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RESEARCH ARTICLE / ARTICLE DE RECHERCHE

Bad Religion and Bad Business: The History of the Canadian Witchcraft Provision

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Abstract

Witchcraft is a fascinating subject on which many volumes continue to be published. But not in Canada. This article stands in contrast to earlier Canadian pieces on witchcraft whose primary goals were to prove that the witchcraft provision marginalized women and to encourage legislators to repeal it. Parliament finally repealed the Canadian witchcraft prohibition in 2018. The moment is thus ripe to ask how—and why—this legislative oddity migrated from England into Canada. The first section of the paper considers the religious origins of the witchcraft prohibition in England and how it made its way into the Canadian *Criminal Code*. The second section explores how the prohibition evolved from one against unwanted spiritual practices to one against unwanted economic practices. The last section of the paper considers how witchcraft morphed into a viable *Charter* defence based on freedom of religion and why the prohibition against it was eventually repealed. In conclusion, the article reflects on the peculiar trajectory of witchcraft in Canada and what it might suggest not only about Canadian criminal law, but also about broader Canadian society.

Keywords: Witchcraft; *Canadian Charter of Rights and Freedoms*; Legal History; Religion; *Criminal Code*; England

Résumé

La sorcellerie est un sujet fascinant sur lequel de nombreux travaux continuent d'être publiés. Au Canada, ce sujet n'a toutefois pas fait l'objet de publications récentes. De ce fait, cet article se distingue des articles canadiens plus anciens sur la sorcellerie; articles dont les principaux objectifs étaient de prouver que la disposition sur la sorcellerie marginalisait les femmes et d'encourager plus largement les législateurs à abroger cette disposition. Le Parlement a finalement abrogé l'interdiction de la sorcellerie au Canada en 2018. Le moment est donc venu de se demander comment – et pourquoi – cette bizarrerie

législative avait migré de l'Angleterre vers le Canada. Pour y arriver, la premiére section de l'article examine les origines religieuses de l'interdiction de la sorcellerie en Angleterre et la façon dont elle avait été introduite dans le Code criminel canadien. La deuxiéme section étudie l'évolution de l'interdiction qui avait muté d'une interdiction contre les pratiques spirituelles indésirables à une interdiction contre les pratiques économiques indésirables. La derniére section de l'article examine comment la sorcellerie s'était transformée en un moyen de défense constitutionnel fondé sur la liberté de religion et pourquoi l'interdiction qui la concernait a finalement été abrogée. En conclusion, l'article propose une série de réflexions sur la trajectoire particuliére de la sorcellerie au Canada et sur les constats qu'elle peut révéler sur le droit criminel canadien et plus largement sur la société canadienne dans son ensemble.

Mots clés: Sorcellerie; *Charte canadienne des droits et libertés*; histoire du droit; religion; *Code criminel*; Angleterre

> You shall not suffer a witch to live. (Exodus 22:18[1])
>
> Canada is a pluralistic society. (*Reference re Same-Sex Marriage*, 2004 SCC 79, para 22)

I. Introduction

Anyone researching the subject of witchcraft in Canada will immediately be struck by how little has been written on Canada's 130-year prohibition against practising witchcraft—a prohibition that stayed in the *Criminal Code* until 2018. This dearth of Canadian publications stands in stark contrast to the myriad volumes and treatises published elsewhere with names such as *Witchcraft and Magic in Europe*,[2] six volumes of *English Witchcraft, 1560–1736*,[3] and the thirty-two essays in *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America*.[4] Another book came out in August 2021 dealing with witchcraft specifically in the little English town of Bideford in the 1670s and 1680s.[5] There are many more titles like these for different times and places the world over. But not in Canada.

[1] This is one of two Biblical verses that were often referred to—most notably in a book written by the ardent anti-witcher King James I—in the witch hunts and used to justify all kinds of inhumane treatments. The other was: "[d]isobedience is as the sin of witchcraft" from 1 Samuel 15:23 (see Martha Rampton, *European Magic and Witchcraft: A Reader* (Toronto: University of Toronto Press, 2018), 394–95).

[2] Bengt Ankarloo et al., *Witchcraft and Magic in Europe* (Philadelphia: University of Pennsylvania Press, 2002).

[3] James Sharpe and Richard Golden, *English Witchcraft, 1560–1736* (London: Pickering & Chatto, 2003), vols 1–6.

[4] Brian P. Levack, ed., *The Oxford Handbook of Witchcraft in Early Modern Europe and Colonial America* (Oxford: Oxford University Press, 2013). Canada is not even mentioned in the index of this work (see ibid., 597).

[5] See John Callow, *The Last Witches of England: A Tragedy of Sorcery and Superstition* (New York: Bloomsbury Academic, 2021).

The only other article published in a Canadian law journal on the topic of witchcraft is a 2015 article by Natasha Bakht and Jordan Palmer called "Modern Law, Modern Hammers: Canada's Witchcraft Provision as an Image of Persecution."[6] This helpful and instructive article addresses the misogynistic application of witchcraft prohibitions in England and in Canada. There are also two other short web articles. Both are advocacy pieces similar to Bakht and Palmer's calling on Parliament to repeal the provision and denouncing the misogynistic application of Canada's witchcraft prohibition—one written by Omar Ha-Redeye[7] and the second by Kristy Isert.[8] But there are no articles or books that focus on how—and why—the prohibition evolved, start to finish, from England into Canada.

This article seeks to fill that gap. As with the rest of criminal law, the story of witchcraft in Canada is the story of social ills. The first social ill that prohibitions against practising witchcraft—including the prohibition that would eventually make it into Canada—tried to address was bad religion, that is, unwanted spiritual practices or perceived spiritual evil. The second social ill was the one that kept witchcraft in the *Criminal Code* for so many years, even though the fear of actual witches had all but disappeared in Canadian society: fraud, or bad business. Preventing bad religion and, later, bad business was the goal of the legislative prohibition against witchcraft and of the courts applying it. But it was a slow evolution from one to the other—an evolution that would, in the end, bring the witchcraft provision back into the realm of the religious as a viable *Charter* defence. This article tells the story of this evolution.

However, as we will see, there was also another, hidden social ill that it would take early writers such as William Blackstone, the eponymous author of the well-known legal treatise, and James Crankshaw, editor of one of the first annotated Canadian *Criminal Codes*, and, much later, several (feminist) authors to point out: the fact that this prohibition was disproportionately applied to women living on the margins of society, particularly in the early, religious phase of its development. The Bakht and Palmer article, as well as the two short web articles dealing with witchcraft in Canada, are all of this variety. In contrast, the present article takes aim not at the application of the provision, but rather at its intent. The article tries to explain *why* people might have enacted such a prohibition in the first place and why this historical oddity remained law in Canada until 2018. It is a story first of bad religion and second of bad business.

But we must first define *witchcraft.* It has been said that the term *witchcraft* is an "unwieldy mass"[9]: a catch-all that the *Oxford English Dictionary* defines as "[m]agic or other supernatural practices; (the use of) magical or supernatural

[6] Natasha Bakht and Jordan Palmer, "Modern Law, Modern Hammers: Canada's Witchcraft Provision as an Image of Persecution," *Windsor Review of Legal and Social Issues* 36 (2015): 123.

[7] Omar Ha-Redeye, "Time to Burn Witchcraft Provisions in the Criminal Code," *CanLII Connects*, April 11, 2017, canliiconnects.org/en/commentaries/45329.

[8] Kristy Isert, "Speaking to the Dead: Repealing Laws Against Pretending to Practice Witchcraft," *LawNow*, May 4, 2018, www.lawnow.org/speaking-to-the-dead-repealing-laws-against-pretending-to-practice-witchcraft/.

[9] Cynthia Eller and Elizabeth Reis, "Witchcraft," in *Encyclopedia of Politics and Religion*, 2nd edn, ed. Robert Wuthnow (Washington: CQ Press, 2007).

powers, esp. for evil purposes or as used by witches."[10] As the dictionary suggests, there seem to be two essential elements to the word: (i) a belief in invisible forces; and (ii) that those forces are used for evil purposes.[11] As we explore the topic of witchcraft, we will call any formal prohibition against practising witchcraft a *witchcraft provision* or *witchcraft prohibition* because the reference information for the specific prohibitions changes with time and place, but the essence remains stopping sorcery in its tracks.

By tracing legislative prohibitions back in time and by looking at books, parliamentary debates, academic and news articles, as well as case law and annotated criminal codes in both French and English, this article follows witchcraft from England into Canada until the Canadian prohibition against it was repealed in 2018. The article deduces from this research two lenses through which to view the Canadian prohibition against witchcraft. The first lens is religious, hence "bad religion" in the title, and the second is economic, hence "bad business."

The author's interest in the topic of witchcraft is twofold: in his first-year criminal law class, several years ago now, he was made to read aloud Canada's prohibition against witchcraft. He was shocked that something like that existed in Canada and laughed himself to tears while reading it. However, in the preface to her informative book, *European Magic and Witchcraft: A Reader*, Martha Rampton says that these kinds of snap judgements do not allow one to empathize with the people of the past. We may laugh, sure, but we must also ask *why*.

In an eloquent expression of the principle of charity, Rampton reminds us that the people who enacted and applied these laws, as much as those who argued against them, are like us in their "desire to be safe, to see justice done, and to make sense of their existence."[12] So, although we may laugh at the idea of witchcraft or reject prohibitions against it out of hand for being misogynistic, irrational, or religiously intolerant, the principle of charity would dictate that we assume that the people enacting, applying, and suffering under these laws were intelligent, well-meaning individuals who simply had a different understanding of the world.

II. The Early Years

In some way or another, witchcraft as a spiritual practice has been outlawed in Europe since the early Middle Ages.[13] The earliest English prohibition dates back to

[10] *Oxford English Dictionary*, 3rd edn (Oxford: Oxford University Press, 2021), www.oed.com/view/Entry/229580?redirectedFrom=witchcraft#eid.

[11] See Eller and Reis, "Witchcraft"; Rampton, *European Magic and Witchcraft*, xiv. On the negative connotation of the word, see Brian P. Levack, *The Witch-Hunt in Early Modern Europe*, 3rd edn (Harlow: Pearson Education, 2006), 4–12.

[12] Ibid. For a list of nasty things that people thought witches were capable of, see e.g., Christopher S. Mackay, *The Hammer of Witches: A Complete Translation of the* Malleus Maleficarum (Cambridge: Cambridge University Press, 2009), 13.

[13] King Clovis (*circa* AD 466–511), the Visigoths, and the Lombards all had formal prohibitions against witchcraft (see Rampton, *European Magic and Witchcraft*, 86, 87, 272ff.).

Henry VIII in 1541.[14] To appease people in her royal entourage, in 1562, Queen Elizabeth I—though not personally bothered by witches—enacted a moralizing prohibition against "any Invocacõns or Conjuracõns of evill and wicked Spirites" on pain of death.[15] But it was during the 1640s that the witch craze in England reached its peak.[16]

The statute invoked during this time was King James's 1604 law, *An Acte against Conjuration Witchcrafte and dealinge with evill and wicked Spirits*,[17] which put the quasi-spiritual, moralizing adjectives *evil* and *wicked* in the title of the statute, not just in the body, and "tighten[ed] the noose around the neck of any poor wretch who might formerly have escaped."[18] Sir James Fitzjames Stephen—a man whose writings later influenced the drafters of the Canadian *Criminal Code*[19]—wrote in 1883 that, by the time King James I had enacted this law in 1604, witchcraft had come to be regarded with "special horror" and to be believed in with an "ardour and eagerness" that were "a natural result of religious excitement."[20] In essence, the word *witchcraft* came to denote spiritual and occult practices that drew religious ire or that did not otherwise fit the dominant religious mould.[21]

The last English conviction for witchcraft was in Hertfordshire in 1712, after which the religious zeal against witchcraft seemed to die out.[22] In the years following, witch prosecutions became so rare in fact that, when a bill repealing England and Scotland's various witch laws was introduced into the English Parliament in 1736, many members of Parliament laughed at the mere mention of witchcraft.[23] The bill eventually passed. The goal of the law was not only to

[14] *The Bill ayenst conjuracõns & wichecraftes and sorcery and enchantments* (UK), 1541–42, 33 Hen VIII, c 8, reprinted in Record Commission, *Statutes of the Realm*, vol 3 (House of Commons, 1810–1825), 837.

[15] *Act against Conjuracõns Inchantmentes and Witchecraftes* (UK), 1562–1563, 5 Eliz, c 16, reprinted in *Statutes of the Realm*, vol 4, 446. On Queen Elizabeth's personal opinions on witches, see Barbara Rosen, *Witchcraft* (London: Edward Arnold, 1969), 52.

[16] See ibid., 51. Writing in 1718, Francis Hutchinson lists no fewer than twenty-three books published before 1718 on the subject of witchcraft (see *An Historical Essay Concerning Witchcraft* (London: R Knaplock et al., 1718), xiii–xiv). Scotland's witch craze happened earlier (see Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, vol 2 (London: 1883), reprinted (New York: Burt Franklin, 1964), 432–33).

[17] (UK) 1 Jac I, c 12, reprinted in *Statutes of the Realm*, vol 4, 1028.

[18] See Daniel J. McKenna, "Witchcraft: An Obsolete Crime," *Marquette Law Review* 13 (1928): 18, at 20.

[19] Because of his influence on both George Wheelock Burbidge's *Digest of the Criminal Law of Canada* (Toronto: Carswell, 1890) and the English Draft Code of 1878 (see *R v Boulanger*, 2006 SCC 32, at para 33). See also Alan W. Mewett, "The Criminal Law, 1867–1967," *Canadian Bar Review* 45 (1967): 726, at 727; A. J. MacLeod and J. C. Martin, "The Revision of the Criminal Code," *Canadian Bar Review* 33 (1955): 3, at 4–5.

[20] Stephen, *History of the Criminal Law of England*, 430–31. Sir Stephen relied heavily on the 1718 work of *Hutchinson*, *Historical Essay*.

[21] On this phenomenon, see Eller and Reis, "Witchcraft."

[22] See Hutchinson, *Historical Essay*, viii. Jane Wenham was sentenced to death but later pardoned (see ibid., 129–35; Stephen, *History of the Criminal Law of England*, 435–36). On the fascinating reasons for the decline in witchcraft prosecutions, see Levack, *Witch-Hunt*, 253–71. The last officially sanctioned execution of a witch anywhere in Europe took place in 1782 (see ibid., 253).

[23] The bill being debated was the *Witchcraft Act* (1736) (UK), 1736, 9 Geo II, c 5. On the laughing, see UK Parliament, "Witchcraft," accessed December 10, 2021, www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/overview/witchcraft/.

repeal the earlier laws on the books, but also to better punish anyone "pretend[ing] to exercise or use any Kind of Witchcraft, Sorcery, Inchantment or Conjuration ... undertak[ing] to tell Fortunes, or pretend[ing] from his or her Skill or knowledge in any occult or crafty Science." Following the "wise example of Louis XIV in France,"[24] the English *Witchcraft Act* (1736) was eventually passed, making prosecuting witchcraft per se illegal, but still allowing the prosecution of anyone *pretending* to practise witchcraft.[25]

One could imagine that the reason for eliminating the *actual* practice of witchcraft from the statute, and leaving only *pretending* to practise it, is that British parliamentarians thought that *all* forms of witchcraft were, in fact, pretending. In other words, no form of supposed witchcraft was ever *actually* witchcraft because no such thing existed. This language of "pretending to practice witchcraft" would remain on the books in England and eventually be copied almost verbatim into the Canadian *Criminal Code.*

III. La Corriveau, Sorcery, and the Canadian Criminal Code

Any discussion of witchcraft in Canada and the *Witchcraft Act* (1736) would be incomplete without mentioning La Corriveau. In a way, the story of La Corriveau, though not her *actual* murder trial, provides a cultural backdrop for the statute and its importation into the Province of Canada—a window into what people at the time might have been willing to believe. At the very least, it sheds light on the narrative appetite of some Canadians in the nineteenth century. But the true story of Marie-Josephte Corriveau, or "La Corriveau" as she is better known in Quebec, starts over a century earlier when Marie-Josephte was born in 1733 near modern-day Lévis, across the Saint Lawrence from Quebec City.[26]

After the death of Corriveau's second husband, Louis Étienne Dodier, in April-1763—only two months after New France was formally ceded to the British—the governing British military charged her (along with her father) with Dodier's murder.[27] Marie-Josephte and her father were both convicted but, the night before his execution, her father declared that he had only helped Marie-Josephte move the body and that she alone had killed her husband.[28] Faced with this and other incriminating evidence, Marie-Josephte then admitted killing her husband with two hatchet blows for physically abusing her.[29] A British court-martial then

[24] William Blackstone, *Commentaries on the Laws of England*, vol 4 (iv) (Oxford: Clarendon, 1769), 61.

[25] (UK), 1736, 9 Geo II, c 5. See vol 2 of Stephen, *History of the Criminal Law of England*, 436. As Sir Stephen asked rhetorically in 1877: "[w]ould it be a good defence to an indictment for this offence to prove that the defendant not only 'pretended,' but actually practiced witchcraft?" (ibid., 278, n 9).

[26] See Culture et communucations Québec, "Répertoire du patrimoine culturel du Québec: Corriveau, Marie-Josephte," *Gouvernement du Québec* accessed June 3, 2023, www.patrimoine-culturel.gouv.qc.ca/rpcq/detail.do?methode=consulter&id=26793&type=pge.

[27] As reported in Luc Lacourcière, "Le triple destin de Marie-Josephte Corriveau," *Les Cahiers des Dix* 33 (1968): 213, at 222.

[28] See ibid., 232, n 32; see also Catherine Ferland and Dave Corriveau, *La Corriveau: De l'histoire à la légende* (Quebec, (Quebec): Septentrion, 2014), 119.

[29] See Lacourcière, "Le triple destin de Marie-Josephte Corriveau," 230–31. Marie-Josephte had indeed purchased a hatchet some time before at an auction (see ibid., 231, n 29) and the military

sentenced La Corriveau to hang until death in an iron cage specifically smithed for the dimensions of her body.

The cage used in the execution of La Corriveau would become significant in how she is remembered in Quebec. Although La Corriveau was *not* charged with pretending to practice witchcraft under the *Witchcraft Act* (1736), once the iron cage used in her execution was unearthed in the church cemetery of Saint-Joseph-de-la-Pointe-Lévy (now part of Lévis, Quebec) in 1851, nearly one hundred years after her execution, myths and legends about La Corriveau began to overshadow the facts of her case.

Her story would eventually take on a life of its own and, before long, legends of all sorts about La Corriveau—and, notably, tales of witchcraft—would appear in novels, art, theatre, and folklore.[30] For example, in a novel published in 1863, author Philippe Aubert de Gaspé used his poetic licence to describe how La Corriveau, having already been dead for some time and serving a 4,000-year sentence in purgatory, took swipes at passersby while suspended in her cage and pleaded with them to take her to a witches' Sabbath and a Will-o'-the-whisp—according to the novel, two ceremonies frequently attended by witches—at the Îsle d'Orléans just outside of Quebec City.[31] The legend of La Corriveau, though not the factual account of Marie-Josephte Corriveau, gives us a sense of what the social context surrounding the *Witchcraft Act* (1736) might have looked like in the mid-nineteenth century, at least in Quebec.

However, it was in the province of Ontario that the *Witchcraft Act* (1736) was first applied in a Canadian court of law, rather than in the court of public opinion. In 1890, in a case called *R. v. Milford*,[32] the Ontario High Court of Justice (the section 96 superior court at the time) held that the British *Witchcraft Act* (1736) applied in Canada by virtue of *An Act for the Further Introduction of the Criminal Law of England into this Province*[33] and that, under English criminal law as it was in 1792, simply pretending to tell fortunes still constituted an offence.

Given that the question of law in this appeal was relatively narrow, it is difficult to discern from Chief Justice John Douglas Armour's laconic reasons whether bad religion or bad business motivated the court to apply the old English statute, or the court was simply content to answer the narrow question of law without addressing the *raison d'être* of the statute. Chief Justice Armour also did

doctor at the time had concluded that the wounds that killed Dodier could not have come from a horse, which is what was originally claimed (see ibid., 222).

[30] See e.g., James MacPherson Le Moine, "La Corriveau—The Iron Cage," in *Maple Leaves: A Budget of Legendary, Historical, Critical, and Sporting Intelligence*, 1st series (Ottawa: Registrar of the Province of Canada, 1863), 68–74; William Kirby, *The Golden Dog (Le Chien d'or): A Romance of the Days of Louis Quinze in Quebec* (Montreal: Montreal News Company, 1877), 359–80.

[31] See Philippe Aubert de Gaspé, *Les Anciens Canadiens*, 1st edn (Montreal: Cadieux & Derome, 1886), 31–33. The fourth chapter of this novel is possibly the first time that La Corriveau is referred to as a witch in writing (see ibid., 31). She is also said to have a cauldron, thus feeding into the classic image the witch in the Western tradition (ibid.).

[32] [1890] OJ No 43, 20 OR 306. *R v Entwistle* (1889) ([1899] 1 QB 846, 63 JP 423), decided in England one year earlier, held that that the word *pretend* in the English provision itself implies that there was an intention to deceive and impose upon others.

[33] (UK), 1800, 40 Geo III, c 1.

not address the fact that the English *Witchcraft Act* (1736) had, for many years, rarely been used in England and the fact that the *Vagrancy Act* (1824)[34] had all but made the *Witchcraft Act* (1736) redundant by preventing anyone from "pretending or professing to tell Fortunes, or using any subtle Craft, ... by Palmistry or otherwise, to deceive any of His Majesty's Subjects."[35] Witchcraft, it seemed, was illegal in the Dominion of Canada as a matter of course.

Ironically, the very same year in which courts brought the British witchcraft prohibition into Canada in *R. v. Milford*—in 1890—George Wheelock Burbidge, one of the influential voices in drafting the *Criminal Code*, opined that "it is doubtful whether or not the [English] Act on which it [the witchcraft article] is founded would be held to apply to Canada."[36] This is doubly so because, under the newly imported *Witchcraft Act* (1736), pretending to practise witchcraft in Canada could still be punished by death. The author of an undated news article from the *Montreal Star*[37], cited in likely the first annotated *Criminal Code of Canada*[38], reasoned that "[w]hen we remember that a similar heroic treatment [the death penalty] was applied in the case of sheep stealing, we are inclined to look for authority elsewhere than in obsolete [English] statutes."[39]

Bristling at the illegal-as-a-matter-of-course approach adopted in *R. v. Milford*, the *Montreal Star* article heralds that, when legislators "return to the light of the present day, after their explorations in the catacombs of precedent," they will see that the fortune-telling under false pretenses is already "punishable at common law" and under the *Vagrancy Act* (1824), which punishes all "rogues and vagabonds."[40] The author of the article concludes presciently by claiming that relying on the *Vagrancy Act* (1824) instead of the *Witchcraft Act* (1736) is "better calculated to subserve the interests of justice than the revival of the old statutes against witchcraft, against which both humanity and enlightenment revolt."[41]

Clearly approving of this view, James Crankshaw then closes his 1893 annotation of section 396 by saying that, under the old witchcraft laws, "many poor wretches were sacrificed to the prejudices of their neighbors, and their

[34] (UK), 1824, 5 Geo IV, c 83, s 4 (*Vagrancy Act*).

[35] Ibid. On the redundancy, see J. C. Martin, *The Criminal Code of Canada* (Toronto: Cartwright & Sons, 1955), 536; James Crankshaw, ed., *The Criminal Code of Canada and the Canada Evidence Act, 1893* (Montreal: Whiteford & Theoret, 1894), 338–39 (*Annotated Code*, 1893).

Justice Douglas Armour was named Chief Justice of Ontario before being named to the Supreme Court of Canada in 1902 (see "The Honourable Mr. Justice John Douglas Armour," *Supreme Court of Canada*, September 4, 2008, www.scc-csc.ca/judges-juges/bio-eng.aspx?id=john-douglas-armour).

[36] Burbidge, *Digest of the Criminal Law of Canada*, 370, n 6. It was in the same year, 1890, that the English *Witchcraft Act* (1736) was held to apply in Canada in *R v Milford* (*supra* note 32).

[37] The *Montreal Star* ceased publishing in 1979 (see "The Montreal Daily Star," *Library of Congress*, accessed October 20, 2021, www.loc.gov/item/2010218037/).

[38] See *Annotated Code*, 1893, *supra* note 35.

[39] Ibid., 338.

[40] This wording appears in the title and in the preamble of the *Vagrancy Act*, *supra* note 34. This was the approach taken by the United Kingdom itself in *Penny v Hanson* (1887), 18 QBD 478, 1887 WL 11245 (Queen's Bench).

[41] *Annotated Code*, 1893, *supra* note 35, 338.

own illusions."[42] Crankshaw's complaint about how the provision was applied echoes that made over a century later by authors such as Omar Ha-Redeye, Kristy Isert, Natasha Bakht, and Jordan Palmer, who would on this basis encourage the Parliament of Canada to repeal it. Nevertheless, the legislator does not speak in vain, and the Dominion legislators presumably kept the arguably redundant *Witchcraft Act* (1736) around because they in fact saw an important difference between the "idle and disorderly persons" telling fortunes under the *Vagrancy Act* (1824) and those doing so under the pretence of witchcraft.[43]

In 1893, not long after *R. v. Milford* in 1890, the Parliament of Canada adopted the *Criminal Code of Canada*[44] based on the common law, existing legislation, Sir James F. Stephen's *Digest of the Criminal Law*,[45] George Wheelock Burbidge's *Digest of the Criminal Law of Canada*,[46] and the English Draft Code of 1878.[47] Like the rest of the *Criminal Code*, the Canadian Parliament imported the provision against witchcraft—section 396 at the time—almost verbatim from section 258 of the English Draft Code, 1878, which was never actually adopted in England.[48] At the time at which it was imported, the provision read:

> **396.** Every one is guilty of an indictable offence and liable to one year's imprisonment who pretends to exercise or use any kind of witchcraft, sorcery, enchantment or conjuration, or undertakes to tell fortunes, or pretends from his skill or knowledge in any occult or crafty science, to discover where or in what manner any goods or chattels supposed to have been stolen or lost may be found.[49]

IV. From Sorcery to Fraud

The early witchcraft prohibitions were originally enacted to deal with unwanted spiritual practices, or bad religion. Given how little the *Witchcraft Act* (1736) was

[42] Ibid.

[43] On the legislator not speaking in vain, see *Quebec (AG) v Carrières Ste Thérèse Ltée*, [1985] 1 SCR 831, p. 838, 20 DLR (4th) 602; Pierre-André Côté and Mathieu Devinat, *Interprétation des lois*, 5th edn (Montreal: Thémis, 2021), nos 1012–15.

[44] 1892, 55–56 Vict, c 29 (*Criminal Code*, 1893). It came into force on July 1, 1893 (see Mewett, "Criminal Law, 1867–1967," 728).

[45] James F. Stephen, *Digest of the Criminal Law* (St. Louis: Soule, Thomas & Wentworth, 1877).

[46] *Supra* note 19.

[47] On this history, see *R v Boulanger*, *supra* note 19, at para 33. For *Hansard* on the origins of the *Canadian Criminal Code*, see *House of Commons Debates*, 7-2, vol 1 (12 April 1892), 1312 (Hon. John Thompson). See also Desmond H. Brown, *The Genesis of the Canadian* Criminal Code *of 1892* (Toronto: Osgoode Society, 1989).

[48] The English Code did not pass the second reading in Parliament (see Ha-Redeye, "Time to Burn Witchcraft Provisions"; see also Martin, *Criminal Code of Canada*, 534; Mewett, "Criminal Law, 1867–1967," 727).

[49] *Criminal Code*, 1893, *supra* note 44, s 396. On the genealogy, see also Henri Elzéar Taschereau, *The Criminal Code of Canada* as Amended in 1893 *with Commentaries, Annotations, Precedents of Indictments*, etc. (Toronto: Carswell, 1980), 433, s 396.

applied and the laughter of British parliamentarians when the subject was brought up in 1735, one can infer that bad religion was less of a serious concern by the time that the statute made its way into the Canadian *Criminal Code.* Indeed, by the turn of the twentieth century, the focus of lawmakers had apparently shifted from England and Scotland's concern with preventing devil worship—the biggest preoccupation for the likes of King James I[50]—to the bad business of defrauding people. We can see this shift in attitudes in the Canadian case law that applied the provision.

The Ontario Court of Appeal decided the first witchcraft case under the brand-new *Criminal Code*: *R. v. Marcott* (1901).[51] The court in *R. v. Marcott* was at pains to distinguish unlawful fortune-telling from the kind commonly done at fairs.[52] One can imagine that this was to distinguish the entertainment afforded to patrons by temporarily suspending their disbelief for a modest sum from the fraudulent hoodwinking of the particularly credulous for more significant amounts of money. In *Marcott*, the main issue was how to define the word *undertaking* in the *Criminal Code* provision that prohibited "undertak[ing], for a consideration, to tell fortunes."[53] This discussion shows us how contractual consideration—the service of fortune-telling in exchange for money—had become the primary concern, rather than illicit spiritual practices. Nevertheless, the concurring judges still felt the need to point out that "undertaking to tell fortunes" simply meant professing a power or ability to tell fortunes, something that "no sane man can believe" because the accused "must know that he has no such powers."[54]

We again see the focus shift towards bad business, rather than bad religion, in two early Ontario cases. In *R. v. Monsell* (1916),[55] the Ontario Court of Appeal applied *R. v. Marcott* and held that, while intent to defraud must be shown, it is not necessary to show that the accused *succeeded* in defrauding the client. In *R. v. Pollock* (1920),[56] the Ontario Court of Appeal once again considered the peculiar history of the witchcraft provision and its "unusual terms" with reference to the English *Witchcraft Act* (1736). The court clarified that, although there is no law that prevents an accused "from communicating with departed spirits"—an interpretation with which King James I might well have disagreed—the witchcraft provision "extends to every case where the accused intends that the person whose fortune is told shall believe that the fortune-teller is really possessed of the power" and, echoing the reasoning in *R. v. Marcott*, that deception is "necessarily inherent

[50] For a contemporary example, see Hutchinson, *Historical Essay*, 66, 264. For the opinions of King James I, see Rampton, *European Magic and Witchcraft*, 394, citing James I of England, *Daemonologie, in Form of a Dialogue, Divided into Three Bookes* (Edinburgh: Robert Walde-Grave, 1597).

[51] 2 OLR 105, 4 CCC 437 (Ont CA) (*Marcott*). Interestingly, one of the judges who had written the court's reasons in *R. v. Milford* in 1890, Justice Armour, also wrote concurring reasons in *Marcott.*

[52] See ibid., 442. See also W. J. Tremeear, *The* Criminal Code *and the Law of Criminal Evidence in Canada* (Toronto: Canada Law Book Company, 1902), 331.

[53] *Criminal Code*, 1893, *supra* note 44, s 396.

[54] *Marcott*, *supra* note 51, 442, 445. See also *R v Best*, [1935] 1 DLR 158 (Man CA) (simply telling fortunes or reading palms is an offence).

[55] 28 DLR 275, 26 CCC 1 (Ont CA).

[56] 54 DLR 155, 22 CCC 155 (Ont CA).

in claiming the power to tell fortunes."[57] As with many other fortune-telling cases, the court gives no explanation as to why people cannot tell fortunes.

Justice Boyd McBride took this reasoning a step further in *R. v. Stanley* (1952),[58] which took place in Edmonton, Alberta. Helen Stanley had clients sign a consent agreement saying that she would read palms "in accordance with the books on the subject."[59] She had even gotten a business licence from the municipality to engage in palm-reading. However, on behalf of the Supreme Court of Alberta (the province's section 96 court), Justice McBride held that one cannot have a permit for something that is a crime. He went on, writing that telling fortunes amounted to "hoodwinking some who are credulous or ignorant" and that, whether it is reading cards, tea leaves, lines in the hand, or "a sort of pseudo-science which I think is called astrology," conviction under this provision does not in fact turn on the technique being used.[60]

Not long after this case, the Parliament of Canada started to revise the *Criminal Code.* Parliamentary debates heated up around the witchcraft provision in early 1953. The Canadian Association for Civil Liberties claimed that the witchcraft provision "would be materially improved if the word 'fraudulent' was added to make it an essential element of the offence."[61] This important addition further suggests the fundamental shift from bad religion to bad business. The shift was confirmed on 26 February 1954, when, while being criticized for the provision in the House of Commons, then Minister of Justice, Stuart Garson, retorted that the goal of the provision is "not witchcraft in the old sense" and that fraud was "the gravamen of the offence."[62] He clarified that "it is not a case of witchcraft or no witchcraft; it is a case of fraud or no fraud."[63] The version of the provision that came into force on 1 April 1955 reads[64]:

308. Everyone who *fraudulently*

(a) pretends to exercise or to use any kind of witchcraft, sorcery, enchantment or conjuration, etc.
(b) undertakes, for a consideration, to tell fortunes, or

[57] Ibid., 161–62. See also M. H. Ogilvie, *Religious Institutions and the Law in Canada*, 4th edn (Toronto: Irwin Law, 2017), 192.

[58] 104 CCC 31, 6 WWR (NS) 574) (Alta QB) (*Stanley*).

[59] Bob Tarantino, *Under Arrest: Canadian Laws You Won't Believe* (Toronto: Dundurn Press, 2007), 106. A similar argument had succeeded in 1902 in *R v Chilcott* (1902), 6 CCC 27 (Ont County Ct), in which the court held that, if the palm reader predicts on the basis of published works on "palmistry," then there is no intent to deceive and the accused must be acquitted (see James Crankshaw, ed., *The Criminal Code of Canada and the Canada Evidence Act* (Toronto: Carswell, 1915), 498).

[60] *Stanley*, *supra* note 58, 32–33.

[61] Senate, Special Committee on Bill No 93, *An Act Respecting the Criminal Law*, 21-7, vol 1, 163. The association was headed by Irving Himel, who had a long history in lobbying for human rights legislation, with a focus on anti-Semitism and racism.

[62] *House of Commons Debates*, 22-1, vol 3 (26 February 1954), 2493 (Hon. Stephen Knowles).

[63] Ibid.

[64] On the coming into force, see MacLeod and Martin, "Revision of the Criminal Code," 3.

(c) pretends from his skill in or knowledge of an occult or crafty science to discover where or in what manner anything that is supposed to have been stolen or lost may be found, is guilty of an offence punishable on summary conviction.[65]

Tellingly, although one minister had (helpfully) argued that leaving the word *witchcraft* in the heading "would help a student or a lawyer find this [provision] more easily,"[66] the word was ultimately dropped from the heading. This subtraction, the addition of the adverb *fraudulently*, and the division of the provision into separate paragraphs can all tell us something about the priorities of lawmakers and the shifting importance of pretending to practise witchcraft (para (*a*)) in the old sense as opposed to dishonest fortune-telling (para (*b*)). After 1955, convictions under the witchcraft provision would, with few exceptions, happen under paragraph (*b*), which prohibits fortune-telling, rather than paragraph (*a*), which explicitly prohibits witchcraft, sorcery, enchantment, and conjuration. Indeed, paragraph (*b*) against fortune-telling had become so important that one of the last annotated criminal codes discussing the witchcraft provision only listed jurisprudence under this paragraph, entirely omitting the other two.[67]

V. Fraudulent Intent vs. Strict Liability: the Moving Target

With its 1955 revisions to the provision, Parliament somewhat belatedly endorsed the shift from bad religion to bad business that had long since occurred before the courts. But the word *fraudulent* in the revised provision was not without its difficulties. The main hitch was that the new word seemed contrary to what the common law had long ago established in cases such as *R. v. Marcott*, *R. v. Pollock*, and *R. v. Stanley*, in which the offence was made out once the prosecution proved the simple act of telling fortunes, irrespective of what the fortune-teller in fact believed or intended. Witchcraft was previously treated as an offence of strict liability. Now, in theory, the revision meant that the prosecution had to also prove fraudulent *intent.*

By the time the first witchcraft prosecution under the revised provision made it to the Montreal Municipal Court in 1974, the Ontario Court of Appeal had already established that, elsewhere in the *Criminal Code*, the word *fraudulently* denoted conduct that was not simply unauthorized, but rather "dishonest and morally wrong."[68] In the 1974 case before the Municipal Court, *R. c. Larin*,[69] the accused, Denise Larin, had not expressly asked for consideration for a palm reading, but she had hinted that people typically leave $5.[70]

[65] *Criminal Code*, 1953–54, 2–3 Eliz II, c 51, s 308, emphasis added.

[66] 22-1, vol 3, *supra* note 62, 2501 (Hon. Daniel McIvor).

[67] See Guy Cournoyer, *Code criminel annoté 2018* (Montreal: Éditions Yvon Blais, 2017), 728. See also Irénée Lagarde, *Droit pénal canadien* (Montreal: Wilson & Lafleur, 1961), 491–92.

[68] *R v DeMarco* (1973), 13 CCC (2d) 369 (Ont CA). See Ogilvie, *Religious Institutions*, 192, n 216.

[69] *R c Larin*, [1974] RL 238, 1974 CarswellQue 271 (Montreal Mun Ct) (cited to Carswell).

[70] See ibid., at para 5.

The main issue at trial was whether or not the defendant *fraudulently* told someone's fortune.[71] Brushing aside the old cases that treated witchcraft as a strict-liability offence, the Municipal Court concluded that these cases were in fact decided "*as if* the word *fraudulently* were included in the section."[72] It found the accused guilty right before asking rhetorically: "why invite strangers into one's home to tell their fortunes if it's not with the intention of receiving consideration!"[73]

One year later, in 1975, the word *fraudulently* was considered in Ontario for the first time in *R. v. Dazenbrook.*[74] Relying on *R. v. Marcott* and making no mention of Quebec's *R. c. Larin*, Justice McConnell held that the "mere telling of a fortune, *per se*, is not illegal."[75] Unlike the court in *R. c. Larin*, Justice McConnell clarified that, while simply telling a fortune was enough to infer intent *before* the legislative revision, now, the prosecution had to show the intent "to delude or defraud"[76] and, because the prosecution had not done so in the case at bar, the court acquitted the accused.[77]

Although the section numbers had shifted over the years, the wording of the provision remained the same as it was in 1955. In 1977, in *R. v. P.S.*,[78] the Ontario Provincial Court essentially overruled *Dazenbrook.* In *R. v. P.S.*, the youth printed leaflets in which she claimed to have a "spiritual power [that] is a gift of God!" and that "[t]here's no problem so great she can't solve."[79] Although Justice Kechin Wang held that the facts in *R. v. P.S.* were similar to those in *R. v. Dazenbrook*, he found that, once the Crown had made a prima facie case that the accused had foretold the future for consideration, then the accused had to rebut the presumption that her foretelling was deceptive.[80] In other words, she had to prove that her claim to be able to predict the future was not fraudulent. And, because the accused in *R. v. P.S.* did not rebut that presumption, she was therefore guilty of the offence. Ontario courts were pushed back to the earlier standard of strict liability.

In 1981, Quebec followed suit with *R. c. Corbeil*,[81] in which the Court of Appeal held that the accused, Rejeanne Corbeil, was guilty under paragraph 365(*b*) when, for $10, she claimed that she could predict the future on the basis of the lines in a customer's hand because she had taken courses in Europe.[82] Her appeal was

[71] See ibid., at para 11.
[72] Ibid., at para 16 (author's translation; emphasis added).
[73] Ibid., at paras 25, 23.
[74] (1975), 23 CCC (2d) 252, 1975 CarswellOnt 1022 (Ont Prov Ct).
[75] Ibid., 254. Unfortunately, the author was unable to find Justice McConnell's first name.
[76] Ibid.
[77] Ibid. See Bakht and Palmer, "Modern Law, Modern Hammers," 133.
[78] 2 WCB 59, 1977 CarswellOnt 1803 (cited to Carswell).
[79] Ibid., 1.
[80] See ibid., 2, 7.
[81] (1981), 65 CCC (2d) 570, 1981 CarswellQue 253 (Qc CA) (cited to Carswell).
[82] See ibid., at para 4. See also Bakht and Palmer, "Modern Law, Modern Hammers," 134. This decision was referred to as recently as 2017 in *R v Blackmore*, 2017 BCSC 1288, at para 297.

dismissed because simply accepting money and telling the future was once again enough to infer deceit without the Crown needing to prove criminal intent.[83]

Six years later, in 1987, the Supreme Court of Canada rendered its only decision on Canada's witchcraft provision in *R. v. Labrosse*[84], another case from Quebec. In its three-page decision, the unanimous court leaned back towards strict liability, holding that the critical fraudulent element may arise simply from the accused's gestures, actions, and words in making the victim believe in her powers of prediction.[85] Despite the claims of Lucette Labrosse, neither the trial court, nor the Quebec Court of Appeal, nor the Supreme Court of Canada thought that she sincerely believed in the "special powers to predict the future" from which she claimed to benefit since childhood.[86] The Supreme Court did, however, leave open the question of whether someone holding an *honest* belief in his or her powers could raise that as a defence.[87] The whole case turned on fraud and bad business, and no mention was made of the spiritual origins of the provision or their one-sided application over the years to marginalized women.

VI. Full Circle: Witchcraft, Freedom of Religion, and the Charter

Two years after *R. v. Labrosse*, in *R. v. M.K.M.* (1989),[88] Justice Arthur Peter Nasmith of the Ontario Provincial Court penned arguably the most lucid judicial reasons on the witchcraft provision. His judgment shifts the focus away from the somewhat post hoc fraud-preventing justifications for the witchcraft prohibition back to its religious inception. During a police operation that Justice Nasmith labelled "an embarrassment on the administration of justice," the accused youth read tarot cards and a horoscope for an undercover police officer.[89] Justice Nasmith then decried the religious roots of the provision when he remarked that the decisions made under it, as well as the case before him, are "tainted with archaic thinking."[90] Presumably the thinking was archaic because it dealt with undesirable religious practices.

He continues, condemning the "dogmatic tone" of the witchcraft provisions —provisions that "were probably intended to counteract the perceived threat to the right of predominant religious institutions to protect their exclusive domain

[83] See ibid., at para 25. See also *R v Blackmore*, *supra* note 86 ("a person commits the *actus reus* of the s. 365(*b*) offence, quite simply, when he or she undertakes, for a consideration, to tell a fortune," at para 297).

[84] [1987] 1 SCR 310, 39 DLR (4th) 639 (*Labrosse*).

[85] See ibid., 312. See also David Watt and Michelle Fuerst, eds., *Tremeear's Criminal Code: The 2018 Annotated* (Toronto: Thomson Reuters, 2017), 696.

[86] See *Labrosse*, *supra* note 84, 311.

[87] See ibid., 312. See also Bakht and Palmer, "Modern Law, Modern Hammers," 134, 146; Tarantino, *Under Arrest*, 107.

[88] 8 WCB (2d) 444, 1989 CarswellOnt 3236 (Ont Youth Ct) (cited to Carswell).

[89] Ibid., at para 24, 1. Justice Arthur Peter Nasmith is the only Nasmith named for the Ontario Provincial Court (see e.g., "Former Judges," *Ontario Courts*, April 14, 2022, www.ontariocourts.ca/en/formerjudges/).

[90] Ibid., at para 3.

for dealing with the realm of superstition or the supernatural."[91] According to Justice Nasmith, "the criminality in these early offences was closely connected to notions of heresy."[92] Foreshadowing the end of the provision nearly thirty years later, Justice Nasmith warns that discussions about believers, non-believers, and partial believers, as well as elements of curiosity, entertainment, and theatre, add up to a "very unsuitable atmosphere for prosecution under the *Criminal Code*."[93] Justice Nasmith called the addition of the word *fraudulent* "refreshing," thus seeming to approve of Parliament's newfound focus on bad business, but his gaze was unequivocally fixed on the prohibition's religious inception.[94]

The *Canadian Charter of Rights and Freedoms*[95] was enacted in 1982. The focus of the prohibition fundamentally shifted back to its religious origins in *R. v. Duarte* (1990)[96] when the accused invoked freedom of religion under the *Charter* against an accusation of witchcraft. In this Ontario case, a woman brought her daughter to Antonio Duarte, a witch doctor, in the hopes that he would help the daughter with fiancé problems and suicidal ideation.[97] Duarte was charged with witchcraft under paragraph 365(*a*) of the *Criminal Code*, which was the first time that charges had been brought under paragraph (*a*) since Parliament separated the provision into paragraphs in 1955. Paragraph 365(*a*) is the one that explicitly prohibits witchcraft, sorcery, enchantment, or conjuration, rather than the oft-invoked paragraph (*b*) that prohibits fortune-telling. And, somewhat paradoxically—given how witchcraft prohibitions had been used in earlier centuries to marginalize women[98]—the accused was a man.

Rather than constituting a criminal offence of which the state could accuse someone, for the first time, witchcraft was now a religious identity being used as a criminal defence. However, Justice Patricia Riley German held that section 365 of the *Criminal Code* did not infringe anyone's freedom of religion under paragraph 2(*a*) of the *Charter*. Nor did it discriminate against Duarte under section 15 of the *Charter* because he did not have to prove the sincerity of his belief. Once again, the dishonesty or falsity of witchcraft was simply assumed without further comment when the court wrote that "any threat [from the provision] is to the dishonest person who pretends belief in these matters and that is not a threat to freedom of religion."[99] Once again, there is no discussion about what would happen to someone not merely *pretending* to believe in these matters, but rather *sincerely* believing in them.

In *R. v. Appleby*,[100] which also took place in 1990, the accused once more invoked paragraph 2(*a*) of the *Charter* as a religious shield against accusations of

[91] Ibid., at para 9.
[92] Ibid.
[93] Ibid.
[94] Ibid.
[95] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11.
[96] [1990] OJ No 690 (Ont Dist Ct) (cited to Lexis QuickLaw; *R v Duarte*).
[97] See Bakht and Palmer, "Modern Law, Modern Hammers," 140.
[98] On the disparity between men and women, see Levack, *Witch-Hunt*, 144–45.
[99] *R v Duarte*, *supra* note 96, 5.
[100] 109 AR 40 (AB Prov Ct) (cited to Lexis QuickLaw).

witchcraft. He claimed that being a Wiccan believer exempted him from section 90 of the *Criminal Code*, which prohibited him from carrying a nine-inch knife that he argued was of spiritual significance. However, Justice Bernard Laven held for the Alberta Provincial Court that, even if Appleby's religious rights under paragraph 2(*a*) of the *Charter* were infringed, this was justifiable as a public safety measure under section 1.[101] He specified that the accused cannot carry around a dangerous weapon "under veil or guise, of his beliefs, religious or otherwise, in the occult, magic, mystery and the craft of Wicca" and that any comparison to the "right or privilege of a Sikh to carry a Kirpan is merely absurd and entirely derisive."[102] As in *R. v. Duarte*, Justice Laven failed to elaborate on why this comparison was absurd and derisive, assuming that the reader would simply understand. Witchcraft might now be a religion, sure, but not one that warranted *Charter* protection.

Although, again in 1990, someone was acquitted of witchcraft on appeal in *R. c. Carjaval*[103], the last actual conviction in Canada under the witchcraft provision, this one, back under the fortune-telling paragraph 365(*b*), was upheld in 1993 by the Quebec Court of Appeal in a case called *R. c. Turgeon*,[104] just over one hundred years after the witchcraft provision was imported into Canada. Yet again, the question on appeal was whether the trial judge could infer fraudulent intent based solely on the accused's claim to predict the future.[105] Just as in *R. v. Marcott*, decided almost one hundred years earlier, in *R. c. Carjaval*, the Quebec Court of Appeal upheld the conviction at first instance by saying that "it is possible to infer *mens rea* simply from the fraudulent character of the actions."[106] And, like witchcraft, simply telling fortunes was again taken without comment to be both false and fraudulent.

VII. Eliminating the Witchcraft Provision

The witchcraft provision was last invoked in two immigration cases in which the person admitted to or was accused of practising witchcraft in another country. In *Zablon v. Canada* (2013),[107] Christopher Zablon was accused of witchcraft in his home country of Kenya.[108] Based on this allegation, his accusers burned down his house and murdered a police officer who was there to protect him.[109] The Canadian Immigration and Refugee Board refused his application for refugee

[101] See Ogilvie, *Religious Institutions*, 192.

[102] *R v Appleby*, *supra* note 100, 6. Contrast this with the decision in *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, at para 50 (*Multani*).

[103] [1990] QC n° 2123, 1990 CarswellQue 677 (Qc CA).

[104] (1993), 56 QAC 277, [1994] RL 104 (Qc CA) (translations by author).

[105] Since she was five years old (see ibid., 2).

[106] Ibid., 4. See also Alain Dubois and Philip Schneider, *Code criminal et lois connexes, 2018* (Montreal: LexisNexis, 2017), 649–50.

[107] *(Minister of Citizenship and Immigration)*, 2013 FC 58.

[108] See ibid., at para 3.

[109] See ibid.

status because, among other things, his religious belief was not one covered under the *Convention Relating to the Status of Refugees.*[110] The Federal Court overturned that decision and sent his application back to the board for redetermination.[111] Later, in *Fofona c. R.*,[112] the accused pleaded guilty in Canada to witchcraft under paragraph 365(*a*) but did not realize that it would harm his application for permanent residency.[113] The Superior Court of Quebec held that it would not be in the interests of justice or of predictability in the law to delay his deportation on this basis.[114]

There have been no convictions under the witchcraft provision since *R. c. Turgeon* in 1993, but the Crown has laid several charges entirely on grounds of bad business rather than bad religion.[115] In 2009, Vishwantee Persaud claimed to be from a family of witches and said that she could embody the client's deceased sister during a tarot reading.[116] She received $27,000 for her services. Prosecutors withdrew the witchcraft charge when Persaud pleaded guilty to four counts of fraud and returned the money that she had received.[117] In 2012, Gustavo Valencia Gomez was charged with witchcraft when, in exchange for $23,000, he treated an ill woman with egg yolks, lemon oil, and worms, believing her to be cursed. Again, the charges were dropped when he returned the money.[118] Finally, in 2017, one Master Raghave provided astrological and psychic services to exorcise an evil spirit from a sick person in exchange for the tidy sum of $101,000. Although he was charged with witchcraft and several other offences, as in the other cases, prosecutors again dropped the witchcraft charge in exchange for restitution and a guilty plea on another fraud charge.[119]

On 6 June 2017, then Minister of Justice Jody Wilson-Raybould introduced Bill C-51, which would, among other things, finally eliminate the witchcraft provision.[120] She targeted this provision "given the paltry number of prosecutions" and the fact that it is redundant with the other fraud

[110] See ibid., 6.

[111] Bakht and Palmer discuss *Zablon* briefly in *supra* note 2, 124, n 9, calling it "[a] positive legal step for sheltering those persecuted for 'witchcraft'."

[112] 2018 QCCS 104.

[113] See ibid., at paras 5–8.

[114] See ibid., at paras 47–48.

[115] In *JA et Responsable du CIUSSS A*, 2017 QCTAQ 12163, 2017 CanLII 89390, the accused was schizophrenic and was found to be mentally unfit to stand trial for fortune-telling under para 365(*b*).

[116] See Isert, "Speaking to the Dead"; Ha-Redeye, "Time to Burn Witchcraft Provisions"; Bakht and Palmer, "Modern Law, Modern Hammers," 123.

[117] See Michael McKiernan, "Accused Witch Pleads Guilty to Fraud, leaves Lawyer in Ruins," *Law Times*, August 2, 2010, www.lawtimesnews.com/news/general/accused-witch-pleads-guilty-to-fraud-leaves-lawyer-in-ruins/259310.

[118] See Jennifer Pagliaro, "Witchcraft Charge Dropped after Restitution Paid to Victims," *Toronto Star*, February 8, 2013, www.thestar.com/news/crime/2013/02/08/witchcraft_charges_dropped_after_restitution_paid_to_victims.html.

[119] See Hina Alam, "Man Charged with Witchcraft Pleads Guilty to One Count of Fraud," *Toronto Star*, April 6, 2017, www.thestar.com/news/gta/2017/04/06/man-charged-with-witchcraft-pleads-guilty-to-one-count-of-fraud.html.

[120] See *An Act to Amend the Criminal Code and the Department of Justice Act and to Make Consequential Amendments to another Act*, SC 2018, c 29, s 41, effective December 13, 2018.

provisions.[121] Once again, the bad religion dimension of the witchcraft prohibition faded into the background while the bad business of fraud stole the show. Doubtless with Persaud, Gomez, and Master Raghave in mind, one minister pointed out that people still use "fraudulent witchcraft powers ... even in this day and age."[122] The Conservative member of Parliament, Erin O'Toole, quipped that the Liberal Minister of Justice was too preoccupied with "removing critical parts of our *Criminal Code*, like witchcraft" instead of dealing with more pressing legislative concerns.[123] In the end, enough members approved the bill, with one even echoing Justice Nasmith's criticism in *R. v. M.K.M.* by noting that the provision "impinges on the rights of some religions."[124] On 13 December 2018, Bill C-51 became law and the witchcraft prohibition was finally repealed in Canada.[125]

VIII. Conclusion: From Bad Religion to Bad Business and Back Again

First and foremost, the long history of witchcraft in England and in Canada makes one think of all of the people—primarily women—who were tortured, imprisoned, or put to death under the early witchcraft prohibitions based on accusations of bad religion. The inequitable application of the witchcraft provision in Canada and elsewhere is something that has been discussed for many decades in the academic literature.[126] It was also a significant concern for early writers, politicians, and influential thinkers who wanted to repeal witchcraft laws.

In 1769, William Blackstone would write that "to the terror of all ancient females in the kingdom ... many poor wretches were sacrificed thereby to the

[121] See the legislative summary of the act published by the library of Parliament: Lyne Casavant et al., "Legislative Summary: Bill C-51: *An Act to Amend the Criminal Code and the Department of Justice Act and to Make Consequential Amendments to Another Act*," *Library of Parliament*, December 18, 2018, s 2.1.3.7, lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c51-e.pdf.

[122] *House of Commons Debates*, 42-1, No 195 (15 June 2017), 12808 (Hon. Peter Van Loan).

[123] Ibid., 12815 (Hon. Erin O'Toole). Wilson-Raybould would be criticized for this in the media as well: see e.g., Daniel Brown and Michael Lacy, "Wilson-Raybould's Regrettable Legacy as Justice Minister," *Toronto Star*, January 16, 2019, www.thestar.com/opinion/contributors/2019/01/16/wilson-rayboulds-regrettable-legacy-as-justice-minister.html.

[124] See 42-1, *supra* note 122, 12818 (Hon. Wayne Stetski).

[125] See Parliament of Canada, "C-51: *An Act to Amend the Criminal Code and the Department of Justice Act and to Make Consequential Amendments to Another Act*," *LegisInfo*, accessed December 10, 2021, www.parl.ca/LegisInfo/en/bill/42-1/C-51?view=progress.

[126] In Canada, see especially Bakht and Palmer, "Modern Law, Modern Hammers" (denouncing witchcraft as a patriarchal offence designed to control women). Elsewhere, among many other examples, see e.g., Christina Lamer, *Witchcraft and Religion: The Politics of Popular Belief*, ed. Alan Macfarlane (Oxford: Basil Blackwell Publisher, 1984), 62; Anna Garland, "The Great Witch Hunt: The Persecution of Witches in England, 1550–1660," *Auckland University Law Review* 9, no. 4 (2003): 1152, at 1158; Elizabeth Reis, *Damned Women: Sinners and Witches in Puritan New England* (Ithaca: Cornell University Press, 1997); G. Geis, "Lord Hale, Witches, and Rape," *British Journal of Law and Society* 5, no. 1 (1978): 26.

prejudice of their neighbours."[127] In 1883, Sir Stephen wrote that this "odious superstition" led to the deaths of far too many "poor old creatures."[128] And, in 1933, a Canadian member of Parliament declared sorrowfully that, although "there never was actually such a thing as witchcraft, ... many poor old women paid with their lives for that superstition."[129] The unequal, unfair, and misogynistic application of the witchcraft provision was noticed and decried long before the uproar about it in modern legal writing.[130]

The next thing that comes to mind is the religious dimension of witchcraft prohibitions. There is no one universally accepted definition of *religion*, and several scholars have noted how the magical aspects of witchcraft overlap with the worldly benefits—such as health, wealth, and resisting temptation—that religion is often said to procure.[131] The Supreme Court of Canada has had similar difficulties in pinning down a definition of *religion.*[132] In *Syndicat Northcrest v. Amselem*, Justice Frank Iacobucci defines *religion* as "belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions."[133] Later, he claims that religious freedom under the *Charter* is the ability to practise and "harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes."[134]

In general, religious belief is declining worldwide and in Canada in particular.[135] This is probably one of the main reasons why Canadians are less excitable about spiritual practices that are unlike their own.[136] It is almost certainly what explains the transition from bad religion toward bad business: religion was just less important to everyone, including Parliament and the courts. Nevertheless, although Justice Laven in *R. v. Appleby* calls the accused's comparison of his Wiccan religion to that of a Sikh "absurd and entirely derisive,"[137] the freedom of religion defence invoking paragraph 2(*a*) of the *Charter* against an accusation of witchcraft

[127] Blackstone, *Commentaries*, 61.

[128] Stephen, *History of the Criminal Law of England*, 378, 380.

[129] *House of Commons Debates*, 17-4, vol 2 (21 February 1933), 2329 (Hon. William Irvine).

[130] For example, in Bakht and Palmer, "Modern Law, Modern Hammers," denouncing in 2015 the fact that the provision is "a method of social control for minority groups and women" (at 123).

[131] See Levack, *Witch-Hunt*, 5. See e.g., A. A. Barb, "The Survival of Magic Arts," in *The Conflict between Paganism and Christianity*, ed. Arnaldo Momigliano (Oxford: Clarendon, 1963), 100; Keith Thomas, *Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth and Seventeenth Century England* (New York: Harmondsworth, 1982).

[132] See M. H. Ogilvie, "The Meaning of 'Religion' and the Role of the Courts in the Adjudication of Religious Matters: an English and Canadian comparison," *Canadian Bar Review* 93 (2015): 303, at 305, 318.

[133] 2004 SCC 47, at para 39.

[134] Ibid., at para 46. On sincerity, see also *R v Jones*, [1986] 2 SCR 284, 31 DLR (4th) 569.

[135] On the decline in religion worldwide, among others, see e.g., Steven Pinker, *Enlightenment Now: The Case for Reason, Science, Humanism, and Progress* (New York: Viking, 2018), 435–38. For a good overview of the role of religion in Canada, see Pew Research Center, "Canada's Changing Religious Landscape," June 27, 2013, www.pewresearch.org/religion/2013/06/27/canadas-changing-religious-landscape/.

[136] On the link between religious zeal and witchcraft prosecutions, see Eller and Reis, "Witchcraft."

[137] *R v Appleby*, *supra* note 100. Contra *Multani*, *supra* note 102, at para 50. See also Diana Ginn, Halsbury's Laws of Canada (online), *Religious Institutions*, "Wearing of a Kirpan" (I.2(4)), HRI-15 "Constitutional Framework" (2018 Re-Issue).

would likely now succeed in light of Supreme Court decisions from the early 2000s such as *Amselem* and *Kapp*, especially now that there have been more and more Wiccans turning up since the 1970s.[138]

Once a criminal charge made with "ardour and eagerness ... as a natural result of religious excitement,"[139] nowadays, modern Canadian society seems ready to accept that "[o]ne person's 'witchcraft' is another person's religion."[140] Gone are the days of burning people at the stake. Gone, too, are the days of persecution and prosecution on the basis of illegitimate belief and social stigma. Now, in the twenty-first century, we find that "Canada is a pluralistic society"[141] and that, as one member of Parliament put it, the witchcraft prohibition "impinges on the rights of some religions."[142] At least for the Honourable Wayne Stetski, witchcraft is not an absurd and derisive comparison to Sikhism, as it was for Justice Laven in *R. v. Appleby*: it is a religious belief that should be treated respectfully.

We now treat the bad business of quasi-spiritual fraud not as its own class of criminal offence, but as any other kind of fraud: under the general fraud provision of the *Criminal Code.* Once, witchcraft was a charge of blasphemy that led women living on the margins of society to their death. It then became a distinct kind of fraud with a spiritual flavour. Now, witchcraft has become a voluntary religious identity for some that "involves pantheism, goddess worship, environmentalism, [and] meditation"—an identity that many adopt precisely *because* of how radical and subversive witchcraft is.[143] But our enlightened and tolerant view of witchcraft was hard-won. As the history of the witchcraft prohibition makes plain, this pluralistic attitude was born of strife, sacrifice, and stigmatization. Thankfully, modern Canadian society finally seems ready to coexist with witchcraft.

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[138] See Bakht and Palmer, "Modern Law, Modern Hammers," 141; Eller and Reis, "Witchcraft." See also Mireille Gagnon, "Old Structures, New Faces: The Presence of Wicca and Neopaganism in Canadian Prison Chaplaincies," in *Religion and Diversity in Canada*, eds. Lori G. Beaman and Peter Beyer (Leiden: Brill, 2008), 150.

[139] Stephen, *History of the Criminal Law of England*, 430–31.

[140] Bakht and Palmer, "Modern Law, Modern Hammers," 136.

[141] *Reference re Same-Sex Marriage*, 2004 SCC 79, at para 22.

[142] 42-1, *supra* note 118, 12818 (Hon. Wayne Stetski).

[143] Eller and Reis, "Witchcraft." See also Bakht and Palmer, "Modern Law, Modern Hammers," 136–37; Monica Sjöö and Barbara Mor, *The Great Cosmic Mother: Rediscovering the Religion of the Earth*, 2nd edn (San Francisco: HarperOne, 1991), 21; Levack, *Witch-Hunt*, 294; Marion Gibson, *Witchcraft: The Basics* (London: Routledge, 2018), 143–69.

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