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Graham Parker

Osgoode Hall Law School of York University

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Citation Information

Parker, Graham. "Jury Reversal and the Appellate Court View of Law and Fact." *Osgoode Hall Law Journal* 14.2 (1976) : 287-305.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol14/iss2/3>

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JURY REVERSAL AND THE APPELLATE COURT VIEW OF LAW AND FACT

By GRAHAM PARKER*

A. INTRODUCTION

This short comment had grandiose beginnings. First, it was meant to provide a legal history of the unusual, if not unique, provision in s. 605(1)(a) of the Canadian *Criminal Code* which, since 1930, has given the Attorney General the right to appeal an acquittal on any ground involving “a question of law alone.”¹

Secondly, this naive researcher wanted to discover the difference between a question of “law” and a question of “fact”.

Finally, there would be a wide-ranging discussion of the jurisprudence of appellate law and procedure.

Instead, if this humble piece deserved a title it should be called, “A Prolegomenon on Crown Appeals from Acquittals” or “Towards a Theory of Appellate Practice”. Perhaps others will be encouraged to pursue this complicated and important subject to a happier conclusion.

B. THE HISTORY OF THE PROVISION

The history of the 1930 amendment to the Code which provided us with what is now s. 605(1)(a) is very quickly told.

Canadians interested in the protection (or, indeed, establishment) of fundamental civil liberties often complain of the wide divergence between the protections of liberty found in the United States and the official incursions made by Canadian law enforcement officers and courts. When the *Morgen-taler* case² was decided by the Canadian appellate courts, many observers from the United States were very surprised that the Crown should have power to appeal a jury’s verdict.

Yet, when the Code was amended in 1930 to provide for Crown appeals from acquittals, there was absolutely no debate in the House of Commons or the Senate on this important issue. The Minister of Justice of the time, Mr. Lapointe, announced first reading of a bill to make several amendments to the *Criminal Code*. In closing his remarks, he announced that there were several amendments of a procedural nature which a recent inter-provincial conference of Attorneys General had decided were necessary changes to Canada’s criminal law. One of these made fundamental changes in the previously final nature of

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* Graham Parker is a Professor, Osgoode Hall Law School, York University.

¹ R.S.C., 1970, c. 34.

² (1975), 30 C.R.N.S. 209.

the jury verdict. The members of Parliament showed some interest in items of substantive law which sought to remedy problems relating to sedition, criminal negligence and driving an automobile while intoxicated. They obviously did not understand the significance of s. 28 of c. 11, 1930 which is now s. 605 (1) (a). Alternatively, they did not care in those depression days, and found more urgent concerns in protecting Canadians from dangerous revolutionaries who would henceforth be more easily convicted of sedition. Similarly, one member noted that more stringent laws were needed to deter the intoxicated motorist as 70 Ontarians had been killed by automobiles in the previous year.

Ironically, one private member, Mr. Church, wanted to insert an additional clause in this bill to amend the *Criminal Code* because he claimed that judges should be prohibited from making adverse comments about jury's verdicts. This practice had become all too common of late. He added:

The functions of a judge are defined by law; they are set out by precedent and by statute. There is no legislative authority for a judge to criticize the action of a jury. He sits in the capacity of a presiding judge; both judge and jury have functions to perform. I think however that at the present time the judges are going altogether too far, and this applies to some of the recent appointees in the province of Ontario. They are overstepping the line which separates the function of the judge and that of the jury.³

Mr. Lapointe advised against any such change in the law because:

I am afraid the suggested amendment cannot be accepted. It almost amounts to a reflection upon the judges. Apart from that I think the judges have a right, if they wish, to send juries back to reconsider their verdicts. I wonder how a judge could take that action without first addressing some remarks to the jury.⁴

A more decisive interference with the province of the jury was in the offing and went unchallenged.

C. THE CASE LAW

Defenders of the widened powers of Crown appeal will point out that the Attorney General is only given a right to appeal on a "question of law alone." This wording suggests that the fact-finding function, at the trial level, particularly as it relates to the jury, is not being affected in any way. Admittedly, there have been very few cases of Crown appeals from acquittals by juries. Critics of the *Morgentaler*⁵ decision are not correct when they suggest that the conviction of Dr. Morgentaler by an appeal court was the first in Canadian legal history, but there have been very few interferences with jury verdicts.

Even if we ignore this debate, the problem remains that the distinction between "law" and "fact" is a morass of irreconcilable precedents, *ad hoc* decisions, and judgments which tend to state that a "question of law alone" must be interpreted in the "strict sense" and then ignore that advice.

The Supreme Court of Canada decision in *Belyea and Weinraub v. The*

³ Can. H. of C. Debates, Vol. III, 2759 (1930) at c. C-34.

⁴ *Id.*

⁵ *Supra*, note 2.

*King*⁶ was a most important decision because it was the first time that court had considered the new provision for Crown appeals against acquittals. In addition it was the first prosecution in Ontario under the *Combines Investigation Act*.⁷ Belyea and Weinraub had been acquitted by a judge sitting alone and the Ontario Supreme Court, Appellate Division,⁸ reversed that judgment, convicted the two, and fined them.

Perhaps it was unfortunate that the *Belyea* decision, which has continued to be considered authoritative, was a prosecution outside the *Criminal Code*, tried without a jury, and resulted, on appeal, in a fine, not a prison term, being imposed. Those factors are not mentioned for the purposes of distinguishing the case out of existence, but simply to express regret that an important policy was first laid down in an atypical case.

One point, and perhaps only one point, is clear about the meaning of the phrase "question of law alone"; it does not allow an appeal from acquittal where the Attorney General challenges the sufficiency of the evidence. Anglin, C.J.C. said of that phrase that it "implies, if it means anything at all, that there can be no attack [by the Attorney General] on the corrections of any of the findings of fact, or no complaint of the sufficiency thereof. . . ."⁹

That seems to be the end of certainty. The Ontario appellate court found that the trial judge had fallen into an error of law in "not distinguishing between the conspiracy and overt acts which, while not themselves the conspiracy, were evidence of the existence of the conspiracy."¹⁰

Although the Ontario court professedly did not challenge the trial judge's fact-finding, it then proceeded to analyze the facts for the purpose of showing that the two accused were in a conspiracy with three other persons whom the trial judge had convicted. In other words, this hardly seems to be a "question of law alone." At first Anglin, C.J.C. seemed to agree. He would have had "no hesitation" in finding that the overt acts would constitute a conspiracy; but he did not proceed on that ground because it "would involve making a finding of fact contrary to a finding of the trial judge."¹¹

Yet, the trial judge's crucial error was that he found that the guilt of Belyea and Weinraub depended on their actual knowledge of, or actual participation in, those overt acts. Once again, this hardly seems a strict question of law. Anglin, C.J.C. decided, however, that where a "conclusion of mixed law and fact, such as the guilt or innocence of the accused, depends . . . upon the legal effect of certain findings of fact made by the judge or the jury," the appellate court should not regard that as "anything else but a question of law."¹² If that is so, then there is no issue which is not a question of law. The

⁶ (1932), 57 C.C.C. 318.

⁷ R.S.C., 1927, c. 26.

⁸ (1931), 56 C.C.C. 68.

⁹ (1932), 57 C.C.C. 318 at 339.

¹⁰ *Id.* at 336.

¹¹ *Id.* at 337.

¹² *Id.* at 339. For an interesting difference of opinion on this same issue, see *R. v. Brown* (1962), 132 C.C.C. 59.

Belyea decision must be clearly wrong as it is patently too broad. For a start, it seems to equate "mixed law and fact" with a "question of law alone." This interpretation by Anglin, C.J.C. seems to deny the difference between the various sections describing the appellate jurisdiction.

Another area where the cases are relatively clear is that concerning procedural matters appealed by the Crown. For instance, there are several cases which decide that the admissibility or rejection of evidence is not a question of law.¹³ At best, the voluntariness of a confession has been viewed as a question of mixed fact and law. Mere inferences drawn from evidence cannot be attacked on the question of law basis. This amounts to merely a sufficiency of evidence question and is not reviewable,¹⁴ although one leading case¹⁵ would limit sufficiency to cases where the decision, with regard to admissibility, turned upon conflicting statements of fact by witnesses. This seems too narrow; credibility is clearly a question of fact or mixed fact and law.¹⁶

If a trial judge fails to direct a jury on what should happen if they disagree, that is considered a question of law which the Crown can appeal on a jury acquittal.¹⁷ If a magistrate dismisses a case for want of prosecution, because the informant did not appear at the accused's trial for assault, at least one court would class that as a question of law.¹⁸ That is very difficult to reconcile with a decision that a Crown appeal based on the trial judge's want of jurisdiction was not a question of law.¹⁹

One of the most important decisions is *R. v. Murikami*,²⁰ where the Crown appealed from an acquittal by a jury of an accused who had been charged with an abortion offence. The Crown argued that the trial judge had misdirected himself in rejecting a confession. The Supreme Court of Canada dismissed the Crown's appeal. Of the majority, only Cartwright, J. examined the question of law issue and decided that the trial judge did not misdirect himself as a matter of law, but was simply deciding that the Crown had not discharged its burden. The Alberta appellate court's treatment of the case is more illuminating. The majority (three of five judges) decided that the admissibility or rejection of evidence is a question of law but the question of voluntariness is a question of fact. In explanation, W. A. Macdonald, J.A. said:

. . . the rejection of the evidence in this case cannot be attacked so long as the finding of fact as to its 'non-voluntary' character stands. To attack the rejection of

¹³ *E.g.*, *R. v. Boisjoly* (1956), 22 C.R. 19, which was a Crown appeal from an acquittal on a charge of murder. But *cf.* *R. v. Fitton* (1950), 24 C.R. 309 and *R. v. Howlett* (1950), 9 C.R. 353.

¹⁴ *R. v. Pearson* (1959), 123 C.C.C. 271.

¹⁵ *R. v. Haslam*, [1945] 1 W.W.R. 368 at 370, following *R. v. Lai Ping* (1904), 8 C.C.C. 467.

¹⁶ *R. v. Bercovitch and Somberg* (1946), 1 C.R. 200.

¹⁷ *R. v. Arsenault* (1956), 115 C.C.C. 400.

¹⁸ *R. v. Allen* (1961), 34 C.R. 240.

¹⁹ *R. v. Sam Wong*, [1944] 3 W.W.R. 717.

²⁰ (1951), 12 C.R. 213.

the statement on appeal, the appellant must attack as well the finding of fact that it was not a 'voluntary' statement and this cannot be said to involve a question of law alone.²¹

The cases on the question of appeals on questions of law are very numerous and often raise related issues which rather complicate matters. Many of them concern appeals by convicted persons who have lost previous appeals with one judge dissenting. Others concern the ambit of appeal where there is a case stated, a directed verdict or a trial *de novo*. Most of these decisions are of limited use. Furthermore, a strong argument can be made that the question of law *alone* provision in s. 605 should be dealt with more strictly than these other appellate matters. *Sunbeam Corporation (Can.) Ltd. v. The Queen*²² is a crucial judgment largely ignored in *Morgentaler*. Ritchie, J. in *Sunbeam* relied on the remarks of Cartwright, C.J.C. in *Regina v. Warner*²³ (in a 5-4 decision), *R. v. Ciglen*,²⁴ and *Regina v. Lemire*²⁵ (where he was dissenting). In all but *Ciglen*, the accused had been convicted of some offence at trial and the Crown appealed the more lenient treatment of the provincial Court of Appeal.

In *Warner*, the accused had been convicted of murder at trial. A Court of Appeal substituted a verdict of manslaughter. The Crown's appeal to the Supreme Court of Canada was dismissed. Cartwright, J. decided that the verdict's not being supported by the evidence was a question of fact. Ritchie, J. gave the opinion that a question of reasonable doubt was a question of fact.

In *Lemire*, the accused had been convicted by a judge sitting alone. The Quebec Court of Appeal had allowed his appeal against conviction but it was restored by the Supreme Court of Canada in a four to three decision. Martland, J. quoted *Belyea* and said that:

. . . the guilt of the respondent . . . depends upon the legal effect of facts found, or inferred, in the Court below. This raises questions of law in respect of which . . . I think there was error.²⁶

As was pointed out earlier in the discussion of *Belyea*, this suggests that any discussion of facts by an appellate court makes that discussion a question of law. A further factor which must be kept in mind about *Belyea* and *Lemire* is that they were both cases of trial judges sitting without juries.

Cartwright, J. dissented in *Lemire* and said that *Warner* showed that where one ground is appealable and another is not, the appeal to the Supreme Court must be dismissed. In any event, he believed that the grounds of appeal were grounds of fact or mixed fact and law. Surely any time the court is examining a verdict where the discussion turns on "the legal effects of facts" (to use Martland, J.'s words) that is a question of mixed law and fact.

Ciglen, which was a non-jury trial involving a prosecution for evasion

²¹ *Id.* at 20-21.

²² (1969), 1 D.L.R. (3d) 161.

²³ (1961), 34 C.R. 246.

²⁴ (1970), 11 C.R.N.S. 129.

²⁵ (1965), 45 C.R. 16.

²⁶ *Id.* at 37.

of taxes under the *Income Tax Act*, decided that the trial judge had misinterpreted the term "suppressing" of income and made two other errors of law. When these legal errors were corrected, the trial judge, on the agreed facts, would have had no problem convicting the accused. Such errors raised questions of law which empowered the appeal court to substitute a conviction. (There is some irony in that the original trial had been aborted after 68 days of hearing by the death of the trial judge and the second trial, leading to an acquittal, had taken 115 days.)

Spence, J. (who had dissented in the *Sunbeam* case) took a very simplistic view of "question of law" when he said: "Surely the meaning in law to be given to a word which appears in an indictment or in a section of the Code is purely a question of law."²⁷

On that basis, any question would become a question of law. As *Ciglen* was relied upon by Pigeon, J. in *Morgentaler* we would expect Spence, J. to agree with the majority in *Morgentaler*. As Spence, J. dissented in the latter case, can we assume that he would distinguish *Ciglen* because it was a trial without a jury or on some other ground?

Spence, J. in *Ciglen* seems to be in disagreement with the majority in *Warner* because he would call a question of reasonable doubt decided by the trial judge contrary to the evidence a "finding on pure law."²⁸

The rather uncommunicative judgments of the majority of the Supreme Court in *Ciglen* must be contrasted with the dissent of Cartwright, C.J.C. and Hall, J. The grey area between "fact" and "law" is well illustrated by the very different interpretation given by Cartwright, C.J.C. in his dissenting judgment. For instance, the Crown had argued on appeal that the judge had misdirected himself on the question that certain monies did not amount to taxable income. Cartwright, C.J.C. commented:

It is obvious that if the learned trial judge had accepted the submission of counsel for Ciglen on this point he would have dismissed the charge and reasons of over 100 pages would have become unnecessary. As I read his reasons, the learned trial judge did not base his finding that he was not satisfied that the moneys in question were taxable income on the failure of the Minister to assess but on the view which he took of the evidence as a whole. The question whether his conclusion was right or wrong is not one of the law alone.²⁹

The Chief Justice arrived at the same conclusion in relation to the trial judge's definition of "suppression" and the *mens rea* of Ciglen in "wilfully" evading income tax. He said: ". . . guilty intent may be inferred from the actions of an accused but the question of whether or not the guilty intent exists is one of fact."³⁰

In conclusion, Cartwright, C.J.C. made an important policy statement about s. 605:

²⁷ *Supra*, note 24 at 148.

²⁸ *Id.* at 149.

²⁹ *Id.* at 134.

³⁰ *Id.* at 136.

It is . . . of the utmost importance that the courts should guard against extending this power by judicial decision to cases, not falling strictly within the terms of the statute creating it, in which the Court of Appeal is satisfied that the judgment of acquittal is clearly wrong.³¹

Cartwright, C.J.C. used the analogy of the unreasonable verdict found in s. 613(1) and pointed out that no corresponding power existed on appeal from an acquittal and that "such a power could be conferred only by Parliament."³²

Cartwright, C.J.C. took the same view in *Lampard v. The Queen*,³³ where, in an unanimous decision, the Supreme Court of Canada restored an acquittal which had been reversed by the Ontario Court of Appeal. A trial judge sitting without a jury had acquitted on charges under the securities legislation. The Court of Appeal did not have the benefit of Ritchie, J.'s judgment in *Sunbeam*, but it was clearly followed by the Supreme Court. The trial judge had allegedly made an error of law in not convicting when the facts were "not in dispute" as the Court of Appeal found. Cartwright, C.J.C. disagreed: "There is dispute as to the vital question of fact whether the appellant did the acts which he is proved to have done with the guilty intention specified in the section."³⁴

Cartwright, C.J.C. quoted Bowen, L.J. in *Edgington v. Fitzmaurice* that a "state of a man's mind is as much a fact as the state of his digestion."³⁵

Much of Pigeon, J.'s judgment in *Morgentaler* is taken up with a very detailed examination of the legislative history of the Code sections about appellate procedure and the meaning of the word "verdict". The judgment places great reliance on the judgment of Anglin, C.J.C. in *Belyea v. The King* (with passing reference to *Ciglen v. The Queen*), and *Wild v. The Queen*.³⁶

Surprisingly, Pigeon, J. took little account of Ritchie, J. in *Sunbeam Corporation (Can.) Ltd. v. The Queen*, which was another Crown appeal from an acquittal at trial of an accused charged under the *Combines Investigation Act*. The Supreme Court of Canada overruled the Ontario Court of Appeal, which had registered a conviction.³⁷ Ritchie, J. decided that a "question of law alone" was not involved when the reviewing court is of opinion that "the finding of the trial judge is unreasonable and improper having regard to the evidence."³⁸

Cartwright, C.J.C., Fauteux, and Martland, JJ. concurred with Ritchie, J.; with Spence, Judson, and Pigeon, JJ. dissenting.

Spence, J. took a rather dubious view in his dissent:

³¹ *Id.* at 136-37.

³² *Id.* at 137.

³³ (1969), 4 D.L.R. (3d) 98; [1969] S.C.R. 373.

³⁴ *Id.* at 103.

³⁵ (1895), 29 Ch.D. 459 at 483.

³⁶ (1971), 11 D.L.R. (3d) 58.

³⁷ (1967), 1 C.R.N.S. 183. Laskin, J.A. dissenting.

³⁸ (1969), 1 D.L.R. (3d) 161 at 173.

... when there is ... a statutory presumption to be applied, once the facts necessary to give rise to it are found by the trial judge to be established beyond reasonable doubt, the question whether the inference should be made is no longer anything but a question of law alone: the statute does not provide that the facts to be inferred *may* be deemed to exist but that they *shall* be.³⁹

The further remarks of Ritchie, J. in the majority judgment go far toward not merely distinguishing but perhaps overruling *Belyea*.

Ritchie, J. made a careful analysis of the Code provisions relating to the powers of appellate courts. He noted that, under the *Criminal Code*, s. 592 (i)(a) (which is now s. 613(1)(a)), on an appeal against conviction, the appeal court had jurisdiction to allow an appeal on three grounds:

- (i) The verdict was "unreasonable" or "cannot be supported by the evidence".
- (ii) The trial court's judgment should be set aside on the ground of "a wrong decision on a question of law".
- (iii) There was "a miscarriage of justice."

Although Ritchie, J. does not cite it, he might have referred to s. 603(1)(a) (then s. 583(1)(a)) which has more explicit provisions about the rights of appeal against conviction on the following grounds:

- (i) ... involves a question of law alone.
- (ii) ... involves a question of fact or a question of mixed law and fact.
- (iii) on any ground ... not mentioned in (i) or (ii) that appears to the court of appeal to be ... sufficient.

These wide provisions, including the broadly discretionary "unreasonable verdict" (s. 613(1)(a)(i)), "miscarriage of justice" (s. 613(1)(a)(iii)) and other "sufficient" grounds of s. 603(1)(a)(iii), must be contrasted with the narrow ground of appeal by the Crown against acquittal, which is found in s. 605(1)(a). This provides an appeal that "involves a question of law alone".

One does not need to be an expert in statutory interpretation to notice that the appeal against acquittal provisions are, by implication, very necessarily limited by the very wide latitude of ss. 603(1)(a) and 613(1)(a). Without exploring maxims of interpretation, one can adopt the common-sense approach of Ritchie, J. who said that even if the trial judge was wrong in concluding that the evidence was not sufficient to satisfy him beyond a reasonable doubt of the guilt of the accused under s. 41(2) of the *Combines Investigation Act*, "this error cannot be determined without passing judgment on the reasonableness of the verdict or the sufficiency of the evidence" and that this was not within the power of the appellate court under s. 605.⁴⁰

He added:

Parliament has thus conferred jurisdiction on the Court of Appeal to allow an appeal against a conviction on three separate grounds, one of which is the very ground upon which the Court of Appeal allowed the present appeal, *i.e.*, that "the

³⁹ *Id.* at 189. Spence, J. had the benefit not only of the *Belyea* case, which was also a conviction under the *Combines Investigation Act*, but also of *Regina v. Moffats Ltd.*, 25 C.R. 201; [1957], O.R. 93; 118 C.C.C. 4 (C.A.), which purportedly supported his thesis about the irrebuttable presumption and yet he did not convince his colleagues in the majority.

⁴⁰ *Id.* at 172.

verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence'. The fact that s. 592(1)(a) recognizes this ground as being separate and distinct from 'the ground of a wrong decision on a question of law' appears to me to be the best kind of evidence of the fact that Parliament did not intend the phrase 'a question of law' as it is used in the *Code* to include the question of whether the verdict at trial was unreasonable or could not be supported by the evidence. It is noteworthy that having accorded the Court of Appeal jurisdiction to hear appeals against conviction on the ground that the verdict was unreasonable, Parliament did not confer the same jurisdiction on that Court in appeals by the Crown. No authority is needed for the proposition that appellate jurisdiction must be expressly conferred.⁴¹

Surely, even a superficial reading of ss. 605(1) and 613(1) shows the clearest application of the maxim *expressio unius est exclusio alterius*. There must be some reason in s. 613(1) for the drafter specifying verdicts which are purely factual and "unreasonable" on those facts. There is no such provision in s. 613(4). Pigeon, J.'s analysis in *Morgentaler* did not draw attention to this clear distinction.

Ritchie, J. in the *Sunbeam* case also subscribes to another important principle, the principle of legality. Although the rule or custom that penal statutes should be construed strictly is no longer of great force in the law, fundamental fairness would suggest that the crucial question of overruling a trial verdict should be construed in favour of the accused. If one of the grounds for *allowing* an appeal against *conviction* is miscarriage of justice, it is difficult to imagine that the statutory provisions regarding appeals against acquittal should not also militate against miscarriage. This would certainly be true in jury trials if all the remarks by our appellate judges about the sacrosanct institution of the jury are to mean anything.

If a judge misdirects himself on a question of "law" such as the intent necessary for the crime, and that is not considered a "question of law alone" (under s. 605(1)(a)), then surely the discretionary decision of the judge to put a defence to the jury should be treated in at least as liberal a fashion. In the *Sunbeam* case, the accused were clearly guilty if the minority view of the Supreme Court of Canada prevailed. The facts of the infraction of the Act had been proved. This was not true in *Morgentaler* because of the defence (or defences) which the jury obviously believed.

Another fundamental principle is that the jury's verdict is only to be interfered with in the most exceptional circumstances, because, as Laskin, C.J.C.'s dissent stated, an appellate court "has not seen the witnesses, has not observed their demeanour and has not heard their evidence adduced before a jury." No other judge of the Supreme Court referred to this principle or judicial viewpoint which appears with regularity in appellate judgments where the appellant's conviction is upheld. These courts are particularly fond of using the provision in s. 613(1)(b)(iii) that, notwithstanding that the appellate court might have decided that there had been a wrong decision on a question of law at trial, the appeal court was "of the opinion that no substantial wrong or miscarriage of justice has occurred."

In addition, appeal courts have made it clear, particularly since *Wool-*

⁴¹ *Id.* at 174.

mington v. D.P.P.,⁴² that all possible defences must be put before the jury. Although *Mancini v. D.P.P.*⁴³ made it clear that this does not mean that the trial judge is obliged to instruct the jury on fanciful defences, any possibly legitimate or feasible defence must be put to the jury. The evidential (not the persuasive) burden is on the accused to bring forward evidence for his defence. Once he has carried this burden then the issue should be put forward by the trial judge. This seems purely procedural and a question of fact. On the other hand, on one would expect the trial judge in *Morgentaler* to instruct the jury on the defences of accident, mistaken identity or superior orders.

The reverse therefore should be true. If a trial judge has decided that a legitimate defence could be put before a jury and the jury has acquitted, it is difficult to see how the appeal court could take away the privilege of that defence.

In the light of *Sunbeam* and *Lampard*, the other authority relied upon by Pigeon, J. (in *Morgentaler*) viz., *Wild v. The Queen*, must be clearly wrong.

The Court was not unanimous (six to three) on this occasion; Cartwright, C.J.C., and two others were in dissent. The accused's crime was an unsympathetic one; while very drunk, he allegedly drove a car and killed three of his friends who were passengers. The trial judge, sitting without a jury, decided that he was not satisfied beyond a reasonable doubt of the identity of the driver of the car at the time of the accident.

Martland, J. once again made a rule similar to the one in *Ciglen* which would include anything within the purview of "question of law." His remarks showed little regard for any narrowing of the concept of question of law:

. . . in considering the facts (the trial judge) failed to appreciate their proper effect, in law, in that he did not distinguish between a conjectural possibility, arising from those facts, and a rational conclusion arising from the whole of the evidence.⁴⁴

Ritchie, J. was no more persuasive in saying that the trial judge was wrong in law in calling evidence based on the rule in *Hodge's Case*⁴⁵ a "matter of conjecture."⁴⁶

Cartwright, C.J.C. in dissent, argued that *Lampard* should be followed and that s. 613(1) should be "limited to questions of law in the strict sense" and that an inference from proven facts as to whether the appellant was driving was "a pure question of fact."⁴⁷

Hall, J. in dissent, was more explicit and very much to the point when

⁴² [1935] A.C. 462.

⁴³ [1942] A.C. 1.

⁴⁴ *Id.* at 70.

⁴⁵ (1838), 2 Lew. C.C. 227; 168 E.R. 1136.

⁴⁶ (1971), 11 D.L.R. (3d) 58 at 71.

⁴⁷ *Id.* at 62.

he said that the appeal courts had “no right to usurp” the function of the trial judge.⁴⁸

In the light of his views in previous cases, Spence, J.’s dissent is surprising:

. . . if there is evidence upon which a learned trial judge may find that there could be another rational conclusion than whether or not that evidence would have been sufficient to cause a Court of Appeal to reach a like conclusion is irrelevant. The task of determining the rationality of another conclusion if evidence exists is for the trial court judge and any weighing of that evidence in a Court of Appeal is engaging in considerations of something other than a question of law alone.⁴⁹

In *Regina v. Odeon Morton Theatres Ltd.*, the Manitoba Court of Appeal was hearing a Crown appeal against the acquittal at trial of the film “Last Tango in Paris.” In a three to two decision, Freedman, C.J.M. for the majority, said:

Manifestly the problem whether the appeal involves a question of law alone is not one to be determined in the abstract but rather against the actualities of the record. It is not usually difficult for an experienced Crown counsel to frame an appeal in language suggesting that a question of law is there involved.⁵⁰

The Chief Justice did not approve of appeal questions which had the form but not the substance of “law”. In other words, he did not regard s. 613(4) as covering questions of law which were merely “poised in the air.”⁵¹

Freedman, C.J.M. had been the sole dissenter in the three-judge court in *Regina v. Poitras*.⁵² This case is one of the few recorded cases where an appeal court has registered a conviction after an acquittal at trial, but this was a charge under the *Narcotic Control Act*⁵³ rather than the *Criminal Code*. Freedman, C.J.M. was of the opinion that “. . . this was a judgment based on the facts as the trial judge viewed them. I find it impossible to say that the appeal from that judgment involves a question of law alone.”⁵⁴

He had strong support in *Regina v. Madigan*,⁵⁵ another drug trafficking case, in which the Crown argued, on appeal, that the acquittal had resulted from the trial judge’s failure to address himself on the implications of s. 21 of the Code and therefore a “question of law” arose. The Ontario Court of Appeal, in a two to one decision, dismissed the appeal and Jessup, J.A. said:

I do not think that simply from the failure to expressly mention s. 21 it can be presumed the provisions of so fundamental a provision of the criminal law were not present to his mind. On the other hand, if he had the section present to his mind, the contention is that he failed to apply it. This amounts to a complaint that he drew the wrong inference from the facts. I think it is clear from . . .

⁴⁸ *Id.* at 72.

⁴⁹ *Id.* at 75.

⁵⁰ [1974] 3 W.W.R. 304.

⁵¹ *Id.* at 305.

⁵² (1973), 6 C.C.C. (2d) 559.

⁵³ R.S.C. 1970 c. N-1.

⁵⁴ *Supra*, note 52 at 560.

⁵⁵ [1970] 1 C.C.C. 354.

Sunbeam . . . that the inference of guilt even from undisputed facts, including the intention of an accused is an inference of fact.⁵⁶

Sunbeam was also followed in *Regina v. Nichol*,⁵⁷ an appeal from acquittal on a charge of criminal negligence. The Court of Appeal decided it could not interfere. Schroeder, J.A. said, "[H]owever wrong we may think that the learned judge was . . . he was discharging the functions of a jury on a question of fact and not of law."⁵⁸

The Prince Edward Island Appeal Court decided that a verdict of not guilty from a properly instructed jury is a question of fact and to allow an appeal in such circumstances would have the effect of placing the accused in complete jeopardy a second time.⁵⁹

On the other hand, Smith, C.J.A. in *Regina v. Kipnes*,⁶⁰ was satisfied that:

. . . when the trial judge reached the conclusion that the respondent was not guilty he was applying misconceptions of the law as to what was necessary to be proved in order to establish the Crown's case.⁶¹

The Crown's appeal was allowed and the Alberta Court of Appeal convicted the accused of an income tax offence.

The crucial question is the role of the trial judge and the amount of autonomy to be granted to him. If the trial judge makes an egregious mistake of law, then that is a question of law alone, in the strict sense. A mere ambiguity in law should not be enough for a Crown appeal against acquittal, or an appellate order for a new trial, and certainly should not result in a conviction.

In addition, the role of the jury must be clearly kept in mind. The appeal courts' decisions described above do not reflect any great respect for the jury system which always receives adulatory remarks from judges and lawyers at bar dinners and conventions.

The cases reviewed show very few instances where the appeal court has substituted a conviction, and in most of those the charge was not one under the *Criminal Code*. Furthermore, there are no cases, other than *Morgentaler*, where the appeal court has usurped the function of the jury.

One of the best discussions on the "question of law" issue is by Kellock, J. in *Can. Lift Truck Co. v. Deputy Minister*:

While the construction of a statutory enactment is a question of law, and the question as to whether a particular matter or thing is of such a nature or kind as to fall within the legal definition is a question of fact . . .⁶²

⁵⁶ *Id.* at 357.

⁵⁷ [1970] 2 C.C.C. 124.

⁵⁸ *Id.* at 127. See, also, the adoption of *Sunbeam* in *R. v. Martin* (1971), 4 C.C.C. (2d) 540.

⁵⁹ *Regina v. Cusack* (1971), 3 C.C.C. (2d) 527, where the accused had been acquitted of non-capital murder.

⁶⁰ (1971), 15 D.L.R. (3d) 449.

⁶¹ *Id.* at 458. See similar decision in *Regina v. Patterson* (1971), 1 C.C.C. (2d) 197.

⁶² (1955), 1 D.L.R. (2d) 497 at 498.

McDermid, J.A. in *Camrose v. Calgary Power Ltd.*, agreed and quoted the *Sunbeam* case and pointed out that the "technical definition of a question of law may be restricted by the terms of the statute, as has been done by the provisions of the Criminal Code."⁶³

Laskin, C.J.C. dissented in *Morgentaler*. He read the decision of the Quebec Court of Appeal as "finding no reversible error in the way the trial judge charged the jury on the defence of necessity."⁶⁴ This seems perfectly clear and the remarks by the Supreme Court in *Regina v. Warner*, that where there are two grounds of appeal, one mixed fact and law and the other a question of law, then the appeal against acquittal should not be entertained, should have been sufficient basis for a very different decision by the Quebec Court of Appeal.

The precedents make it abundantly clear that an insufficiency of evidence is not the same as no evidence. For instance, the unsympathetic Smith, C.J.A. makes that clear distinction in *Regina v. Peterson*, and in *Regina v. Kipnes*. In the latter, the Alberta Court of Appeal allowed an appeal and entered a conviction for an income tax offence when the trial judge, sitting alone, was considered by Smith, C.J.A. to be "applying misconceptions of the law as to what was necessary to be proved."⁶⁵ The New Brunswick Appeal Division in *Regina v. Robichaud*⁶⁶ decided that sufficiency of evidence is a question of fact, not of law. Other cases such as *Regina v. Nichol*⁶⁷ and *Regina v. Cusack*,⁶⁸ refused to interfere in two cases of offences under the *Criminal Code*, one with a jury and one without, because the jury was properly instructed, or the trial judge did not misdirect himself. Finally, in *Alta. Giftwares Ltd. v. The Queen*,⁶⁹ in an unanimous nine to zero decision, the Supreme Court of Canada distinguished *Sunbeam* and *Lampard v. The Queen* from the case then before it because those two decisions were concerned with sufficiency of evidence and inferences of guilt which were both held to be questions of fact.

The Quebec Court of Appeal seemed to be oblivious of this wealth of authority. Laskin, C.J.C. was quite correct in saying that the Quebec Court had found no reversible error on the trial judge's charge on necessity.

The following comments of the Quebec judges should be noted as indications that the Court was talking about sufficiency of evidence, *i.e.*, a question of fact which was not appealable by the Crown after an acquittal at trial, particularly where there was a jury as trier of fact:

Per Casey, J.A.:

. . . whether it be called the defence of necessity or that of *Criminal Code*, s. 45, respondent can avoid the sanctions of the law only if . . . he has succeeded in establishing . . .

⁶³ [1973] 1 W.W.R. 126 at 137.

⁶⁴ (1974), 17 C.C.C. (2d) 289 at 292-94.

⁶⁵ *Supra*, note 60 at 458.

⁶⁶ (1971), 2 C.C.C. (2d) 135.

⁶⁷ [1970] 1 O.R. 579.

⁶⁸ (1971), 3 C.C.C. (2d) 527.

⁶⁹ [1974] S.C.R. 584.

I am satisfied that the trial judge's general remarks respecting respondent's burden are beyond criticism . . .

On the element of the real and urgent medical need for the operation there may be some evidence that is relevant but if there is it is so weak that it could not have created a reasonable doubt in the minds of a properly directed jury . . .

Assuming on the need issue that there was something for the jury to consider the complete absence of proof on the other leads inescapably to the conclusion that a properly directed jury necessarily would have convicted.⁷⁰

Per Belanger, J.A.:

. . . I am of the opinion, like the trial judge, that the common law defence of necessity was permitted in the terms of s. 7(3) of the *Criminal Code*.

. . . I completely agree with [the trial judge's] résumé at the end of his account to the jury of the defence of necessity . . .

The evidence in the case could not justify a properly-directed jury in concluding that the accused's decision to provide the abortion without respect for the requirements of s. 251(4) of the *Criminal Code*, was taken in good faith in accordance with the requirements of the defence of necessity.⁷¹

If the defence of necessity were available, and the trial judge had made a résumé to the jury which was agreeable, then how can it be suggested that the jury was not properly directed? The accused did not carry the evidential burden but that has always been, at most, a mixed question of law and fact.

Admittedly, two judges of the Quebec Court of Appeal, Rinfret and Crete, J.J.A. held that there was no evidence of necessity to go to the jury but Dubé, J.A. gave no opinion on the defence of necessity, so we are left, at best, with a two-to-two decision upsetting a jury decision of acquittal.

Only Casey, J.A. implied that a s. 45 defence was open to Morgentaler, but this was only because he saw that section as another facet of the necessity defence.⁷²

Further support for the minority view can be found in the recent Ontario Court of Appeal decision in *Regina v. Anthes Business Forms Ltd.*⁷³ The accused had been acquitted on a prosecution under the *Combines Investigation Act*. The Crown alleged eight errors of law by the trial judge. The Court of Appeal found that some of the Crown's submissions were well-founded; these included a statement by a witness on cross-examination which, according to the Crown, amounted to a confession. Houlden, J.A. admitted the trial judge's error on this point and on his interpretation of the word "unduly"; but nevertheless he refused the Crown's appeal because it was necessary to look at all the evidence, and without these isolated mistakes by the trial judge, there would not automatically have been a finding of guilt. On the limited scope of a Crown appeal from acquittal, the policy stand taken by Houlden, J.A. is important:

I do not necessarily agree with the inferences drawn by the trial judge. If instead of being limited to an appeal on questions of law, there had been a full-scale appeal in this case, the result of this appeal would probably have been different.⁷⁴

⁷⁰ *Supra*, note 64.

⁷¹ *Id.* at 311, 315 and 317.

⁷² *Id.* at 292.

⁷³ (1976), 26 C.C.C. (2d) 349.

⁷⁴ *Id.* at 388.

Houlden, J.A. had strong precedent for this view, although even a superficial student of this area would realise the treacherous quality of past decisions. For instance, the Supreme Court of Canada in *Telmosse v. R.*⁷⁵ had decided that the trial judge's assessment of whether an alleged thief had feloniously taken, or merely borrowed within the legitimate terms of his employment, was a factual inference preceding a conclusion of law, and therefore was not reviewable as a question of law.

The British Columbia Court of Appeal had decided that the meaning of "discrimination in regard to employment" in provincial labour legislation, and whether there was evidence of such discriminating conduct by the defendant corporation, was a question of mixed fact and law, and not reviewable.⁷⁶ The same court decided in *R. v. Turner*⁷⁷ that the Crown could not appeal from an acquittal where the trial judge had allegedly misdirected himself on the elements of the charge of living on the earnings of prostitution.

Some of the earlier cases were strongly in favour of a narrow interpretation of "question of law alone", a position to which Houlden, J.A. in *R. v. Anthes Business Forms Ltd.* seems to have returned. In the 1933 case of *R. v. Grotzky*,⁷⁸ Haultain, J.A. viewed s. 605 as limited to questions of law arising out of proceedings at the trial based upon facts admitted or conclusively found at trial, and should not include the appreciation or weighing of evidence by the appellate court.

The Alberta Supreme Court, Appellate Division, similarly refused a Crown appeal where the trial judge had dismissed a charge of gross indecency.⁷⁹ The Crown contended that the facts disclosed an offence under s. 149 of the Code, but the appeal court considered this at best a question of mixed fact and law. Another case from the same court points out the confusion and difficulty encountered. The accused was acquitted of possession of a narcotic. The trial judge said that he was "suspicious" of the accused's behaviour, but was prepared to give him the benefit of the doubt. The majority considered this was purely a matter of proper weight and therefore a question of fact. The remarks of the two dissenting judges make a nice distinction which does not seem tenable in the light of authority:

If [the trial judge] was suspicious or if his doubt was as to the evidence of possession then that is a question of fact and there is no appeal. If he was suspicious or his doubt was as to the knowledge of the responsibility as to the content of the parcel then that involves a question of law. . . .⁸⁰

⁷⁵ (1944), 83 C.C.C. 133. This was an appeal by an accused.

⁷⁶ *R. v. F. W. Woolworth Ltd.*, [1949] 1 W.W.R. 175.

⁷⁷ (1939), 70 C.C.C. 404.

⁷⁸ (1935), 64 C.C.C. 345, adopting *R. v. Boak* (1925), 44 C.C.C. 218 at 221.

⁷⁹ *Regina v. J.* (1957), 26 C.R. 57. Cf. *R. v. Cross* (1954), 108 C.C.C. 262, where a four-judge court was evenly split. See, also, *R. v. Matioli and Nadeau* (1953), 108 C.C.C. 227.

⁸⁰ *R. v. Wagner* (1951), 12 C.R. 270 at 271. Also, note *R. v. Dreher* (1952), 14 C.R. 339, per Clinton, J. and Ford, J.A. at 361:

[The trial judge] held that the burden of proof had not been satisfied, and his findings are of fact, or of inference from fact, based upon the evidence and a proper appreciation of what the governing law and practice is and is not a misdirection of himself as to the law.

The editor of the Criminal Reports stated in a Practice Note⁸¹ that there is no single rule of practice which can determine whether an appeal covers a "question of law alone." Each case must be "determined upon its own circumstances." This is not very helpful, and such an exercise of judicial discretion should certainly be avoided in substituting conviction for acquittal, particularly if the latter is arrived at by a jury.

Houlden, J.A. also referred to *Lampard* where Cartwright, C.J.C. had said that if a trial judge was "clearly wrong" in drawing a particular inference, but there was some evidence to support that inference, then that was a question of fact, and therefore, non-reviewable. If, on the other hand, there was no evidence to support a particular inference, then the trial judge had made an error of law.⁸²

Once again, we must ask ourselves the difficult question. If the appeal court is examining the fact-finding of the trial judge, is it simply questioning that judge's competence in the purely discretionary area of fact? Alternatively, is the very difficult question of deciding what is fact and what is law of its very nature a question of law?

D. OF LAW AND FACT AND EVERYTHING IN-BETWEEN — SOME SPECULATIONS

In 1876, J.C. Wells, a Counsellor at Law, wrote *A Treatise on Questions of Law and Fact: Instructions to Juries and Bills of Exceptions*.⁸³ That no one has tackled the job in the last one hundred years should not be surprising. This book may have been helpful to practitioners of the United States a century ago, but it does not offer us much illumination of our problem. The jury tries the facts and the judge tries the law, so says Wells, and then spends another seven hundred and fifty pages saying so. Perhaps readers will find the following a more useful test: "The general rule as to the meaning of words is, that, if they are spoken, they are to be interpreted by the jury; if written, by the court."⁸⁴ (Not much more useful.)

Finally, a quotation from the well-known United States Judge Story, in response to remarks made by the equally well-known counsel Daniel Webster, who had obviously given his opinion that the jury were triers of fact and law:

. . . I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. . . . If the jury were to settle the law for themselves, the effect would be not only that the law itself would be most uncertain, . . . but, in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review, as it had been settled by the jury . . . Every person accused as a criminal, has a right to be tried according to the law of the land; the fixed law of the land;

⁸¹ (1951), 12 C.R. 270.

⁸² *Supra*, note 33 at 380 (S.C.R.).

⁸³ J. C. Wells, *A Treatise on Questions of Law and Fact: Instructions to Juries and Bills of Exceptions* (New York: H. Cockcroft and Co., 1876).

⁸⁴ *Id.* at 69. Compare the treatment of this topic to Thayer, *A Preliminary Treatise on Evidence at Common Law* (South Hackensack: N. J. Rothman Reprints of 1898 ed., 1969) at 203-04.

and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake to interpret it. . . . But believing as I do that every citizen has a right to be tried by the law, and according to the law, — that it is his privilege and truest shield against oppression and wrong, I feel it my duty to state my views, fully and openly. . . .⁸⁵

The most authoritative statement on the meaning and significance of law and fact is found in the work of James Bradley Thayer. One can hardly do better than paraphrase some of the more important points that learned author raises. Furthermore, these ideas need wider circulation and they might encourage all lawyers, including judges, to use words with a little more care. Most importantly, some of the points raised may give us some first thoughts about an appellate jurisprudence.

1) Do old forms of action and methods of proof rule the law of evidence from their graves? To what extent are juries, and to a lesser extent judges, still operating on outdated notions of proof of law and fact? An analogous problem is that of judicial notice, which is a strange hodge-podge of legal fictions and half-received customs.⁸⁶ Perhaps expert evidence suggests similar problems.

2) There has never been as clear a separation of roles for judge and jury, as sole arbiters of the law and fact respectively, as some old (and more recent) authorities would indicate.

3) Earlier in this comment, we have noted that it is too easy to convert every question into one of law. In saying that “[a]ll inquiries into the truth, the reality, the actuality of things, are inquiries into the fact about them”, Thayer admits that this “portentous definition” turns every question into one of fact.⁸⁷

4) The philosopher Austin was correct in saying that there was a middle ground between ascertainment of the facts and the application of a rule or standard of law. These are questions of reasoning, of the application of law to fact, questions of method and procedure.⁸⁸ The survey of the Canadian cases certainly shows this to be the problem area, whether we are questioning the reasonableness of a jury’s verdict, or the inferences drawn by the judge in applying his reason to connect a factual inference to an inference of law.

5) Thayer offers a further thought:

We are not . . . to suppose that a jury has found all the facts merely because it has found all that is needed as a basis for the operation of the reasoning faculty; the right inference or conclusion, in point of fact, is itself matter of fact, and to be ascertained by the jury.⁸⁹

Can we draw an analogy between the primary facts, *i.e.*, the raw material of the case and the secondary or ultimate facts and, on the other hand, the bare words of a statute and the ascertainment of their legal meaning? The

⁸⁵ *Supra*, note 83 at 47-48.

⁸⁶ See Law Reform Commission of Canada: *A Study Paper by the Law of Evidence Project: Judicial Notice*, Study Paper #7, 1973.

⁸⁷ Thayer, *supra*, note 84 at 191-92.

⁸⁸ J. Austin, *Lectures in Jurisprudence, or, the philosophy of positive law* (London: John Murray, 1885) Vol. 1, at 236.

⁸⁹ Thayer, *supra*, note 84 at 194.

ultimate facts are those to which the substantive law applies, and the legal consequences and implications are inextricably bound up with the facts.

6) The Canadian *Criminal Code* and many other federal and provincial statutes state that "for the purposes of this section, the existence, definition, sufficiency *etc.*, *etc.*, of X will be treated as a question of law." One of the best known is the question of whether an act is or is not "mere preparation" in the crime of attempt.⁹⁰ This is a legal fiction, meaning that a question of fact will be determined by the judge. Clearly, question of law here has a different meaning from the one ascribed to the term in s. 605 of the *Criminal Code*.

7) In the absence of expert evidence, the judges are often obliged to explain to the jury terms such as "malice", "fraud", and "insanity". Inevitably, this takes some questions out of the hands of the triers of fact. In addition, what is the exact status and, indeed, meaning of the phrase "legal term of art"?⁹¹

8) The most common "legal term of art" is the word "reasonable". Yet this is usually viewed as a question of fact. Thayer comments:

. . . where the courts or statutes have fixed the legal standard of reasonable conduct, *e.g.* as being that of the prudent man, and have no exacter rule, the determination of whether any given behaviour conforms to it or not is a mere question of fact. It is not a question of law; because there is no rule in question.⁹²

Austin agreed, up to a point. He thought it was absurd to look upon these most indefinite and vague terms as either questions of fact or law. Instead the difficulty is "in determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact."⁹³

9) In the context of the *Morgentaler* case, the final word of Thayer seems apposite. First, he quoted Pratt, C.J.⁹⁴ who said, "[i]t was never yet known that a verdict was set aside by which the defendant was acquitted in any case whatsoever, upon a criminal prosecution." Thayer adds:

In such cases the judge could not govern their action; he could simply lay down to them the rules of law; and thus it was their duty to take from him, and apply it to the fact. Although this might be their duty, yet the jury had the final power, to find the law against the judge's instruction. This power, where it was uncontrollable has been considered by some to be not distinguishable from a right; and it is not at all uncommon to describe it thus, — as a right to judge of both law and fact.⁹⁵

E. SOME FINAL QUESTIONS

There are several continuing legal education series and lawyers' refresher courses on "Arguing an Appeal" and similar topics. No doubt these lectures,

⁹⁰ *Criminal Code*, *supra*, note 1, s. 24(2).

⁹¹ See D. Mellinkoff, *The Language of the Law* (Boston: Little, Brown, 1963) at 16, 22.

⁹² Thayer, *supra*, note 84 at 250. See, also, Lord Herschell in *Phipps v. London and N.W. Railway Co.*, [1892] 2 Q.B. 229.

⁹³ *Supra*, note 88.

⁹⁴ *The King v. Jones* (1724), 8 Mod. 201 at 208.

⁹⁵ Thayer, *supra*, note 84 at 253.

seminars, and audio-visual presentations are very useful to the practitioners, but it seems a pity that some deeper thought is not given to the whole question of appeals.

The following questions suggest themselves:

- 1) What do we expect from our appellate system of justice? Should we have more or fewer appeals? Do we wish to make the right to appeal more or less difficult? What ground-rules should apply to such a choice?
- 2) Should we make a distinction between appeals in cases where the basis of appeal involves a fundamental principle, and those where the issue is mechanical or merely procedural? In the latter cases, is the present system too cumbersome and time-consuming?
- 3) Should we follow the English example of granting the right to appeal to the House of Lords only on questions of exceptional importance? Or should we emulate the United States Supreme Court's screening process *via certiorari*? (These questions would apply most obviously to the highest appellate courts in Canada.)
- 4) After we have decided the bases of appeal, do we need to lay down definitive rules about those issues of fact and law which are appealable? Too frequently, appeal courts in Canada want to tinker with the record, to re-interpret the facts, and to go outside the issues raised in the factums. On the other hand, should the appeal courts reach some firm decision about *amicus curiae* and Brandeis briefs?
- 5) On a more specific level, do we wish to curtail judicial discretion, such as found in section 613(1)(b)(iii) of the Canadian *Criminal Code*? Similarly, do we wish to continue to have Crown appeals from acquittals?

