MANITOBA

LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

# REPORT
# ON
# A REVIEW OF *"THE PRIVACY ACT"*, CAP. P125
# AND
# THE PROPOSED AMENDMENTS TO THE *CRIMINAL CODE* EXPRESSED IN BILL C-6

Report #9

September 11, 1972

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

The Commissioners are:

Francis C. Muldoon, Q.C., *Chairman*

R. Dale Gibson

C. Myrna Bowman

Robert G. Smethurst, Q.C.

Val Werier

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Professor John M. Sharp is Chief Research Officer to the Commission. The Secretary of the Commission is Miss Suzanne Pelletier.

The Commission offices are located at 331 Law Courts Building, Winnipeg, Manitoba R3C 0V8.

The subject of this Report is a review of *"The Privacy Act"*, Cap. P125, and the proposed amendments to the *Criminal Code* expressed in Bill C-6 which would create offences relating to the interception and disclosure of private communications, among others, and would establish rules about the admissibility of evidence obtained by such interception.

This Report is prepared in response to a request by the Honourable the Attorney-General received by the Commission on May 1st, 1972, in which he requested that he be provided "with any recommendations for altering or enlarging the legislation in Manitoba in this field".

At the Attorney-General's suggestion, we reviewed the excellent report of the Ontario Law Reform Commission in 1968 entitled **Report on the Protection of Privacy in Ontario,** which preceded the enactment of *"The Privacy Act"* of Manitoba by two years. The Commission considered not only Bill C-6, but also its predecessor Bill C-252, as well as the Minutes of Proceedings and Evidence of the House of Commons Standing Committee on Justice and Legal Affairs which considered Bill C-6 during June this year. In performing this study, we inevitably had to consider the numerous questions of the constitutional division of legislative jurisdiction which are presented in Bill C-6. It would be premature to attempt a definitive assessment of the efficacy of *"The Privacy Act"* because no jurisprudence has developed to date in Manitoba.

A research paper was prepared by the Chairman and our Chief Research Officer for consideration and discussion by the full Commission. The research paper is detailed, lengthy and quite forthright in its conclusions. Wholly in an appreciation of our own functions and responsibilities – but not in any sense to manifest an intrusion upon the work of those whose job is to advise the federal authorities – the Commission considers it advisable to attach the research paper to this Report. It is Appendix "A".

In summation, the Commission recommends no present alteration of the legislation expressed in *"The Privacy Act"*; it is, in our view, a progressive and valid exercise of the Legislature's undoubted jurisdiction.

The validity of the provisions for punitive damages in Bill C-6, if enacted, ought to be challenged as being *ultra vires* of Parliament because their operation would diminish the efficacy and integrity of the Manitoba legislation expressed in *"The Privacy Act"*. One Commissioner, Professor Gibson, dissents on the question of the *vires* of the punitive damages provisions of Bill C-6 and asserts his opinion that they would be *intra vires* of Parliament.

The disparate approach to the admissibility of evidence ought to be drawn to the attention of the public in general and the legal profession and law officers of the Crown in particular. *"The Privacy Act"* of Manitoba, by section 7, rejects as "tainted fruit" the admissibility in any civil proceedings of evidence obtained "by virtue or in consequence of" an actionable violation of privacy. Bill C-6, by section 178.16(1), does not render inadmissible evidence obtained through information acquired in the interception of a private communication, even though that communication itself be inadmissible as evidence. This latter provision applies not only to all criminal proceedings, but also to all civil proceedings and other matters respecting which Parliament has jurisdiction. One such civil proceeding, for example, is divorce. Under the exception expressed in section 37 of the *Canada Evidence Act* the admissibility rule established in Bill C-6 could oust that broad rejection of "tainted fruit" asserted in section 7 of *"The Privacy Act"*. If the cited provisions of Bill C-6 were

enacted, it might not be generally appreciated that in divorce, bankruptcy and many other proceedings "evidence obtained ... as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence."

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"* dated this 11th day of September, 1972.

Francis C. Muldoon, Chairman

R. Dale Gibson, Commissioner

C. Myrna Bowman, Commissioner

Robert G. Smethurst, Commissioner

Val Werier, Commissioner

Sybil Shack, Commissioner

Kenneth R. Hanly, Commissioner

## APPENDIX "A"

## MEMORANDUM

(research paper)

TO: Members of the Manitoba Law Reform Commission

FROM: J.M. Sharp and F. C. Muldoon July 17, 1972
/sp

RE: *"The Privacy Act"*, Cap. P125

On April 26, 1972, the Hon. the Attorney-General wrote to us in the following terms:

> "I would appreciate the Commission reviewing The Manitoba Privacy Act having in mind the proposed Federal legislation and the 1968 Report of the Law Reform Commission of Ontario and thereafter providing me with any recommendations for altering or enlarging the legislation in Manitoba in this field."

The "proposed Federal legislation" mentioned in the letter was referred to as "Bill C-252", in fact, Bill C-252 died on the order paper in 1971 when, soon after its first reading, the Session ended. The Bill, in almost identical form reappeared this Session as Bill C-6, and the remarks below are based on Bill C-6.

A rather preliminary point concerns the mention of the 1968 Report of the Law Reform Commission of Ontario. We know that those who prepared the original draft for *"The Privacy Act"*, Cap. P125, did so, having read, and having in mind the Ontario Report. In addition, the Sullivan Report (The British Columbia report which led to the enactment of *"The Privacy Act"* of British Columbia 1968, c. 39) and a number of Bills which had been introduced into the U.K. Parliament, were all scrutinized and considered in the drafting of our Act. The Ontario Report has certainly been borne in mind in writing this memorandum. One keeps particularly in mind the last sentence of that thorough study:

> "Without such cooperation [between federal and provincial jurisdictions], the federal legislation may have the effect of excluding much of the detailed regulation of those private and commercial activities that combine to create a serious threat to privacy and which can only be effectively controlled by the exercise of provincial jurisdiction."

The purposes of Bill C-6 are:

a) by amendments to the *Criminal Code*, to create offences related to
   i) the interception of private communications by the use of any device or apparatus defined to be an electro-magnetic, acoustic, mechanical or other device,
   ii) the disclosure of private communications intercepted by the use of any such device, and
   iii) the possession, sale or purchase of any such device or apparatus or any component thereof the design of which renders it primarily useful for surreptitious interception of private communications

and to establish rules regarding the admissibility of evidence obtained by the interception of private communications;

b) by amendments to the *Crown Liability Act*, to provide for civil liability of the Crown in circumstances where a private communication is unlawfully intercepted or disclosed by a servant of the Crown; and

c) by amendments to the *Official Secrets Act*, to provide for the interception, etc. where the purpose of the interception is the prevention or detection of espionage, sabotage, etc.

It would seem that, on consideration, the contents of Bill C-6 do not call for any amendment or addition to *"The Privacy Act"* of this Province. There are, however, a number of points at which the two bear comparison, and it might be the wish of the Commission to recommend action on one or more of these points. One might deal with these individually. They are:

1. **The definitions** of the criminal act and the tort created by *"The Privacy Act"* (compare Bill C-6, s. 2, 178.11 and *"The Privacy Act"*, s. 3.)
2. **Defences** (Compare Bill C-6, s. 2, 178.11, 4, 7.2 and 4 7.3 and *"The Privacy Act"*, s. 5)
3. **Damages.** An examination of Bill C-6, ss. 2, 178.21 and 4, 7.3 and its possible effect upon the awarding of damages under *"The Privacy Act"*. In particular, the constitutionality of these sections and the possibility of *res judicata* problems arising.
4. **Admissibility of Evidence.** The correlation of Bill C-6 s. 2, 178.16 and *"The Privacy Act"*, s. 7.
5. **The Annual Report.** The effect upon the position of the Provincial Attorney-General. Bill C-6, s. 2, 178.22.

### 1. Definitions of the criminal act and the tort

The criminal offence created by Bill C-6 is defined in the following terms:

> 2, 178.11(1) Every one who, by means of an electromagnetic, acoustic, mechanical or other device, wilfully intercepts a private communication is guilty of an indictable offence, and liable to imprisonment for five years.

With this definition, one may compare the following provisions of *"The Privacy Act"*:

> 3. Without limiting the generality of section 2, privacy of a person may be violated
>
> a) by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following; or
>
> b) by the listening to or recording of a conversation in which that person participates, or messages to or from that person, passing along, over or through any telephone lines, otherwise than as a lawful party thereto or under lawful authority conferred to that end . . .

It appears that s. 3(b) of *"The Privacy Act"* more than covers, for the purposes of civil liability, those acts which are deemed by s. 2, 178.11 of Bill C-6 to be indictable offences. The Manitoba Act is wider in that, for example,

a) Civil liability may arise where no mechanical devices have been used during the process of eavesdropping, whereas criminal responsibility arises in this field only where a "device" of some type has been used;

b) Civil liability, under s. 3(a) can arise as a result of merely visual surveillance, such as "watching, spying, besetting or following".

and other points indicating a wider civil liability could be adduced.

It is submitted that this point of difference between the Federal and Provincial provisions is not only compatible but desirable. *"The Privacy Act"* and Bill C-6 pursue different ends; at places they may be complementary, but no change is recommended at the Provincial level for either expansion or reduction of s. 3(a) or (b).

**2. Defences**

The defences provided by Bill C-6 follow the definition of the offences:

s. 2, 178.11

(2) Subsection (1) does not apply to

(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

(b) a person who intercepts a private communication in accordance with an authorization or a permit given under subsection 178.15(1) *or any person* who in good faith aids in any way a person whom he has reasonable and probably grounds to believe is acting with any such authorization or permit;

(c) a person engaged in providing a telephone, telegraph or other communication service to the public who intercepts a private communication,

i) if such interception is necessary for the purpose of providing such service,

ii) in the course of service observing or random monitoring necessary for the purpose of mechanical or service quality control checks, or

iii) if such interception is necessary to protect the person's rights or property directly related to providing such service; or

(d) an officer or servant of Her Majesty in right of Canada in respect of a private communication intercepted by him in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (2) (a), subsection 178.16(1) and subsection 178.2(1).

The defences available under *"The Privacy Act"* are set out in s. 5 of that Act. These include the consent of the plaintiff, the reasonable ignorance of the defendant that his act would violate the privacy of any person, the protection of a legal right or

interest, and (where publication is involved) that publication was in the public interest all as defined in the section. Of particular relevance are paragraphs (d) and (e) of section 5:

> **Defences.**
> 5. In an action for violation of privacy of a person, it is a defence for the defendant to show
>
> (d) that the defendant acted under authority conferred upon him by a law in force in the province or by a court or any process of a court; or
>
> (e) where the act, conduct or publication constituting the violation was
>
> i) that of a peace officer acting in the course of his duties; or
>
> ii) that of a public officer engaged in an investigation in the course of his duty under a law in force in the province;
>
> that it was neither disproportionate to the gravity of the matter subject to investigation nor committed in the course of a trespass; and was within the scope of his duties or within the scope of the investigation, as the case may be, and was reasonably necessary in the public interest;

The application of paragraph (d), namely "that the defendant acted under authority conferred upon him by a law in force in the province, etc.", will have the result that Bill C-6's provisions contained in ss. 2, 178.11(2) and 2, 178.15(1) will be "imported" into the list of available defences to a civil action under *"The Privacy Act"*. (This would include, *inter alia*, the fact that a permit to wiretap had been issued under the highly-controversial provisions of Bill C-6.) Section 5(d) and (e) of *"The Privacy Act"* are, of course, of wider application than the field of wiretapping and the use of devices prohibited by Bill C-6. Section 5(d) and (e), therefore, retain an independent validity and purpose in relation to other situations which might arise under s. 3.

It is therefore submitted that the wording of s. 5(d) has the effect of incorporating into Provincial civil law, on this specific issue, the defences available to criminal indictments, so that a defence under s. 2, 178.11(2) and (3) of Bill C-6 automatically becomes available as a defence to a civil action brought under *"The Privacy Act."* As indicated above, the possible extra defence provided under s. 5(e) is left untrammelled, so that the overall effect is that civil rights (in terms of defences to actions brought under *"The Privacy Act"*) are augmented by incorporation and not diminished. The ultimate result, in practical terms, would seem to be a high degree of substantial correlation, if not of exact correspondence, between the outcome of criminal charges and civil actions brought on the same facts where wiretapping, etc., is involved. In terms of the consistency of the law in general, and in terms of protection from actions of those who wiretap, etc., lawfully, there seems little or no grounds on which changes in *"The Privacy Act"* could be recommended.

It may be noted that under s. 4 of Bill C-6, special provisions are made which are intended to come into effect by amendment of the *Crown Liability Act*. These read as follows:

**7.2** (1) Subject to subsection (2), where a servant of the Crown, by means of an electromagnetic, acoustic, mechanical or other device, intentionally intercepts a private communication, in the course of his employment, the Crown is liable for all loss or damage caused by or attributable to such interception, and for punitive damages in an amount not exceeding $5,000 to each person who incurred such loss or damage.

(2) The Crown is not liable under subsection (1) for loss or damage or punitive damages referred to therein where the interception complained of

(a) was lawfully made;

(b) was made with the consent, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it; or

(c) was made by an officer or servant of the Crown in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada.

(3) Where a private communication is originated by more than one person or is intended by the originator thereof to be received by more than one person, a consent to the interception thereof by any one of such persons is sufficient for the purposes of paragraph (2) (b) and of subsection 7.3(2).

**7.3** (1) Subject to subsection (2), where a servant of the Crown who has obtained, in the course of his employment, any information respecting a private communication that has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, intentionally

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

the Crown is liable for all loss or damage caused thereby, and for punitive damages in an amount not exceeding $5,000, to each person who incurred such loss or damage.

(2) The Crown is not liable for loss or damage or punitive damages referred to in subsection (1) where a servant of the Crown discloses a private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof or the existence of a private communication

(a) with the express consent of the originator of the private communication or of the person intended by the originator thereof to receive it;

(b) in the course of or for the purpose of giving evidence in any civil or criminal proceedings or in any other proceedings in which he may be required to give evidence on oath;

(c) in the course of or for the purpose of any criminal investigation if the private communication was lawfully intercepted;

(d) in giving notice under section 178.16 of the *Criminal Code* or furnishing further particulars pursuant to an order under section 178.17 of that Act;

(e) in the course of random monitoring that is necessarily incidental to radio frequency spectrum management in Canada; or

(f) where disclosure is made to a peace officer and is intended to be in the interest of the administration of justice.

**7.4** No award for punitive damages shall be made under section 7.2 or 7.3 where punitive damages have been ordered to be paid to the person claiming such damages pursuant to subsection 178.21(1) of the *Criminal Code.*

The defences mentioned in the immediately above-cited part of Bill C-6 are mentioned purely for the purposes of completeness, and it is not suggested that they necessitate any amendments to *"The Privacy Act"*. They are merely additional defences which may be available in the specific situations where Crown liability as defined by the *Crown Liability Act* arise (as amended by Bill C-6, if that Bill is enacted) and as such fall outside the jurisdiction of the provincial legislature in any case.

### 3. Damages

The references in Bill C-6 to punitive damages create what is probably the most difficult problem created by that Bill in relation to the operation of our provincial *"Privacy Act."* Section 2, 178.21 of Bill C-6 provides as follows:

**178.21**

(1) Subject to subsection (2), a court that convicts an accused of an offence under section 178.11 or 178.2 may, upon the application of a person aggrieved, at the time sentence is imposed, order the accused to pay to that person an amount not exceeding $5,000 as punitive damages.

(2) No amount shall be ordered to be paid under subsection (1) to a person who has commenced an action under Part I.1 of the *Crown Liability Act.*

(3) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgment, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgment is enforceable against the accused in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings.

(4) All or any part of an amount that is ordered to be paid under subsection (1) may be taken out of moneys found in the possession of the accused at the time of his arrest, except where there is a dispute as to ownership of or right of possession to those moneys by claimants other than the accused.

(It may be noted that under s. 4, 7.3 of Bill C-6, punitive damages are included as part of the potential Crown liability created by that section. Within that field, of course, federal jurisdiction must be supreme and for that reason the critical remarks which follow in relation to the provision for punitive damages under s. 2, 128.21 are limited specifically to that section and do not apply to the suggested amendment of the *Crown Liability Act.*)

The central problem which may arise under s. 2, 128.21 is, it is submitted, that the suggested amendment may have the practical effect of diminishing or impinging upon the civil rights of those who might otherwise have a better right to sue for damages under the provisions of *"The Privacy Act"* of Manitoba. It is suggested that once an aggrieved person has made application under s. 2, 178.21 to the convicting court, and after a sum of punitive damages has been awarded and registered as a judgment in the Superior Court of the province of Manitoba (or other province) as provided for in Bill C-6, there will have been created an estoppel by the operation of the doctrine of *res judicata.* Thus, if an action were subsequently brought by the aggrieved person under *"The Privacy Act"* of Manitoba, it would seem that, at least as far as the issue of punitive damages is concerned, there will be an estoppel *per rem judicatam.* The latest edition of Spencer-Bower and Turner on "Res Judicata" lists the following *(inter alia)* as the essential elements of an estoppel *per rem judicatam:*

1. That the alleged judicial decision was what in law is deemed such;
2. That the particular judicial decision relied upon was in fact announced, as alleged;
3. That the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
4. That the judicial decision was final;
5. That the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
6. That the parties to the judicial decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel is raised or their privies, or that the decision was conclusive *in rem.*

At page 200 of the same work, it is stated that "For the purposes of estoppel *per rem judicatam,* a 'party' in proceeding *in personam,* means not only a person named as such, but also one who intervenes and takes part in the proceedings, after lawful citation, in whatever character he is cited to appear, or who, though not *nominatim* a party insists on being made so, and obtains the leave of the court for that purpose."

It is suggested that on the basis of this definition of a "party", and given an acceptance of the prerequisite of a *res judicata* (and these constituent parts have been accepted by many courts) the voluntary application by the aggrieved person at the time of giving judgment in a criminal proceeding under this proposed amendment to the *Criminal Code* would constitute a *res judicata* at least as regard any further award of punitive damages in that case, or in any subsequent civil proceeding under *"The Privacy Act"* on the same matter. Thus, if the applicant, applying under the *Criminal Code* is awarded only, say, $1,000 punitive damages, he will most likely be debarred from seeking more extensive punitive damages in an action under *"The Privacy Act".*

It is true that s. 10 of the Criminal Code provides that:

> No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.

This section would not have the effect of preventing a potential *res judicata* situation which might arise under the amendment of Bill C-6. In *Hurley v. Foreman* (1962) 35 D.L.R. (2nd) 596, the defendant had previously pleaded guilty to a charge of assaulting the plaintiff contrary to s. 231(2) of the *Criminal Code*, 1953-54, and pursuant to his power under s. 638(2) (a) of the Code, the magistrate suspended sentence on the defendant and prescribed as a condition of his recognizance that the latter pay the medical expenses of the plaintiff. Subsequently, the plaintiff brought a civil action for the same assault and claimed as damages the aforementioned medical expenses as well as loss of wages and general damages for pain and suffering. The defendant pleaded *res judicata* as a defence to the civil action. It was held that the doctrine of *res judicata* had no application here. In the words of the Chief Justice of the Court of Queen's Bench (New Brunswick):

> In the case under consideration it cannot be said that the cause of action and issues sought to be set up are identical with the cause and issues disposed of by the county magistrate. The county magistrate had to decide whether the accused was guilty of a criminal offence. The issue now before this court is whether the defendant is liable for damages occasioned to the plaintiff. It is true that these damages result from an act which was criminal, but this aspect is covered by s. 10 of the Code already quoted . . . In a criminal prosecution, by way of indictment, the parties involved are the Crown and the accused. Before the magistrate, the Crown was the plaintiff and charged Foreman with the commission of a criminal offence. In the present action the parties are different. Hurley is the plaintiff. It was, and I think properly, submitted that the condition contained in the order of the magistrate is not a judgment enforceable by the plaintiff against the defendant. It is not a judgment falling within the doctrine of *res judicata* because (a) it lacks the finality of a civil judicial decision in that an indeterminate sum was ordered to be paid, (b) the magistrate had no jurisdiction to determine the amount that was to be paid.

It is suggested that the decision in *Hurley v. Foreman* (the leading decision on this matter) can be easily distinguished from any set of similar facts arising by a combination of an application for punitive damages under the amendment to the *Criminal Code* suggested by Bill C-6 and an action brought civilly under *"The Privacy Act."* For one thing, the same clear disparity as between parties which was present in *Hurley v. Foreman* is not present in a situation as envisaged above. If the aggrieved person applies under the new amendments to the *Criminal Code*, he will thus be voluntarily making himself a party to the first action, albeit that the Crown was the initial prosecuting party. Furthermore, in *Hurley v. Foreman* there was no final civil judicial decision on the matter, and the condition made by the magistrate was in no way enforceable by the victim of the assault. Once again, in the situations which may arise as envisaged above, there is a decision on the issue of punitive damages which carries with it all the characteristics and finality of a civil judicial decision; the Code will itself provide for the filing of this judgment in the provincial court of superior jurisdiction and is thus enforceable by the individual himself. It is thus suggested that the effect of this new provision in the *Criminal Code* would be to estop the aggrieved individual from taking any further civil action on the issue of punitive damages under *"The Privacy Act"* of Manitoba. This would clearly represent a potential diminishment of the civil rights of any plaintiff bringing such an action in

Manitoba and, it is suggested for that reason, would make the new provision in the Code *ultra vires* the Federal Parliament and should be challenged on that basis.

It is seriously doubtful that Parliament has the constitutional jurisdiction to enact the provisions expressed in section 178.21(1) and (3) of the amendment. Those subsections relate to (a) the convicting court's purported authority to award punitive damages in favour of the "person aggrieved"; and (b) the manner in which such person can enforce his judgment for damages "in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings."

While these provisions, *in form*, are almost identical with sections 653(1) and (2), and 654 (1) and (2) of the *Criminal Code*, Chapter C-34, R.S.C. 1970, regarding compensation and restitution to victims and innocent purchasers, the cited provisions of the amendment go much further in legislating for the awarding by the convicting court to the person aggrieved of "an amount not exceeding $5,000 as punitive damages." There is no doubt that Parliament, under section 91, head 27, of the *B.N.A. Act*, has legislative jurisdiction over "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including Procedure in Criminal Matters." Are the provisions of section 178.21(1) and (3) regarding the awarding of up to $5,000 as punitive damages "criminal law", (or necessarily ancillary to the crime of interception of a private communication) or do they constitute "procedure in criminal matters"? Is the awarding of damages not exceeding the stated sum against one person and in favour of another, made enforceable "in the same manner as if it were a judgment rendered against the accused in that court in civil proceedings" a matter of "Property and Civil Rights"? Is it a matter, perhaps, of the "Constitution ... and Organization of Provincial Courts ... of Civil ... Jurisdiction and including Procedure in Civil Matters in those Courts"? The latter jurisdictional areas are, of course, accorded exclusively to the Legislature of each province under heads 13 and 14 of section 92 of the *B.N.A. Act*.

The arguments of those who would support that such a provision is *intra vires* the Federal Parliament would most probably be based on a suggestion that the provision for the award of punitive damages is intended to act as an ancillary power which would bolster up and support the general criminal law. It is submitted that this argument is not valid. If the criminal law is in any need of bolstering or support, then the logical way of achieving this end would be to either increase the limit to which fines can be exacted on the conviction for the offence or possibly increasing the upper limited for the period of imprisonment for the commission of such offences. It may also be argued that the provision for the making of orders for the payment of punitive damages will assist those individuals who reside in provinces where there is no provincial legislation equivalent to *"The Privacy Act"* of Manitoba, and who do not have an independent right to seek civil damages to compensate them for the invasion of their privacy. This argument may be rebutted by pointing out that such matters are essentially within the provincial jurisdiction and if any given province has not seen fit to enact protective legislation in the form of awards of civil damages, as the Manitoba Government has done, then it is not for the Federal Parliament to step in and, using their powers in the area of criminal law, try to remedy a defect in the provincial law or otherwise plug gaps left by the provincial legislation.

It is true that there have been provisions enacted by Parliament which appear to be attempts, under the guise of legislating in relation to criminal law, to trench upon the field of property and civil rights, but which have been held to be a valid exercise of federal jurisdiction. Such a determination was made by the Supreme Court of Canada in *Goodyear Tire & Rubber Co. of Canada Ltd., vs. The Queen* (1956) S.C.R. 303;

2 D.L.R. (2d) 11, in which Parliament's authorizing the Court to make orders prohibiting the convicted companies from a continuation or repetition of the offence, as provided in section 31 of the *Combines Investigation Act*, was held not to be *ultra vires* of Parliament. The Supreme Court held that Parliament's power to legislate in relation to criminal law is not restricted to defining offences and providing penalties: it extends, as well, to legislation designed for the prevention of crime.

The same status of validity is invested in *Criminal Code* provisions relating to highway or driving offences where, in addition to other punishment, the Court may make an order prohibiting the offender from driving a motor vehicle anywhere in Canada during a specified period.

In these cases the Court's power to prohibit is given by Parliament in addition to any *other* penalty or punishment and is thus treated as a penalty. It is exacted by the state (through the instrumentality of the Court) in the public interest, and not in the interest of any particular person, even though the victim of a crime may feel a sense of vindication upon the conviction of an offender. On appeal, the adversaries remain as the accused and the state. The complainant acquires no special interest upon conviction and is not, accordingly, divested of any interest or expectation if the conviction be quashed on appeal. There is no special loss to the complainant either, where a prohibition order falls, along with the conviction upon which it is founded.

Parliament goes further, however, in the provisions relating to compensation and restitution in exciting the expectations of the complainant, or victim, or, as described, "the person aggrieved". The matter is considered by Mr. Justice Bora Laskin in *Canadian Constitutional Law*, 896-7 (3rd ed. revised, 1969) where he says:

> Similarly, there is a tenable argument for the validity, as an exercise of the criminal law power, of legislation providing for the return of stolen goods to their owner or for restitution of property or money realized therefrom by a thief: see Cr. Code, ss. 629, 630; and see *Benesiewicz v. Dionne*, (1946) 1 D.L.R. 426, (1945) 3 W.W.R. 297.
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> But even without legislation the Courts could be expected to assert jurisdiction to order return of money or other property to their owners or to persons from whom it was taken, even if such persons be accused who were acquitted, or are convicted persons from whom property was taken which had no connection with their crime: see *Regina v. Hargreaves* (1959), 124 Can. C.C. 167, 31, C.R. 182; *Regina v. Doig*, (1963) S.C.R. 3, (1963) 1 Can. C.C. 292, 38 C.R. 373. It is more doubtful, however, whether Parliament may empower the convicting criminal court (as it purports to do in Cr. Code, s. 628) to order the accused "to pay ... an amount by way of satisfaction or compensation for loss of or damage to property suffered ... as a result of the commission of the offence ..." The validity of this provision was assumed in *Regina v. Scherstabitoff*, (1963) 2 Can. C.C. 208, 39 C.R. 233, where on an appeal against an order under s. 628(1) to pay compensation to the victim of an offence the Court, in affirming the order, said shortly that once the order is made "it then becomes an enforcement on the civil side."
>
> In *Hurley v. Foreman* (1962), 35 D.L.R. (2d) 596, where an order to pay the medical expenses of an aggrieved person was made as a condition of a recognizance under Cr. Code, s. 638, on suspension of a sentence for assault, it was held that the order did not preclude a civil action for the same assault since it did not amount to a judgment enforceable by plaintiff against defendant; failure to obey the order would merely expose

> defendant to liability to sentence for the offence of which he was convicted. Even if it is not a judgment, would it not be open to the aggrieved person to sue on the order, as indicated in the *Scherstabitoff* case? The compensation provisions of the Cr. Code whose validity is assumed in the cases are illustrations of the Code giving rise directly to civil liabilities enforceable by action.

It is that assumption of validity which may be doubted. In truth it was not always doubted, because in the early days after Confederation the "superior" position and general powers of the national Legislature were held in more awe than they are today. Thus, in the case of *Doyle vs. Ball* (1884-85) 11 O.A.R. 326, the validity of Parliament's giving an informer the right to recover, by a civil action, a penalty imposed as a punishment for election bribery was upheld. The *ratio* of the decision is twofold: (i) that the provisions of the *Dominion Elections Act 1874* which accord a right of recovery by civil suit were, in a sense, inherited from pre-Confederation statutes and those of England and ought not, therefore, to be uprooted from the Dominion's field of jurisdiction in relation to enforcement of its electoral law; and (ii) that if the Dominion Parliament chooses recovery by civil suit at the behest of an informer for visiting punishment upon a briber (as opposed to direct prosecution leading to fine or imprisonment) then so be it, because Parliament ought to be allowed, as a matter of policy – not jurisdiction – a very wide discretion as to the mode of enforcing its own enactments.

Of the three judgments expressed (Morrison, J.A. concurred either with Patterson J.A., or in the result) that of Mr. Justice Patterson appears to be the most profoundly thoughtful – and unpredictable. He is quoted, at pp. 329-330 as observing:

> "The only question which has been argued before us is the very important one of the legislative jurisdiction of the Parliament of Canada.
>
> The contention on the part of the defendant is, that in giving an action to an informer to recover the penalty in a civil action, the Parliament has overstepped the jurisdiction conferred upon it by the B.N.A. Act.
>
> One argument in support of this contention was based upon the existence, in section 109 and the sections following it to which I have alluded, of provisions touching procedure and evidence in civil actions. It was urged that this was a clear violation of the division No. 14 of section 92 of the B.N.A. Act, which places amongst the classes of subjects, in relation to which the Provincial Legislature is given exclusive power to make laws, procedure in civil matters in the Provincial Courts.
>
> This position struck me as being a formidable one, and I still think so. The action to recover a penalty by an informer is clearly a civil action, and not a criminal proceeding. That was solemnly decided more than a century ago in *Acheson v. Everett*, Cowp. 891, which was an action of the character of the present action, to recover a penalty for bribery under 2 Geo. II, ch. 24, sec. 7; and this quality of the action is expressly recognized in the words which I have just read from section 111.

And at page 331:

> At present we have to deal with the broader inquiry whether the jurisdiction of the Provincial Legislature over 'property and civil rights in the Province,' assigned to it by division No. 13 of section 92 of the B.N.A. Act, excludes the power of the Parliament of Canada to give the right to an informer to recover, by a civil action, a penalty imposed as a punishment for bribery at an election.

> I do not think this subject has been so directly touched by any of the decisions upon the B.N.A. Act as to relieve us from the duty of considering it on principle.
>
> Any argument founded upon the inevitable interference with property and civil rights by the Parliament, in the exercise of its exclusive legislative authority over the large class of subjects enumerated in section 91, seems to me entirely beside the present discussion: and, without venturing an opinion as to how far civil rights created by Dominion legislation ought to be left for their enforcement to the remedies and procedure provided by the Provincial Courts under Provincial laws, or how far such remedies and procedure may be prescribed by Parliament, I think the fullest power in connection with such matters might be conceded to the Parliament, without necessarily involving the right to give a civil action to a private individual as a mode of punishing an offence.
>
> The two subjects have, to my apprehension, no analogy.

The question of legislative encroachment by Parliament outside its field of jurisdiction is correctly and perceptively stated by Patterson, J.A., who then goes on to adhere to and participate in the unanimous upholding of the validity of the questioned provisions. Patterson, J.A. closes his reasons (at p. 334) with what, for the year 1884, may be regarded as most penetrating – if not clairvoyant observations. After citing the principal constitutional decisions to date, ending with *Hodge v. The Queen*, 9 App. Cas. 117, he said:

> "The principle of these decisions requires us to be cautious before treating as an enroachment upon the legislative jurisdiction over property and civil rights, every enactment by which a right or a liability cognizable in a Civil Court is created."

The view veers about as time passes and in 1939, in the case of *Gordon vs. Imperial Tobacco Sales Co. et al.* 2 D.L.R. 27, Mr. Justice McFarland, of the Ontario Supreme Court asserts (at pp. 30-31) his opinion that:

> "the principle is quite clearly established that Dominion legislation cannot trespass upon or create any civil right in a Province."

Prior to Mr. Justice McFarland's assertion, some landmark decisions on the extent of federal power had been rendered. In the Privy Council decision in *A-G. for Ontario vs. Reciprocal Insurers* 1924 A.C. 328, Mr. Justice Duff *ad hoc* noted (at p. 342):

> "In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid."

About seven years later there followed the significant decision in *Proprietary Articles Trade Association v. A-G. of Canada* (1931) A.C. 310; 2 D.L.R. 1; 1 W.W.R. 552 in which the Privy Council defined a broad scope for the exercise of Parliament's criminal law powers. In that case, Lord Atkin delivering the judgment of the Board said (D.L.R. pp. 9-10):

> It certainly is not confined to what was criminal by the law of England or of any Province of 1867. The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality – unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence;' for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished."

However, in conformity with the quoted expression of Sir Lyman Duff, Lord Atkin goes on to warn (at p. 10):

> "The contrast is with matters which are merely attempts to interfere with provincial rights, and are sought to be justified under the head of 'criminal law' colourably and merely in aid of what is in substance an encroachment."

Some few years later circumstances afforded the Privy Council an opportunity to refine the above quoted "warning" of Lord Arkin, in the case of *A-G. for British Columbia vs. A-G. for Canada*, (1937) A.C. 368; 1 D.L.R. 688; 1 W.W.R. 317. There, again, the judgment was delivered by Lord Atkin. The case had to do with the validity of section 498A of the *Criminal Code* which stigmatized certain defined acts of unfair trade and merchandizing practices to destroy competition. Lord Atkin said (D.L.R. p. 689):

> "The basis of that *(Proprietary Trade Articles Association)* decision is that there is no other criterion of 'wrongness' than the intention of the Legislature *(i.e. Parliament)* in the public interest to prohibit the act or omission made criminal."

Lord Atkin next enunciates the same sort of caveat as he did in the previous case (p. 690):

> "The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. It is no objection that it does in fact affect them. If a genuine attempt to amend the criminal law it may obviously affect previously existing civil rights.
>
> . . .
>
> In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext or that the Legislature *(i.e. Parliament)* is in pith and substance only interfering with civil rights in the Province."

Such pretexts have been found. In the case of *Reference as to the Validity of Section 5(a) of the Dairy Industry Act* (1949) S.C.R. 1; 1 D.L.R. 433, the Supreme Court of Canada came to that conclusion by a majority of 5 to 2 in relation to Parliament's attempts to prohibit the manufacturing and marketing of margarine in Canada. Mr. Justice Taschereau characterized Parliament's attempts as follows (S.C.R. p. 43):

> "Le cas décidé dans cette cause dispose, il me semble, de la prétention qu'il s'agit en l'occurrence de législation criminelle. Sous le prétexte de légiférer en matière criminelle, l'autorité fédérale qui normalement est compétente en la matière ne peut pas empiéter dans le domaine provincial, sur des matières où son autorité légale ne pourrait autrement s'exercer. Le Parlement Fédéral ne peut pas plus contrôler les contrats de ventes et d'achats de margarine et d'oélomargarine qu'il ne peut contrôler les contrats d'assurance, et les raisons qui justifient la décision du Conseil Privé s'appliquent également à la présente cause.

And in the same margarine case Mr. Justice Rand said (p. 50):

> "Under a unitary legislature, all prohibitions may be viewed indifferently as of criminal law; but as the cases cited demonstrate, such a classification is inappropriate to the distribution of legislative power in Canada.
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here.
>
> . . .
>
> But to use it as a support for the legislation in the aspect of criminal law would mean that the Dominion under its authority in that field, by forbidding the manufacture or sale of particular products, could, in what it considered a sound trade policy, not only interdict a substantial part of the economic life of one section of Canada but do so for the benefit of that of another. Whatever the scope of the regulation of interprovincial trade, it is hard to conceive a more insidious form of encroachment on a complementary jurisdiction."

In the margarine case, the Court found no difficulty in severing a single-paragraph provision so as to distinguish that which was beyond Parliament's powers from that which was within them. The provision was:

> 5. *No person shall*
>
> (a) *manufacture, import into Canada, or offer, sell or have in his possession for sale, any oleomargarine, margarine, butterine, or other substitute for butter, manufactured wholly or in part from any fat other than that of milk or cream.*

The majority of the Supreme Court of Canada held that the prohibition of importation of the goods mentioned was *intra vires* of Parliament, but that the prohibition of manufacturing, possession and sale was *ultra vires* of Parliament.

It is to be noted that the provision for punitive damages in Bill C-6 purports to authorize the Court to order the convicted person to pay damages to the aggrieved person. By contrast, it does not provide that the Crown will *share* the *fine* with the aggrieved person; nor does it constitute the aggrieved person as a species of informer; nor does it purport to accord restitution of a "sum certain" or the ascertainable

value of an object stolen or destroyed. (Even this latter category is considered of dubious federal jurisdiction in Laskin's *Canadian Constitutional Law*, 3rd ed. revised 1969.)

With the exception of the *Civil Code* of Quebec, most, if not all, of Canadian law – in terms of constitutional division of powers – is founded on "inherited" concepts of English law. The awarding of unliquidated damages in favour of one "subject" against another "subject" is an incident of civil rights as expressed in and through the law of tort.

Equally, it is apparent that the provision for punitive damages expressed in Bill C-6 is not necessarily, or even reasonably, ancillary to the legislative or administrative scheme of the enactment. The new crime of interception of private communications can be as effectively prosecuted and punished without that provision as with it. That provision does, however, in pith and substance, appear to be an unnecessary encroachment into the field of civil rights and civil procedure in the provinces.

The whole issue of the use of punitive damages is a weighty and complex one, demanding much more space and attention than can be given in a memorandum of this length. However, one or two points may be briefly made to indicate that the importation of provisions relating to punitive damages into the *Criminal Code* is a highly undesirable tendency, which is not limited to these amendments to the *Criminal Code*. Your attention may be directed to:

1. The fact that the judgment of Lord Devlin in *Rokes v. Barnard* (1964) 1 All E.R. 367, has largely been distinguished by the Canadian courts and that the award of punitive damages in civil proceedings is a device very widely used within Canada.
2. The fact that in many Canadian courts, no distinction has been drawn between the terms "punitive", "aggravated", "retributory", etc. in describing damages. In *Dennison v. Fawcett* (1957) O.W.N. 393, Chief Justice McRuer of Ontario stated that "the textbooks and the authorities use different terminology to characterize damages awarded in excess of strict compensation for the injuries suffered. They are described as exemplary, vindictive, penal, punitive, aggravated and retributory damages. Their purpose is discussed and different views expressed as to the basis on which they are awarded." It is, from these remarks and those of other courts, that punitive damages are widely used and form an important element which may be taken into account when damages are computed in civil actions.
3. That there is an increasing tendency to use the device of punitive damages in legislation introduced into the Federal Parliament, thus arrogating to the Federal field a device which is essentially one of provincial application. One may refer not only to the proposed amendments to the Criminal Code under examination in this memorandum, but also to a similar provision which is contained in the proposed amendments to *The Competition Act*.
4. The likelihood of undue pressure on a convicted person, who hopes to receive a suspended sentence or small fine, to accept whatever imposition of punitive damages the Criminal Court might award without "quibbling". In such a case, without that pressure, and before a Court dealing specifically with the tort issue, better and further evidence and argument might be heard in mitigation of damages.

5. The question of whether the Criminal Court would take cognizance, in ordering punitive damages, of the defences prescribed by subsisting provincial legislation. Would it be obliged to do so?
6. The question of whether such an order to pay punitive damages under the Code would be a proper subject of appeal. And at whose instance? Is it an appeal against sentence by or on behalf of the person convicted (*R. v. Graves* (1950) 97 Cdn. C.C. 16, notwithstanding)? Who is the "other party" on such an appeal – the Crown or the "person aggrieved"? What if the "person aggrieved" considered the award too small? What status would he have to appeal, or must he just be content? If it be a civil appeal, could the appeal court reverse or vary the order made under the Code, and by what criteria?

Without wishing to appear sensational or over-dramatic, it should be pointed out that if this tendency increases and such provisions are often inserted into pieces of Federal legislation, it is at least theoretically possible that there is almost no area of tort law (an area intended by the *B.N.A. Act* to be exclusively within the jurisdiction of the Provinces) which could not be subverted and operated indirectly under the control of the Federal jurisdiction.

As indicated above, if doubt is felt about the effect of this provision upon the efficacy and undiminished effect as intended by the provincial legislation, then resistance to this effect cannot be sought in an amendment to the provincial Act. It would have to come in the form of either an objection in substantive litigation by alleging that the provisions of Bill C-6 are *ultra vires*, or else by the taking of a reference to the Supreme Court to resolve the matter directly. The danger of such an oblique interference with the operation of provincial legislation in this way may be remote, or even unlikely, but the fact remains that such interference is possible as long as such provisions are passed unchallenged by the Federal Parliament.

### 4. Admissibility of Evidence

Section 2, 178.16 provides as follows:

**178.16**

(1) A private communication that has been intercepted is inadmissible as evidence against the originator thereof or the person intended by the originator thereof to receive it unless

(a) the interception was lawfully made, or

(b) the originator of the private communication or the person intended by the originator thereof to receive it has expressly consented to the admission thereof.

but evidence obtained directly or indirectly as a result of information acquired by interception of a private communication is not inadmissible by reason only that the private communication is itself inadmissible as evidence.

(2) Subsection (1) applies to all criminal proceedings, and to all civil proceedings and other matters whatsoever respecting which the Parliament of Canada has jurisdiction.

(3) For the purposes of this section only, an interception of a private communication in accordance with a permit given under subsection 178.15(1) shall be deemed not to have been lawfully made where

(a) no application for an authorization to intercept private communications in the circumstances to which the permit relates or for approval of the permit is made pursuant to a direction under subsection 178.15(2); or

(b) either of such applications is made and is refused.

(4) A private communication that has been *lawfully* intercepted shall not be received in evidence unless the party intending to adduce it has given to the accused reasonable notice of his intention together with

(a) a transcript of the private communication, where it will be adduced in the form of a recording, or a statement setting forth full particulars of the private communication, where evidence of the private communication will be given *viva voce;* and

(b) a statement respecting the time, place and date of the private communication and the parties thereto, if known.

(5) Any information obtained by an interception that, but for the interception would have been privileged, remains privileged and inadmissible as evidence without the consent of the person enjoying the privilege.

The only provision in *"The Privacy Act"* of Manitoba relating to the admissibility of evidence is to be found in s. 7 which reads as follows:

> From and after the coming into force of this Act, no evidence obtained by virtue or in consequence of a violation of privacy in respect of which an action may be brought under this Act is admissible in any civil proceedings.

It may be noted that ss. (2) of s. 2, 178.16 of Bill C-6 is designed to affect not only criminal proceedings but also civil proceedings, and "other matters whatever respecting which the Parliament of Canada has jurisdiction".

There is therefore some correlation and consistency as between the criminal law and the civil law as to the admissibility of evidence obtained, in the one case as a result of wiretapping, and in the other in consequence of wiretapping or other forms of violation of privacy. It may be noted that in connection with civil proceedings, the degree of inadmissibility is greater under the provincial Act than under Bill C-6. The Bill C-6 exclusion is applicable only in regard to evidence which it is desired to use against the originator (i.e. of the private communication) thereof, whereas under s. 7 of the provincial Act there is no such restriction and one may assume that the exclusion here would be applied by the Court even where it is intended to use the evidence against parties other than the originator of the communication. This was the intention of the legislature when it enacted *"The Privacy Act"*, and it is basically a question of policy, not law, as to whether the provincial Legislature might wish at some future time to reduce the area or degree of inadmissibility in relation to evidence being used in civil cases. As the law stands at the moment, and assuming that Bill C-6 will become law, it seems that the Federal restriction would not necessarily have the effect of preventing the provincial provisions having a more wide degree of application in civil proceedings.

### 5. The Annual Report

Section 2. 178.22(6) provides that:

> The Attorney-General of each province shall, as soon as possible after the end of each year, prepare and publish or otherwise make available to the public a report relating to
>
> (a) authorizations for which he and agents specially designated in writing by him for the purposes of section 178.12 made application, and
>
> (b) permits given under section 178.15 by peace officers and public officers specially designated in writing by him for the purposes of that section,
>
> and interceptions made thereunder in the immediately preceding year setting forth, with such modifications as the circumstances require, the information described in subsections (2) to (4).

This subsection of Bill C-6 is mentioned here merely to draw the attention of Hon. the Attorney-General probably unnecessarily, to the fact that this Annual Report is required. There are, of course, no sanctions provided by Bill C-6 in the event of a provincial Attorney-General failing to supply his Annual Report.

All the foregoing is respectfully submitted for the consideration of the Commissioners and Hon. the Attorney-General.