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HISTORICAL PERSPECTIVES ON THE FEDERAL - PROVINCIAL SPLIT IN JURISDICTION IN CORRECTIONS

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1979

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1. Origins

It appears that, prior to the middle of the nineteenth century, the notion of a two-year cutoff had, in part, been established. Chapters 24, 25 & 26 of 4-5 Victoria 1841 provide for offenders:

> "to be imprisoned at hard labour in the provincial penitentiary for any term not less than seven years, or to be imprisoned in any other prison or place of confinement for any term not exceeding two years."

This would seem to be the origin of the two-year split that persists to this day.

6 Victoria 1842 Chapter 5 Section 3 was cited by the Archambault Report[1] as the first statute fixing the split at two years, for the purpose of:

> "better proportioning the punishment to the offence in certain cases, and for other cases therein mentioned."

The two-year dividing line was further reaffirmed, with certain exceptions, by the Consolidated Statutes of Canada 1859, Ch.90, S.100, 32-33 Victoria 1869 Ch.29 S.96, Revised Statutes 1886, Ch.181 S.28, 55-56 Victoria 1892, Ch.29 S.955 and RS Can 1927 Ch.36 S.1056, which latter

[1] Report of the Royal Commission to Investigate the Penal System of Canada, Ottawa: King's Printer, 1938. Hereinafter referred to as Archambault.

statute remained in effect to the time of Archambault, and which states:

> Everyone who is sentenced to imprisonment for a term less than two years shall, if no other place is expressly mentioned, be sentenced to imprisonment in a common gaol of the district, county or place in which the sentence is pronounced; or if there is no common gaol there, then in that common gaol which is nearest to such locality,or in some lawful prison or place of confinement other than a Penitentiary, in which the sentence of imprisonment may be lawfully executed.[2]

This reference, while maintaining the two-year split, does imply that it is possible for a judge to make an exception and to sentence the short-term offender to serve that term in a penitentiary. At the same time, Section 41 of the Penitentiary Act (in effect in 1938) provided that everyone who was sentenced to imprisonment for life or for a term of not less than two years , be sentenced to imprisonment in a penitentiary for the province in which the conviction took place.

It is clear that the net effect of these two statutes was to affirm the two-year split,but to also provide for exceptions in the case of certain short-term inmates.

[2] Quoted in Archambault,p.339

2.The British North America Act

The B.N.A. Act is, of course, the major instrument of the nineteenth century used in fixing the division of responsibility between federal and provincial jurisdictions. It provides that the legislative authority of the Parliament of Canada extends to the establishment,maintenance, and management of penitentiaries. Further, provision is made for the legislatures of the provinces to make laws in relation to the establishment, maintenance and management of public and reformatory prisons in and for the province.

It is important to note that there is no provision in the British North America Act either defining penitentiaries or fixing a dividing line between those prisoners who are to serve terms in the penitentiaries and those who are to be incarcerated in provincial institutions.

It would appear to be, therefore, in the power of the federal government to alter in any respect the two-year rule by its ability to legislate in the area of criminal law; this could be done through amendments to the Criminal Code, to the Penitentiaries Act and/or to the Prisons and Reformatories Act.

3.The First Challenge to the Two-Year Rule

The first attempt to alter the two year rule that seems to be extant appears in the proceedings of the Inter-Provincial Conference of 1887, called at the request of the Hon. Honore Mercier, Premier of Quebec.

The purpose of the conference was to reconsider the financial basis of Confederation. The argument raised by Quebec, and seconded by Nova Scotia,New Brunswick, Ontario and Manitoba (other provinces did not attend) was that rising populations and the effects of legislation passed by the federal government posed real fiscal hardships for the provinces, particularly inasmuch as the B.N.A. Act had transferred certain important sources of revenue (customs and resources) to the federal government.

A major area singled out was that of the administration of justice, and the Quebec delegation (which hosted the conference) recommended:

> Payment by the Federal Government of the cost of Administration of Justice in criminal matters and the maintenance of prisoners convicted for infringement of

> Federal laws; amendment of the criminal law so as to limit to six months the period of incarceration in Provincial prisons;all incarceration for periods of over six months to be in the Provincial (sic) penitentiaries.[3]

In addition,Quebec proposed that the revenues of fines, confiscations and penalties be transferred to the provinces[4] and, as well, that the Lieutenant Governors be returned the power to

> respite,reprieve and pardon criminals and commute and remit sentences in whole or in part...[5]

The point was raised, and, indeed, it has not been resolved to this day, that certain (if not all) provinces feel that, by its power to legislate, the federal government can impose fiscal burdens on the provinces in the way of administration of justice, and that these are expenditures which the provinces can neither avoid nor control.

[3] Minutes of the Proceedings of the Interprovincial Conference held at the City of Quebec, from the 20th to the 28th October,1887,inclusively,Ottawa: Library of Parliament compilation,n.d.,p.12

[4] Ibid.,p.13

[5] Ibid.

Further, it was implied that the federal government has an obligation to relieve the provinces of the burden thus created.

What is germane is that, while this cry for fiscal relief was echoed by later conferences in 1902[6] and 1906[7], the split in jurisdiction,the transfer of the right to pardon or the question of revenues from fines were never again raised in the period before World War I. The latter question was eventually resolved; the other two were not.

Indeed, the Quebec resolution (if it ever really came to that!) regarding an amendment to the two-year split was never passed by the conference, despite Archambault's assertion to the contrary.[8]

It was only with the Fauteux Commission's report of 1956 that the question of a six-month split was again raised, and then for radically different reasons.

[6] Minutes of Proceedings of the Interprovincial Conference held at the City of Quebec,from the 18th to the 20th of December,1902,inclusively,Ottawa:Library of Parliament compilation,n.d., pp.43-44,52-53,62-66.

[7] Minutes of the Proceedings in Conference of the Representatives of Canada and of the Provinces,October,1906, Ottawa:Library of Parliament compilation,n.d.,p.83.

[8] Archambault,Op.Cit., p.340.

4. The Archambault Report

Archambault was written at a time when the concept of using corrections to rehabilitate inmates, rather than simply to punish them or to temporarily protect society through their absence, was bursting upon North American corrections. This report was the origin of a series that waxed (Fauteux[9]) and waned (Law Reform Commission[10]) as the ideal of rehabilitation became first the prime objective of corrections and than, as its promises remained more and more obviously unfulfilled, began to be spoken of with greater and greater restraint.

Archambault noted that, in 1937-38, there were seven federal penitentiaries and a large number of provincially-operated institutions. While a number of negative observations were made regarding the penitentiaries, it was the provincial institutions that came in for the most damning criticism in the report.

> Practically all the city,county and municipal jails were erected many years ago and, from the point of view of reformation,classification, segregation or providing useful employment,

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[9] Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, Ottawa: Queen's Printer,1956. Hereinafter referred to as Fauteux

[10] Law Reform Commission of Canada, Report on Dispositions and Sentences in the Criminal Process, Ottawa,1976. Hereinafter referred to as L.R.C.

> they are entirely inadequate...In too many of them prisoners are forced to spend all their waking hours in idleness, and young prisoners, in many cases between sixteen and twenty-one years of age, who are perhaps first
>
> offenders,must serve their sentences under these conditions and in company with older prisoners who have served numerous terms of imprisonment in other penitentiaries for more serious crimes.[11]

The first two concerns of Archambault, within the overall purpose of protecting society, were to improve conditions and to make rehabilitation a primary concern of corrections.

> ...the task of the prison should be, not merely the temporary protection of society through the incarceration of captured offenders, but the transformation of reformable criminals into law-abiding citizens, and the prevention of those who are accidental or occasional criminals from becoming habitual offenders.[12]

The only offenders who were regarded by Archambault as exceptions to this rule were habitual offenders, who should be segregated in a separate institution.[13] The approach to them, to use the popular idiom, would be "throw them in jail and toss away the key".

11 Archambault,p.16

12 Ibid.,p.9

13 Ibid., R.17,18,p.355.

The Archambault Report felt strongly that it would be impossible to create a strong corrections system that would either protect the public or rehabilitate offenders, unless all corrections were brought under one centralized control, i.e., federal. In the virile language of the Report,

> It is obvious, for example, that if different treatment than that recommended by your Commissioners is given to the prisoners in provincial institutions, if classification and segregation are not uniformly instituted, if a different discipline is in effect, and the administration is not supervised by the same authorities, the success of the system recommended by your Commissioners would be jeapardized, and the evils discerned in the antiquated treatment at present in existence would be permanantly extended. The federal authorities would be handicapped in the proper treatment of those who come to federal institutions already stamped with the imprints of the multiple provincial institutions.[14]

In addition to its concern lest its master plan go astray, Archambault also stressed the economies that had resulted in other countries (notably Britain) and would presumably result from the centralization of Canadian corrections. It pointed out that in England and Wales, with a population of 41 million, there were a total of thirty-one prisons of various kinds; Canada, with a population of only eleven million, had one

[14] Ibid., p.340.

hundred and forty-seven.[15]

Archambault is strangely silent on the question of provincial interest.Indeed, the problems of centralization were glossed over in the following words:

> Your Commissioners are well aware of the difficulties to be overcome in such a consolidation, but they are also aware that many of these difficulties existed in England before 1877 and did not prevent consolidation. It is in the power of the Parliament of Canada to amend section 1056 of the Penitentiaries Act,and the Reformatories Act, to change the minimum terms for which a convicted person may be sentenced to a penitentiary and to prescribe the nature of treatment to be given in federal institutions.Alternately, an agreement might be made between the Dominion and the provinces for the former to take over the administration of provincial penal institutions,paying compensation therefor, in order that persons committed to prison should be committed to federal institutions for terms of less than two years.[16]

The sole reference to provincial concerns in the Recommendations section is found in R.1 and 2:

> 1.The Canadian penal system should be centralized under the control of the Government of Canada,with the federal authorities taking charge of all the prisons in Canada,the provinces retaining only a sufficient number to provide for offenders against provincial statutes,prisoners on remand, and those serving short sentences.

[15] Ibid.,p.341.

[16] Ibid.,p.343.

> 2. An immediate conference between the federal and provincial authorities should be held with a view to obtaining the full co-operation of the provincial authorities in putting the recommendations of the Commission into effect.[17]

Archambault offered no discussion whatever of other possible alternatives; centralization was the only means seen by which the goals of rehabilitation, protection and economy could be achieved.

There were two exceptions made to this doctrine. First, as has been mentioned above, habitual offenders were to be largely written off as irredeemable. They were to be sentenced to indeterminate terms and to be housed separately:

> R.17. The necessary legislation should be enacted to provide for sentencing habitual offenders to preventive detention in a separate institution to be provided for that purpose.
> R.18. All incorrigible and intractable prisoners in the penitentiaries should be segregated in one institution.[18]

It is to be noted, however, that these institutions were to be part of the centralized system.

A different tack was taken in dealing with female offenders.

[17] Ibid., p.354

[18] Ibid., p.355.

Recommendation 55 provides that:

> Arrangements should be made with the provincial authorities for the confinement of women prisoners, such as are now incarcerated in the Women's Prison at Kingston, in provincial jails and reformatories for women, and when such arrangements have been made, the use of the Women's Prison at Kingston Penitentiary should be devoted to other penitentiary purposes.[19]

This was to be the sole exception to the centralization theme.

In retrospect, Archambault, read in the context of the day, made a great deal of sense. It would have eliminated a large number of antiquated, inefficient facilities, it would have provided a common purpose for Canadian corrections and, presumably, it might have provided the programming needed for effective rehabilitation (if, indeed, such programs have ever existed). It also would have removed a large part of the fiscal burden for the administration from the shoulders of the provincial governments, something for which they had been seeking relief since very shortly after Confederation.

Archambault, however, failed to give any meaningful consideration to provincial or local interests. It must be

[19] Ibid., p.358

admitted that it was written at a time when the federal government was accustomed to legislate with far less federal-provincial consultation that is presently the case. However, we have ample proof, from 1887 onward, that the provinces were unwilling to give up control over the administration of justice and it is doubtless upon this rock that Archambault foundered.

5. The Fauteux Report

It is generally accepted that Fauteux represents an extension of the idea of rehabilitation expressed in Archambault. As MacDonald saw it, the Commissioners

> ...appeared to take Archambault as their starting point,and worked from there to push Canada further along the fairly well-lighted path to reform...Like the Archambault Commissioners before them, the Fauteux Commission were optimistic about their ability to define the principles of the system, and to find (mostly in Britain) examples of how the goals could be achieved.[20]

Retributive justice was now wholly abandoned in favour of rehabilitation and, to a lesser degree, deterrence. In the words of the Commission itself,

> Initially, imprisonment was based on a philosophy of punishment or sentence (sic).This type of thinking is still to be found in some measure in the public

---

[20] K.J.MacDonald, A Summary and Analysis of Some Major Inquiries on Corrections - 1938 to 1977, Ottawa: Solicitor General, May 1977,p.6.

> mind. Increasingly, however, society appears to recognize that if it is to be protected to the greatest possible extent, an increasing number of offenders must receive such treatment in the institutions as will promote their reformation and rehabilitation. Such a process assists the offender to resume a normal, self-directed, law abiding life in free society...Prison life is an unnatural form of life. If it is going to aid in the reformation and rehabilitation of the prisoner, every effort should be made to provide surroundings and experience that, as far as possible, will contribute to these ultimate aims in a natural and positive way.[21]

While not providing a catalogue of the deficiencies of the various institutions, as had Archambault, Fauteux stressed the overcrowding in, primarily, the federal facilities and deplored the lack of classification and other services perceived as aiding in rehabilitation.

Particular emphasis was to be placed in the construction of new, specialized treatment facilities for alcoholics, drug addicts, sex offenders and psychotics[22].

Fauteux interpreted the recommendations of Archambault regarding the treatment of habitual or incorrigible offenders as suggesting the creation of a "Canadian Alcatraz."[23]

[21] Fauteux, Op.Cit., 46.

[22] Ibid., p.48.

[23] Ibid.

While it agreed that such offenders should be incarcerated in a separate institution, it was emphasized repeatedly that no inmate, regardless of how long a record he had or how apparently incorrigible he had been, could be allowed to lose the hope of regaining his freedom.[24]

Fauteux has been attacked, over the years, for suggesting that it favours, holus bolus, longer prison terms. I believe this is a considerable misinterpretation of its position. It is true that the Report does say;

> If a prison term is to be effectively reformative, it should be long enough to provide for a period of treatment. Many sentences imposed for minor offences are much too short to permit the institution to invoke any effective treatment. Where treatment is required little or no purpose is served by sentences under six months.[25]

At the same time, however, it is clear Fauteux did not agree with the idea of long, particularly long indeterminate sentences, which had so largely been adopted in the United States as the logical approach to rehabilitative sentencing.

[24] See, for example, Ibid., p.46-48.

[25] Ibid., p.46.

> In Canada there has been a tendency towards the imposition of sentences which may be unnecessarily long, when observed from the rehabilitative point of view.If an individual is required to remain in an institution indefinitely or even for extended periods of 8,10 or 15 years, he tends to become completely institutionalized,dependent,and incapable of initiating positive action on his own behalf.[26]

Clearly, Fauteux wanted the best of both worlds; sentences long enough to be able to "work with",but short enough for the inmate to see the point in "working".

Like Archambault, Fauteux deplored the chaos that would result from a fragmented correctional system, though the language used was never as thunderous. The recommendations concerning the restructuring of federal and provincial corrections are expressed in half a page!

> ...there is much confusion,if not actual contradiction in the law.We consider that much could be done by means of suitably co-ordinated legislation to achieve greater unity of purpose and treatment in the various provinces.
>
> We therefore recommend a careful examination by the responsible authorities of the whole legislative framework of the Canadian correctional system for the purpose of providing a well coordinated statutory basis for the Canadian system of corrections.
>
> ....

[26] Ibid.

> At first glance it would...appear that all persons in provincial prisons are serving sentences of less than two years. There is here,however, an interesting anomaly.If the convicted person is given a series of consecutive sentences of two years less a day, he may thus serve in a provincial institution a total term well in excess of what was apparently the intended maximum for any inmate of that institution. We consider that any person sentenced to a term of two years or more,by whatever method this period may be arrived at, should be confined in a penitentiary.[27]

From this, it may be interpreted that Fauteux envisaged a continuation, indeed, a clarification to make even more definite the two-year jurisdictional split. The Report, however goes on:

> Representation has been made that there would be much advantage to be gained in Canadian prison administration if the maximum term for detention in a provincial institution were considerably reduced. One view is that the provincial government should be responsible only for the care and treatment of persons confined for a maximum term of six months, and that the responsibility for all persons sentenced to periods longer than six months should be the responsibility of the federal government. Such a change,if effected, would result in greater uniformity of treatment of offenders throughout Canada and should ultimately result in the establishment of a greater number of types of institutions for prisoners who are sentenced to terms in excess of six months.We recommend accordingly.[28]

[27] Ibid.,p.50.

[28] Ibid.

On this astounding note, the section of Fauteux devoted to correctional administration ends. There is no other discussion of the point, no detailed rationale, no offering of other alternatives. Most certainly, there is no discussion whatsoever of how federal-provincial consensus might be achieved or even if it were seen to be important at all!

Fauteux thus recommends a sweeping centralization of corrections, with the provinces retaining the administration of sentences of less than six months, because these are not meaningful in terms of rehabilitative potential and because centralized doctrine would promote rehabilitation.

In the balance, this is not greatly different from Archambault. It will be recalled that the latter had recommended centralization for reasons that were largely the same (exception: Archambault wanted to consolidate, Fauteux to expand), and Archambault had also recommended that the provinces continue to administer short sentences, though it suggested no specific split.

On the question of female offenders, Fauteux and Archambault took opposed positions. Archambault had wanted

to have such inmates incarcerated in provincial institutions. While recognizing the problems of a single centralized prison for women, Fauteux stated that;

> It appears to us,however, that this institution,with a relatively small and comparatively static population,is precisely the kind of institution where...treatment... could be most readily carried on.This,we think, is the most important consideration... We therefore recommend that in the new Women's prison,which we understand is now under consideration, the federal government plan for a more intensified treatment program.[29] (italics mine!)

In summary,then, while Fauteux marked a much more radically rehabilitative approach in some areas, as far as the split in jurisdiction was concerned, there was very little difference from Archambault, with the solitary exception of the problem of the female offender.

6. A Federal Offer to Increase its Respsonsibility

In 1958, at a federal-provincial conference held to consider recommendations made by the Fauteux Commission, an offer was made by the federal government to assume responsibility for a greater proportion of the Canadian inmate population.

This offer was not generally accepted by the provinces and

[29] Ibid.,p.41

it is abundantly clear from the reports of the various provincial commissions of inquiry into corrections of the day that, if the federal government had made up its mind to implement the Archambault/Fauteux recommendations for a change in split, the provinces were far from agreed.

Then, as now, the less financially well endowed provinces favoured centralization, while their more affluent sisters did not.

The Dickson Report[30] of 1951 indicated, that, as far as New Brunswick corrections was concerned, centralization was very welcome.[31] It remarked, regretfully but accurately,

> The Government of Canada has not implemented this recommendation and it will probably be years before Canada assumes responsibility for all prisoners.[32]

Ontario, shortly before the Fauteux Commission reported, took a very different stand:

> The fixing of the term of two years as the division between Federal and Provincial responsibility is purely arbitrary. The

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[30] J.B.Dickson, Report of Commission on Gaol System of New Brunswick, Fredericton: Mar.30, 1951 (copy of Oct. 1963)

[31] Ibid., p.5, p.9

[32] Ibid., p.9

> Committee is in accord with the view of the Archambault Commission that the basis of two years is superficial and is in need of revision. There appears to be good reason for a study of the division of responsibility between Federal and Provincial Governments with a view to possible re-alignment.
>
> The Committee believes it would be more realistic and more in keeping with the intended purpose of the division of responsibility for Federal penitentiaries to accept a considerable portion of the recidivists who are convicted under federal statutes, regardless of length of sentence, *so that Provincial institutions would be better able to perform their reformative function*. (italics mine)[33]

According to the Ontario report's position, then, the *provincial* institutions were to play the reformative role, while, by implication, those relatively minor offenders (presumably who were regarded as beyond help) were to be placed in *federal* custody! At the same time, the Report recommended longer indeterminate sentences of from one to five years which would presumably be served in provincial institutions and which would facilitate rehabilitation for the same reasons as those advanced by *Archambault*.[34]

The general message of the Ontario report was that the province should, in fact, assume responsibility for *more*, rather than fewer, inmates.

[33] *Report of the Select Committee Appointed by the Legislative Assembly of the Province of Ontario, to Study and Report upon Problems of Delinquent Individuals and Custodial Questions and the Place of Reform Institutions Therein*, Toronto: March 8th, 1954, pp.39-40

[34] *Ibid.*, p.41.

Other provinces, in this period, did not appear to take strong positions either way. Reports in Saskatchewan[35] and British Columbia[36], for example, are silent on the question of a redefinition of the jurisdictional split.

It should not be assumed that this indicated indifference to corrections on the part of the provinces; the period between Archambault and Fauteux saw the gradual acceptance of the rehabilitative ideal as a major objective of corrections in the majority of provinces. It is true, as a later report was to point out[37], that there was little institutional development in this period, owing, presumably, to provincial fears of a federal takeover of provincial facilities.

What is clear is that, in 1958, there was very little agreement among the various governments as to whether or not the recommendations of Archambault and/or Fauteux should be implemented, as regards a change to the split.

[35] Report of the Saskatchewan Penal Commission 1946, Regina: Ministry of Public Works.

[36] Report of the Commission Appointed by the Attorney-General to Inquire into the State and Management of the Gaols of British Columbia 1950, Victoria:King's Printer,1950.

[37] Report of the Canadian Committee on Corrections, Ottawa: Queen's Printer,1969.Hereinafter cited as Ouimet.

7. The Ouimet Report

The Ouimet Report, as a number of studies have shown, (MacDonald[38], Vantour & Needham[39], Needham[40]) represents yet another stage in the rise and fall of the rehabilitative ideal.

The concept, first enunciated in Archambault and which Fauteux had suggested as being the primary objective of corrections, was beginning to show signs of promises unfulfilled. In MacDonald's words,

> If the Archambault and Fauteux Reports shared a sense of optimism about the prospects for rehabilitation within the prison system, the Ouimet Report showed the first signs of doubt about its possibility. Many of the recommendations of the previous reports had been implemented, in full or in part, and some problems associated with their implementation had begun to surface... Furthermore, there had begun to appear some cracks in the facade of expert consensus on goals, and growing public acceptance of rehabilitation...[41]

While agreeing with Archambault and, it must be admitted, Fauteux that the primary objective of criminal justice

[38] MacDonald, Op.Cit.

[39] J.Vantour & H.Needham, Approaches to the Reform of Juvenile Justice, Ottawa: unpublished memorandum, 1976.

[40] H.Needham, Perspectives on Pre-Sentence Reports, Ottawa: unpublished memorandum, 1978.

[41] MacDonald, p.9.

Ouimet saw the criminal law as a very powerful tool and one that, in Canada, was over-used to a considerable extent.

> Traditionally it has been regarded as inherent in the criminal process that one who is judged to have committed a crime is to be convicted of crime and thereby made subject to the penological or correctional process...Are all of those presently convicted of crime apt subjects for the penological and correctional services?...The Committee believes that traditionally punishment has been over-stressed as a means of crime prevention...Present penal and correctional institutions must be reassessed both in the light of the role that they are expected to play and the practicability of their discharging this role.Where punishment is imposed for deterrent reasons,penal facilities must be made available.If correction rather than punishment is to be the goal,then both institutional and community based correctional agencies must be created and maintained.[42] (italics mine)

This statement is at the heart and soul of the report. Three elements are noted; first, that rehabilitation is not for all; second, that sentencing may be done for discrete reasons,one of which is legitimately punishment; third, at least some rehabilitation is best done in the community, rather than in the institution. These three themes were, only a few short years later, to be taken to what a number of Canadians regard as their extremity

[42] Ouimet, Op.Cit.,pp.18-19.

by the federal Law Reform Commission.[43]

Ouimet recognized that reform (c.f.,progress) could be neither simple nor speedy;

> There is no plan for corrections in Canada that embraces all the services,nor can there be one until there is agreement with respect to its aim and function...The situation is aggravated by geography.Services are spread over such vast distances and extensive communication of ideas is difficult.The isolated location of so many of Canada's penal institutions,including some of the newest, further insulates the staff from ready access to modern developments and thinking...There is also a great deal to learn about the most effective ways of dealing with certain kinds of offenders,although practice is still largely behind knowledge.[44]

Ouimet spent considerable time on jurisdictional issues in corrections. It is also worth noting that it spoke to the problem of the voluntary agencies, "an important part of the total picture" [45] as no other report previously had.

The report reviewed the recommendations made as to adjusting the division of reponsibilities by Archambault and Fauteux and, unlike the latter reports, presented a series of possible options. It came to the conclusion that:

[43] L.R.C., Op.Cit.

[44] Ouimet,Op.Cit.,pp.274-275.

[45] Ibid.,p.275.

> ...considerable time has elapsed since the Fauteux Committee completed its work and there has been considerable growth in provincial correctional services,including prisons. These developments, along with those in the federal system, have increased the problems associated with a major transfer of responsibility.
>
> These difficulties have impressed the Committee as has the lack of consensus among the many people across the country with whom the Committee has discussed this problem.The Committee has therefore concluded that insufficient reasons exist to recommend any major transfer of responsibility for prisons.
>
> The Committee recommends that the federal government retain responsibility for prisoners sentenced to incarceration for a period of two years or longer and that the provinces retain responsibility for those receiving a sentence of less than two years; that anomalies that run counter to this provision be removed; and that there be provision for the federal government to contract for prison service from a province and for a province to contract for prison service from the federal government.[46]

Rather than amending the two year split, then, Ouimet sought to rationalize and reinforce it. Both the federal and provincial corrections services should have a wide range of services and full control over imprisonment and release of inmates in the separate jurisdictions. In the area of parole, for example, the

[46] *Ibid.*,pp.282-283.

Commission said;

> It is inefficient for an inmate to be the responsibility of one government until the question of parole arises and for him then to pass under the control of another level of government.
>
> The Committee recommends that the federal government retain responsibility for parole as it affects all inmates of federal penitentiaries and that the provinces assume responsibility for parole as it affects all inmates of provincial institutions.[47]

It should be noted, in passing, that the only provinces, at the time of *Ouimet*, that used indeterminate sentences were Ontario and British Columbia and these were therefore the two with provincial parole boards, as distinct from the federal parole authority. Three other provinces had legislative provision for such authorities but, in 1969, they were inactive.

Despite the fact that *Ouimet* saw a series of *discrete* criminal justice systems in operation, it was very much an application of the old adage that "all are created equal but some are more equal than others." The federal government, for reasons constitutional, historical and, not least, fiscal, was to be given a "leadership,

[47] *Ibid.*, p.283.

stimulation and coordinating role in relation to the adult correctional services".[48] By this means, the thorny question of national standards was to be approached, particularly in respect of new approaches that the provinces were to be induced, nudged or coerced into trying out.

Ouimet's approach to the problem of the female offender was in accord with its guiding principles of restraint, controlled development and divided responsibility:

> The Committee recommends that early discussion between the federal government and the provinces give attention to developing across Canada services which could be used as alternatives to criminal proceedings in dealing with offences without a direct victim[49] (Ed.note: Ouimet is here addressing prostitution, vagrancy, alcoholism, etc., to which female offenders were seen as especially prone)
>
> ....
>
> It is recommended that arrangements for purchase of prison services be made between the Government of Canada and the various provinces so that a unified service could be provided in each area and that the Government of Canada offer to purchase services from the larger provinces and to provide regional services that could be purchased by smaller provinces.[50]
>
> ....
>
> It is recommended that the government with primary responsibility retain responsibility for parole as it applies to any woman inmate for whom prison service has been purchased from another government.[51]

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[48] Ibid., p.284.

[49] Ibid., p.395

[50] Ibid., p.401

[51] Ibid., p.402

> The Committee recommends that the Government of Canada appoint a suitably qualified woman to a position of senior responsibility and leadership in relation to correctional treatment of the woman offender in Canada.[52]

In the matter of habitual offenders, Ouimet found that the existing legislation, rather than providing a means of controlling dangerous persons, had become instead a trap for very small flies - the persistant petty offenders. It recommended replacement of the legislation by dangerous offender legislation that would provide for long,indeterminate terms. These, by definition, would be served in federal institutions.

In summary, Ouimet recognized the limits to rehabilitation, the problems inherent in a major shift in jurisdictional boundaries and, particularly, the efforts made to develop provincial corrections since Archambault. Its answer was to retain the existing demarcation point, but to use the criminal law with greater restraint and to seek new approaches outside institutional corrections.

8.The Response to Ouimet

It is, perhaps, too early to assess with any credibility the long-term impact of Ouimet on the Canadian correctional systems. A major difficulty is that Ouimet was part of an historical progression that was to be taken somewhat

[52] Ibid.,p.403.

further along the same path by the Law Reform Commission of Canada.

It is safe to say, however, that the Ouimet Report, since its 1969 publication, has been and remains the major source of direction for correctional development in this country. In the years following Ouimet, there was a spate of provincial studies on corrections, assisted in part by the efforts, fiscal and otherwise, of the federal government, in compliance with its perceived leadership function.[53] Typically, these accept the philosophy of Ouimet; where there are differences, they are generally due to regional or local situations. In the two areas of female offenders and dangerous offenders, consensus continued, however, to evade the various authorities. Nor were all the provinces desirous of a complete rationalization of corrections - if it meant the creation of provincial parole authorities. This situation extends to the present day.

One development that may have, in the future, significant impact on the split in jurisdictions, is the growing number of federal-provincial exchange of services agreements.

[53] The Rise of the Sparrow: A Paper on Corrections in Manitoba (Winnipeg: Department of Health and Social Development, July 1972) is an example of the more progressive of these.

At present, only a small number of inmates are involved and further expansion is largely restricted by differences of opinion between the various governments as to appropriate per-capita costs. A massive expansion of this program on the part of either party, however, could have the effect of overturning the two-year split, in practice, if not in law.

9. The Law Reform Commission of Canada

Archambault had suggested that, in addition to its punitive functions, the threat of imprisonment was a deterrent and the operation of imprisonment could be rehabilitative. Fauteux saw incarceration as being a deterrent but, much more, a chance to rehabilitate. Ouimet suggested that maybe it was not as rehabilitative as had been suggested by its predecessors. The Law Reform Commission said flatly that the experience of rehabilitation was that it generally was unworkable in institutional corrections.[54]

Much more than Ouimet, L.R.C. urged restraint in the application of the heavy-handed machinery of justice. While the former had suggested that community-based corrections

[54] L.R.C., Op.Cit.

were an important arrow in the justice quiver, L.R.C. took the position that such approaches were, in fact, the *major* weapon available.

A sentence of incarceration was to be a last resort and could only be imposed for three reasons:

> (a) to protect society by separating offenders who are a serious threat to the lives and personal security of members of the community; or
> (b) to denounce behaviour that society considers to be highly reprehensible, and which constitutes a serious violation of basic values; or
> (c) to coerce offenders who wilfully refuse to submit to other sanctions.[55]

The first refers primarily to crimes of violence, for which a maximum sentence of twenty years would be available.[56] *Because of the serious nature of the offence, all such offenders, regardless of length of sentence, would be incarcerated in federal institutions.*[57]

The second includes primarily offences against property, for which a maximum sentence of three years would be available, except in cases of combined or cumulative sentences.[58] These could be served in either a federal

[55] *Ibid.*, p.26
[56] *Ibid.*, p.27
[57] *Ibid.*, p.59
[58] *Ibid.*, p.27

or a provincial institution;

> sentences of denunciation may be split on a time basis if the present situation prevails or may be left to the discretion of the court or placed under federal jurisdiction since this sentence would apply to offences which seriously undermine core values even though dangerousness may not be a factor.[59]

This is a most ambivalent position.

Sentences for coercion are to be used where non-custodial sanctions have failed. A maximum term of six months would be available, except for cases of combined or cumulative sentences[60] and, because of the relatively minor nature of the offences and, presumably, the offenders, these would be under provincial jurisdiction.[61]

The general effect of implementation of these proposals, and, more important, those others which refer to the use of non-custodial alternatives, would be to remove a great many offenders from prisons of all jurisdictions.Inasmuch as it would be the relatively minor cases of offences against property that would be dealt with in the community,

[59] _Ibid._,p.59
[60] _Ibid._,p.28
[61] _Ibid._,p.59

it would be the provincial institutions that would feel the greatest impact of such a change. The federal institutions would rapidly become repositories for violent offenders of all kinds and hard-core property offenders. It is unlikely that the size of the federal system would be greatly affected and the emphasis placed by L.R.C. on graduated repatriation to the community would continue to provide a role for federally-operated community corrections facilities and for the parole function, which the Commission saw as playing a much more central role in determining the flow of offenders through the correctional system.

Impact on the institutional requirements of provincial corrections, would depend upon whatever option, as stated on the preceding page, were to be adopted.

No comments are made on the questions of the habitual ("dangerous") offender or the female offender.

The report contained important implications for parole. All sentence of separation would be supervised by a "Sentence Supervision Board" which would control the movement of the offender through progressive levels of relative liberty. Offenders sentenced for purposes of

denunciation or for purposes of coercion, while being under the general supervision of such a Board, would generally be under the control of the sentencing court, which would have the authority to amend previous dispositions it had made. The latter offenders would not move through graduated forms of institution, but would serve all time in one level of security; for them, prison was to be purely punitive.

The approach taken by the Law Reform Commission represents a considerable departure both from existing practice and from those of its predecessors. The split would be structured along what are essentially functional grounds, rather than those of sentence length. Moreover, a major effort was to be made to keep offenders out of the prisons to start with, thus reducing drastically the overall inmate population.

It is possible to construe this as an attempt to make the federal government responsible for institutionalized corrections, especially for the hard-core kinds of inmates, while the provinces would be generally responsible for community-centred alternatives and for the administration

of what the judiciary are fond of describing as "short sharp shocks" to the ungodly. It is decidedly curious, therefore, that the L.R.C. recommendations have met with far more interest and approval on the part of the federal government than of the provinces!

It is difficult to assess the probable impact of L.R.C. The reports have been on the table for almost three years. Certain bits and pieces, notably those relating to sentencing alternatives, have been introduced as legislative amendments, primarily to the Criminal Code. There have been some experiments with diversion, the use of citizens' justice councils, and other innovations suggested by L.R.C., but there has nowhere been the swing to change that was the result of Ouimet.

One reason may be that the L.R.C. is continuing to issue reports and governments may feel that they want to see the whole picture before deciding on a response. On the other hand, the federal government is well aware that certain groups, indeed, certain provinces, view L.R.C.s proposals as radical to the point of being unacceptable. Only time will tell, but one point must be stressed, and

it is this; it was,and is, possible to implement either Archambault or Fauteux or Ouimet piecemeal and be able to expect to see some success. The grandiose sweep of L.R.C.'s vision, however, makes it almost impossible for little dribs and drabs of legislative amendment to produce the desired effect; too many of the recommendations are interlocking and require great alterations to systems outside that of criminal justice. There is no indication that either the federal government or the provinces are much interested in change of this magnitude and it is suspected that correctional officials will continue to harken to Ouimet, rather than L.R.C., as their "bible" for development.

10. The Steering Committee on Split in Jurisdiction in Corrections

In June,1977, the Ministers responsible for Corrections reviewed the work of two task forces on long-term objectives in corrections and requested that three options be studied in depth:

1. the provinces take over all adult corrections;
2. the federal government assume responsibility for all adult offenders with terms in excess of six months;

3. a joint federal/provincial corporation be established to assume responsibility for all corrections within a province.

In September, 1978, the final report of the federal-provincial steering committee which considered these options was released.[62]

In addition to the three options recommended, the Task Force tabled two further; one, a mixed federal-provincial model and the other, a plan for federal takeover of all corrections. Neither of these approaches was perceived as realistic and attention has focused on options that would give increased responsibility to the provinces.

11. Summary

In conclusion, then, it is clear that the two-year split has long been sanctified, both by practice and by legislation. While other alternatives have been suggested over the years, there has been discerned a

[62] Final Report of the Steering Committee on Split in Jurisdiction in Corrections, n.p., September 1978.

tendency to rationalize and reinforce that split.Only the wealthier provinces have ever expressed the slightest inclination to assume more responsibility for corrections and this represents, for them, an abrupt reversal of their original positions taken in Canada's formative years. The other provinces have been ambivalent and there are indications that increased federal authority has, at least in the past, been seen as an end to what has been,for them, a very expensive responsibility.

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January 12,1979

Bibliography

J.B.Dickson, Report of Commission on Gaol System of New Brunswick, Fredericton:March 30,1951 (copy of October 1963)

Final Report of the Steering Committee on Split in Jurisdictions in Corrections,n.p.,September 1978.

Law Reform Commission of Canada, Report on Dispositions and Sentences in the Criminal Process,Ottawa,1976.

K.J.MacDonald, A Summary and Analysis of Some Major Inquiries on Corrections - 1938 to 1977, Ottawa: Solicitor General, May 1977.

H.G.Needham, Perspectives on Pre-Sentence Reports, Ottawa: unpub.m.s.,1978

Minutes of the Proceedings of the Interprovincial Conference held at the City of Quebec,from the 20th to the 28th October,1887,inclusively, Ottawa: Library of Parliament compilation,n.d.

Minutes of the Proceedings of the Interprovincial Conference held at the City of Quebec, from the 18th to the 20th of December 1902,inclusively, Ottawa:Library of Parliament compilation, n.d.

Minutes of the Proceedings in Conference of the Representatives of Canada and of the Provinces,October 1906, Ottawa: Library of Parliament compilation,n.d.

Report of the Canadian Committee on Corrections,Ottawa: Queen's Printer,1969 (Ouimet Report)

Report of the Commission Appointed by the Attorney General to Inquire into the State and Management of the Gaols of British Columbia 1950, Victoria:King's Printer,1950.

Report of a Committee Appointed to Inquire into the Principles and Procedures Followed in the Remission Service of the Department of Justice of Canada, Ottawa:Queen's Printer,1956 (Fauteux Report)

Report of the Royal Commission to Investigate the Penal System of Canada, Ottawa:King's Printer, 1938 (Archambault Report)

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Report of the Saskatchewan Penal Commission 1946, Regina:Ministry of Public Works,1946.

Report of the Select Committee Appointed by the Legislative Assembly of the Province of Ontario to Study and Report upon Problems of Delinquent Individuals and Custodial Questions and the Place of Reform Institutions Therein, Toronto:Legislative Assembly, March 8th 1954.

The Rise of the Sparrow: A Paper on Corrections in Manitoba, Winnipeg: Department of Health and Social Development, July 1972.

J.Vantour & H.Needham, Approaches to the Reform of Juvenile Justice, Ottawa: unpub. m.s.,1976.

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