Notes and Comments

ON SINS AS CRIMES: THE MANITOBA COURT OF APPEAL TAKES A SECOND LOOK AT FELLATIO

Proponents of the "Just Society" insist that sins be distinguished from crimes and say that some of the former must be expunged from the Criminal Code.[1] In one area at least, Canadians have far outdone their Biblical ancestors in making crimes out of sins; The Bible says:[2]

> "Thou shalt not lie with mankind as with womankind . . .
> Neither shalt thou lie with any beast to defile thyself therewith . . ."

Section 147 of the Criminal Code says:

> "Everyone who commits buggery or bestiality is guilty of an indictable offense . . ."

Section 148 of the Criminal Code extends the Biblical interdiction to assaults with intent to commit buggery and to indecent assaults by males on other males. However, it is section 149 of the Code which puts the Biblical rules to shame for their timerity, for it states:

> "Everyone who commits an act of gross indecency with another person is guilty of an indictable offense . . . "

This section is a revision of former section 206[3], which provided:

> "Every male person is guilty of an indictable offense . . . who in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any acts of gross indecency with another male person."

This section covered any act done by a male to a male which violated (the court's sense of) what the community considered decent, to an extent which could be labelled "gross". Perhaps afraid that section 206 was too narrow to catch all evil conduct, Parliament enacted section 149 in replacement: Note that section 149 does not require, as did section 206, that the actors be male.

Section 149 does require that decency be offended and, therefore, it is not surprising that a note of hysteria crept into the judgment in *Regina v. LeFrancois*[4] when the Manitoba Court of Appeal unanimously upheld a conviction under section 149; the act in question was forced fellatio. At page 256 the court said:

> "The type of conduct displayed by the accused is, in our opinion, a clear example of gross indecency. His conduct was so repugnant to ordinary standards of morality and decency that it cannot be called other than grossly indecent."

1. S.C. 1953-54, c. 51.
2. Leviticus 18:22 and 23.
3. R.S.C. 1927, c. 36.
4. (1965) 4 C.C.C. 255, 47 C.R. 54; see also the editorial annotation following the report of the decision in the C.R.

The tautology should be noted.[5] The court continued:

> "The accused's behaviour was unnatural and depraved and violated the common standards of conduct accepted by the people of our land, and it is our view that Canadians are not prepared to condone such acts as falling within acceptable standards of behaviour."

Note that it is the court's view of what are the "common standards of conduct" that governs. Two paragraphs later the court said:

> "We cannot see how the accused can escape conviction for an offense which emanated from conduct which violates the instinctive sense of Canadians as to what is decent and clean, as distinct from that which is indecent and dirty."

The elements of the offense seemed to be as follows: Two people (regardless of sex) interacting in some physical contact with sexual overtones, which act offends the court's instinctive sense of what is clean and decent to an extent which can be labelled gross: Or to put it another way, it is that conduct which the court considers sinful.

In January of this year, the Manitoba Court of Appeal again dealt with the issue in *Regina v. P*[6]. The conduct in question was fellatio, performed by a consenting adult woman[7] on an adult man. The circumstances were unusual. The couple were in a lighted kitchen in a house. Another man was sleeping in a drunken stupor in a chair in the entrance to the kitchen, and a third man was on the upper floor of the house. While there was doubt expressed, the entire court accepted, for the purposes of judgment, that the man and woman lived together as husband and wife, although not married.[8]

Notwithstanding an extremely vigorous and well-argued dissenting judgment,[9] the majority of the court upheld the magistrate's acquittal and said;[10]

> "(i) That the act of fellatio between male and female may be grossly indecent depending on time, place and circumstances [As Smith, C. J. M. said 'My decision would have been different if the man sitting in the chair had been awake'[11]]"

5. Gross indecency is seemingly not definable in other than synonymous expressions. This is not the fault of the court but of Parliament for enacting such a vague section.

6. (1968) 64 W.W.R. 222.

7. Curiously, the term "girl" was used in **Regina v. LeFrancois** while "woman" was used in **Regina v. P.**

8. The couple were discovered by police officers who had called at the house to execute a warrant to search for liquor and who had observed the act while peering through the vestibule door window.

9. By Monin, J. A., who had been a member of the panel of judges which decided **Regina v. LeFrancois.**

10. At p. 241.

11. At p. 224.

(ii) That, saving what is prescribed by sec. 147, Parliament never intended, by sec. 149, to attach criminal sanctions to sexual acts done in private by consenting adults of different sex.[12]"

The "Just Society" can take heart with this judgment. Now it need only remove the criminal sanctions which attach when the "time, place and circumstances" result in "indecency", and it will have advanced to the stage where the Bible was 4000 years ago.[13]

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WILLS AND TRUSTS

Wills

1. *Holograph wills.*

Perhaps the most interesting of the year's cases on wills was the decision of the Manitoba Court of Appeal in *Re Tachibana Estate.*[1] A native-born Japanese had executed, partly in English and partly in Japanese, a holograph document, clearly testamentary in character, in which his signature appeared at the beginning and in the middle but not at the end. Was this a valid holograph will by the law of Manitoba? The Court of Appeal held that it was. The document was executed in 1963, and therefore the court had to apply the provisions of the old Wills Act.[2] Section 6(1) provides that "no will shall be valid unless . . ." inter alia, it "is signed at the end or foot thereof", and states that "every will" shall be valid only if the signature is placed in the defined position. Section 6(2) states that a holograph will is valid if it is "wholly in the handwriting of the testator and signed by him." Section 6(2) is silent as to the place of signature in a holograph will; but do the words in s. 6(1), "no will is valid unless . . ." and the words in s. 7, "Every will . . ." include holograph wills? The court

12. It is possible that Parliament had thought that criminal sanctions attach in circumstances like those which existed in **Regina v. P.**, because last year the federal government proposed the following amendment to the Criminal Code in Bill C-195, section 7:

"149A(1) Sections 147 and 149 do not apply to any act committed in private between:

(a) a husband and his wife, or

(b) any two persons, each of whom is twenty-one years or more of age, both of whom consent to the commission of the act . . ."

13. It is the writer's view that the municipal and provincial governments should be left with the responsibility to enact by-laws or statutes, which would protect the public from being scandalized by obnoxious behaviour on the streets, for the writer does not believe that criminal sanctions should attach to such activity.
Another suggestion, albeit less acceptable to this writer, would be to clarify section 149 by limiting its effect to acts committed in public and by expressly itemizing those indecent acts which Parliament wishes to designate as crimes.

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1. (1968) 66 D.L.R. (2d) 567; (1968) 63 W.W.R. 99.

2. R.S.M. 1954, ch. 293; now repealed and replaced by The Wills Act, S.M. 1964, ch. 57, which came into force on April 16th, 1964, and applies in general only to wills made after that date—see sections 37 and 48 of the new Act; and cf. s. 43.