 257 A.L.A. 588 (1952).
*New York Times Company* v. *United States*; *United States* v. *The Washington Post Company*, 403 U.S. 713 (1971) (U.S. S.C.).
*Scull* v. *Virginia ex rel. Committee on Law Reform and Racial Activities*, 359 U.S. 344 (1959).
*United States* v. *Chandler*, 72, F. Supp. 230 (1947) (D.C. Mass.).
*Winters* v. *New York*, 333 U.S. 507 (1948).
*Yates* v. *U.S.*, 354 U.S. 298 (1957) (U.S. S.C.).