Courts of Criminal Jurisdiction and Section 96: An Overdue Evaluation

Criminal law and procedure are unfailing areas for technical argument and constitutional challenge. Until recently, however, our criminal court structures have escaped scrutiny on the basis of the federal appointment power in section 96 of the *Constitution Act, 1867*.[1] This has now changed with decisions by New Brunswick courts in *R.* v. *Charters* and *R.* v. *McGann*.[2] Commenced as separate prosecutions for narcotic offences, they were joined as one matter and resolved by quashing the charges on the basis that the accused's *Charter* right to speedy trial had been infringed.[3] En route to this result, four judges delivered seven separate judgments of which two considered the section 96 issue. The Provincial Court judge, having himself raised the issue, determined that the *Criminal Code* scheme of conferring almost complete offence jurisdiction, either absolutely or by consent, on non-section 96 criminal courts violated the constitutional constraints imposed by that provision. On judicial review to the Court of Queen's Bench, the lower court ruling was quashed and the jurisdiction of the Provincial Court in relation to the particular offences charged was affirmed.

In section 96 litigation the focus of inquiry is narrowed to the particular functions or powers in issue. As, however, the narcotic charges in *Charters* and *McGann* were unknown in 1867, placing such offences in the section 96 context requires examination of criminal jurisdiction at large. Accordingly, after reviewing the law of section 96, this note undertakes a general historical inquiry into Canadian courts of criminal jurisdiction in order to determine the jurisdictional constaints intended by that constitutional provision. The jurisdictional scheme of the present *Criminal Code* is then outlined and the reasons for decision in *Charters* and *McGann* analyzed, leading to conclusions which cast serious doubt on the constitutionality of the present criminal court

[1](U.K.), 30 & 31 Vict., c.3.

[2]*R.* v. *Charters* (1986), 71 N.B.R. (2d) 31 (Prov. Ct.); *Re Harper: R.* v. *McGann & Charters* (1986), 70 N.B.R. (2d) 361 (Q.B.).

[3]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11. The sequence of events leading to the sudden termination of these prosecutions was both colourful and varied. Approximately one week before his scheduled jury trial, Charters re-elected trial by provincial court judge. On 26 February Harper Prov. Ct. J. on his own motion refused to accept the re-election and held, in oral reasons, that it was *ultra vires* the Parliament of Canada to confer on an inferior court either exclusive or concurrent jurisdiction over "serious criminal offences". The next day, 27 February, Charters was brought before Dickson J., who took the position that the Queen's Bench lacked jurisdiction to proceed in light of the re-election. He resolved on requesting the chief Provincial Court judge to assign another trial judge to Charters' case. Harrigan, Chief Prov. Ct. J., declined to accede to this request. On 28 February Judge Harper applied his reasoning to halt the trial of McGann, which had proceeded to the stage of the opening of the defence. On 7 March Judge Harper released lengthy reasons for decision in *Charters*. On 10 April Stevenson J. denied leave to Judge Harper to appear and argue the jurisdictional issue on the scheduled judicial review application. On 8 May Stevenson J., having heard argument three days earlier, delivered reasons granting judicial review, quashing the decisions of Judge Harper and directing him to proceed with both cases. On 6 June Stratton C.J.N.B. denied an application brought by Judge Harper for a stay of the judicial review orders of Stevenson J. On 24 June Dickson J. granted an application under s.24 of the *Charter* and terminated the prosecutions.

(1987), 36 *UNB LJ* 87.

system. A detailed appendix reviews criminal court structure and jurisdiction in each of the four original provinces prior to Confederation.

Section 96

Every written constitution of necessity contains both institutional provisions, establishing the various organs of government, and distribution of powers provisions, which feed jurisdiction to those institutions. In the Canadian context this was early recognized in *Valin* v. *Langlois*. In confirming the validity of the conferral by Parliament on the provincial superior courts of jurisdiction in relation to controverted elections, Ritchie C.J. observed that:

> [B]efore these specific powers of legislation were conferred on Parliament and on the Local Legislatures, all matters connected with the constitution of Parliament and the Provincial Constitutions had been duly provided for, separate and distinct from the distribution of legislative powers, and, of course, over-riding the powers so distributed; for until Parliament and the Local Legislatures were duly constituted, no legislative powers, if conferred could be exercised.[4]

This self-evident relationship between the two types of provisions was, however, obscured by insertion of a *non obstante* clause in the preamble to section 91 of the *Constitution Act, 1867* such that the legislative powers of Parliament were conferred "notwithstanding anything in this Act". Whether this clause reversed the normal hierarchy of institutional and distribution of powers provisions was an issue long avoided by restrictive construction of the enumerated federal powers. For example, in the 1979 *Senate Reference* the Supreme Court "read down" the phrase "Constitution of Canada" in the then section 91(1) so as not to refer to Canada in a geographic sense but rather to "matters of interest only to the federal government".[5] Accordingly, it was not open to Parliament unilaterally to amend the institutional provisions of the constitution relating to the "Senate". The issue whether institutional or federal distribution of powers provisions were to be controlling was only recently resolved by the judgment of the Supreme Court in *Reference Re Exported Natural Gas Tax*. The referred facts set squarely in opposition federal legislative jurisdiction under section 91(3) ("The raising of money by any mode or System of Taxation") and the institutional provision in Part VII of the *Constitution Act, 1867* conferring interjurisdictional immunity from taxation (section 125: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation"). The decision of the majority expressly held in favour of the institutional provision:

> The immunity conferred by s.125 must override the express powers of taxation contained in ss.91(3) and 92(2). The legislative powers conferred by Part VI (ss. 91 to 95) must be regarded as qualified by provisions elsewhere in the Act.[6]

One of the provisions "elsewhere in the Act" which enjoys the status of an institutional provision is section 96: "The Governor General shall appoint the judges of the Superior, District and County Courts in each Province...".

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[4](1879), 3 S.C.R. 1 at 11.

[5]*Reference: Re Authority of Parliament in Relation to the Upper House* [*Senate Reference*], [1980] 1 S.C.R. 54; (1979), 30 N.R. 271 at 285.

[6](1982), [1982] 1 S.C.R. 1004 at 1067.

The intent of this section was, at least in part, a practical one. On the assumption that the "brightest and the best" of the public-spirited legal minds would choose the federal political arena over the provincial, it naturally followed that their talents would be best measured, and a proper selection for the more important judicial appointments made, by the federal authorities.[7] However cynically one may view this rationalization in relation to other factors such as recognition of the importance of the judiciary in promoting the legitimacy of the new state and its laws and the significant though mundane control of patronage, the Judicial Committee of the Privy Council soon beatified the section as one of the "principal pillars in the temple of justice, and...not to be undermined".[8] They viewed section 96 as a key element promoting the impartiality and independence of the provincial judiciary.[9] The reasoning behind this view was not articulated, but it was presumably felt that federally-appointed judges would be free of any obligation or deference to the provincial authorities. Why such judges would feel equally independent of federal authorities is not apparent and remains a serious flaw in this theory.

Section 96 draws an arbitrary line across the judicial institutions of the provinces. Above the line, the power of appointment is exclusively federal; below the line, appointment may be made provincially under heads 92(2) and (14) of the *Constitution Act, 1867.* Above the line are a generic court — the Superior Court — and two particularly named courts, the District and County Courts. It has always been accepted that section 96 could not be avoided by a mere change in the nomenclature of courts. The identity of section 96 courts rests on the powers and functions of such court in 1867 rather than on the name under which they function. In *Re Residential Tenancies Act, 1979*, the Supreme Court of Canada, per Dickson J., synthesized the jurisprudence into a three-step test for a violation of section 96.[10] Given a particular power or jurisidiction in issue, the first step is to determine by thorough historical inquiry whether, if it existed in 1867, it was within the exclusive power or jurisdiction of superior, district or county courts or, if it did not then exist, whether the power or jurisdiction broadly conforms to such exclusive power or jurisdiction. If the answer to this inquiry is in the negative, that is the end of the matter, as the power or jurisdiction may be validly exercised by a body other than a section 96 court. If, however, the answer to the historical enquiry is in the affirmative, the second step asks whether the particular function retains its nature as 'judicial function' as exercised in its institutional setting. Important considerations are whether there is a *lis inter partes* and whether the

[7]Per Hector Langevin, Solicitor-General, during the Confederatio debates in the Parliament of Canada, 1865, quoted in E.R.A. Edwards, "Section 96: The Historical Rationale" (1984) 42 *Advocate* 541 at 542.

[8]*Toronto Corporation* v. *York Corporation* (1938), [1938] A.C. 415 at 426.

[9]*Martineau & Sons* v. *Montreal,* [1932] A.C. 113 at 120-21. P. Hogg, *Constitutional Law of Canada,* 2nd ed. (Carswell: Toronto, 1985) at 136 suggests that the rationale for section 96 is that "provincial courts are courts of general jurisdiction" applying and determining the constitutional validity of both federal and provincial laws. Accordingly, in his view, "some federal involvement in their establishment is appropriate". While attractive, this view equates section 96 courts with provincial superior courts as courts of general jurisdiction and ignores the inclusion of District and County Courts in section 96. Second, this is merely a rationalization unsupported by the considerations actually expressed at the time. Third, this view logically supports provincial involvement in the selection of Supreme and Federal Court judges who must, like their provincial colleagues, interpret and apply the constitution.

[10][1981] 1 S.C.R. 714 at 734-35.

tribunal acts in a 'judicial capacity' — does it apply "a recognized body of rules in a manner consistent with fairness and impartiality"? If the answer is in the negative, as when the tribunal's task involves questions of 'policy' as opposed to 'principle', then again, that ends the matter and the power or jurisdiction may be exercised by a body other than a section 96 court. If, however, the answer to this second inquiry is also in the affirmative, the third step calls for a determination whether the tribunal's adjudicative function is merely ancillary to its general administrative functions or is its sole or central function. If the adjudicative function is the sole or central one, section 96 is violated since the tribunal would then be exercising, in a judical capacity, and as its sole or central function, a power or jurisdiction exercised in 1867 exclusively by a superior, district or county court. In other words, it would be acting 'like a section 96 court'. On the other hand, if the adjudicative function is merely ancillary, then the tribunal would not be said to be acting 'like a section 96 court'. To fall victim to a section 96 challenge, the power or jurisdiction in issue must fail all three steps in the inquiry; it survives if it succeeds at any stage. Where the institution in question is an administrative tribunal, the three-step approach may be short-circuited by assuming adverse findings at steps one and two and concentrating on step three — the relative importance of the adjudicative function. Steps two and three lose their significance where the tribunal in question is itself a court, as the factors that are important are not available. In such a situation the only test is the historical inquiry.

Before applying this test for section 96 to courts of criminal jurisdiction, two significant propositions must be noted. First, despite former doubts expressed, particularly by Chief Justice Laskin, it is now clear that section 96 binds Parliament, at least to the extent that in the exercise of its legislative authority jurisdiction is conferred on provincial courts or tribunals.[11] This was confirmed by the Court's 1983 decision in *McEvoy* v. *Attorney-General of New Brunswick*, in which section 96 was invoked as a constitutional impediment to creation of a unified criminal court with provincially-appointed judges exercising comprehensive jurisdiction conferred by Parliament.[12] Second, as recently applied by the Supreme Court, it would appear that there is no uniform concept or standard of what constituted a superior, district or county court in 1867. Rather, the historical inquiry is controlled by the 1867 position of the province concerned, if one of the original four. This follows from the Court's decision in *Attorney-General of Quebec and Régie du Logement* v. *Grondin* in which issues similar to those previously decided by the Court in *Re Residential Tenancies Act, 1979* were resolved differently owing to historical differences in curial jurisdiction in Quebec from that in Ontario prior to 1867.[13] Accordingly, different results can be achieved for the same power or jurisdiction when the issue arises in one of the four original confederating provinces. This possible checkerboard effect marks section 96 as a unique institutional provision in our constitution: its application may vary according to the history of the province concerned. Though one may regret this exception to

[11] *Papp* v. *Papp* (1969), [1970] 1 O.R. 331 at 339 (C.A.); *Attorney-General of Canada* v. *Canard* (1975), [1976] 1 S.C.R. 170 at 176; *Reference Re B.C. Family Relations Act* (1982), [1982] 1 S.C.R. 62 at 76.

[12] (1983), [1983] 1 S.C.R. 704; (1983), 148 D.L.R. (3d) 25.

[13] *Attorney-General of Quebec and Régie du Logement* v. *Grondin* (1983), [1983] 2 S.C.R. 364 at 377-82.

uniformity, the historical inquiry task is thereby simplified to the province concerned, since constitutional principles applicable to provincial landlord and tenant law apply equally to federal criminal law. On the other hand, this variable interpretation is open to question since the actual wording of section 96 does not necessarily require it. It is also inconsistent with prior section 96 jurisprudence where a uniform concept was sought and anomalous legislative provisions in some provinces isolated and identified.[14]

Historical Inquiry

Sharing a common English legal heritage, it is not surprising to find that the uniting provinces of Ontario, Quebec, New Brunswick and Nova Scotia had, in 1867, similar substantive criminal laws and criminal court structures. Public law offences were divided on a procedural basis into two types: summary conviction and indictable. Summary conviction proceedings, says Blackstone, were a pure creation of statute; the person or persons appointed by statute determined the guilt or innocence of the accused without the intervention of a jury.[15] The procedure was initially limited to the most minor offences (e.g., swearing, drunkenness and vagrancy) and was instituted to provide speedy justice while relieving freeholders from "troublesome attendances to try every minute offence" as jurors. The growth in the use of summary proceedings for minor public order offences — or, as Stephen described them, "administrative purpose" offences — into the more serious reaches of the criminal law obviously alarmed Blackstone, who warned of the threat to the "admirable and truly English trial by jury".[16] Indictable offences were in the realm of trial by jury. An indictment or allegation of a specific offence was found by a grand jury, when that system was used, or an information was put before a justice of the peace who conducted an inquiry and then bound the accused over for his trial by a petit jury. Although all indictable offences were prosecuted before a petit jury, such offences were categorized as either felony or misdemeanor. This distinction, no longer in our technical legal parlance, followed a line between more and less serious criminal offences and may be said generally to have developed due to the consequences of conviction — historically the punishment for felony being death and also perhaps forfeiture of estate.[17] In British North America in 1867 these felony/misdemeanor and indictable/summary conviction distinctions were recognized and applied in the criminal law of each of the four confederating colonies.

In each of the provinces court structures on the English hierarchical model administered criminal justice. At the foundation of the system were justices of the peace — men of good reputation, position and property though usually not legally trained. Sitting alone, a justice exercised a limited preliminary jurisdiction in relation to indictable offences by, for example, issuing warrants, conducting an inquiry, binding the accused and witnesses over

[14] *Reference Re Section 6 of the Family Relations Act* (1982), 131 D.L.R. (3d) 257 at 264, per Laskin C.J.C.

[15] *Blackstone's Commentaries* vol. IV (1769) at 280; see also J. Stephen, *History of the Criminal Law of England* (London, 1883) at 122-26.

[16] Stephen, *ibid.* at 122; Blackstone, *ibid.* at 278.

[17] Stephen, *ibid.* at 192-93; Blackstone, *ibid.* at 94.

for the trial and, in misdemeanor offences, granting bail. Combinations of justices, usually two sitting together, constituted a court of summary jurisdiction to try those offences for which this statutory procedure was allowed. In urban areas the office of magistrate was usually constituted exercising the authority of two or more justices of the peace, thereby conferring a summary jurisdiction.

A further combination of justices of the peace met every four months as the Court of Quarter Sessions for a county. The court was constituted by two or more justices of the peace, though historically all justices for the county were called to attend. Further, certain of the justices were named as being "of the quorum", so that the attendance of at least one of them was necessary to constitute the court. By the commission to the justices, the wording of which was settled in 1590, Sessions had jurisdiction to:

> hear and determine all felonies, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, engrossings and extortions, and all other crimes and offences of which such justices may or ought lawfully to inquire.[18]

In essence Sessions enjoyed a nominal comprehensive jurisdiction over "all felonies and trespasses" or "all felonies and indeed all crimes except treason".[19] This broad jurisdiction was qualified by an admonition in cases of difficulty not to "proceed to judgment, but in the presence of one of the justices of the courts of king's bench or common pleas, or one of the judges of assize".[20] According to Stephen, quoting Chitty, by the early 19th century the jurisdiction of Sessions in practice was limited to "petty larcenies and misdemeanours".[21] Whatever the practice, the theoretically broad jurisdiction of Sessions continued into the early 19th century with the upper limit of its jurisdiction conventionally fixed at offences short of the death penalty.[22] In addition to Quarter Sessions, incorporated urban areas had a variant of Sessions with the same jurisdiction as in the counties but not limited to the four sittings per year. As well, special Sessions could be constituted if the need arose.

The more serious indictable offences were normally reserved for the commissioners of Oyer and Terminer and Gaol Delivery, usually sitting as Courts of Assize, though the commissions could be issued independently of any civil jurisdiction. The commission of Oyer and Terminer authorized the holder "to hear and determine all treasons, felonies and misdemeanors" in general, while the commission of Gaol Delivery was directed to the trial of prisoners in a particular gaol. Although the commissions could be issued to anyone, they were in practice issued to the judges of the common law courts for trial of the most serious indictable offences on circuit. Finally, at the apex of the criminal trial

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[18]Stephen, *ibid.* at 111-16; Blackstone, *ibid.* at 268.

[19]Stephen, *ibid.* at 114; Blackstone, *ibid.* at 268.

[20]Blackstone, *ibid.* at 268.

[21]*History of the Criminal Law, supra,* note 15 at 114-15; see also J. Chitty, *Practical Treatise on the Criminal Law,* vol. I (Philadelphia, 1819) at 114.

[22]R.M. Jackson, *The Machinery of Justice in England,* 7th ed. (Cambridge: Cambridge University Press, 1977) at 182.

court structure was the Court of King's Bench which, as one of the central common law courts, enjoyed in theory an unlimited criminal jurisdiction over all manner of crimes.[23] In this English model, trial by jury — that is, for felonies and misdemeanors by indictable procedures — was the method of adjudication in Courts of Quarter Sessions, Oyer and Terminer and Gaol Delivery and King's Bench.

Into this English model it is now necessary to fit the control standard of section 96 in order to determine where it divides the hierarchy of criminal courts in section 96 and non-section 96 courts. This section, it will be recalled, established a line at the "Superior, District and County Courts" level for exclusive federal appointment. Just as there can be no doubt that the summary jurisdiction courts of justices of the peace were outside the ambit of the section in 1867, so superior courts of criminal jurisdiction (whether labelled Supreme Court as in New Brunswick and Nova Scotia or Queen's Bench as in Ontario and Quebec) were within the section, being generically enumerated therein. It is also clear that courts of Oyer and Terminer and Gaol Delivery were section 96 courts.[24] While historically the commissions were not restricted to the judges of the superior courts, only in Ontario was there legislation in 1867 allowing issuance of commissions to county court judges and "counsel learned in the law".[25] In New Brunswick the judge of the Supreme Court had been freed of the inclusion in the commissions of magistrates and others by legislative enactment in 1854.[26] It must not be forgotten that in England commissions of Oyer and Terminer and Gaol Delivery were issued to judges of the superior courts together with other persons, usually justices or magistrates, but it was specified that the judges were only "of the *quorum*, so that the rest cannot act without them".[27] The close association of the commissions with the English Queen's Bench was fully realized when in 1873 the Courts of Oyer and Terminer and Gaol Delivery were formally made part of the High Court of Justice.[28] This reform was also adopted in the provinces of Canada.

The pivotal point in this inquiry has now been reached — determining on which side of the section 96 line to place the Courts of Quarter Sessions of the Peace. This question is not as free from doubt as the placing of the other criminal courts in the hierarchy. Each of the four confederating provinces had criminal courts based on the Quarter Sessions model prior to 1867, but varia-

[23] *Blackstone's Commentaries*, vol. IV (1769) at 262, 267, 269; *History of the Criminal Law, supra*, note 15 at 94-95, 107, 110.

[24] Stephen, *ibid.* at 111; *In Re Robert Evan Sproule* (1886), 12 S.C.R. 140 per Ritchie C.J.: "As to the courts of assize, *nisi prius*, oyer and terminer and general gaol delivery, I am of opinion that these courts are superior courts of record, and...courts of very high degree, dignity and importance"; *Fourth Report of Commissioners on Criminal Law*, [1834-41] *British Parliamentary Papers*.

[25] *An Act Respecting Courts of Oyer and Terminer and General Gaol Delivery and of Assize and Nisi Prius*, C.S.U.C. 1859, c.11, s.2.

[26] *An Act to regulate the Circuit Courts and Courts of Oyer and Terminer and Sittings After Term*, S.N.B. 1854, c. 19, s. 1; J.W. Lawrence, *Judges of New Brunswick and Their Times* (Saint John, 1907) at 387 explains this legislation as resulting from an incident at the Saint John circuit in 1853 when two magistrates overruled the sitting Supreme Court judge.

[27] *Blackstone's Commentaries*, vol. IV (1769) at 267.

[28] *Supreme Court of Judicature Act, 1873*, 36 & 37 Vict., c.66, s.16.

tions among the provinces existed both as to composition and jurisdiction of the courts. In Ontario, while justices of the peace were still required in 1867 to gather quarterly to constitute a Court of Session in each county, the position of Chairman of Sessions was by statute reserved for the judges of the County Court, the court consisting of the County Court judge and the justices of the peace.[29] In addition, Recorder's Courts with the same formal jurisdiction as Sessions were established in municipalities, presided over by a barrister of five years' standing at the Bar or, in this absence, the mayor either sitting alone or assisted by aldermen.[30] A similar structure existed in Quebec. General Sessions of the Peace were held in the Districts of Montreal and Quebec, and Quarter Sessions in the other districts of the province on the issuance of a proclamation to that effect by the governor, the major criminal work being performed in these other districts by the Court of Queen's Bench.[31] Means to constitute Sessions were provided by statute: (i) two justices of the peace at General Sessions; (ii) a judge of the Superior Court sitting alone at Quarter Sessions, except for Montreal and Quebec; and (iii) in Montreal and Quebec, the Recorder or the Inspector and Superintendant of Police sitting alone at Quarter Sessions.[32] In New Brunswick prior to 1867 the English model prevailed in having the justices of the peace in the counties — and, in the city and county of Saint John the mayor, recorder and alderman — constitute Courts of Sessions for the trial of misdemeanors. In 1867 legislation creating the new county court system abolished the indictable offence jurisdiction of Sessions, so that at union New Brunswick was without such a separate court; it had been replaced by the new federally-salaried County Court.[33] The greater territorial part of Nova Scotia also entered Confederation without a Court of Sessions exercising indictable offence jurisdiction. In 1841 the Legislature responded to the duplication of criminal jurisdiction in the Supreme Court and Sessions by abolishing Sessions as an indictable offence court for all counties in the province except Halifax.[34] There, Sessions continued on the English model, constituted by justices of the peace.

Jurisdiction of Sessions in relation to specific offences varied among the confederating provinces. Again, the English lead in reforming the jurisdiction of Sessions was generally followed, with local variation. It will be recalled that the historical criminal jurisdiction of Sessions was very broadly framed to include all indictable offences involving a breach of the peace, treason excepted. Although it would appear that in the 16th century Sessions actually exercised its jurisdiction over high offences and condemned various accused to death, by the late 18th century Sessions, in recognition of the limited expertise of the justices, had been curtailed in the actual exercise of its jurisdiction in relation

[29] *An Act Relating to the Court of General Quarter Sessions of the Peace*, C.S.U.C. 1859, c.17, ss 3,5.

[30] *An Act Respecting the Municipal Institutions of Upper Canada*, C.S.U.C. 1859, c.54, ss 370-71.

[31] *An Act Respecting the Courts of General or Quarter Sessions of the Peace, Justices of the Peace and Special Sessions of the Peace*, C.S.L.C. 1860, c.97, ss 1,2.

[32] *Ibid.* ss 4,5.

[33] *An Act to Establish County Courts*, S.N.B. 1867, c.10.

[34] *An Act to Improve the Administration of the Law, and to reduce the number of Courts of Justice within this Province, and to diminish the expense of the Judiciary therein*, S.N.S. 1841, c.3.

to offences punishable by death.[35] This decline of Sessions resulted in an increased burden on Assizes and delays in bringing accused to trial, as Assizes usually sat only twice a year. Consequently in 1842, Lord Lyndhurst L.C. introduced a bill in Parliament "to transfer the trial of many offences that were not of a capital description from the Assizes to the court of quarter sessions".[36] Rather than being expressed in the positive, by stating what the jurisdiction of Sessions was, the *Act to Define the Jurisdiction of Justices in General and Quarter Sessions of the Peace* was expressed in the negative, stating what its jurisdiction was not:

> neither the Justices of the Peace acting in and for any County, Riding, Division, or Liberty, nor the Recorder of any Borough, shall, at any Session of the Peace, or at any Adjournment thereof, try any Person or Persons for any Treason, Murder, or Capital Felony, or for any Felony which, when committed by a Person not previously convicted of Felony, is punishable by Transportation beyond the seas for Life, or for any of the following Offences... [there then follow eighteen categories of offences].[37]

Significantly, rather than restricting Sessions, the Act was intended to enlarge its actual jurisdiction by curtailing its formal jurisdiction.

In Nova Scotia this reform was not followed, having been made redundant by the 1841 abolition of the indictable offence jurisdiction of Sessions throughout the province except for Halifax County, where Sessions exercised a limited actual as opposed to formal jurisdiction. In New Brunswick, the Assembly enacted a broader limit on the jurisdiction of Sessions by directing that "Every crime of felony, incest, or adultery, shall be dealt with in the Courts of Oyer and Terminer or General Gaol Delivery...".[38] Sessions was thereby restricted to the misdemeanor indictable offences. Other provisions expressly conferred jurisdiction over lotteries (concurrent with Oyer and Terminer) and "larceny, accessories thereto, and all receivers of stolen goods when the value of the property does not exceed five pounds".[39] In the then province of Canada (Ontario and Quebec) reform of the jurisdiction of Sessions came more slowly. The 1859 Consolidated Statutes merely prohibited Sessions from trying a miscellany of nine misdemeanor and six felony of-

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[35] *History of the Criminal Law, supra,* note 15 at 114-15. See also N. Landau, *The Justices of the Peace, 1679-1760* (Berkeley: University of California Press, 1984) at 241-44 (a study of the Kent justices). There would appear to have been a reversal of the decline of Sessions in the early 19th century, at least in some parts of England. The commissioners to study the criminal law, *supra,* note 24 at *xi-xii,* wrote of the problem of non-legally-trained justices and "the increased extent to which the criminal business of the country is now transacted in the Courts of Sessions. Those courts which in former times seldom exercised jurisdiction as to higher offences than petit larceny, are now in the habit of trying nearly every species of offence, including even cases where the court has no discretion as to the punishment, but is bound on conviction to pass sentence of transportation for life". But see "Return of General Sessions of the Peace for the County of Devon" (25 Feb. 1834) in [1834], 47 *Sessional Papers,* document 143 where of sixty-five charges, there were fifty-two thefts, eight receiving stolen goods, four false pretences and one breaking prison.

[36] 63 H.L. Deb., 30 May 1842, col. 974.

[37] (U.K.), 1842, 5 & 6 Vict., c.38.

[38] *Of Proceedings on Indictment,* R.S.N.B. 1854-55, c. 158, s.3. See *An Act for Improving the Administration of Justice in Criminal Cases,* S.N.B. 1831, c.14, s.8.

[39] *Of Proceedings on Indictment,* R.S.N.B. 1854-55, c.158, s.22; *Of Trial,* R.S.N.B. 1854-55, c.159, s.25.

fences.[40] In 1861, however, a limited English-model reform was finally enacted restricting Sessions from trying "Treasons and Felonies, for conviction whereof the punishment of Death is imposed".[41] At that time ten categories of offences were subject to the death penalty, ranging from murder to buggery to endangering a vessel. In 1865 the number of such offences was reduced by the substitution of a maximum penalty of life imprisonment in seven of the categories, leaving only murder, rape and carnal abuse of girls under the age of ten as death penalty offences.[42]

These Courts of Sessions in the four original provinces are not expressly enumerated in section 96. That, however, can be a neutral rather than determinative factor. Just as the phrase "superior courts" has been accepted as a generic term, so might "county court" be considered to refer not only to the nominate County Courts with their civil jurisdiction but also to the gathering of justices in county Sessions to dispense criminal justice. Some support for this view may be found in the transfer in New Brunswick of Sessions' remaining indictable offence jurisdiction to the new County Court system established in anticipation of the coming into force of the *Constitution Act, 1867.* Negating this conclusion is the logical corollary that inclusion of Sessions in section 96 would require that justices of the peace be appointed by the Governor-General. Such a proposition is not supportable, denied by the very structure of section 96 in naming only certain courts, and not all.

Thus the real problem in locating Sessions for section 96 purposes, and in assuming a uniform historical standard rather than multiple provincial standards, is that there was in 1867 no single constitution of a Court of Sessions. In England, Sessions was constituted either by the justices of the peace in county Sessions or by a Recorder sitting alone in borough or municipal Sessions. In Nova Scotia, justices of the peace in Sessions had no indictable offence jurisdiction after 1841, except in Halifax County where the jurisdiction seems to have been more formal than actual. In New Brunswick, justices in Sessions had indictable jurisdiction over only misdemeanors prior to Confederation, and even that was removed to the County Courts in anticipation of the union. In Ontario, justices in Sessions exercised indictable jurisdiction, but with a County Court judge presiding. Only in Quebec did justices in Sessions have what would be considered the regular jurisdiction of Sessions, but the exercise of that jurisdiction appears to have been secondary to that of the superior courts of criminal jurisdiction. Considered globally, Sessions seems more properly paced within section 96 than without. Yet, one must also consider the Sessions constituted in municipalities by the legally-trained Recorder sitting alone. Following the English example of London being considered like a

[40] *An Act respecting Offences against Person and Property,* C.S.C. 1859, c.92, ss 51-66; *An Act respecting Offences against the Person,* C.S.C. 1859, c.91, ss 15, 16, 18 per s.47; *An Act respecting Arson and other malicious injury to property,* C.S.C. 1859, c.93, ss 2,3, 11, 13 per s.39.

[41] *An Act to Abolish the Right of Courts of Quarter Sessions and Recorders' Courts to try Treason and Capital Felonies,* S.C. 1861, c.14, s.1.

[42] *An Act respecting Offences Against the Person,* C.S.C. 1859, c.91, ss 5, 19, 20, 22; *An Act respecting Offences Against Person and Property,* C.S.C. 1859, c.92, ss 1,8; *An Act respecting Arson and other malicious injury to property,* C.S.C. 1859, c.93, ss 7, 8; *An Act for abolishing the punishment of death in certain cases,* S.C. 1865, c.13, s.1.

separate county, one might argue that Recorder's Courts are caught by a generic interpretation of "County Courts" in section 96. However, such a generic interpretation has already been considered and rejected. As well, Recorders are not among the courts expressly enumerated in section 96, although that is not determinative as such courts might be said to have been continued by section 129 which, in part, continues all courts of criminal jurisdiction until altered by Parliament or the legislatures. The weakness of invoking section 129 is the introductory qualification "Except as otherwise provided by this Act", which would require compliance with section 96 itself in appointment of recorders (assuming Sessions is a section 96 court). This would mean that Recorders, as provincial appointees, would have been acting in violation of constitutional limitations since 1867.

One means of unlocking the constitutional definition of Sessions may lie in a direct application of section 96 to the various combinations available to constitute the court. A Sessions of justices of the peace may then be distinguished from Sessions with a clear section 96 control, as in Ontario where County Court judges presided. Powers and jurisdiction exercised by justices alone in Sessions are thereby excluded from the ambit of section 96 while those reserved to Sessions with a section 96 control, or to the superior courts, are within section 96. This solution means a broad spectrum of powers and jurisdiction over indictable offences may be conferred validly on non-section 96 courts, including jury trials. It is consistent with the formal position of English and Canadian Sessions, subject to the statutory limits of jurisdiction imposed prior to Confederation. The historical roots of present Provincial Court judges as having only the summary jurisdiction of two or more justices of the peace is irrelevant for section 96 purposes. The standard is that of the section 96 courts, not of the non-section 96 courts; the powers and jurisdiction of non-section 96 courts can expand as long as the section 96 control is not violated. The problem with this solution is that justices alone did not sit in Ontario, could do so in Quebec, had only indictable misdemeanor jurisdiction in New Brunswick (until just prior to the *Constitution Act, 1867,* when even that was taken away), and in Nova Scotia, sat only in Halifax County with a limited jurisdiction in practice. The viable court was the Recorder's Courts in both Ontario and Quebec. It is this court which effectively resolves the point and makes unnecessary the rationalization of Sessions on the basis of its composition. In terms of offence jurisdiction, Recorders were equivalent to Sessions presided over by a section 96 judge. The following jurisdictional provision of the first *Criminal Code* and its post-Union antecedents confirms this legal equivalency, though restricted to Recorders in Montreal and Quebec City:

> Every Court of General Quarter Sessions of the Peace, when presided over by a Superior Court judge, or a County or District Court judge, or in the cities of Montreal and Quebec by a recorder or judge of the Sessions of the Peace; and in the province of New Brunswick every County Court judge has power to try any indictable offence except as hereinafter provided.[43]

[43] *Criminal Code*, S.C. 1892, c.29, s.539. The judge of Sessions of the Peace referred to in the section was the title of the Inspector and Superintendent of Police after 1862. The antecedent of s. 539 is *An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law*, S.C. 1869, c.29, s.12. It may be presumed from the absence of Ontario Recorders in the Code provision that they had not exercised their extensive criminal jurisdiction in practice.

As a practical result, Sessons is to be considered a non-section 96 court for constitutional purposes and the task will be merely to determine those indictable offences excluded from the 1867 jurisdiction of Sessions and Recorders in Ontario and Quebec. These offences were noted above.[44] The early legislation of the Parliment of Canada was essentially a re-enactment of the legislation of the former province of Canada, so it is not surprising that these offence restrictions are repeated in post-Union criminal law.[45] The first *Criminal Code* added to the statutory exclusions those offences historically excluded from Sessions such as treason and piracy.[46]

If, however, the controlling principle is not section 96 uniformity but rather the *Grondin* principle of provincial diversity, the constitutional position in both New Brunswick and Nova Scotia will be a more restricted one.[47] In those provinces, it will be recalled, indictable offence jurisdiction was, on the coming into force of the *Constitutional Act, 1867,* conferred exclusively on section 96 courts, the only non-section 96 criminal courts being justices of the peace and magistrates exercising a summary jurisdiction. This black and white situation is, however, blurred by the existence of Sessions in Halifax County and the fact that the indictable misdemeanor jurisidiction of New Brunswick Sessions was transferred to the County Court only in 1867.

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[44] *Supra,* text at notes 40-42.

[45] *Criminal Procedure Act,* R.S.C. 1886, c. 174, ss 4, 5, 6.

[46] *Criminal Code,* S.C. 1892, c.29, s.540:

> 540. No such court as mentioned in the next preceding section has power to try any offence under the following sections, that is to say:
>
> Part IV. Sections sixty-five, treason; sixty-seven, accessories after the fact to treason; sixty-eight, sixty-nine and seventy, treasonable offences; seventy-one, assault on the Queen; seventy-two, inciting to mutiny; seventy-seven, unlawfully obtaining and communicating official information; seventy-eight, communicating information acquired by holding office.
>
> Part VII. Sections one hundred and twenty, administering, taking or procuring the taking of oaths to commit certain crimes; one hundred and twenty-one, administering, taking or procuring the taking of other unlawful oaths; one hundred and twenty-four, seditious offences; one hundred and twenty-five, libels on foreign sovereigns; one hundred and twenty-six, spreading false news.
>
> Part VII. Piracy; any of the sections in this part.
>
> Part IX. Sections one hundred and thirty-one, judicial corruption; one hundred and thirty-two, corruption of officiers employed in prosecuting offences; one hundred and thirty-three, frauds upon the Government; one hundred and thirty-five, breach of trust by a public officer; one hundred and thirty-six, corrupt practices in municipal affairs; one hundred and thirty-seven (a.), selling and purchasing offices.
>
> Part XI. Escapes and rescues; any of the sections in this part.
>
> Part XVIII. Sections two hundred and thirty-one, murder; two hundred and thirty-two, attempts to murder; two hundred and thirty-three, threats to murder; two hundred and thirty-four, conspiracy to murder; two hundred and thirty-five, accessory after the fact to murder.
>
> Part XXI. Sections two hundred and sixty-seven, rape; two hundred and sixty-eight, attempt to commit rape.
>
> Part XXIII. Defamatory libel; any of the sections in this part.
>
> Part XXXIX. Section five hundred and twenty, combinations in restraint of trade.
>
> Part XL. Conspiring or attempting to commit, or being accessory after the fact to any of the foregoing offences.

[47] *Supra,* note 13.

Present Jurisdictional Framework

Simply put, the present *Criminal Code* recognizes two levels of court for the trial of indictable offences: "superior courts of criminal jurisdiction" and "courts of criminal jurisdiction". For each province the Supreme Court, (and for some the Court of Appeal also) is defined as a "superior court of criminal jurisdiction" and given "jurisdiction to try any indictable offence". The definition of "court of criminal jurisdiction":

> (a) a court of general or quarter sessions of the peace, when presided over by a superior court judge or a county or district court judge, or in the cities of Montreal and Quebec, by a municipal judge of the city, as the case may be, or a judge of the sessions of the peace,
>
> (b) a provincial court judge or judge acting under Part XVI, and
>
> (c) repealed
>
> (d) in the Province of Ontario, the District Court.[48]

Subsection (a) repeats the equivalency of the then Recorder's Courts of Montreal and Quebec with Sessions presided over by a section 96 judge, as found in both pre- and early post-Union criminal legislation. Subsection (c) incorporates by reference two other definitions, that of "provincial court judge" in section 2 (meaning a person with "the power and authority of two or more justices of the peace") and that of "judge" in section 482 (defined as a section 96 judge for all provinces except Quebec), where it means "a judge of the sessions of the peace or a judge of the provincial court"). Subsection (d) refers to a section 96 judge. A distinction is plainly drawn between subsections (a) and (d), which are always "courts of criminal jurisdiction", and (b), which includes the Part XVI qualification. Part XVI of the Code provides for trial of indictable offences without a jury. Under this Part, a provincial court judge has absolute jurisdiction over the offences enumerated in section 483 and, with the consent of the accused, jurisdiction by section 484 over all other indictable offences except those reserved for "superior courts of criminal jurisdiction" by section 427. Similarly, an accused may elect to be tried by a "judge" as defined, sitting without a jury.[49] The scheme of Part XVI is reinforced by section 427, which expressly confers jurisdiction to try every indictable offence on a "court of criminal jurisdiction" except the crimes of (i) treason, (ii) alarming Her Majesty, (iii) intimidating Parliament or a legislature, (iv) inciting to mutiny, (v) seditious offences, (vi) piracy, (vii) piratical acts, (viii) murder, (ix) being an accessory after the fact to high treason, treason or murder, (x) bribery (by the holder of a judicial office) (xi) attempting any of the first seven offences, and (xii) conspiring to commit any of the first eight offences.

Reasons for Decision in *Charters* and *McGann*

The initial decision on jurisdiction was delivered by Harper, Prov. Ct. J.[50] In his lengthy reasons for decision traditional section 96 analyses of the type presented above was avoided in favour of what was considered the controlling

[48] *Criminal Code*, R.S.C. 1970, c. C-34, as amended, ss 2, 426.

[49] *Ibid.* s. 488.

[50] *Supra*, note 2.

decision of the Supreme Court in *McEvoy* v. *Attorney-General of New Brunswick*.[51] In that case a proposed unified criminal court with provincially-appointed judges exercising complete original criminal jurisdiction, either exclusively or concurrently with the superior court, was held to violate section 96. It was said that Parliament was bound by the terms of section 96 in respect of provincial courts and could not confer complete superior court criminal jurisdiction on provincially-appointed judges; nor could a province appoint judges to exercise such superior court jurisdiction. Harper Prov. Ct. J. having set forth the jurisdictional framework of the *Criminal Code*, found that the proposed court rejected in *McEvoy* was already in existence as the Provincial Court under the Code. He made this determination on the basis that the offences restricted to superior courts of criminal jurisdiction by section 427 were of such rarity as to be reduced in practice to murder and conspiracy to murder. As a result, a Provincial Court enjoyed Code jurisdiction over all summary conviction offences, and all indictable offences except murder and its conspiracy either absolutely under section 483 or by consent of the accused under section 484. The murder exception was found to be not of such significance as to distinguish the Code scheme from the proposal raised in *McEvoy*.

McEvoy, however, is not so controlling. In *McEvoy* the Supreme Court was addressing specific questions referred by the Lieutenant-Governor in Council of New Brunswick. Those questions involved a complete conferral of criminal jurisdiction on a provincially-appointed court, and the response of the Court must be considered in that light. As the Court itself carefully emphasized,

> What is being contemplated here is not one or a few transfers of criminal law power, such as has already been accomplished under the *Criminal Code*, but a complete obliteration.[52]

The Court distinguished the notion of an erosion of superior court jurisdiction from "an obliteration". On the other hand, the passage should not be taken as sanctioning past erosions unless the Court is willing to apply a "living tree" approach to section 96, a notion somewhat contrary to strict historical inquiry. In any event, such erosions were not before the Court for consideration. The significance of *McEvoy* is that Parliament is bound by section 96; it does not establish just where the section 96 line transects criminal law jurisdiction. Only one passage in the judgment seems to address this point:

> There is no doubt that jurisdiction to try indictable offences was part of the superior court's jurisdiction in 1867; none of the parties suggests otherwise. Nor does anyone argue that inferior courts had concurrent jurisdiction to try indictable offences in 1867.[53]

The line is apparently being drawn at the indictable/summary offence distinction. Yet considered in light of the "obliteration" nature of the proposal, this passage should be considered as a neutral statement of the position of the parties rather than a determination by the Court.

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[51] *Supra*, note 12.

[52] *Ibid.* D.L.R. at 37.

[53] *Ibid.*, at 36.

Judge Harper summarized his underlying concern in relation to the present Code scheme as follows:

> Surely at the time of the original enactment of s. 96...it was never contemplated that a mere magistrate or a person with the power of two or more justices of the peace acting together would have absolute jurisdiction to send a person to a Federal Penitentiary.[54]

Here is revealed the erroneous notion that the section 96 standard restricts the inferior rather than the superior courts. It is clear constitutional law that the functions and powers of non-section 96 judges may be increased as long as the constitutional line is not crossed. Drawing on, though not quoting the *McEvoy* statement noted above, Judge Harper apparently established the line at the indictable/summary distinction in terms of offence jurisdiction and at the two years level in terms of punishment. His general conclusion was, accordingly, that the Provincial Court cannot validly exercise jurisdiction to try "serious indictable offences".

On judicial review, Stevenson J. of Court of Queen's Bench quashed the jurisdictional decision of Harper Prov. Ct. J. He quite rightly recognized the limited scope of the *McEvoy* decision yet, in distinguishing it, adopted much too narrow a definition of "concurrent" jurisdiction:

> In my opinion jurisdiction is concurrent in two or more courts only if the part instituting the proceeding has an unrestricted choice of forum. In other words, in criminal matters, the initiating party — the Crown, the Attorney General, the prosecutor or the informant — could choose the court in which the proceeding would be initiated and tried.

Having established this "straw man" definition, it was then applied to save the *Criminal Code* provisions since it is "the accused, not the initiating party, that has the choice of forum".[55] But jurisdiction is to be viewed as concurrent when two courts can determine the same matter between the same parties, nuances of procedure notwithstanding. Section 96 is not to be so easily evaded. In criminal law the key elements seem to be offence jurisdiction coupled with severity of possible punishment and perhaps the question of a jury trial.

Turning to historical inquiry, Stevenson J. focussed on the Court of General Sessions of the Peace as the pivotal body. He apparently viewed the fact that Sessions was an "inferior" court as determinative of its non-section 96 status. Nowhere in the reasons for judgment is there an express placing of the court outside of the section, notwithstanding the fact that two other "inferior" courts — County and District — are specifically included. As reviewed above, Sessions in New Brunswick was found to have had only misdemeanor indictable jurisdiction after 1831 (the 1867 legislation removing even this was not referred to) and in Nova Scotia, except Halifax County, only summary jurisdiction. Ignoring the situation in Quebec, Stevenson J. merely quoted an 1869 federal statute re-enacting the 1859 Canadian *Act Respecting the Prompt and Summary Administration of Criminal Justice in Certain Cases* without ex-

[54] *R.* v. *Charters, supra,* note 2 at 60.

[55] *Re Harper, supra,* note 2 at 388.

plaining the significance he attached to it.[56] That Act concerned the summary trial of various larceny offences where value did not exceed $10 and various assault and bawdy house offences. The maximum punishment under the Act was six months. From this statute, a jump in logic is made to the conclusion that Sessions in Ontario in 1867 had jurisdiction "over felonies other than treason and capital felonies". This bare statement is presented uncomplicated by the fact that only County Court judges could preside at such Sessions and the constitutional effect this might have in placing Sessions in the section 96 context. Having found that an "inferior court" in at least one province exercised jurisdiction over "serious criminal offences", Stevenson J. determined in favour of the present Code scheme and the jurisdiction of the Provincial Court in relation to the specific offences charged:

> Does the fact that the jurisdiction now given to inferior courts encompasses all indictable offences except those enumerated in s.427 of the *Code* offend ss. 96 to 100 of the *Constitution*? I do not think it does. The legislation has not altered the character of the inferior courts nor has it conferred on them functions that were reserved exclusively to superior, district or county courts in 1867.[57]

Unfortunately, in arriving at this conclusion Stevenson J. did not review the erosion of superior court criminal jurisdiction since 1867. To be fair, such an examination was not necessary to determine the jurisdictional issues before the court but was necessary properly to support such opinion. The reasons for decision are sorely inadequate to support the conclusions reached. It must again be stressed that the decision of Stevenson J. is based on the jurisdiction perceived to have been enjoyed by Sessions in Ontario in 1867, thereby transforming the exception into the standard, as such jurisdiction was found in neither New Brunswick nor Nova Scotia.

Conclusions

If the Supreme Court's interpretation of section 96 in *Grondin* — that the standard for the powers and jurisdiction of superior, district and county courts is a provincial rather than a uniform national standard — is accepted and applied in the criminal law area, then the conclusion is inescapable that the *Criminal Code* jurisdictional provisions in respect of indictable offences are unconstitutional in at least New Brunswick and Nova Scotia. Criminal law in Canada has followed the pre-Confederation law of the Province of Canada rather than accommodating the variances in jurisdiction in the two Maritime provinces where indictable offence jurisdiction was restricted in 1867 to what are now section 96 courts. Alternatively, if section 96 creates a national standard then the problem is to identify that standard. Putting Sessions on one side or the other of the section 96 line does not necessarily resolve placement of certain offences owing again to pre-Confederation provincial variations. These are resolvable, however, by the "confirming to" approach of section 96 analysis.

Section 427 of the *Criminal Code* enumerates those offences within the exclusive jurisdiction of superior courts of criminal jurisdiction. When com-

[56] S.C. 1869, c.32; C.S.C. 1859, c.105, ss 1, 30, 31.

[57] *Re Harper, supra,* note 2 at 394.

pared with offences similarly reserved in pre-Confederation Canada, New Brunswick and Nova Scotia, and even the *Criminal Code* of 1892, the list is an abbreviated one. This erosion of exclusive superior court offence jurisdiction and the conferral of such jurisdiction on non-section 96 courts is, at minimum, open to question on section 96 grounds. Such offences represent the *core* of jurisdiction for which the section 96 historical inquiry is undertaken. Some of the offence erosion may be validated as a result of the change in punishment, from the death penalty to imprisonment, altering the character of such offences. But this does not justify all of the offence erosion. It depends on which provincial jurisdictional standard is adopted as the proper one for section 96 purposes.

The offences in issue in *Charters* and *McGann* were punishable by life imprisonment. As such, one may safely conclude on the *Grondin* approach to section 96 that they were, indeed, beyond the constitutional competence of the Provincial Court in New Brunswick. Both of the reasons for decision of the courts which examined the issue are flawed, one being too broad, the other too narrow. It is unfortunate that this important constitutional issue did not reach at least the Court of Appeal. The constitutional propriety of the conviction and imprisonment of many tried before Provincial Courts across Canada remains in question.

J.P. McEVOY*

*Of the Faculty of Law, University of New Brunswick

APPENDIX

New Brunswick

In 1832 a Commission of Inquiry was appointed to examine the judicial institutions of New Brunswick and in particular the fee schedules and emoluments of the various law officers. Although the Commissioners — Ward Chipman, Robert Parker and William Kinnear — generally restricted their attention to the trial of divil matters, their report provides a convenient reference point from which to commence a section 96 historical review as it includes the following table of the then judicial institutions of the province:

> Supreme Court
> Courts of Nisi Prius)
> Courts of Oyer and Terminer) combined under the
> and Gaol Delivery) name of Circuit Courts
> Inferior Courts of Common Pleas, in the respective counties
> Courts of General Sessions of the Peace, in the respective counties[1]
> Courts of Justices of the Peace having jurisdiction in Civil Suits
> City Court in the City of Saint John having the like jurisdiction
> Justices of the Peace in the exercise of their power as Conservators of the Peace, and in apprehending and committing Criminals, and in Summary Convictions under penal statutes
> Court of Chancery
> Court of Vice Admiralty
> Governor and Council [in various capacities].[2]

Of these courts, only the Supreme Court, Circuit Courts (particularly of Oyer and Terminer and Gaol Delivery), Sessions of the Peace and Justices of the Peace exercised criminal jurisdiction as trial courts.

Having identified the court structure, the 1854-55 Revised Statutes in turn provide a convenient point from which to begin analysis of the jurisdiction exercised by the criminal courts. Title XXXIX of the Revised Statutes is entitled "Of the Criminal Law", chapters 143 to 155 of which detail various public order offences, both felony and misdemeanor. In total, ninety-three offences are created — forty-five felonies, thirty-six misdemeanors and twelve not expressly classified.[3] The accompanying Table identifies the numbers of express felonies and misdemeanors by the maximum penalty allowed for the offence.

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[1]The 1785 Charter of the City of Saint John created the mayor, recorder and aldermen as justices of the peace with authority to hold Sessions of the Peace for the city and county of Saint John: printed in S.N.B. 1786-1836, Appendix 2.

[2]*Report Made to His Excellency the Lieutenant-Governor of the Province of New Brunswick by the Commission Appointed to Inquire into the Judicial Institutions of the Province* (Fredericton, 1833) at 2-4.

[3]This total excludes both c. 154, *Of other Felonies*, which is concerned with parties to the principal offence and c. 155, *Of the Definition of Terms and Explanations* which, as its title indicates, is merely a definition chapter.

Type of Offence	Maximum Penalty	Number of Such Offences
Felonies	death	9
	14 years	12
	7 years	17
	4 years	0
	3 years	6
	2 years	1
	Total	45
Misdemeanors	14 years	1*
	7 years	1**
	4 years	2
	3 years	2
	2 years	13
	1 year	4
	6 months	5
	fine only	2
	discretionary	6***
	Total	36

* c. 145, s.2 (incest) ** c.153, s.1 (attempted arson)
*** c. 145, s.5; c. 149, ss 9, 12; c. 151, ss 16, 17; c. 153, s.15.

As a general matter and consistent with the common understanding of the division between felony and misdemeanor, these statistics indicate a high correlation between classification of offence and severity of punishment: offences classified as felonies had a prescribed penalty greater than two years imprisonment (44 of 45); and those as misdemeanors, two years or less (30 of 36). Viewed another way, offences for which the prescribed penalty was greater than two years imprisonment were classified as felonies (44 of 50) and those not exceeding two years were misdemeanors (30 of 31).

The question now arises as to which courts enjoyed jurisdiction over particular criminal offences. For purposes of criminal procedure, offences were historically classified as being either indictable or summary conviction according to whether they were tried by jury.[4] Summary conviction procedure was codified as c. 138 of the Revised Statutes, *Of Summary Convictions*. That Act provided that a justice might try any accused against whom an information were laid alleging commission of "any offence punishable by summary conviction".[5] As to which were summary offences, earlier statutes had expressly allowed summary trials for such offences as larceny, assault and injuring cattle.[6] A problem for the historical researcher arises, however, as these earlier statutes were repealed by the Revised Statutes and the summary conviction procedure consolidated into the new c. 138 without enacting an express link to the offences concerned; i.e., offences were not expressed to be triable on summary conviction. As a creation of statute, standard rules of interpretation would limit summary procedure to offences expressly so identified. In the absence of such identification, it may be assumed that only minor offences, such as the so-called "police offences", were considered appropriate for summary procedure and this jurisdiction of a justice of the peace may be

[4]See J.C. Smith and B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983) at 25; *Blackstone's Commentaries*, vol. IV (1769) at 277.

[5]R.S.N.B. 1854-55, c. 138, ss 1, 11. See generally *Blackstone's Commentaries*, vol. IV (1769), c.20.

[6]*An Act to consolidate and improve the Laws Relative to the Administration of Criminal Justice*, S.N.B. 1849, c. 30, ss 73, 74; *An Act for the more summary punishment of Persons guilty of maliciously killing, maiming, disfiguring or otherwise injuring Cattle*, S.N.B. 1830, c. 22.

dismissed from further consideration in terms of the dividing line between section 96 and non-section 96 courts. Such jurisdiction may be considered as having been non-section 96.

Title XL of the Revised Statutes, headed "Of The Administration of Criminal Justice", encompasses chapters 156 to 160. Chapter 156, *Of Proceedings before Indictment*, details the duties of a justice before whom a complaint was laid concerning an indictable offence. In effect, the duty of the justice was to conduct a preliminary inquiry and either discharge the accused or commit to trial. If the latter, the justice was to admit the accused to bail or remand to gaol and to take recognizances of witnesses. This general procedure applied whether the indictable offence was a felony or a misdemeanor. Chapters 157 to 160 then follow a normal procedural progression: c. 157, *Of Recognizances in Criminal Cases*; c. 158, *Of Proceedings on Indictment*; c. 159, *Of Trial*; and c. 160, *Of Error, Punishment and Expenses.* In these chapters the jurisdictional key is unlocked not on the basis of the procedural division between indictable and summary offences, but rather on the substantive division between felony and misdemeanor. It must be acknowledged that both the justices in Sessions and the Assize Commissioners in England enjoyed comprehensive criminal jurisdiction. Commissions of Oyer and Terminer and Gaol Delivery empowered the holders "to hear and determine all treasons, felonies and misdemeanors". These Commissions were issued to judges of the superior courts together with other persons, ususally the justices or magistrates, but specified that the judges only were "of the *quorum*, so that the rest cannot act without them".[7] The Commissions of Oyer and Terminer and Gaol Delivery constituted the holders a superior court for the trial of criminal offences.[8] It must be remembered that those receiving commissions acted not pursuant to whatever other position they may have held but only under the commission. Thus the fact that magistrates or others in early New Brunswick were also appointed commissioners does not detract from the stature of the court. In any event, as a result of legislative intervention, after 1854 the Supreme Court judges in New Brunswick held circuit courts without the necessity of either a commission or the judicial assistance of "others".[9] Circuit Courts after 1854 were, therefore, undoubtedly section 96 courts exclusively.

As originally constituted, General Sessions in New Brunswick enjoyed an extensive jurisdiction similar to that in England. For example, the 1785 Sunbury County "Charter" appointed eight individuals as justices of the peace and named four of them as being of the quorum for the purposes of holding:

> two Courts of General Sessions of the Peace in each year...[with] full power and authority to enquire of, hear and determine within the County aforesaid, all and all manner of felonies, imprisonments, riots, routs, oppressions, extorsions, forestallings, regratings, trespasses, offences and all and singular other evils, deeds and offences whatsoever...in as ample manner and form as Justices of the Peace [in England].[10]

Doubts as to the limits of jurisdiction of Sessions, arising from the imprecise restriction "in any case of difficulty", were statutorily resolved by enacting express limits on jurisdiction. The 1854-55 Revised Statutes expressed this in c. 158, *Of Proceedings on Indictment*, s.3:

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[7] *Blackstone's Commentaries*, vol. IV (1769) at 267. See also C. Turner, *Kenney's Outlines of Criminal Law* (Cambridge, U.K., 1952) at 453-54; J. Stephen, *History of the Criminal Law of England*, vol. I (London, 1883) at 97-111.

[8] J. Chitty, *Practical Treatise on the Criminal Law*, vol. I (Philadephia, 1819) at 109.

[9] *An Act to regulate the Circuit Courts, and Courts of Oyer and Terminer, and Sittings after Term*, S.N.B. 1854-55, c.19, s.1.

[10] Printed in S.N.B. 1786-1836, Appendix 3.

> Every crime of felony, incest or adultery, shall be dealt with in the Courts of Oyer and Terminer or General Gaol Delivery, except where power may be specially given by law to any other Court to try and determine the same.[11]

The statues contain no express conferral of such power on any other court. This restriction of Sessions jurisdiction is consistent with that adopted in England in 1842 which forbade the Sessions from trying "any Person or Persons for any Treason, Murder, or Capital Felony, or for any Felony...punishable by Transportation beyond the Seas for Life, or for any of the following offences...[a list of eighteen classes of offences]".[12] Other jurisdictional provisions in the Revised Statutes enacted that either Sessions or any Court of Oyer and Terminer could deal with lotteries as common and public nuisances and that Sessions had power to try "larceny, accessories thereto, and all receivers of stolen goods, when the value of the property does not exceed five pounds".[13]

Thus in 1854-55 justices of the peace exercised a summary jurisdiction in relation to minor offences, justices of the peace acting in the Court of General Sessions enjoyed general jurisdiction over misdemeanors, and superior court judges in the Supreme or Circuit Courts exercised exclusive felony jurisdiction. Focusing attention again on the above Table of offences, the misdemeanor offence with the greatest penalty — incest punishable by imprisonment not to exceed fourteen years — was in fact within the exclusive jurisdiction of the superior court and expressly excluded from Sessions by c. 158, s.3, reproduced above. It would appear, then, that the most important function of Sessions as a criminal court lay in the trial of minor offences.[14] The substantive criminal law of the 1854-55 Revised Statutes remained essentially unaltered until the coming into force of the *Constitution Act, 1867.* Any variation involved reduction of the number of offences for which the prescribed penalty was death and the addition of a few new crimes.[15] With respect to court structure, however, legislation was approved barely two weeks before the coming into force of the new constitution establishing a County Court system for the province. Significantly, thereafter no petit jury was to be summoned to attend General Sessions of the Peace, thereby formally removing the jurisdiction of Sessions to try any indictable offence. Indictments found at Sessions were to be handed over to the new County Court to be "proceeded with to trial and conviction in the same manner as in the Circuit Court".[16]

With respect to New Brunswick, historical inquiry leads to the conclusions that, on 1 July 1867: (i) section 96 courts enjoyed exclusive jurisdiction in relation to the trial of all offences classified as felony; (ii) in general, any offence for which the prescribed punishment exceeded two years imprisonment was classified as felony; (iii) section 96 courts enjoyed exclusive jurisdiction in relation to the trial of all offences prosecuted by

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[11] Earlier versions of this provision are found in *An Act to Consolidate and Improve the Laws Relative to the Administration of Criminal Justice,* S.N.B. 1849, c. 30, s. 24; *An Act for improving the Administration of Justice in Criminal Cases,* S.N.B. 1831, c.14, s.8.

[12] *An Act to define the Jurisdiction of Justices in General and Quarter Sessions of the Peace,* (U.K.), 5 & 6 Vict., c.38, s.1.

[13] *Of Proceedings on Indictment,* R.S.N.B. 1854-55, c.158, s.23; *Of Trial,* R.S.N.B. 1854-55, c.159, s.25.

[14] A. Monro, *New Brunswick; with a Brief Outline of Nova Scotia and Prince Edward Island: Their History, Civil Divisions, Geography and Productions* (Halifax, 1855) at 30: "The Sessions regulate the business of the county, such as the levying of rates for its necessary expenditure, granting tavern licences, determining cases of bastardy and settlement and they also try petty criminal cases".

[15] *An Act for taking away the punishment of death in certain cases, and substituting other punishments in lieu thereof,* S.N.B. 1862, c.21; *An Act further to amend the Law relating to offences against the person,* S.N.B. 1864, c.4; *An Act relating to Larceny and other similar offences,* S.N.B. 1864, c.6.

[16] *An Act to Establish County Courts,* S.N.B. 1867, c.10 (enacted 17 June 1867).

indictment; and (iv) trial by petit jury could be held only before a section 96 court. Ignoring the 1867 *County Courts Act* would remove the last two conclusions, in light of the misdemeanor jurisdiction of Sessions.

Nova Scotia

In 1824 the Nova Scotia Legislature addressed perceived problems in the administration of civil and criminal justice. The most important feature of the reorganization of the province's court structure was the requirement that the First Justice of the Court of Common Pleas and the Court of General Sessions of the Peace in each district be an attorney with at least ten years experience in the practice of law.[17] This change in the qualifications necessary for these judicial offices not only improved the quality of justice administered but also brought about another significant, though probably unintended, development. The historically broad criminal jurisdiction of justices in Sessions had been restricted by usage to the less serious offences, in deference to the superior courts. With the appointment of equally-qualified judges to the Sessions and Common Pleas, those courts began to expand the exercise of their jurisdictions to become in effect concurrent courts to the Supreme Court.[18] Consequently, criticism began to be expressed regarding the fiscal wisdom of funding distinct but concurrent court systems. In 1841 the Legislature ended this duplication by enacting *An Act to improve the Administration of the Law, and to reduce the number of Courts of Justice within this Province, and to diminish the expense of the Judiciary therein.*[19] As its title would indicate, the Act reduced the number of courts by abolishing, on the civil side, the Court of Common Pleas and, on the criminal side, the indictable offence jurisdiction of the Court of General Sessions of the Peace in each county except Halifax. To achieve abolition of the criminal jurisdiction, it was enacted:

> That, from and after the passing of this Act, no Bill of Indictment shall be found or preferred in or before any Court of General Sessions of the Peace (Halifax excepted,) nor shall any Trial by Petit Jury be had in or before the same, but in all other respects such Courts of General Sessions of the Peace shall have and exercise the same powers as heretofore by Law such Courts can or may have been used to have and exercise... .[20]

Consequently, in seventeen of eighteen Nova Scotia counties the Supreme Court gained exclusive jurisdiction to try all indictable offences, it being the only court to sit with a petit jury. Only in Halifax County was the criminal jurisdiction of Sessions retained, in-

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[17] *Act to make further Provision for the Equal Administration of Justice in the Province of Nova Scotia,* S.N.S. 1824, c.38. The province was divided into the districts of Cape Breton, Halifax, and three districts comprising the rest of the province, labelled Eastern, Middle and Western.

[18] *Supreme Court Act,* S.N.S. 1809, c.15, s.7 established the qualifications for appointment as Assistant Justice of the Supreme Court as ten years as an attorney, with at least five years in practice before the appointment.

[19] S.N.S. 1841, c.3. There is no report of a commission or committee to explain the purposes of this Act. A newspaper account of the Assembly debate of 23 February 1841, regarding creation of a committee to consider the matter, is found in *Acadian Recorder* (6 March 1841). It notes that Mr. Young (Inverness) moved in favour of a judiciary bill for essentially fiscal reasons: the number of common law judges; the anomalous situation of two distinct courts with concurrent jurisdiction; and the frequency of the holdings of courts with their attendant juries. The creation of the committee is reported to have been approved by a large majority. The report of the Committee is a mere handwritten resolution to effect the abolition of the courts of Common Pleas and Sessions.

[20] *Ibid.* s.5. See also s.24: "from and after the passing of this Act, no Petit Jury shall be summoned or required to attend at any Court of General Sessions of the Peace for any County within this Province, Halifax excepted"; and *Of General and Special Sessions,* R.S.N.S. 1864, c.44, s.5: "Bills of indictment may be preferred, found and tried, and judgment thereon given, in the general sessions of the peace for the county of Halifax, as heretofore". See also *Of Juries,* R.S.N.S. 1864, c.136, s.20 re petit jury for Halifax Sessions.

cluding ability to sit with a petit jury.[21] This court structure for the trial of indictable offences — a unitary system in the Supreme Court for most of Nova Scotia with a dual system for Halifax County — remained unaltered to the time of Confederation.

A comparison of the returns of both the Supreme Court sitting at Halifax and the Court of General Sessions of the Peace for Halifax County during the period 1851-1861 leads to the conclusion that the Halifax Sessions reverted to a court for the trial of less serious offences, while the more serious were tried by the Supreme Court. There were forty-one cases tried at Sessions over that eleven year period: thirty-six were for assault, three for breaking windows, one for larceny and one bastardy case.[22] In only two cases — an assault and the larceny conviction — did the Court impose a sentence of imprisonment, and in both the term was three months. In contrast, during the same period the Supreme Court sitting at Halifax tried sixty cases as follows:

murder	1
manslaughter	2
rape	2
unnatural offence	2
burglary	2
arson	3
concealing birth of child	3
stabbing	4
assault and wounding	4
robbery	4
larceny	20
various	13

As with the Sessions returns, all accused were convicted. In five cases the sentence imposed was a fine, the maximum being £25; in the others, the sentence ranged from two months imprisonment to death.[23]

Jurisdiction to try offences prosecuted in a summary way was conferred on justices sitting either alone or in combination as stipendary magistrates or in Sessions. Stipendary magistrates were empowered to try,

> all larcenies where the value of the goods stolen shall not exceed twenty dollars, receiving of stolen goods, assaults, batteries, riots, petty trespasses, malicious or wanton injuries to property, and breaches of the peace

and to punish persons convicted by imprisonment not to exceed sixty days or by fine not to exceed $20 and costs.[24] At Sessions, five justices sitting together had jurisdiction to try in a summary manner "all larcenies when the value of the property stolen shall not

[21] *Ibid.* s.24. The exclusion of Halifax from the ambit of the Act is unexplained. It was referred to neither in the account of the debate reported in the *Acadian Recorder, supra*, note 19 nor in the report of the Assembly Committee considering the abolition of the inferior courts. Its exclusion is all the more puzzling in light of the contemporaneous consideration and passage of a bill to incorporate Halifax and constitute both a municipal government and court structure: *An Act to Incorporate the Town of Halifax*, S.N.S. 1841, c.55.

[22] "Return of the Convictions for Criminal Offences in the Court of Sessions for the County of Halifax", 12 December 1861: Public Archives of Nova Scotia, RG34, 312-J3. A return for 1865 shows three assaults punished by fines and three assaults punished by terms of imprisonment of ten days and three months. In 1866 only three cases were tried — larceny, twenty days; assault, three months; and bastardy, a fine of $20.

[23] "Return of the Names of Parties, the Nature of Offence, and the Punishment awarded to persons convicted of Criminal Offences in the Supreme Court at Halifax for the last Ten Years", 31 December 1861: Public Archives of Nova Scotia, RG34, 312-J3.

[24] *Of Stipendary or Police Magistrates*, R.S.N.S. 1864, c. 129, ss 6, 8. Note that on the trial of all larcenies where only one magistrate had been appointed, that magistrate was to sit with two justices of the peace and a jury of three (if required by the accused).

exceed one hundred dollars" and could, on conviction, impose either a fine not exceeding $40, or imprisonment not exceeding six months, or both. For other minor offences, provision was made to allow summary trial by justices sitting alone or in combination. For example, two justices could try common assaults and batteries and in sentencing could impose a fine not exceeding $8.[25]

Turning attention to the substantive classification of crimes as being felony or misdemeanor, one finds that the Nova Scotia draughter was lax in expressly classifying offences in such terms. Examination of Part IV of the Revised Statutes of Nova Scotia, 1864, headed "Of the Criminal Law and the Administration of Criminal Justice" — particularly Title XLI "Of Offences Against The Government"— reveals 106 offence provisions — forty-three felonies, six misdemeanors and fifty-seven not expressly identified. Of the forty-three felonies, one is punishable by death, six by life imprisonment, thirteen by fourteen years imprisonment, sixteen by seven years imprisonment, three each by five and three years imprisonment and one by two years imprisonment. Of the six misdemeanors, one is punishable by imprisonment for five years, for one the penalty is unclear and for four the penalty is left to the discretion of the court. The fifty-seven unclassified offences include sixteen punishable by imprisonment by five, three in which the penalty is left to the discretion of the court, and thirty-eight punishable by lesser terms of imprisonment.[26]

With respect to Nova Scotia, historical inquiry leads to the conclusions that, on 1 July 1867: except for Halifax County, (i) section 96 courts enjoyed exclusive jurisdiction in relation to the trial of all offences classified as felonies; (ii) section 96 courts enjoyed exclusive jurisdiction in relation to the trial of all offences prosecuted by indictment; and, (iii) trial by petit jury could be had only before a section 96 court. Only in Halifax County did a similar criminal jurisdiction lie in a non-section 96 court.

Courts of Criminal Jurisdiction — Quebec

From the coming into force of *An Act to Re-unite the Provinces of Upper and Lower Canada and for the Government of Canada* until their separation as provinces of the new Canada in 1867, Ontario and Quebec shared a common legislature and substantive criminal law.[27] Historical inquiry into the criminal jurisdiction of the courts of these two provinces is greatly eased by the consolidation of the laws in 1859 of the former Upper Canada and in 1860 of the former Lower Canada. The separate provincial consolidations will be used to identify the court structure in both sections of the united province and the common consolidation will clarify issues of jurisdiction.

The Court of Queen's Bench of Lower Canada, Crown Side, enjoyed by statutory enactment complete criminal jurisdiction to try and determine all manner of offences, felonies or misdemeanors, except those within the exclusive jurisdiction of the Admiralty. A qualification, if one may call it that, to this expansive jurisdiction was provided by limiting removal of cases into the Queen's Bench from other courts to offences before any Court of General or Quarter Sessions "in which a trial by jury is by law allowed". It

[25] *Of Petty Offences, Trespasses and Assaults*, R.S.N.S. 1864, c. 147, ss 1, 3, 23. See also, for example: *Of Offences Relating to the Army and Navy*, R.S.N.S. 1864, c. 157, ss 1-4 (maximum fine $200 and in default of payment, imprisonment not to exceed twelve months); *Of Offences Against Religion*, R.S.N.S. 1864, c. 159, ss 1-4 (maximum fine $40 and in default of payment, gaol term not to exceed four days); *Of Offences Against Public Morals*, R.S.N.S. 1864, c 160, s.1 (drunkenness — maximum fine $4 and in default, gaol term not to exceed four days).

[26] Included in this group are rape (maximum life imprisonment), manslaughter (maximum fourteen years), shooting or stabbing to avoid arrest, perjury, carnal knowledge of any girl between the ages of ten and twelve years and larceny, each punishable by imprisonment not to exceed seven years.

[27] (U.K.) 3 & 4 Vict., c. 35.

was further provided that in any district in which the Court of Quarter Sessions had been discontinued or no such court appointed to be held, the Queen's Bench could try and determine all "matters and appeals" within the cognizance of Sessions.[28] A separate enactment expressly provided that Commissions of Oyer and Terminer and General Gaol Delivery could be issued at times other than during sittings of the Queen's Bench, as circumstances required.[29]

For purposes of administration of justice, Quebec was territorially divided into twenty districts, seven then existing and thirteen planned or so-called new districts.[30] Courts of General Sessions of the Peace were held in the Districts of Montreal and Quebec and, when a proclamation was issued by the Governor, Courts of Quarter Sessions of the Peace could be held in the other five existing districts and in the thirteen new districts. It would appear that the Court of Sessions was considered as merely supplementary to the Queen's Bench since in all districts, apart from Montreal and Quebec, the Governor could either institute or discontinue holding a Court of Sessions depending whether "the dispatch of the criminal business of the district renders it necessary". Two justices could preside at a General Sessions, a judge of the Superior Court sitting alone could hold Quarter Sessions, except in Montreal and Quebec, and in those two cities the Recorder or Inspector and Superintendent of Police sitting alone could hold Quarter Sessions. The criminal jurisdiction was legislatively defined such that Sessions might "hear and determine all matters relating to the preservation of the peace, and whatsoever is then by them cognizable according to the Laws of England then in force in Lower Canada".[31] Finally, the Recorders and the Inspectors and Superintendents of Police for the cities of Montreal and Quebec were constituted justices of the peace with the jurisdiction of two justices. As well, a justice sitting alone was given jurisdiction over certain minor offences within the territorial limits of any municipality.[32]

Courts of Criminal Jurisdiction — Ontario

The criminal jurisdiction of the Court of Queen's Bench for Upper Canada was established by statute as being equivalent to that of "a Superior Court of...Criminal jurisdiction" in England.[33] Accordingly, the Court had theoretically plenary criminal jurisdiction. By separate enactment, Courts of Oyer and Terminer and General Gaol Delivery were to be held twice yearly in each county outside of Toronto and three times yearly in Toronto. Such commissions, when issued, were directed to judges of the superior courts, although provision was also made for inclusion of County Court judges and counsel learned in the law.[34] Justices of the peace were to hold Courts of Sessions

[28] *An Act Respecting the Court of Queen's Bench*, C.S.L.C. 1860, c. 77, ss 67, 69, 70. Note that in exercise of its original criminal jurisdiction, the Court of Queen's Bench could sit with only one judge (ss 71, 72), and that in each district two terms of the Court were to be held in each year (s.77).

[29] *An Act Respecting Courts of Oyer and Terminer*, C.S.L.C. 1860, c. 96, s.1.

[30] *An Act Respecting the Division of Lower Canada into Districts for the Administration of Justice*, C.S.L.C. 1860, c. 76.

[31] *An Act respecting the Courts of General or Quarter Sessions of the Peace, Justices of the Peace, and Special Sessions of the Peace*, C.S.L.C. 1860, c. 97, ss 1, 2, 5. Note that the jurisdiction of the Superior Court was civil in nature, aside from its supervisory jurisdiction over the lower courts: *An Act Respecting the Superior Court*, C.S.L.C. 1860, c. 78, ss 1, 4. Other civil courts were the Circuit Courts (C.S.L.C. 1860, c. 79, s.2) and the Commissioners' Courts (C.S.L.C. 1860, c.94). One assumes that justices did not often sit in Sessions since, unlike Recorders, they were omitted from Sessions jurisdiction by the *Criminal Code*, S.C. 1892, c.29.

[32] *An Act Respecting the Police in Quebec and Montreal, and certain regulations of Police in other Towns and Villages*, C.S.L.C. 1860, c. 102, ss 1(1), 9-20.

[33] *An Act respecting the Superior Courts of Civil and Criminal Jurisdiction*, C.S.U.C. 1859, c.10, s.3.

[34] *An Act respecting Courts of Oyer and Terminer and General Gaol Delivery and of Assize and Nisi Prius*, C.S.U.C. 1859, c.11, ss 1, 2.

quarterly in the counties of the province. But rather than one of the justices *simpliciter* presiding as chairman of Sessions, that function was specifically reserved for a judge of the County Court, thereby allowing the judges of that court of restricted civil jurisdiction a role in the administration of criminal justice.[35] As with the Courts of Oyer and Terminer and General Gaol Delivery, the jurisdiction of Sessions was not specifically declared in the Consolidated Statutes for Upper Canada. Within municipalities, separate courts were established at two levels. A Recorder's Court, with a barrister of five years standing, or in his absence the mayor sitting either alone or assisted by aldermen, was constituted with the same criminal jurisdiction as the Court of Sessions exercised in counties. As well, justices of the peace, police magistrates and mayors were empowered to try offences against municipal bylaws.[36] In addition, specific minor offences were expressly made triable by justices of the peace sitting alone.[37]

Consolidated Statutes of Canada, 1859

Examination of Title 11, "Criminal Law", of the 1859 Consolidated Statutes of Canada reveals 157 offence provisions.[38] Of this total, there are seventy-nine felonies, forty-two misdemeanors, and thirty-six not specifically identified as either but including such obvious felonies as murder, accessory after the fact thereto and manslaughter. The accompanying Table correlates the numbers of express felonies and misdemeanors with the maximum penalty prescribed for the offence.

Type of Offence	Maximum Penalty	Number of Such Offences
Felonies	Death	9
	Life	13
	14 Years	8
	10 Years	6
	Any term not less than 7 years	1
	7 Years	13
	5 Years	2
	4 Years	4
	3 Years	3
	Any term not less than 2 years	17
	2 Years	3
	Total	79

[35] *An Act relating to the Court of General Quarter Sessions of the Peace*, C.S.U.C. 1859, c.17, ss 3, 5.

[36] *An Act respecting the Municipal Institutions of Upper Canada*, C.S.U.C. 1859, c.54, ss 366, 369-71.

[37] E.g., *An Act to prevent the Profanation of the Lord's Day, in Upper Canada*, C.S.U.C. 1859, c. 104 (fines not to exceed $40 or in default imprisonment not to exceed three months); *An Act respecting Petty Trespasses in Upper Canada*, C.S.U.C. 1859, c. 105 (animal trespass for which fines not to exceed $10).

[38] In chapters 89-98 (excluding c.97: *An Act respecting Principals in the second degree, accessories, and second convictions*).

Misdemeanors	14 Years	5
	7 Years	3
	5 Years	1
	4 Years	1
	3 years	12
	Any term not less than 2 years	9*
	2 Years	6
	6 months	2
	Discretionary	3
	Total	42

* Includes 5 offences punished "accordingly"

Of the offences not specifically identified as one or the other, twenty-one are punishable by fines, fourteen by maximum terms of imprisonment and one by death. Of the offences punishable by terms of imprisonment, three are for life, six for fourteen years, one for three years, three for any term not less than two years and one for three months. The twenty-one offences punishable by fine alone are made triable before justices of the peace.

The information set out in the Table is, however, not as significant in determining the jurisdiction of section 96 courts as was the case with New Brunswick and Nova Scotia. In the two Maritime provinces, Sessions had been restricted in its criminal jurisdiction; this was not so in the Canadas where Sessions, in general, retained its formal plenary jurisdiction subject to the "any case of difficulty" proviso. In this regard it must be remembered that in Lower Canada, a Court of Sessions or its equivalent could be constituted in three ways: (i) justices of the peace sitting together; (ii) a Superior Court judge sitting alone; and (iii) in the cities of Montreal and Quebec, the Recorder, or Inspector and Superintendent of Police, sitting alone. In Upper Canada there were two means to constitute Sessions: (i) justices of the peace with a County Court judge as chairman; and (ii) in municipalities, the Recorder or Mayor sitting in the Recorder's Court. Given this variety of combinations to constitute Sessions, the legislature might limit jurisdiction by either a general restriction — thereby treating the courts, though differently constituted, as equivalents — or by varying jurisdiction depending on the constitution of the court. As to the former, the only provision in the 1859 Canadian Consolidation specifically limiting the jurisdiction of Sessions in general did so by prohibiting trial at Sessions of eight misdemeanor offences dealing with larcenies by servants, trustees or bankers, each punishable by imprisonment not exceeding three years.[39] As to the latter, neither justices nor Recorders had jurisdiction to try any of five felony and one misdemeanor offences concerning explosives and one felony offence relating to arson.[40]

Finally, the 1859 Consolidation authorized Recorders generally, Inspectors and Superintendents of Police in Montreal and Quebec, Police Magistrates in Upper Canada and two justices of the peace, sheriffs and deputy-sheriffs in Lower Canada to try the following offences summarily: (1) simple larceny not exceeding $1 in value, (2) attempted larceny from the person, (3) simple larceny, (4) aggravated assault, (5) assault on a female or on a male child, (6) assault on a magistrate or other officer, and (7) keeping or being an inmate of a disorderly or bawdy house. With respect to the first three offences, consent of the accused was a prerequisite to the exercise of summary jurisdiction, but for the latter four, jurisdiction was absolute. The maximum terms of im-

[39] *An Act respecting Offences against Person and Property*, C.S.C. 1859, c.92, ss 51-66.

[40] *An Act respecting Offences against the Person*, C.S.C. 1859, c. 91, ss 15, 16, 18 per s. 47; *An Act respecting Arson and other malicious injury to property*, C.S.C. 1859, c. 93, ss 2,3,11,13 per s.39.

prisonment provided under the Act were three months in respect of the first three offences and six months for the last four.[41] In addition, particular statutes authorized justices of the peace to try various minor offences summarily and impose punishment by way of fine.

The courts of criminal jurisdiction for the provinces of Upper and Lower Canada as reflected in the 1859-60 consolidations continued structurally unaltered until and beyond Confederation. With respect to jurisdiction, however, an important limitation was enacted in 1861 with respect to Quarter Sessions and Recoder's Courts to remove jurisdiction to try "Treasons and Felonies, for conviction whereof the punishment of Death is imposed".[42] In addition to offences constituting treason, the felony offences thus removed from the jurisdiction of Sessions and Recorders were: murder, poisoning or stabbing with intent to murder, rape, carnal abuse of girls under ten years of age, buggery, robbery with violence, burglary with assault with intent to murder, arson to an occupied dwelling house, arson of a ship, and endangering a vessel.[43] In 1865 a maximum penalty of life imprisonment was substituted for the death in seven of these offences, leaving only murder, rape and carnal abuse of girls under ten as the only felonies subject to the death penalty.[44]

Historical inquiry in respect of Ontario and Quebec leads to the following conclusion: (i) a non-section 96 court, that of the Recorder, sitting with the jurisdiction of a Court of Sessons, enjoyed a comprehensive indictable offence jurisdiction except for specific offences restricted to a superior court of criminal jurisdiction when punishable by death; (ii) in Ontario, trial by jury was available only before a court with a section 96 element — either a superior court of criminal jurisdiction or the Sessions chaired by a County Court judge; and (iii) in Quebec, trial by jury was legally possible before a Sessions composed of justices.

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[41] *An Act respecting the prompt and summary administration of Criminal Justice in certain cases*, C.S.C. 1859, c. 105, ss 1,4,16,30,31.

[42] *An Act to abolish the right of Courts of Quarter Sessions and Recorders' Courts to try Treasons and Capital Felonies*, S.C. 1861, c.14, s.1.

[43] *An Act respecting Offences against the Person*, C.S.C. 1859, c.91, ss 5,19,20,22; *An Act respecting Offences against Person and Property*, C.S.C. 1859, c.92, ss 1,8; *An Act respecting Arson and other malicious injuries to property*, C.S.C. 1859, c.93, ss 1,7,8.

[44] *An Act for abolishing the punishment of death in certain cases*, S.C. 1865, c.13, s.1.