House of Commons
Canada

FIRST PRINCIPLES:

Recodifying the General Part

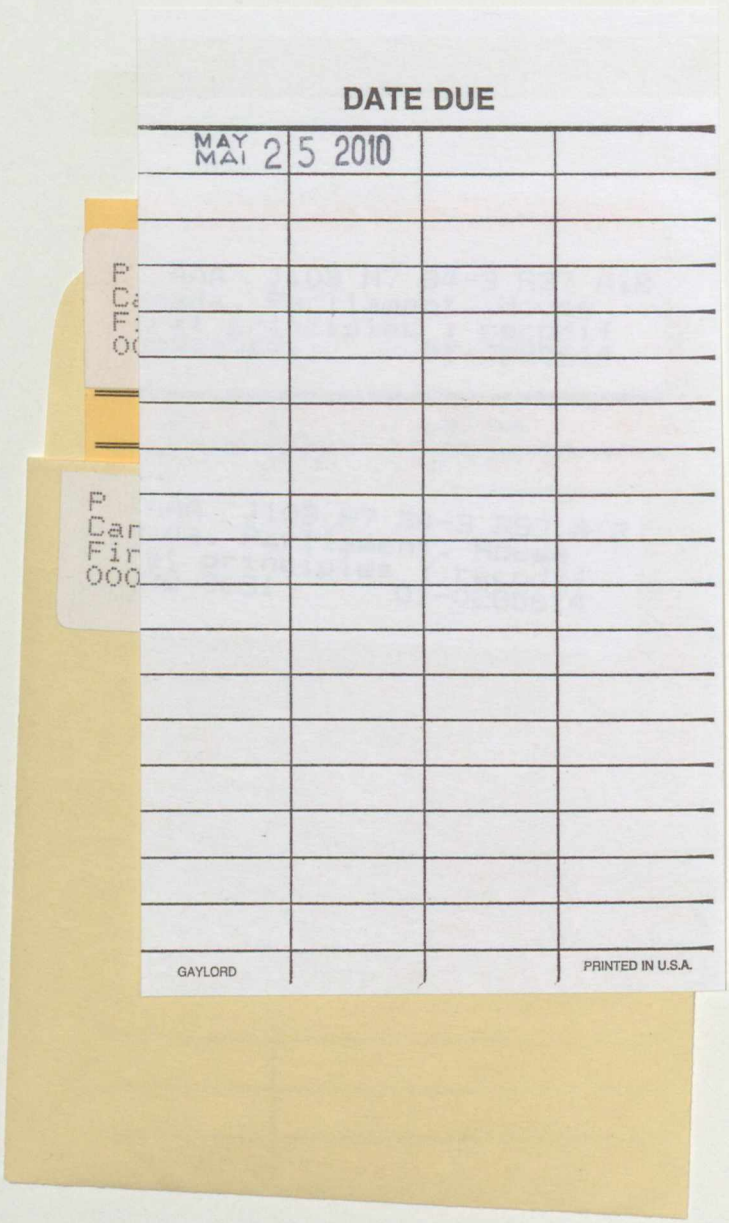
of the

Criminal Code of Canada

Report of the Sub-Committee
on the Recodification of the General Part of the Criminal Code
of the
Standing Committee on Justice and the Solicitor General

Blaine Thacker, M.P., Q.C.
Chairperson

February 1993



FIRST PRINCIPLES:

Recodifying the General Part of the Criminal Code of Canada

Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General

Blaine Thacker, M.P., Q.C.
Chairperson

February 1993

HOUSE OF COMMONS

Issue No. 11

Thursday, December 10, 1992
Tuesday, February 2, 1993
Thursday, February 4, 1993
Tuesday, February 16, 1993

Chairperson: Blaine Thacker

CHAMBRE DES COMMUNES

Fascicule nº 11

Le jeudi 10 décembre 1992
Le mardi 2 février 1993
Le jeudi 4 février 1993
Le mardi 16 février 1993

Président: Blaine Thacker

Minutes of Proceedings and Evidence of the Sub-Committee on the

Recodification of the General Part of the Criminal Code

of the Standing Committee on Justice and the Solicitor General

Procès-verbaux et témoignages du Sous-comité sur la

Recodification de la Partie générale du Code criminel

du Comité permanent de la justice et du Solliciteur général

RESPECTING:

Pursuant to Standing Order 108(1)(a) and (b) and the Order of Reference of June 13, 1991 of the Standing Committee to the Sub-Committee, consideration of the recodification of the General Part of the *Criminal Code*

INCLUDING:

THE FIRST REPORT TO THE HOUSE

CONCERNANT:

Conformément à l'article 108(1)a) et b) du Règlement et de l'Ordre de renvoi du Comité permanent du 13 juin 1991 au Sous-comité, considération de la recodification de la Partie générale du *Code criminel*

Y COMPRIS:

LE PREMIER RAPPORT À LA CHAMBRE

Third Session of the Thirty-fourth Parliament,
1991-92-93

Troisième session de la trente-quatrième législature,
1991-1992-1993

25299—1

SUB-COMMITTEE ON THE RECODIFICATION OF THE GENERAL PART OF THE CRIMINAL CODE OF THE STANDING COMMITTEE ON JUSTICE AND THE SOLICITOR GENERAL

Chairperson: Blaine Thacker

Members

Rod Laporte
George Rideout—(3)

(Quorum 2)

Richard Dupuis

Clerk of the Sub-Committee

James W. O'Reilly,
Legal Counsel

From the Library of Parliament:

Philip Rosen,
Senior Analyst

Marilyn Pilon,
Research Officer

From the Committees Directorate:

Nancy Hall,
Assistant Clerk

Georgette Dubeau,
Secretary

SOUS-COMITÉ SUR LA RECODIFICATION DE LA PARTIE GÉNÉRALE DU CODE CRIMINEL DU COMITÉ PERMANENT DE LA JUSTICE ET DU SOLLICITEUR GÉNÉRAL

Président: Blaine Thacker

Membres

Rod Laporte
George Rideout—(3)

(Quorum 2)

Le greffier du Sous-comité

Richard Dupuis

James W. O'Reilly,
Conseiller Juridique

De la Bibliothèque du Parlement:

Philip Rosen,
Analyste principal

Marilyn Pilon,
Attachée de recherche

De la Direction des Comités:

Greffier adjoint,
Nancy Hall

Georgette Dubeau,
Secrétaire

Published under authority of the Speaker of the House of Commons by the Queen's Printer for Canada.

Available from Canada Communication Group — Publishing, Supply and Services Canada, Ottawa, Canada K1A 0S9

Publié en conformité de l'autorité du Président de la Chambre des communes par l'Imprimeur de la Reine pour le Canada.

En vente: Groupe Communication Canada — Édition, Approvisionnements et Services Canada, Ottawa, Canada K1A 0S9

The Sub–Committee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the *Criminal Code* has the honour to present its

FIRST REPORT

Pursuant to Standing Order 108(1)(*a*) and (*b*) and the Order of Reference of June 13, 1991, of the Standing Committee on Justice and the Solicitor General, your Sub–Committee was constituted on Wednesday, March 25, 1992 in order to examine the Recodification of the General Part of the *Criminal Code.*

Your Sub–Committee adopted this Report with the following recommendations:

Table of Contents

ACKNOWLEDGEMENTS

The Sub-Committee is grateful to all those, who, over the years, contributed to the consideration of a Recodification of the General Part of the *Criminal Code*. Its work was greatly facilitated by the input from the witnesses who appeared before the Sub-Committee offering various perspectives on a wide variety of issues. Their contribution proved invaluable to us.

In addition, the Sub-Committee's work was substantially furthered by the assistance received from David Daubney and Heather Holmes of the Department of Justice and by the work of those formerly associated with the Law Reform Commission of Canada.

The Sub-Committee also wishes to express its appreciation to the central staff for their excellent work and commitment and for the long hours devoted to this study.

The Sub-Committee owes a special debt of gratitude to its advisors for their dedication and great expertise. We especially thank James W. O'Reilly who provided research support and drafted the Report in collaboration with Philip Rosen and Marilyn Pilon of the Library of Parliament Research Branch.

In particular, we wish to thank the Clerk of the Sub-Committee Richard Dupuis, who ably scheduled the activities and managed the administrative, financial and logistical aspects of the Sub-Committee's work. We also appreciate the contribution of Nancy Hall, Assistant Clerk, as well as Georgette Dubeau, secretary of the Clerk who has worked faithfully for the Sub-Committee since the beginning of its mandate.

Finally, the Sub-Committee would like to thank the staff of the Committees Directorate, and all the support services of the House of Commons and the Research Branch of the Library of Parliament for their co-operation and publication of this report. Special thanks to the Translation Bureau of the Secretary of State who had to translate very technical briefs.

CHAPTER I

INTRODUCTION

(a) Background

The *Criminal Code* was adopted by Parliament in 1892 and proclaimed in force in 1893. Over the years, a number of Commissions and Committees have urged that it be comprehensively examined, evaluated and recodified. Parliament examined the *Criminal Code* in 1955 and carried out a major overhaul of it which did not, however, amount to a recodification. It has also, on numerous occasions, been amended in a piecemeal fashion by Parliament.

The impetus for criminal law reform in Canada in recent years came from the work of the Law Reform Commission in the 1970s. In October 1979, the Honourable Jacques Flynn, then Minister of Justice, and his provincial counterparts agreed to establish the Criminal Law Review. This review had as one of its priorities a thorough revision of the *Criminal Code*. One of the characteristics of the Criminal Law Review was to be a close collaboration between the Law Reform Commission and the Department of Justice.

In August 1982, the Government of Canada published *The Criminal Law in Canadian Society.*[1] This unique document for the first time in history set out the Government of Canada's policy on the purpose and principles of the criminal law. It drew on earlier work carried out by the Law Reform Commission.[2] In turn, the Law Reform Commission in 1986 published its Report 30 entitled *Recodifying Criminal Law.*[3] It was superseded in June 1987 by Report 31, *Recodifying Criminal Law—Revised and Enlarged Edition.*[4] This comprehensive report was the product of widespread consultation and contained detailed legislative proposals. It became the basis upon which subsequent discussions of reform of the *Criminal Code* have occurred.

The former Minister of Justice formally requested in May, 1990 (see Appendix A) that the Standing Committee take up the study of a recodification of the General Part of the *Criminal Code*. In response to this request, the Standing Committee created the Sub-Committee on the Recodification of the General Part of the Criminal Code on March 25, 1992. The Clerk of the Sub-Committee, Mr. Richard Dupuis, sent letters to many groups and individuals inviting them to participate in the Sub-Committee's study. Those who participated by appearing before the Sub-Committee or submitting a brief, or both, are listed in Appendix C. In addition, in order to receive the testimony of a witness (Ms. Sue Rodriguez) who was unable to appear in person, the Sub-Committee agreed to hear her testimony by way of video tape.

---

1 (Ottawa: 1982).

2 *Report 3, Our Criminal Law,* (Ottawa: Supply and Services, 1976).

3 (Ottawa: LRCC, 1986)

4 (Ottawa: LRCC, 1987), hereinafter *Report 31*.

In preparation for the work of the Sub-Committee, the Law Reform Commission and the Department of Justice collaborated in the preparation of a framework document entitled *Toward a New General Part for the Criminal Code of Canada*. This important document, published in December 1990, thoroughly canvassed a multitude of legal and policy issues related to enactment of a recodified General Part. It was widely distributed and, along with the Law Reform Commission's *Report 31*, became the starting-point of the Sub-Committee's deliberations.

The Canadian Bar Association in August 1992 released a report entitled *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada*[5] prepared by its Criminal Recodification Task Force. The *CBA Task Force Report*, produced by representatives of the criminal bar and bench, contained detailed legal analysis and specific legislative proposals. It, along with the Law Reform Commission work and the framework document, became one of the primary points of reference for both the Sub-Committee and those who made submissions to or appeared before it.

(b) The Need for Codification

When Parliament adopted the *Criminal Code* in 1892, Canada was in the vanguard as the first common-law country to codify its criminal law. Since that time, our *Code* has not been comprehensively amended. The General Part, which sets the basic rules of conduct and culpability for the rest of the Code, is in particular need of rebuilding.

The Honourable Kim Campbell, then Minister of Justice and Attorney General of Canada, told the Sub-Committee that:

> The present General Part is, by the standards of most criminal codes, incomplete. A General Part, as the term implies, should cover the rules and other matters that generally apply to all offences.[6]

The Law Reform Commission has provided a more detailed exposition of the state of the present General Part

> The present *Criminal Code* has served us well over the past 95 years but is no longer adequate to our needs. Even though amended many times, with a major revision in 1955, it remains much the same in structure, style and content as it was in 1892. It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled by the judiciary. It includes obsolete provisions. It over-extends the proper scope of the criminal law. And it fails to address some serious current problems. Moreover, it has sections which may well violate the *Canadian Charter of Rights and Freedoms*.[7]

---

5 (Ottawa: Canadian Bar Association, 1992), hereinafter *CBA Task Force Report.*

6 Issue 1:10. *Note*: Frequent references will be made throughout this Report to testimony and briefs contained in the Sub-Committee's *Minutes of Proceedings and Evidence*. In the references to the *Minutes*, such as the preceding one (*i.e.* "Issue 1:10"), the first number indicates the Issue number in which the statement referred to may be found. There are ten Issues comprising the *Minutes*. If the first number is followed by a letter, then the reference is to a brief contained in that particular Issue, rather than to oral testimony. The second number refers to the page at which the source referred to can be found.

7 *Report 31*, at 1.

The Sub-Committee agrees with both of these assessments of the General Part in its present form. It suffers from a lack of cohesion and consistency. The general rules applicable to all areas of the criminal law are not clearly and completely set out. Parts of it may not pass constitutional muster in the 1990s in light of the *Canadian Charter of Rights and Freedoms*. As times in Canada have changed, the *Code* has not been systemically adapted to reflect and accommodate the changing reality of Canadian society.

Only one witness appearing before the Sub-Committee, Ms. Jessie Horner, opposed a recodification of the General Part. Her view was that there is insufficient consensus in Canada on what the contents of the General Part should be.[8]

Recodification of the criminal law, and of the General Part in particular, is an important means of adapting and adjusting the criminal justice system to the evolving reality of Canada and its constitutional regime. Vincent Del Buono, President of the Society for the Reform of the Criminal Law, described the importance and impact of recodification in the following words:

> The codification or recodification of the criminal law is a difficult task at the best of times. But it is a process that must be undertaken periodically by democratic societies to give or restore coherence to the criminal law, which, imperfect as it is, is one of the most important expressions of our fundamental values as a community and as a nation.[9]

The impact of any criminal law recodification effort is difficult to evaluate. The task of identifying basic social values and having them accurately reflected in the general principles of criminal law is a difficult, but necessary, task. Any recodification exercise may have the effect of questioning and forcing the evolution of presently accepted principles and practices. The General Part is important because it sets out the basic principles that govern the determination of criminal liability of persons who are in conflict with generally-accepted social values enforced by the state. It also establishes some of the basic rules for the functions performed by the institutions and agencies that make up the criminal justice system.

Mr. Justice Gilles Létourneau, then President of the Law Reform Commission, argued in favour of a recodified General Part for the following reasons:

> This is needed for three purposes: organization, rationalization, and illumination of the criminal law. For these purposes, it must employ general rules to avoid endless repetition in the definition of offences, systematic arrangement to give the code coherence, and articulation of basic principles of justice to manifest the underpinning of the criminal law.
>
> A general part must be comprehensive and include all rules of general application and put all the law in these general matters into one document instead of leaving it to volumes of case law. At the same time, it must be clear and use plain language, ordinary words and straightforward sentences, to make the criminal law more accessible to the ordinary citizen.

---

8 Issue 9:5.

9 Issue 1:21.

> A general part must also promote the legitimacy of the criminal justice system. It must incorporate the basic social values of the community served by that system. Second, it must articulate the basic principles of fairness and justice that underpin that law and give it its moral grounding.[10]

The Sub-Committee agrees with these arguments. A recodified General Part will have the effect of rejuvenating the *Criminal Code* and give impetus to an eventual recodification of its Special Part. If this should happen, Canada will rejoin the vanguard of countries actively engaged in profound criminal law reform, a status it had when Parliament adopted the *Criminal Code* in 1892.

The Sub-Committee particularly agrees with Mr. Justice Létourneau's suggestion that the General Part be recodified in understandable language. The current General Part is difficult to understand, in part because it is unduly complex in some areas and in part because it uses terminology that is not commonly used by Canadians.

In his testimony before the Sub-Committee, Professor Don Stuart gave an example of a case in Toronto in which the trial judge took over eight hours to instruct the jury on the law of murder, intoxication, aggravated assault and self-defence.[11] Even at that, the jury did not understand the instruction. This is, no doubt, due in part to the fact that the existing law on such matters as intoxication and self-defence is very complicated. However, an additional problem is that the words in the *Code* dealing with principles of liability and defences are not easily understood. For example, section 34 dealing with self-defence uses terms such as "grievous bodily harm" and "reasonable apprehension".

The Sub-Committee believes that it is important that the *Criminal Code* speak to all Canadians. Everyone should understand what the basic rules of criminal law are. It is also of vital importance that these rules be easily understood, as Professor Stuart's example shows, since judges must explain them to juries. As such, the Sub-Committee believes that every effort should be made to recodify the General Part in plain language.

Recommendation One

The Sub-Committee recommends that the General Part of the *Criminal Code* be recodified.

Recommendation Two

The Sub-Committee further recommends that, to the extent possible, a recodified General Part of the *Criminal Code* be drafted in plain language.

(c) Proceedings of the Sub-Committee

This report does not give equal attention to all elements of a recodified General Part. This is for two reasons. First, none of the witnesses appearing before, nor the submissions received by, the Sub-Committee dealt with *all* the contents of a new General Part. Witnesses and authors of

---

[10] Issue 1:17.

[11] Issue 9:16-7.

submissions addressed what they believed to be either the most important or the most controversial elements of a renewed General Part. To some extent, then, the Sub-Committee is limited by the testimony it heard and the submissions it received.

The Sub-Committee wishes it to be known that it would have liked to have heard a broader range of views on some of the challenging and fundamental issues contained in the General Part. Undoubtedly, its work would have been enhanced by the participation of representatives from minority groups, women's groups and Aboriginal peoples' associations, among others. We sincerely hope that once a bill is introduced by the Minister of Justice, these groups will be able to provide Parliament with the benefit of their input on these difficult matters. After all, the *Criminal Code*, particularly its General Part, is a statement of the most basic rules that we as Canadians believe should govern our relations with each other. The more those rules are informed by the views of members of Canadian society, the better they will reflect the reality of modern Canada and the greater the likelihood that they will be respected.

The second reason why this Report does not deal equally with all elements in the General Part is that the Sub-Committee believed that there were some issues in the General Part on which its views would, perhaps, be of greater assistance than others. As such, it attempted to identify, based on the testimony it heard and the submissions it received, the most fundamental or controversial matters among the array of issues comprising the General Part. Accordingly, this Report gives emphasis to the issues addressed in Chapters I to XIII. Chapter XIV deals with an array of issues on which the Sub-Committee wished to give its preliminary views.

Each element of a recodified General Part on which the Sub-Committee has made a definitive recommendation is dealt with in a separate chapter of this report. Each chapter has a first part describing the current state of the law and a second part setting out the Sub-Committee's view. The Sub-Committee has accepted the advice of Mr. Justice Gilles Létourneau[12] and has not attempted the difficult task of drafting legal text for inclusion in a recodified General Part of the *Criminal Code*.

12 In his testimony, Mr. Justice Létourneau stated "I would urge you to keep your discussions with those who will appear before you at the level of principles and leave it to the draftpersons to fiddle with the words and the legislative techniques" (Issue 1:20).

CHAPTER II

PREAMBLE/STATEMENT OF PURPOSES AND PRINCIPLES

(a) Current Situation

At present, the *Criminal Code* does not contain a preamble or statement of principles. Judges interpret the *Code* according to basic principles of criminal law found in the Constitution, the common law or academic treatises.

The idea of including a preamble or statement of principles in legislation is not novel. Perhaps the most obvious example of legislation that includes a statement of principles is the *Young Offenders Act*.[13] An example of legislation that includes a preamble is the recently-enacted Bill C-49[14] amending the *Criminal Code* in relation to sexual assault. The Bill contained a preamble setting out the mischief at which the legislation was aimed, but the preamble does not actually form part of the *Criminal Code*. We note also that Bill C-90,[15] which would amend the provisions of the *Criminal Code* in relation to sentencing, contains a statement of the purposes and principles of sentencing to guide judges in the imposition of just sanctions on conviction of a crime. Other examples include the *Emergencies Act*,[16] the *Canadian Human Rights Act*,[17] the *Canadian Environmental Protection Act*[18] and the recently-adopted *Corrections and Conditional Release Act*.[19]

The benefit of a preamble or statement of principles is that it can guide the interpretation of the *Criminal Code*. The use of discretion by police officers, prosecutors and judges in applying the *Code* is an important part of the operation of our criminal justice system. When this discretion is exercised, it is for the public benefit. A legislative statement of the purposes of the criminal law and the basic principles underlying the *Criminal Code* can help ensure that these publicly accountable actors in the criminal justice system perform their role in accordance with a common and explicit set of values. This argument is perhaps even stronger in the era of the *Canadian Charter of Rights and Freedoms*.

---

13 R.S.C. 1985, c. Y-1.

14 S.C. 1992, c. 38.

15 First Reading, June 23, 1992.

16 R.S.C. 1985, c. 22 (4th Supp).

17 R.S.C. 1985, c. H-6.

18 R.S.C. 1985, c. 16 (4th Supp.).

19 S.C. 1992, c. 20.

More than ever before, the actions of police officers, prosecutors and judges are being measured against the "basic tenets of our legal system".[20] Surely it would be of value for the *Criminal Code* itself to set out the basic tenets underlying it.

The contrary argument is that a preamble or statement of principles would only complicate the already difficult task of interpreting the provisions of the *Criminal Code*. The principles could themselves become the object of litigation and this could cause delays. By necessity, any such preamble or statement of principles would be extremely general. There could easily be disagreement about the meaning of a given principle. Further, the principles could give rise to efforts to give novel interpretations to provisions of the *Code* whose meaning had long been settled. Finally, there is the argument that a preamble or statement of principles is incompatible with the nature of a true Code. A Code is a special variety of legislation whose contents are comprehensive and whose provisions are internally consistent. If the *Criminal Code* is a true Code in this sense or, at least, is to be rendered a true Code through improvements such as a recodified General Part, then perhaps a preamble or statement of principles is unnecessary. The meaning of the *Criminal Code* should, by this reasoning, be made evident by its substantive provisions alone.

The Government of Canada in its 1982 publication *The Criminal Law in Canadian Society* proposed the adoption of a general statement of purpose and principles for the criminal justice system. It was to consist of a preamble, an enunciation of the purposes of the criminal law and a formulation of the principles to be applied to achieve the purpose.[21]

The Law Reform Commission dealt with the issue of a preamble and declaration of principles in *Report 31*.[22] The majority of the signatories of the report were opposed to such a legislative statement, whereas the minority were in favour of it. The report contained the draft legislative text of a preamble and declaration of principles to which the minority subscribed.

(b) The Sub-Committee's View

There appear to be three options for the Sub-Committee to consider in addressing this issue:

- the recodified General Part of the *Criminal Code* should not contain a preamble or statement of principles; or

- the recodified General Part of the *Criminal Code* should contain a preamble or statement of principles; or

- any bill brought to Parliament dealing with a recodified General Part of the *Criminal Code* should include a preamble or statement of principles so that this issue can be given further consideration and the contents of such a legislative instrument can be given closer examination at a later stage.

---

20 As guaranteed by s. 7 of the *Charter*. See *Reference re s. 94(2) of the Motor Vehicle Act of B.C.*, [1985] 2 S.C.R. 486.

21 At 51-4.

22 At 7-8.

The Quebec Bar has expressed reservations about the model preambles or statements of principles it has considered.[23] The group of criminal law professors in the brief prepared by Professor Don Stuart of Queen's University indicated they were doubtful about a proposed preamble and shared the concern of the majority of signatories of the Law Reform Commission's *Report 31*.[24]

The Criminal Trial Lawyers Association of Alberta argued for a well-drafted, unambiguous General Part and against a preamble or statement of principles for the following reasons:

> . . . the Courts are unlikely to find real assistance in a preamble. The aim of the *Criminal Code* is ambiguous. It is intended to promote social control but also to preserve individual freedom. Any attempt to catalogue aspects of these interests will, by necessity, be vague and internally inconsistent. The Courts are unlikely, therefore, to use a preamble as a genuine aid to interpretation. It is more likely that they will seize upon an isolated portion of the preamble to justify an interpretation already made.
>
> In addition, as the Law Reform Commission has noted, a preamble might be used to narrow or broaden specific provisions in ways not intended by legislators.[25]

Because its authors believe that the *Criminal Code* is a legislative document of fundamental importance, the *CBA Task Force Report* supported the position taken by the minority of signatories of the Law Reform Commission's *Report 31*. It recommended that the recodified General Part of the *Criminal Code* contain a declaration of purposes and principles. Its draft legislative text is in the form of a preamble containing a statement of purposes and an enunciation of principles.[26]

The CBA Task Force has made these arguments in the following terms:

> The Task Force agrees with the view expressed by the minority of Commissioners (of the Law Reform Commission) that a preamble containing a declaration of principles will assist in the interpretation and application of the *Criminal Code*, particularly in difficult cases. The incorporation of a declaration of principles reinforces the view that the Code is more than an ordinary statute. Rather, it is a comprehensive and integrated document of fundamental importance. Like the Code itself, the preamble reflects Canadian values. The statement is clear and its meaning ascertainable. These factors are of prime importance in an area of law which has a strong, and perhaps unequalled, impact on all Canadians.[27]

This debate is a vigorous one and the lines are clearly drawn. The incorporation of a preamble or statement of principles into the General Part of the *Criminal Code* would be a departure from past practices, but not entirely unprecedented. The concern that such a legislative instrument would lead to increased litigation is a serious one but not necessarily an unwelcome development. A preamble or statement of principles would be one means of providing some coherence to an often incoherent criminal law and criminal justice system.

---

23 Issue 4A:11-5.

24 Issue 9A:44. Hereinafter referred to as *Criminal Law Teachers' Brief*.

25 Issue 10A:16.

26 Issue 5A:23-4.

27 Issue 5A:24.

Any preamble or statement of principles would have to be carefully drafted and attempt to accommodate and clarify the often contradictory intentions of the criminal law and criminal justice system. This legislative instrument, although of fundamental importance, must not be a substitute for a clearly drafted, comprehensive General Part and *Criminal Code*. Such clarity of legislative drafting would, one hopes, keep litigation to a minimum.

Two issues have to be resolved in dealing with this debate. Should any statement of legislative intention be enacted in a preamble to the General Part of the *Criminal Code* or as an integral part of the *Code*? The resolution of this issue will determine the interpretive weight to be accorded by the courts to a statement of legislative intention. The second issue in this debate is what social and public values should be reflected in any such statement of legislative intention and how should contradictions among them be accommodated.

The Sub-Committee merely identifies these as important issues that must be given further consideration after more extensive debate has been encouraged and taken place.

The majority of members of the Sub-Committee believe that a statement of legislative intention in a preamble or statement of principles is an idea that is worthy of further consideration. A further study should deal with the contents of any such statement of legislative intention, as well as its implementation and interpretive status. A statement of legislative intention should not diminish the requirement that the General Part and the *Criminal Code* be drafted as clearly and unambiguously as possible.

One member of the Sub-Committee does not believe that the General Part of the *Criminal Code* should contain a preamble or statement of principles. It would, in his view, lead to increased litigation and undermine the work of Parliament. The criminal law, he believes, should be clearly drafted—any difficulties or ambiguities should be resolved by the courts in light of the *Canadian Charter of Rights and Freedoms*. Therefore, that member believes a preamble or statement of principles is unnecessary and could result in ambiguities in judicial interpretation.

Recommendation Three

The Sub-Committee recommends that the bill introduced in Parliament dealing with a recodified General Part of the *Criminal Code* include a preamble or statement of principles so that this issue can be given further consideration and the contents of the statement of legislative intent can be given closer examination.

CHAPTER III

THE PRINCIPLE OF LEGALITY

(a) Current Situation

It is a basic principle of criminal law that one should only be convicted of an offence if the relevant conduct was expressly prohibited by law. This principle is expressed by the latin maxim *nulla poena sine lege*—no punishment without a law—and is motivated by fairness and liberty interests. The idea is that no one should be prevented from doing anything unless it has been expressly prohibited. Otherwise, one could be convicted of an offence even though he or she had no way of knowing that the particular conduct was unlawful. This principle is currently contained in section 9 of the *Criminal Code*. It provides that one cannot be convicted of a crime at common law.

The principle of legality also finds expression in the *Canadian Charter of Rights and Freedoms*. Paragraph 11(*g*) provides:

> 11. Any person charged with an offence has the right
>
> . . .
>
> (*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

Thus, as it stands now under Canadian law, one can raise as a defence any justification or excuse provided either by the *Code* or the common law.[28] On the other hand, one can only be convicted of an offence if it is specifically provided for in the *Code* or some other statute.

While this generally describes the state of Canadian law, there is one exception to it. One can still be convicted in Canada of the common law offences of contempt of court. Section 9 of the *Criminal Code* recognizes this as an exception to the general rule that one cannot be convicted of a common law offence. Neither does contempt appear to violate s. 11(*g*) of the *Charter* as it does not specifically require that offences be set out in statute. Proposals have been made for the codification of contempt of court over the years and legislation was introduced in Parliament in 1984, but died on the order paper with the dissolution of Parliament that year.[29]

(b) The Sub-Committee's View

The Law Reform Commission of Canada recommended in its *Report 31* that the principle of legality should be expressly provided for in a recodified General Part. Its formulation was as follows:

> 2(1) Principle of Legality. No one is liable except for conduct defined at the time of its occurrence as a crime by this Code or by some other Act of the Parliament of Canada.

---

28 See discussion of common law defences below in Chapter IV.

29 See Bill C-19, First Reading February 7, 1984.

The Commission justified its recommendation in the following terms:

> The rationale is that in such cases conviction and punishment would be unjust, self-contradictory and pointless: unjust because no punishment is deserved, self-contradictory because it stigmatizes as wrongdoers those who clearly are not, and pointless because no one can be deterred from doing what is not as yet against the law.[30]

Notably, the Commission did not foresee any exceptions to its provision. Indeed, it went on to propose codification of the various offences under the rubric of contempt of court.[31]

The CBA Task Force also recommended enactment of the principle of legality in virtually identical terms to the Law Reform Commission proposal. Although it did not expressly recommend it, the Task Force must be taken as implicitly in favour of codifying the common law offences of contempt of court.

The Sub-Committee believes that the principle of legality is an important underpinning of our criminal justice system. It is motivated by the highest principles of fairness and liberty.

The Sub-Committee considered the following options:

- include in the General Part an equivalent of s. 9(3);
- include in the General Part a provision expressing the principle of legality, absent the exception for contempt of court;
- leave legality to the protection in s. 11(*g*) of the *Charter.*

Given the fundamental character of the principle of legality, the Sub-Committee believes that it should find expression in a new, comprehensive General Part, rather than left solely to the *Charter.*

As for recognizing the last remaining common law offence, contempt of court, the Sub-Committee is of the view that there is no reason why this offence should not be codified. We cannot reconcile the fundamental nature of the principle of legality with the existence of such a broad exception to it.[32] In addition, recommendations in this area are plentiful. Proposals for legislation have been made in several publications of the Law Reform Commission.[33] Legislation was introduced in 1984, but died on the order paper. Thus, there is no shortage of inspiration for legislation. Contempt of court should be codified at the same time as a new General Part of the *Criminal Code.*

Recommendation Four

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* contain a provision setting out the principle that no one should be convicted of an offence unless it is set out in an Act of Parliament (the principle of legality).

---

30 *Report 31*, at 18.

31 *Report 31*, Chapter 25.

32 The Sub-Committee notes that the English Law Commission recommended codification of many common law offences in keeping with its proposed enactment of the principle of legality. Law Commission, *A Criminal Code for England and Wales* (1989), Vol. 1, (Law Com. No. 177), s. 4(1) of the *Draft Criminal Code Bill*, at 44..

33 *Report 17, Contempt of Court* (Ottawa: Supply and Services, 1982); *Working Paper 56, Public and Media Access to the Criminal Process* (Ottawa: LRCC, 1987); and *Report 31.*

Recommendation Five

The Sub-Committee further recommends that the principle of legality should not be subject to an exception for the common law offences of contempt of court. Those offences should be codified.

CHAPTER IV

COMMON LAW DEFENCES

(a) Current Situation

At present, the *Criminal Code* permits judges to recognize defences that are not explicitly set out in it. Subsection 8(3) provides:

> Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

This provision has been relied on by courts to recognize defences not set out in the *Code* itself. Some examples are: the defence of necessity, the defence of duress (by a party to the offence), the defence of due diligence (to an offence of strict liability), the defence of *de minimis non curat lex*, the partial defence of intoxication and the defence of entrapment.

As an additional source of defences in Canadian law, one must also mention, of course, the *Canadian Charter of Rights and Freedoms*, especially section 7. Section 7 provides that "every one has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Since criminal prosecution always has the potential to deprive a person of liberty on conviction, our criminal laws must accord with the principles of fundamental justice or they will be found to be unconstitutional. Thus, if it would offend the principles of fundamental justice to convict a person of an offence by not recognizing a particular defence or exception, then s. 7 may constitute the legal source for that defence or exception.

(b) The Sub-Committee's View

If the General Part of the *Criminal Code* is recodified, the common law defences that have to this point been generally recognized by Canadian courts should be expressly set out in the interests of greater certainty and fairness. The question the Sub-Committee has considered is whether the recodified General Part can be expected to contemplate all possible defences or whether the common law should be permitted to continue to give life to new defences. Alternatively, the Sub-Committee has also considered whether section 7 of the *Charter* is a sufficient source of new defences, so that it would be unnecessary to include in the *Criminal Code* a provision like subsection 8(3).

One of the characteristics of the criminal law in Canada has been the hybrid nature of its development. It has evolved over the years through a combination of judicial interpretation and legislative enactment. This has allowed the criminal law to both react and adapt to changing realities in Canada. Change has not always occurred in a timely manner and has been incremental in nature.

The Sub-Committee believes the criminal law must be allowed to continue to adapt to and accommodate changing realities in Canada. Although the General Part of the *Criminal Code* should comprehensively set out the basic criminal law principles for determining liability, it should also have the capacity to grow and evolve as Canadian society changes. As a result of this conclusion, the Sub-Committee believes the General Part should continue to allow for the further development of existing and new common law defences.

To achieve this objective, the Sub-Committee considered the following two options:

- the General Part should continue to allow for the recognition of new defences; or
- the recodified General Part should be taken to have codified all defences other than those that may be recognized by section 7 of the *Canadian Charter of Rights and Freedoms*.

The first option represents, as was described earlier in this chapter, the present state of the law. It is also the recommendation made by the CBA Task Force. The Task Force expressed the view that because the *Criminal Code* is the principal legislative statement of criminal liability, all uncodified common law defences should be allowed unless curtailed by Parliament through an amendment to the Code. It also argued that such a provision would allow the courts to give effect to both existing and emerging common law defences.

The second option represents the view put forward by Professor Don Stuart of Queen's University on behalf of a group of law professors. He argued in his brief that such a provision may not really be necessary because of the presence of section 7 of the *Canadian Charter of Rights and Freedoms*. He affirmed that the Task Force recommendation relies too heavily on the common law and has the danger of encouraging uncertainty in the law.

Professor Stuart states in his brief that:

> In our view it is no longer necessary to have a residual provision allowing for the possibility of common law defences. Section 7 of the Charter already imposes a mandate on courts to recognize defences in accordance with "principles of fundamental justice." If there is any need to reflect this possibility it should be a specific provision such as that:
>
> > "no person shall be convicted of an offence if such conviction would in all the circumstances of the case constitute a violation of the principles of fundamental justice which violation cannot be reasonably justified in a free and democratic society."[34]

Not all of the law professors share Professor Stuart's view. Professor Tim Quigley of the University of Saskatchewan expressed the following reservation:

> I am a little uneasy about completely foreclosing common law defences, although I agree that the example of common law duress is compelling for your argument. I guess I am somewhat sceptical that the judiciary would necessarily rely on the principles of fundamental justice to accept new defences. For instance, I am uncertain whether officially induced error or entrapment would have been recognized without the specific authority of s. 8(3) to rely upon.[35]

---

34 Issue 9A:50.

35 Issue 9A:76.

Professor Kent Roach of the University of Toronto expressed his disagreement with Professor Stuart by saying:

> I think it would be best to follow the CBA approach and maintain room for development of common law defences. I think that constitutional litigation is too blunt an instrument to develop new defences. I think courts should be encouraged to experiment with new defences as they learn more about the medical and psychological causes of crime and that mandatory constitutionalization of new defences would inhibit their development.[36]

The Sub-Committee believes that the first option is the better means of ensuring that the common law defences continue to develop as lived reality in Canada changes. This would be one means, among others, for the criminal law and the criminal justice system to reflect and accommodate the experiences of women, aboriginal people, ethno-cultural groups and other disadvantaged minorities. It would also allow there to be a continued evolution of the common law as social, forensic, behavioral, and other sciences develop. Finally, as Professor Roach suggests, not all developing common law defences are susceptible of consideration by the courts as constitutional issues.

Recommendation Six

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* codify existing defences and continue to allow for the recognition of new defences.

36 Issue 9A:77.

CHAPTER V

THE FAULT ELEMENT OF CRIMES

(a) Current Situation

One of the primary functions of criminal law is to denounce and deter, by way of punishment, conduct that is offensive to fundamental social values. For the most part, conduct that is so offensive as to be sanctioned by the criminal law is conduct that causes harm and is carried out deliberately. We consider to be morally blameworthy those who purposely cause harm. To take a simple example, a person who accidentally bumps into someone else we would call clumsy or negligent. We would not call that person a criminal unless he or she meant to collide with the other person. The former would still be liable civilly for any harm he or she caused, but would not be convicted under the *Criminal Code* for assault. Thus, it is primarily by way of the mental state of the perpetrator of offensive conduct that we separate criminals from others.

As such, fault in current Canadian criminal law is primarily determined according to the subjective mental state of the accused. By and large, the maxim *actus non facit reum nisi mens sit rea* (an act is not wrongful unless the mind of the accused is guilty) is observed by our *Criminal Code*. This general rule is not, however, without exceptions. There are situations where a person can be convicted of a crime, notwithstanding that he or she did not intend to commit the prohibited act, or was not aware of the risk that the prohibited act could flow from his or her actions. A person can be convicted of a criminal offence if he or she simply engaged in some form of conduct that represented a marked departure from the standard of conduct one would expect from a reasonable person in those circumstances. This form of liability is called criminal negligence.

As it represents a departure from the usual rule that criminal liability attaches to intentional or reckless conduct, criminal liability for negligent conduct is generally limited by two criteria. It applies where the accused fails to discharge a legal duty and where the negligence gives rise to serious consequences, such as bodily harm or death. Thus, the *Criminal Code* contains offences of criminal negligence causing bodily harm or death.[37] In addition, a person can be convicted of manslaughter for negligently causing someone's death.[38]

---

[37] Section 220 of the *Criminal Code* provides:

> 220. Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.

Section 221 provides:

> 221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[38] Subsection 222(5) of the *Code* provides:

> 222.(5) A person commits culpable homicide when he causes the death of a human being,
>
> ...
>
> (*b*) by criminal negligence,

Culpable homicide that is not murder is manslaughter (s. 234).

While this accurately describes the principles of liability in the current *Code*, the *Charter* has had an impact, not yet fully felt, on these principles. The Supreme Court of Canada has held, for example, that it is offensive to the principles of fundamental justice for a person to be convicted of murder unless it has been proved that he or she had a sufficient mental state in relation to the actions causing the death of the victim.[39] The Court ruled that certain offences, including murder, carry with them a stigma and punishment requiring that a person convicted of them be shown to have had a positive mental state in relation to them. By this approach, the fault element of criminal offences would be directly proportionate to their corresponding punishment and stigma.

It is not clear, however, that the *Charter* dictates the kind of spectrum of fault that the cases on homicide first suggested. For example, in the more recent case of *R.* v. *DeSousa*,[40] the Supreme Court of Canada held that s. 7 of the *Charter* requires simply that offences carry with them a fault requirement, whether objective or subjective. Only a few offences, such as murder, require proof of a subjective mental element. By this approach, the *Charter* does not require a spectrum of fault corresponding to stigma and punishment. Rather, it creates two classes of offences—the first made up of the small number of offences for which subjective fault is constitutionally required and the second made up of the remainder of offences for which some fault requirement is necessary.

(b) The Sub-Committee's View

The degree of fault or moral blameworthiness required to justify criminal sanction is a public policy issue of fundamental importance, not the least because of the consequences that flow from that determination. At present, the various mental states required to attract criminal liability are not defined in the General Part of the *Criminal Code*. As might be expected, the minimum acceptable degree of fault for a finding of criminal liability was an issue of some controversy among those who made submissions to the Sub-Committee.

The CBA Task Force took the position that there should be no criminal liability without subjective fault, although it did agree that sanctions should increase with the degree of subjective fault involved and that the new *Criminal Code* should set out the various mental states required to attract liability. The *CBA Task Force Report* proposed three possible mental states including "intent," "knowledge" and "recklessness," all three of which would require some level of subjective fault. According to the Task Force, the definition of knowledge would include wilful blindness as "a rational and justifiable exception to the subjectivity principle."[41] Recklessness would include an objective test of whether the particular risk undertaken was "unreasonable" in the circumstances, but only after the Crown had proved that the accused had subjectively foreseen the consequences.[42] The Task Force wholly rejected the idea of criminal liability for inadvertent negligence. The Criminal Trial Lawyers Association of Alberta endorsed the Task Force position on the requisite mental elements.

---

39 See *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636; *R.* v. *Martineau*, [1990] 2 S.C.R. 633; *R.* v. *Sit*, [1991] 3 S.C.R. 124 (ruling that so-called constructive liability for murder offends s.7 of the *Charter*).

40 (1992), 15 C.R. (4th) 66 (S.C.C.); See also *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

41 Issue 5A:50.

42 Issue 5A:53.

In the *Criminal Law Teachers' Brief*, Professor Stuart disagreed with the subjectivist approach taken by the CBA Task Force. He argued that there is a case to be made for the punishment of negligent conduct, so long as the *Criminal Code* distinguishes the criminal liability of the deliberate risk-taker from one who is merely negligent.[43] He also suggested restricting criminal responsibility for negligence to those offences carrying the risk of "serious harm."[44]

The Law Reform Commission of Canada in *Report 31* argued that liability requirements should be included in the General Part of the *Criminal Code* and that the requisite mental element should be satisfied by either "purpose," "recklessness" or "negligence."[45] In order to distinguish it from its civil counterpart, criminal negligence would require a "marked" departure from the ordinary standard of reasonable care,[46] a point of view also endorsed by Professor Stuart.[47]

The Sub-Committee considered the following options:

- the General Part should not codify particular mental states giving rise to liability; or
- the General Part should codify the mental states of intention, knowledge and recklessness, and should not permit liability for negligence; or
- the General Part should codify mental states and continue to permit liability for criminal negligence.

In defence of a requirement for subjective fault, the CBA Task Force made the following comments:

> Not only is a fault requirement firmly entrenched in the common law, it is now part of the constitution of Canada under section 7 of the *Charter of Rights and Freedoms*.
>
> The law is clear that the fault requirement must be subjectively determined; it is not enough that the "reasonable person" would have known, or that a specific accused should have known. That is the test for civil liability, but it has no place in determining criminal liability.[48]

The Task Force also argued that there are sufficient sanctions for negligence in the form of regulatory or provincial offences as well as civil actions.[49] Finally, in their testimony before the Sub-Committee, representatives of the Task Force said they were not advocating an end to offences like criminal negligence in the operation of a motor vehicle; rather, the name of the offence would be changed to "reckless driving" or "driving in a reckless manner" in order to reflect the test actually applied, with the added benefit of clearer language to assist the trier of fact.[50]

---

43 Issue 9A:46.

44 Issue 9A:47.

45 *Report 31*, at 21.

46 *Report 31*, at 25.

47 Issue 9A:47.

48 Issue 5A:22.

49 Issue 5A:54.

50 Issue 5:31.

In support of an objective standard for certain offences, Professor Stuart made the point that the distinction between subjective and objective fault was not clearly drawn until this century and, even though the Supreme Court of Canada has said that a subjective awareness standard is constitutionally required to ground a murder conviction, recent case law suggests that it would not take the same view for all offences.[51] The Quebec Bar agreed that even though criminal offences ordinarily require proof of a subjective intent, Parliament could designate negligence as sufficient mental element for a particular offence.[52]

A subjective awareness standard may well be the minimum acceptable degree of fault for serious offences. As Professor Stuart pointed out, it provides the fairest possible treatment to an accused. However, the Sub-Committee is not persuaded that the imposition of criminal sanctions should always require proof of subjective fault. Especially in those situations where there is a risk of very serious harm to others, policy considerations may well justify setting an objective standard of behaviour while maintaining a clear distinction between civil and criminal tests for negligence. So long as constitutional requirements are satisfied, the Sub-Committee would not wish to see restrictions on Parliament's ability to craft appropriate exceptions to the general rule that respond to the needs and priorities of Canadians.

In light of the approach adopted recently by the Supreme Court of Canada in *DeSousa*, there is much room for Parliament to devise fault elements it sees fit for particular offences. Objective fault will be sufficient for many offences. However, the Sub-Committee is of the view that objective fault should continue to be used with restraint. The general rule, consistent with the basic purposes of criminal law, should continue to be that subjective fault is a required element of criminal offences. The Sub-Committee agrees with the views of Professor Anne Stalker, expressed during her appearance before us that liability based on objective fault has "inborn limitations".[53] And, as Professor Stuart has stated "objective responsibility should be resorted to with restraint and involve the imposition of lesser penalties."[54]

Recommendation Seven

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* set out culpable mental states.

Recommendation Eight

The Sub-Committee recommends that a recodified General Part be based on the principle that subjective fault is the usual minimum requirement for criminal liability and that objective fault should be used with restraint.

---

51 Issue 9A:45.

52 Issue 4A:20.

53 Issue 9:25.

54 Don Stuart, "The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumph of Pragmatism and Law Enforcement Expediency" (1992), 15 C.R. (4th) 88, at 101.

CHAPTER VI

LIABILITY FOR OMISSIONS

(a) Current Situation

In general, a person is held criminally liable for acts that are expressly prohibited. The criminal law, for the most part, sets out expressly the things that members of our society are forbidden to do—steal, assault, murder, *etc.* Rarely does the criminal law compel action. The reasons for this orientation of our criminal laws are not entirely clear, but there is no doubt that creating general liability for omissions, the failure to act, would be problematic. As Eric Colvin has pointed out, if there were general liability for omissions, people would perhaps be forced to take actions even if there were some risk to their personal safety.[55] On a more practical note, Glanville Williams has pointed out that where a person has done something wrong, it is relatively easy to assign liability. By contrast, in a situation where no action was taken, everyone who failed to act is to blame:

> At first sight it may seem strange to say that an offence can be committed by an omission. If there is an act, someone acts; but if there is an omission, everyone (in a sense) omits. We all omit to do everything in the world that is not done.[56]

Thus, in order to confine liability for omissions, the criminal law generally punishes them only where a particular individual had a legal duty to act in the circumstances. In this way, problems relating to creating sweeping compulsions to act and identifying those who are blameworthy for not acting are largely solved.

The provisions of the *Criminal Code* expressly creating liability for omissions include the following:

- Section 68—failure to depart from riot scene
- Section 145—failure to abide by conditions of release or attend court as required
- Section 215—failure to provide necessaries of life
- Section 252—failure to stop vehicle at the scene of an accident
- Section 254—failure to provide breath sample
- Section 263—failure to guard opening in ice or excavation
- Section 510—failure to appear for purposes of *Identification of Criminals Act*

---

55 Eric Colvin, *Principles of Criminal Law (2nd ed.)* (Toronto: Carswell, 1991), at 33.

56 Glanville Williams, *Textbook of Criminal Law* (London: Stevens & Sons, 1978), at 34.

In addition, there are provisions of a more general nature. Section 219 creates the offence of criminal negligence. It states:

> 219. (1) Everyone is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section, "duty" means a duty imposed by law.

In effect, this provision creates an open-ended basis for criminal liability. It does not proscribe any particular conduct. It punishes any act or omission that manifests a wanton or reckless disregard for human life or safety. By sections 220 and 221, liability is limited to situations where the negligence causes death or bodily harm respectively.[57]

With respect to omissions, one will only be liable for criminal negligence if the omission amounted to a failure to discharge a legal duty. Thus, where a failure to act creates a situation that is dangerous to human life or safety and actually results in bodily harm or death, liability for criminal negligence will attach only if the person was under a legal duty to act in the circumstances.

Legal duties are not confined to duties created by the criminal law, although some such duties may be found there. For example, section 215 creates legal duties to provide necessaries of life to family members or others in one's care. Section 216 creates a duty on those administering medical treatment to use reasonable knowledge, skill and care. Section 217 states that every one who undertakes to do an act is under a legal duty to do it if failure to do it is or may be dangerous to life. In addition, legal duties can arise from virtually any other legal source—common law, federal non-criminal statutes, or provincial laws.

Thus, liability for omissions in Canadian criminal law can arise from failure to discharge an express duty to act set out in the *Criminal Code* or any other legal duty, whatever the source, if that failure constitutes a wanton or reckless disregard for human life or safety and results in death or bodily harm.

(b) The Sub-Committee's View

Generally, the criminal law is brought to bear to denounce and sanction what one does rather than what one fails to do. To do otherwise may appear to be inconsistent with an approach to criminal law that is characterized by restraint in its use. Despite this basic starting point, the *Criminal Code* does, as was described earlier, impose criminal liability for omissions in a number of offences.

The Canadian Police Association has graphically described how some of those omissions now contained in the *Criminal Code* constitute offences and are not necessarily inconsistent with a conduct-based approach to criminal law:

> . . . omissions create culpability more in the sense that it is behaviour including failure to do something which constitutes a crime. Failing to remain at the scene of an accident is in reality the action of leaving the accident scene without complying with specific

---

[57] See above note 37.

duties. Failing to provide necessities of life almost always involves the doing of something else like buying beer instead of baby food. It is also accurate that the failure to act frequently merits criminal liability where specific duties are imposed by society as in the case of a parent.[58]

There would appear to be three options open to the Sub-Committee for dealing with this issue:

- the General Part should not specify the duties that would give rise to criminal liability if they failed to be performed; or;
- the General Part should set out all of the duties that would give rise to criminal liability if they failed to be performed; or
- the General Part should state that failure to perform duties imposed by an Act of Parliament and special duties imposed by the *Criminal Code* would give rise to criminal liability.

The first of these options represents the current state of the General Part of the *Criminal Code*. There is no general statement of the criminal law of omission at the present time. Specific *Criminal Code* provisions make an omission to fulfil a duty an offence in different circumstances.

The Sub-Committee believes that a recodified General Part of the *Criminal Code* should deal with the criminal law of omissions.

The second option being considered by the Sub-Committee was proposed by the CBA Task Force. It proposed that the General Part should provide criminal liability for omissions when a duty is imposed by the *Criminal Code* or when it defines the omission as an offence.

The Task Force has provided the following supporting argument for its proposal:

> Subsection (a) [of the recommendation] creates liability for causing a criminal harm by omitting to perform a legal duty, such as providing necessaries of life to one's dependent children (s. 215(1)(a)). It is narrower than the existing law, as it requires that the legal duties which can result in criminal liability must be specifically set out in the new *Criminal Code*. Current law appears to allow for criminal liability for breach of any legal duty whether specified at common law or in any federal or provincial statute. The rationale for this change is the principle that the new *Criminal Code* should be comprehensive. Citizens should not only know what acts are criminal but also what omissions are criminal. Such information on omissions should be available by reference to the *Criminal Code*, without having to search through thousands of other statutory provisions or Court decisions.
>
> Subsection (b) [of the recommendation] covers a host of *Criminal Code* offences which define the prohibited conduct in terms of failing to do something, such as in the case of failure to stop at the scene of an accident (s. 252(1)).[59]

The Sub-Committee shares the aim of the Task Force that the General Part of the *Criminal Code* should be comprehensive and make the law in relation to omissions less uncertain. It is not, however, in agreement with the basic premise of the Task Force's position—that is, that the General Part and

---

58 November, 1992 Brief, at 5.

59 Issue 5A:30-1.

the *Criminal Code* should set out all duties that would give rise to criminal liability if one failed to perform them. The Sub-Committee believes it would be impractical and unrealistic to include all such duties in the *Criminal Code*. Any attempt to do so in a comprehensive way would make an already unwieldy *Criminal Code* even more difficult to work with. Ease of access to the general principles of criminal law would be lost in a welter of detailed provisions imposing duties in many different legislative contexts.

The Sub-Committee believes that the third option is the most appropriate one to achieve comprehensiveness in addressing the issue of the law of omissions. The General Part should provide that the omission to perform duties imposed by an Act of Parliament or special duties imposed by the *Criminal Code* should give rise to criminal liability.

This option was proposed by the Law Reform Commission in its *Report 31*.[60] This option would allow for the codification of a general principle of criminal law while also ensuring that Parliament would be able to impose legal duties in specific legislative contexts. It would be a reaffirmation of the comprehensive nature of a recodified General Part in setting out the general principles of criminal responsibility.

The Quebec Bar enunciated its position on this issue by saying in its brief that:

> If Parliament decides to incriminate conduct by omissions, the General Part should specify that an omission cannot give rise to liability unless the accused had a legal obligation to act, which could be stated either in the General Part of the Code or in the provision creating the offence. The General Part of the Code should also specify that a duty to act set out in a provincial statute or in the common law may not be invoked in the context of a criminal offence. The *Barreau du Québec* considers that indictable conduct must be the same no matter the province or territory in which it takes place.[61]

It is obvious that criminal law sanctions should be used with restraint and only with respect to serious breaches of widely accepted public values. This is especially the case with respect to criminalizing omissions to fulfil legally-imposed duties. Alex Colvin, one of the University of Toronto law students under the supervision of Professor M.L. Friedland, Q.C. who made a submission to the Sub-Committee, offered the following caution in this area:

> The modern state has a variety of regulatory tools at its disposal to encourage its citizens to act in a more responsible fashion. Its most severe sanction, the imposition of criminal liability, should generally be retained for anti-social acts and only imposed for omissions where the acceptance of some special relationship by the persons justifies a higher standard being imposed on them.[62]

The Sub-Committee accepts this cautionary note in making its recommendation.

---

60 At 19-21.

61 Issue 4A:22.

62 Issue 2A:16.

The Sub-Committee notes that its recommendation is similar to the approach taken in the New Zealand *Crimes Bill*.[63] It contains a general rule that one is not liable for omissions unless the law specifically creates an offence for failure to act or a person fails to discharge a duty expressly provided in the law. In the latter case, the person can be found liable for homicide or for intentional serious injury or reckless endangerment. The difference is that failure to discharge a duty under the New Zealand Bill could result in liability for an offence of recklessness whereas, under the approach the Sub-Committee recommends here, a person could be found liable for criminal negligence.

This approach to omissions is also similar to that proposed in the Australian *Model Criminal Code*.[64]

Recommendation Nine

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* state that a person may be criminally liable for failure to perform duties imposed by an Act of Parliament or special duties imposed by the *Criminal Code*.

---

63 See s. 20.

64 See s. 202.3.

CHAPTER VII

CORPORATE LIABILITY

(a) Current Situation

Under the existing *Criminal Code*, the definition of "person" in section 2 includes bodies corporate. Thus, a corporation is as capable of committing a crime as a natural person. Obviously, though, corporations can only act by way of the actions of those individuals who have been given decision-making authority within them. So, while corporations can be prosecuted and convicted of crimes under the *Criminal Code*, one must look to the actions of the individuals in charge of their activities to determine liability. However, obviously not all decisions made by individuals within a corporation are attributable to it. One must look to the common law for guidance on the question as to when the corporation will be criminally responsible for the actions of its officers or directors. The *Criminal Code* contains no express provisions on this issue.

The current approach to the question of corporate liability was established by the Supreme Court of Canada in the case of *R.* v. *Canadian Dredge and Dock Co. Ltd.*[65] The Court held that a corporation will generally be liable for an offence if a corporate director or officer commits an offence for the benefit of the corporation in the course of his or her employment. The question is whether the particular individual represents the "directing mind" of the corporation. Those with the status of president, vice-president or general manager generally come within this test.

(b) The Sub-Committee's View

The Sub-Committee believes that corporate liability should be clarified in Canada by the inclusion of express rules in the General Part of the *Criminal Code*.

It is particularly important for this to be done, in the Sub-Committee's view, once the rules on omissions and fault are codified. For example, the Sub-Committee wishes it to be clear that corporations may be liable for criminal negligence for their failure to discharge their responsibilities under federal statutes and regulations.

The Sub-Committee is at a disadvantage with respect to this issue. Witnesses did not address this area of the law in their testimony. Nor did any written brief make recommendations on it. However, the Law Reform Commission made recommendations on corporate liability in its *Report 31*.

---

[65] [1985] 1 S.C.R. 662.

A majority of the Commissioners recommended inclusion of two provisions on corporate liability in the General Part. One dealt with liability for crimes of purpose or recklessness. The other dealt with offences of negligence:

> 2(5) Corporate Liability.
>
> (*a*) With respect to crimes requiring purpose or recklessness, a corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy.
>
> (*b*) With respect to crimes requiring negligence a corporation is liable as above, notwithstanding that no director, officer or employee may be held individually liable for the same offence.[66]

The first of these provisions would essentially enact the law set out by the Supreme Court of Canada in *Canadian Dredge and Dock*.[67] The second clause would be new. Its effect would be to impose corporate liability for negligence even where there are no identifiable persons whom one could pinpoint as responsible for the actions or omissions making up the offence. In other words, there would be no necessity in relation to crimes of negligence to identify the individuals for whose actions the corporation is alleged to be responsible.

A minority of the Commissioners preferred an alternative formulation. It would apply to all offences the approach that the majority would confine to negligence offences. In other words, these Commissioners would not require that there be an individual who could be identified as the perpetrator of the offence in order for the corporation to be found liable. It would be sufficient to show that the conduct was carried out by the principal decision-makers in the firm:

> A corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy, notwithstanding that no director, officer or employee may be held individually liable for the same offence.[68]

The Sub-Committee favours the latter approach as it allows a maximum of flexibility and is probably more consistent with decision-making processes within corporations, particularly large ones. By this approach, in situations where there is a particular individual who could be said to be responsible for a criminal act or omission, that person could obviously be charged. In addition, the corporation could be charged if the offence was committed for the benefit of the corporation by a person with authority who was acting in the course of his or her responsibilities. Further, if there was no such individual, the corporation could be held liable for the collective conduct of those in charge. One person or group of persons may have the *mens rea* of the offence while others actually committed the acts. Still, the corporation would be liable. With respect to omissions, the corporation

---

66 *Report 31*, at 26.

67 *Supra*, note 65.

68 *Report 31*, at 26.

would be liable in criminal negligence if those responsible within the corporation failed to discharge its legal duties, the failure constituted a marked departure from the standard of conduct expected of it in the circumstances and death or bodily harm resulted.

Recommendation Ten

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* contain a provision on corporate liability that makes clear that corporations will be liable for conduct committed by those with authority over its actions, whether or not there is an individual who could be held personally liable for the conduct.

CHAPTER VIII

THE DEFENCE OF INTOXICATION

(a) Current Situation

There is probably no other area of Canadian criminal law that is as confusing and controversial as intoxication. Underlying the law are conflicting values.[69] On the one hand, to be consistent with basic principle, a person should not be convicted of a crime if he or she did not have the requisite mental state for the offence. A person may, through voluntary intoxication, be deprived of the necessary degree of mental awareness. On the other hand, a person who voluntarily induced in himself or herself such an extreme state of intoxication that criminal behaviour resulted is not viewed as completely blameless, unlike a person who may be in a state of automatism, for example. Many would say that such a person deserves to be punished.

The existing Canadian law, deriving from common law, achieves a reconciliation of sorts between these seemingly contradictory values by limiting the availability and the scope of the defence of intoxication. The defence is available only for crimes of "specific intent". It is not available for crimes of "general intent".

This terminology derives from the case of *Director of Public Prosecutions* v. *Beard*[70] in which Lord Birkenhead stated:

> [E]vidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.[71]

Canadian courts have interpreted this passage as meaning that there are some offences ("specific intent" offences) for which courts may consider evidence of intoxication in determining whether the accused had the necessary *mens rea* and there are other offences ("general intent" offences) for which evidence of intoxication will not assist the defence.

This approach left courts to work out which offences fall into each category. The definition of a "specific intent" offence was given by the Supreme Court of Canada in *R.* v. *George*. [72] Fauteux J. stated:

> In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of

---

69 See the discussion of the tensions in the existing law by Patrick Healy, *Case Comment—R. v. Penno* (1992), 71 *Can. Bar. Rev.* 143.

70 [1920] A.C. 479 (H.L.).

71 *Ibid.* at 501-2.

72 [1960] S.C.R. 871.

> an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to the general intent, a specific intent attending the purpose for the commission of the act.[73]

Even with this definition, courts have struggled to determine the two categories of offence. The general rule is that where the definition of the offence includes a particular *mens rea* or the offence involves some ulterior motive or intent, then the offence is one of specific intent. If there are no such requirements, then the offence is probably one of general intent. Some commentators have suggested that courts decide this issue on the basis of pragmatism rather than the criteria set out in *George*.[74]

There is an additional element of the defence of intoxication which flows from the specific/general intent distinction. While evidence of intoxication on the charge of a general intent offence does not afford a defence, it can actually substitute for proof of the *mens rea* of the offence, relieving the prosecution of the burden of bringing forward actual evidence of intent.

To give some examples of specific and general intent offences, murder, robbery, breaking and entering, theft, assault with intent to wound, carrying a weapon with intent to use it, are offences of specific intent while manslaughter, assault, sexual assault, and assault causing bodily harm are offences of general intent.[75]

The consequences of the distinction between specific intent and general intent are that a person charged with a specific intent offence and who introduces evidence of intoxication sufficient to raise a doubt about the existence of the appropriate *mens rea* will be acquitted of that offence but may be convicted of a related general intent offence. For example, a person charged with murder and found not to have had the intent to cause the victim's death because of intoxication will be acquitted of murder, but may be convicted of the offence of manslaughter. Similarly, a person charged with robbery and found not to have had an intention to steal may be convicted of assault. As such, not only is intoxication a limited defence in that it only applies to certain offences, it will generally not result in a complete acquittal, but a conviction for a general intent offence with a lesser punishment.

This general approach to intoxication has been the subject of severe criticism on the grounds of illogic. For example, Professor Healy states:

> The difficulties with the orthodox rule on voluntary intoxication are severe. First, the sole utility of the distinction between specific and general intent is to limit the ambit of the defence of intoxication: it has no other substantive content and is largely incoherent. Second, to accept that basic intent is proved by voluntary intoxication is to condone proof by fiction and to violate the presumption of innocence.[76]

The criticism is directed primarily at the artificiality of the specific and general intent categories.

---

73 *Ibid.* at 877.

74 See *e.g.* Don Stuart, *Canadian Criminal Law—A Treatise, 2nd ed.* (Toronto: Carswell, 1987), at 369-70.

75 Stuart, *ibid.*, at 369-70.

76 Healy, *supra* note 69, at 147.

So far, however, the orthodox approach has withstood both criticism and constitutional challenges. In the case of *R.* v. *Bernard*,[77] a majority of the Supreme Court of Canada endorsed the common law approach to intoxication.

(b) The Sub-Committee's View

Upholding the principle that a crime requires an act accompanied by some kind of fault or blameworthiness, the common law generally excuses an accused who lacks the *mens rea* required for a conviction. However, when the absence of an essential element arises out of an accused's voluntary intoxication, criminal liability becomes a policy issue of great concern and significant controversy.

No one appearing before the Sub-Committee suggested that the current law be retained. The CBA Task Force called the existing law "unprincipled and arbitrary".[78] The Criminal Law Teachers "strongly support[ed]"[79] rejection of the specific and general intent distinction. At the same time, few were willing simply to abolish the distinction and allow drunkenness as a complete defence for all crimes. Only the Criminal Law Teachers advocated this approach, although they were not unanimous.

The following four options were considered by the Sub-Committee:

- the General Part should not codify this defence; the existing distinction between specific and general intent offences should be preserved; or
- intoxication should be recognized as a defence to specified offences where mental or physical elements are not present, but persons should be convicted of an included offence of criminal intoxication; or
- intoxication should be recognized as a defence where mental or physical elements are not present, but persons should be convicted of an included offence of criminal intoxication leading to the offence charged; or
- intoxication should be recognized as a defence where mental or physical elements are not present.

The Quebec Bar called for clarification of the law in this area, without resort to "the artificial distinction between crimes of general intent and those of specific intent."[80] The following observation was offered in the *CBA Task Force Report*:

> The heart of the problem lies with the courts' creation of an artificial distinction between crimes of specific intent and general intent. In *Leary*, Mr. Justice Dickson described it as an "irrational" dichotomy, "for there are not, and never have been, any legally adequate criteria for distinguishing the one group of crimes from the other."[81]

---

77 [1988] 2 S.C.R. 833.

78 Issue 5A:109.

79 Issue 9A:51.

80 Issue 4A:25.

81 Issue 5A:109.

The Sub-Committee finds itself in agreement with the foregoing Task Force comment and rejects the first option of preserving the existing law respecting intoxication.

The fourth option was advocated in the *Criminal Law Teachers' Brief*. Professor Stuart agreed that the distinction between specific and general intent offences should be abolished and expressed the following view:

> There is real doubt whether any residual intoxicated-related offence is needed. This is especially true if negligence offences are recognized, as we suggest they should be, to which voluntary intoxication will not be a defence.[82]

It should be noted that the law professors were not unanimous in this view (Professor Quigley of the University of Saskatchewan and Professor Roach of the University of Toronto were amenable to a backup or residual offence should the specific/general intent distinction be abolished.[83])

The Law Reform Commission also recognized the illogical nature of the present specific/general intent distinctions. However, the Law Reform Commission was of the view that in situations of voluntary intoxication, "policy and principle preclude complete acquittal."[84] Likewise, the CBA Task Force argued that "the public interest would be best served" by providing for a lesser included offence.[85]

In support of his position, Professor Stuart argued that the experience in Australia and New Zealand, "where the defence of voluntary intoxication is recognized for any offence," suggests that such defences rarely succeed and, therefore, that a residual offence is not required. Even though it may be that few additional acquittals would arise under such a scheme, the Sub-Committee finds itself in agreement with Mary Jackson, a University of Toronto law student under the supervision of Professor M.L. Friedland, who offered the following observation:

> . . . becoming intoxicated to such a degree that one consciously or unconsciously creates harm is viewed as morally blameworthy. A new law of voluntary intoxication should reflect this view.[86]

The second and third options are similar in that both advocate abolition of the specific/general intent distinction and both reject a complete acquittal for lack of control or culpability arising out of voluntary intoxication.

The CBA Task Force Report recommended *Criminal Code* provisions that would render persons not liable for crimes for which "by reason of intoxication" they were not culpable, except where "voluntary consumption of an intoxicant is a material element of the offence charged."

---

82 Issue 9A:52.

83 Issue 9A:76, Issue 9A:78.

84 *Report 31*, at 31.

85 Issue 5A:112.

86 Issue 2A:34.

However, for certain scheduled offences only, an accused found not liable by reason of intoxication would be liable for "the included offence of criminal intoxication" and liable to the same punishment "as if found guilty of an attempt to commit the offence charged."[87]

In *Report 31*, the Law Reform Commission also advocated recognizing intoxication as a defence to any crime. However, anyone not liable for the offence charged, by reason of intoxication, would be liable for committing the crime "while intoxicated" or, where death results, for manslaughter while intoxicated.[88] In a later brief to the Sub-Committee, the Law Reform Commission advocated a slightly altered offence of "criminal intoxication leading to" the offence charged.[89] In his testimony before the Sub-Committee, Mr. Justice Gilles Létourneau, former President of the Law Reform Commission, explained the reason for this change in the Commission's definition of the offence of criminal intoxication:

> [I]t would be better and more consistent with principles if the crime of criminal intoxication referred to the very fact of intoxication leading to the commission of a crime. In other words, rather than having a finding of guilt for say robbery while intoxicated you will have a finding of criminal intoxication leading to robbery. In that instance the offender would be punished for what he did, allowing himself to become intoxicated to a point where he lost control and resorted to criminal behaviour.[90]

We assume that the Law Reform Commission's alteration of its recommendation on intoxication on the basis of "principle" was intended to meet the objection that its previous recommendation failed to observe the principle of "coincidence" or "contemporaneity"[91] — that is, that the fault element of the offence (voluntary intoxication) did not coincide with the physical element (the act). In other words, one could become intoxicated voluntarily with no intention of carrying out a prohibited act but still be convicted of performing that act while intoxicated. There need not be a temporal or causal connection between one element of the offence and the other. The modified offence proposed by the Commission is better in that the offence consists of the act of becoming intoxicated. The subsequent conduct, whether it is assault or robbery or some other offence, is a consequence of the intoxication.

An additional merit of the Law Reform Commission's proposal, pointed out to us by Mr. Justice Gilles Létourneau, is that penalties for criminal intoxication could be adjusted "according to the gravity of the behaviour that resulted from the state of intoxication" and might include "detoxification or treatment."[92] In other words, since the offence is defined as intoxication itself, the sanctions imposed can be tailored to that conduct.

The Sub-Committee is attracted to the consistency of allowing a conviction for the included offence in cases where the defence of intoxication is successful. Thus, the Sub-Committee is in favour of the latter option, which has the advantage of attaching the wrongful conduct to a concrete

---

87 Issue 5A:106.

88 *Report 31*, at 31.

89 Issue 1A:15.

90 Issue 1:19.

91 Professor Healy alluded to this problem in his testimony before the Sub-Committee (Issue 9:39).

92 Issue 1:32.

result. Rather than having an open-ended offence of criminal intoxication as proposed by the CBA Task Force, the included offence would be connected to the actual conduct carried out by the accused while intoxicated. As such, the elements to be proved by the prosecution are clearer and the gravity of the offence will vary with the seriousness of the conduct carried out.

The Sub-Committee believes that the new offence of criminal intoxication should stand on its own—that is, it should have its own fault requirements and physical elements. As such, an accused person who raised a successful defence of intoxication would not automatically be convicted of criminal intoxication. The elements of the offence would have to be proved beyond a reasonable doubt. This is obviously not the same as having a reasonable doubt about the accused's liability for the principal offence, which is all that would be needed for a successful defence of intoxication. The Sub-Committee is hesitant to spell out the precise elements of this new offence as no witness appearing before it specifically addressed the issue. It notes, however, that in this respect its approach is similar to that proposed by Professor Quigley.[93]

Professor Stuart pointed out to the Sub-Committee that "there isn't in conventional criminal law theory a defence of intoxication to an offence of negligence".[94] While the Law Teachers generally did not propose creation of an offence of criminal intoxication, the Sub-Committee sees no reason why such an offence could not be created while limiting the defence of intoxication to offences with subjective fault elements. As such, even under the Law Reform Commission's approach, intoxication would not be a defence to a charge of manslaughter, for example, since negligence is a sufficient fault element for that offence. Nor, of course, would intoxication be a defence to a charge for which intoxication forms part of the offence (*i.e.* impaired driving).

Recommendation Eleven

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* recognize intoxication as a defence where any element of the offence is not present. The defence should not be available in relation to offences of negligence or offences for which intoxication forms part of the definition.

Recommendation Twelve

The Sub-Committee further recommends that a new offence be created in the *Criminal Code* of criminal intoxication leading to conduct prohibited by the *Code* (e.g. criminal intoxication leading to assault; criminal intoxication leading to robbery, etc.). The new offence should be recognized as an included offence to any offence for which intoxication would be available as a defence.

---

93 Tim Quigley, "Reform of the Intoxication Defence" (1987), 33 *McGill Law Journal* 1, at 37-40.

94 Issue 9:22.

CHAPTER IX

THE DEFENCE OF AUTOMATISM

(a) Current Situation

Even more basic, perhaps, than the principle that the criminal sanction should be imposed only on those whose conduct is morally blameworthy is the idea that a person should be held responsible only for conduct over which he or she had control. Canadian criminal law recognizes that where a person's conduct was involuntary, it should not give rise to criminal liability. In effect, if the person's conduct was involuntary, the criminal law does not ascribe responsibility to the person for it. For example, a person is not guilty of the crime of assault if, because of an involuntary muscle spasm, he or she strikes another person.

Recognition of the defence of automatism is in keeping with this reasoning. Automatism is a state in which the accused can be said to have lost control over his or her conduct because of a mental disorder, a physical illness or condition, a blow to the head, or a psychological shock. The defence is not, however, provided for in the *Criminal Code*. It is one of the defences that has evolved from the common law and is recognized by way of subsection 8(3) of the *Code*.[95]

The law does not, however, treat all automatism cases the same. The legal treatment of automatism cases varies with the source of the dissociative state. The important question is whether the source of automatism lies in a mental disorder. If the source of the automatism is a mental disorder (or "disease of the mind"), the accused is treated the same as a person who pleads not guilty by reason of mental disorder under section 16 of the *Code*. He or she may then be released or subject to detention under section 672.54 of the *Code*. This is sometimes referred to as "insane automatism". If the source is not a mental illness, the person will be entitled to a complete acquittal. This is referred to as "non-insane automatism" or "sane automatism".

Given this important distinction, much of the case law is taken up with discussions as to whether the source of the dissociative state lay in the accused's mental make-up or elsewhere. For example, the case of *R.* v. *Rabey*[96] turned on the question whether the accused's violent unconscious reaction to a psychological blow evidenced a mental disorder. A majority of the Supreme Court of Canada held that the accused's response manifested an internal weakness. As such, his dissociative state could not be attributed solely to an external source. Therefore, *Rabey* was a case of "insane automatism".

---

[95] See discussion of common law defences above in Chapter IV.

[96] [1980] 2 S.C.R. 513.

Similarly, in the more recent case of *R.* v. *Parks*,[97] the question arose whether a dissociative state brought on by sleepwalking amounted to "sane" or "non-insane" automatism. The Court held that, on the facts before it, the accused's dissociative state was not the product of mental disorder. As such, the jury having accepted the defence, the accused was entitled to a full acquittal. The Court took pains to point out that in other cases sleepwalking could be found to be a mental disorder.

(b) The Sub-Committee's View

In the course of the Sub-Committee's hearings, a number of submissions were made on the defence of automatism. Suggestions ranged from various draft codifications to a complete abolition of the concept.

The Sub-Committee considered five options to address the issue of automatism:

- the recodified General Part of the *Criminal Code* should not codify automatism; or
- automatism should be codified in keeping with the current common law; or
- automatism should be codified by simply recognizing that involuntariness does not satisfy the physical element; or
- automatism should not result in a complete acquittal—judges should be able to order a disposition in the same manner as for mentally disordered persons; or
- automatism should be included within the concept of mental disorder.

The Sub-Committee believes that concerns about the nature and scope of the automatism defence can best be met in the drafting process, as opposed to excluding the defence from codification in the General Part. In the words of the Quebec Bar:

> . . . it is imperative to proceed with codification and legislative rationalization of all the rules, because at present people on trial must rely on specific decisions by the Supreme Court in judgments that leave many questions unanswered.[98]

Thus, in the interests of certainty and consistency, the Sub-Committee does not favour leaving the defence of automatism to the common law.

The fourth and fifth options would change the ultimate result for those who are successful in pleading the automatism defence. Both seek to address the issue raised in a minority decision in the *Parks*[99] case concerning the acquittal of persons who may constitute a continuing threat to society.

Professor Gerry Ferguson of the University of Victoria proposed the following special verdict and disposition for automatism, as additions to the CBA Task Force draft provisions:

> Where evidence of automatism is given at trial and the accused is acquitted, the judge or jury shall declare whether the accused was acquitted by reason of automatism.

---

97 [1992] 2 S.C.R. 871.

98 Issue 4:7.

99 See above note 97.

> Where a person is found not responsible by reason of automatism, the court may deal with that person in the same manner as if that person had been found not guilty by reason of mental disorder, provided that person's automatism is likely to occur again in a manner which poses a substantial danger to the lives or safety of others; and such persons shall be subject to the same safeguards, procedures and reviews as persons who are found not guilty due to mental disorder.[100]

The Sub-Committee is concerned that Professor Ferguson's suggestion appears to be inconsistent with the common law defence as it is currently defined. The defence of non-insane automatism calls for an acquittal where otherwise criminal behaviour is, through no fault or special weakness of the accused, truly outside his or her power to control. Placing restrictions upon someone so described would seem to be inconsistent with generally accepted limits of criminal responsibility.

In another approach, the Canadian Psychiatric Association took the view that the concept of automatism should be abolished. The Association argued that the concept is outdated, since the distinction between organic and functional mental disorders is disappearing as illnesses once thought to be functional are found to be related to pathological cause.[101] Because illnesses like sleepwalking or hypoglycaemia are "physical illnesses which cause organic mental disorders and are likely to recur or be permanent," they may require careful monitoring.[102] As a result, the Association made the following submission:

> The illnesses that are thought to cause automatism are mental disorders. They should fall under the present legal definition of mental disorder and be dealt with under the new law governing mentally disordered offenders. This law allows the flexibility of disposition of the accused as appropriate.[103]

Like Professor Ferguson's suggestion, this also has the attraction of allowing some level of intervention, as required, for those who may pose an ongoing threat to society. The Sub-Committee was attracted to this approach. However, while one member would endorse the CPA's recommendation, a majority of the Sub-Committee was concerned that the current mental disorder provisions of the *Criminal Code* were not broad enough to accommodate automatism and that amendments could cause unforeseen complications. "Mental disorder" is currently defined as a "disease of the mind". This definition specifically excludes non-insane automatism. If non-insane automatism were to be included within the meaning of mental disorder, the current definition would have to be repealed or expanded to include it. Repealing the current definition of "mental disorder" would disconnect it from the common law cases setting out what is a disease of the mind and render it completely open-ended. To include non-insane automatism within the definition of "mental disorder" would amount to codifying non-insane automatism along the lines proposed by the CBA Task Force, but within section 16 of the *Code*, rather than as a separate defence. In the end, a majority

---

[100] Issue 5A:221-2.

[101] Issue 6A:2.

[102] Issue 6A:3.

[103] Issue 6A:4.

of the Sub-Committee was more favourably disposed toward addressing the defence of automatism within the concept of voluntariness. Still, it believes that the approach of the Canadian Psychiatric Association has much merit and is worthy of future consideration.[104]

The CBA Task Force advocated the second option, that of codifying the common law defence of automatism as expressed by the Supreme Court of Canada in *R.* v. *Rabey.*[105] Their draft provision would excuse otherwise prohibited, unconscious, involuntary behaviour caused primarily by external factors; a psychological blow would qualify as an external factor if it might be expected to cause the same result in the average person. As a result, psychological factors would be subjected to an objective test but physical ones would not. Thus, this is one area where the Task Force departed from its general rule that liability should be based on subjective fault. The Task Force thought the Law Reform Commission's *Report 31* drew the defence of automatism too narrowly by subjecting both psychological and physical factors to an objective test in a way that could remove the defence for a "thin-skulled accused."[106] The Task Force would bar the defence where the behaviour was the result of a mental disorder or voluntary intoxication, or where the autonomic state had been voluntarily induced by the accused's own fault.[107] The Criminal Trial Lawyers' Association of Alberta adopted the Task Force's recommendations.[108]

In proposing the third option, the Law Reform Commission characterized automatism as simply an absence of the conduct necessary to establish criminal liability due to a lack of volition on the part of the accused, much like compulsion.[109] The Commission suggested codifying automatism as a defence where the lack of control arises from factors "which would similarly affect an ordinary person in the circumstances"; the defence would exclude those who negligently bring about their autonomic state, by making them liable for crimes that could be committed by negligence.[110]

The Criminal Law Teachers took a similar approach to the Law Reform Commission. They would prefer to see a general provision recognizing that a person will not be liable for involuntary conduct. This would not only be simpler, but would allow for a more flexible defence of automatism in keeping with the Supreme Court's recent ruling in the *Parks* case. Professor Stuart doubted the necessity of distinguishing between unconscious and conscious involuntary conduct and was also concerned that the codification suggested by the CBA Task Force was more restrictive than the common law most recently expressed by the Supreme Court of Canada in the *Parks* decision.[111]

---

[104] The Sub-Committee notes that the English Law Commission recommended that automatism be included in the definition of "mental disorder" in its *Draft Criminal Code Bill*: Law Commission, *A Criminal Code for England and Wales* (1989), Vol. 1, (Law Com. No. 177), s. 34, at 58.

[105] See above note 96.

[106] Issue 5A:37.

[107] Issue 5A:28.

[108] Issue 10A:17.

[109] *Report 31*, at 28.

[110] *Report 31*, at 29.

[111] Issue 9A:51.

In the interests of simplicity, the Sub-Committee prefers the third option, as advocated by the Law Reform Commission and the Criminal Law Teachers. However, the Sub-Committee accepts the improvements on the Law Reform Commission's proposal suggested by the Criminal Law Teachers and the CBA Task Force. Thus, it believes that a provision on involuntariness should not be governed by an objective test and should be flexible to take account of a variety of causes of involuntary conduct. The Sub-Committee notes that this is consistent with the approach adopted in the New Zealand *Crimes Bill*[112] and the Australian *Model Criminal Code*.[113]

Recommendation Thirteen

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* recognize the defence of automatism by providing that no one should be liable for conduct that is involuntary, whether the conduct is conscious or unconscious.

[112] See s. 19.

[113] See s. 202.2.

CHAPTER X

USE OF FORCE IN DEFENCE OF PROPERTY

(a) Current Situation

The *Criminal Code* currently contains several provisions defining and delimiting the actions that can be taken in defence of personal or real property.

Section 38 permits a person in possession of personal property to take actions to prevent someone from taking it or to re-take the property from someone who has wrongfully taken it away. However, the section only permits actions short of striking another person or causing the person bodily harm. Section 39 deals with situations where more than one person has a claim to personal property. The person who possesses the property is entitled to defend his or her possession against the other claimant. The section permits the use of force, but not beyond what is necessary in the circumstances.

Sections 40, 41 and 42 deal with immovable property. Section 40 permits the occupant of a dwelling to use as much force as is necessary to prevent another person from entering the dwelling by force. Section 41 says that force is justified in preventing a person from trespassing on real property or in a dwelling, or to remove a trespasser, so long as no more force than was necessary was used. Finally, section 42 gives legal authority to a person to enter a dwelling or real property if he or she is lawfully entitled to it.

Even as cursory an examination of these provisions as this reveals serious problems with the current law in this area. First, the fact that the law is spread across five sections which, in some cases, overlap with others makes it difficult to determine the ambit of the defence of property justification.

Second, the degree of force permitted by these provisions appears excessive. They generally permit the use of "as much force as is necessary" to maintain possession of the property sought to be taken by others. There is, by this formulation, no limit on the degree of force one may employ to assert control over property. By contrast, in self-defence, one may only use such force as is necessary to defend oneself short of force intended to cause death or grievous bodily harm unless there is a reasonable belief that no other means exists for preserving oneself from death or grievous bodily harm (section 34). In other words, it appears on the face of the *Code* that there are stricter limits on the force one may use in self-defence than the force one may employ to defend property.

Courts have, in fact, imposed some limits on the degree of force used to defend property.[114] For example, it seems clear that one may not use deadly force in the protection of property. These limits have not, however, been codified.[115]

(b) The Sub-Committee's View

There are two sources of controversy in this area: the distinction between movable and immovable property, and the degree of force to be allowed in the defence of property.

As seen earlier in this chapter, the *Criminal Code* now contains provisions dealing with the defence of movable and immovable property. These provisions of the law are complex and at times unclear. The Law Reform Commission in *Report 31* made recommendations that would clarify and simplify the defence of property defence but would retain the movable-immovable distinction.[116]

The CBA Task Force concluded there was no reason to retain the movable-immovable distinction in the defence of property defence. It expressed in its report the belief that the test for defending against the improper taking of either form of property should be the same.[117]

The Sub-Committee agrees with this conclusion. The goal of the recodification of the General Part of the *Criminal Code* is to clarify, to the extent possible, the basic principles of criminal law. Consequently, any distinctions that lead to undue complexity, rather than to clarity, should not be adopted. It is the Sub-Committee's view that the principles of the defence of property defence can be comprehensively and clearly enough developed to cover both movable and immovable forms.

As indicated earlier, the second area of controversy before the Sub-Committee related to the degree of force to be allowed in defence of property. The CBA Task Force proposal in this area was the centre of controversy before the Sub-Committee. It proposed the following definition:

> (1) A person is justified in using such force as, in the circumstances which exist or which the person believes to exist, is reasonable:
>
> (*a*) to protect property (whether belonging to that person or another) from unlawful appropriation, destruction or damage, or
>
> (*b*) to prevent or terminate a trespass to that person's property.
>
> (2) In no circumstances is it reasonable, in defence of property, to intend to cause death.[118]

---

[114] See, *e.g.*, *R.* v. *Baxter* (1975), 33 C.R.N.S. 22 (Ont. C.A.); *R.* v. *Clark* (1983), 5 C.C.C. (3d) 264 (Alta. C.A.).

[115] See Colvin, *supra*, at 225-6.

[116] *Report 31*, at 37-8.

[117] Issue 5A:90.

[118] Issue 5A:86.

Because the Sub-Committee concluded that the present enunciation of the defence of property defence in the General Part of the *Criminal Code* is inadequate, it considered the following two options:

- the General Part should simplify and codify defence of property as a justification for use of reasonable force, but should make clear that the use of deadly force is never justified to protect property; or
- the General Part should simplify and codify defence of property as a justification for use of reasonable force, but should *not* specifically state that use of deadly force is never justified to protect property.

The first of these options represents the position of both the Law Reform Commission[119] and the CBA Task Force.[120]

The Task Force holds this position because, in its view, it is never reasonable to intend to cause death in defence of property. The recommendation it makes enshrines as a fundamental value the principle that human life is always of more importance than property interests.[121]

Michele Fuerst, a CBA Task Force member, made its position clear in the following terms:

> Essentially, I would suggest to you what we have done is to attempt to reflect the reality of life in modern society, which is that we recognize the primacy of human life, unlike the situation in the 1800s when the preservation of property was given precedence over the preservation of human life, and as a result certain common law concepts involving the defence of property came into being. The task force would say that in no circumstances would it ever be reasonable to intentionally cause death simply to protect one's own property. That I leave with you as a concept that is in keeping with modern day society and is the kind of concept that we need to create if we are to have a *Criminal Code* that will take us into the 21st century.[122]

The second option represents the views of Professor Don Stuart of Queen's University, writing on behalf of the Criminal Law Teachers. Professor Stuart is critical of the Task Force position, and hence of the first option, for arbitrarily restricting the circumstances in which the defence of property defence can be invoked. He makes this point in the following terms:

> In our opinion even though the fundamental question of reasonableness may be weighed differently in the case of a defence of property there is no reason to declare arbitrarily in advance that in no circumstances will it ever be reasonable to intend to cause death. It is inconsistent with the flexibility that the C.B.A. recognizes in the case of other defences.[123]

---

[119] *Report 31*, at 37-8.

[120] Issue 5A:86.

[121] Issue 5A:91.

[122] Issue 5:19.

[123] Issue 9A:50.

In setting out Professor Stuart's position, it must be noted that not all of the law teachers agree with him on this issue (Professors Delisle and Manson of Queen's University, Professor Ferguson of the University of Victoria and Professor Roach of the University of Toronto disagree with him[124]).

The majority of members of the Sub-Committee believe that the recodified defence of property justification should not specifically state that use of deadly force is never justified in defence of property. To do otherwise would be to arbitrarily limit the availability of the defence. The requirement for a reasonable use of force to fit the circumstances will ensure that the defence of property defence is not abused. The Sub-Committee's position will make the defence of property defence available in circumstances where the defence of the person defence may not be appropriate or adequate.

One member of the Sub-Committee does not believe that the recodified defence of property defence should allow for the use of deadly force to protect property. The defence of the person defence would be adequate to deal with any circumstances in which serious harm or death would result from a person's defence of property. Canada today, in that member's view, values human life more than property, and therefore the defence of property defence should not itself be available where loss of life results.

Recommendation Fourteen

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* permit the use of reasonable force in the defence of property, without distinguishing between movable and immovable property.

Recommendation Fifteen

The Sub-Committee further recommends that a recodified General Part of the *Criminal Code* not state that use of deadly force may never be used to protect property.

---

[124] Issue 9:21.

CHAPTER XI

THE DEFENCE OF ENTRAPMENT

(a) Current Situation

Strictly speaking, entrapment is not a defence at all. In a situation where a court concludes that the accused was induced to commit a crime, the Court may enter a stay of proceedings, not an acquittal. The law of entrapment is based on the idea that where the conduct of the police has been unfair, courts should not allow their processes to be used to secure a conviction. In reality, in entrapment situations, the accused has committed the offence. Courts simply intervene to prevent the accused from being convicted.

The law on entrapment in Canada has been clarified in recent Supreme Court of Canada judgments. In the case of *R.* v. *Mack*,[125] the Court adopted an objective approach to entrapment, one which focuses on the conduct of the police, not on the perceptions of the accused. This distinguishes Canadian law from the approach in the United States. In Canada, entrapment will occur when:

- the authorities provide to a person an opportunity to commit an offence when they have no reasonable suspicion that the person is already engaged in criminal activity or they are not acting pursuant to a *bona fide* inquiry; or
- if authorities do have a reasonable suspicion about the accused or are acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity for the accused to commit an offence by actually inducing the accused to commit it.

In addition to providing this definition of entrapment, the Court also made clear that the defence is really procedural, rather than substantive in nature. That is, entrapment does not relate to whether or not the accused actually committed the offence. It is independent from issues of liability. As such, courts should first determine whether the accused is responsible for the offence charged and then inquire into the behaviour of the police. Further, unlike substantive defences for which the accused does not bear a burden of proof,[126] for entrapment to succeed the accused must show on a balance of probabilities that the conduct of the police fell within the definition of entrapment.

This approach to entrapment was applied by the Supreme Court of Canada in the subsequent case of *R.* v. *Barnes*.[127] There, the police had approached persons on a street known for the presence of drug traffickers and inquired of those who fit the typical image of drug traffickers whether they had drugs for sale. The question was whether this conduct fell within the Court's concept of a *bona*

[125] [1988] 2 S.C.R. 903.

[126] Except for the defences of mental disorder and, in non-criminal cases, due diligence.

[127] [1991] 1 S.C.R. 449.

fide inquiry or, in effect, amounted to "random virtue testing" under the first branch of the Court's definition of entrapment. The Court held that since the geographical area of the police officers' interest was reasonably well-defined, their activities were indeed part of a *bona fide* inquiry. As such, there was no requirement that they have prior suspicions in relation to the persons who were questioned.

(b) The Sub-Committee's View

Even though the current law regarding entrapment is reasonably well-settled, the Sub-Committee was urged to offer direction or guidance on the policy issues involved. While the Canadian Association of Chiefs of Police saw no need to codify entrapment, James Kingston of the Canadian Police Association thought that codification could be beneficial in providing guidance for law enforcement agencies.[128]

The Sub-Committee considered two options in dealing with the issue of entrapment:

- the General Part should not codify entrapment; or
- the General Part should codify entrapment in accordance with recent Supreme Court of Canada case law.

The Law Reform Commission expressed the view that entrapment, held by the Supreme Court of Canada to relate to abuse of process, would be better dealt with in the criminal procedure chapters of the *Criminal Code*.[129] Scott Bomhof, a University of Toronto law student under the supervision of Professor M.L. Friedland, agreed that a formulation of entrapment did not belong within the General Part.[130] Mr. Justice Gilles Létourneau, appearing on behalf of the Law Reform Commission, made the further point that entrapment might be codified within the general principles of criminal liability if it were decided to treat the issue as a lack of *mens rea*.[131] To treat entrapment as an absence of *mens rea* would, however, be out of keeping with the recent approach of the Supreme Court of Canada.[132]

The CBA Task Force favours codifying entrapment, within the General Part of the *Criminal Code*, as articulated by the Supreme Court of Canada in the *Mack*[133] and *Barnes*[134] cases.[135] In keeping with those decisions, the court, rather than the jury, would decide whether or not entrapment has occurred and the onus would be on the accused to prove entrapment on a balance of

---

128 Issue 3:10.

129 Issue 1A:6.

130 Issue 2A:65.

131 Issue 1:36.

132 See, however, the judgment of Ritchie J. in the case of *Amato* v. *The Queen*, [1982] 2 S.C.R. 418 in which this approach was adopted.

133 See above note 125.

134 See above note 127.

135 Issue 5A:139.

probabilities.[136] Only after the Crown had proved all essential elements of the offence beyond a reasonable doubt, could the court then consider whether a stay should be entered on account of entrapment. Entrapment would include those instances where the authorities provide the opportunity to commit the offence, in the absence of a "reasonable suspicion" that the accused is "already engaged in that particular criminal activity," or where the authorities are not "acting in the course of a *bona fide* investigation directed at persons present in an area where it is reasonably suspected that the particular criminal activity is occurring." Even where one or both of those circumstances obtain, entrapment will be found where the authorities "go beyond providing an opportunity and induce the accused to commit that offence."[137]

Notwithstanding the Supreme Court of Canada's finding that entrapment does not operate as a justification or excuse, the Canadian Bar Association Task Force has included the "defence" of entrapment with other "Part IV: Defences, Justifications and Excuses" in its draft legislation. The Sub-Committee agrees with that approach and with the Task Force's draft provisions. Even though entrapment is essentially procedural rather than substantive in nature, it is commonly thought of as a defence and, therefore, would not be out of place in a recodified General Part.

Recommendation Sixteen

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* codify entrapment as including

(a) a situation where authorities provide the accused an opportunity to commit an offence without reasonable suspicion that the accused is engaged in that conduct, or in the absence of a *bona fide* inquiry; or

(b) a situation where the authorities have a reasonable suspicion that the accused is engaged in criminal conduct, or are engaged in a *bona fide* inquiry, and go beyond providing an opportunity to the accused and actually induce the accused to commit the offence.

---

[136] Issue 5A:140.

[137] Issue 5A:136.

CHAPTER XII

EXCEPTIONS FOR MEDICAL PRACTICE

(a) Current Situation

The *Criminal Code* currently contains a provision which exempts from criminal liability those performing surgery for the benefit of the patient (section 45). This exemption applies only to surgery and excuses the surgeon only if the operation is performed with reasonable skill and it was reasonable to perform the operation in the circumstances.

In effect, this section provides that a surgeon cannot be charged with a criminal offence (such as assault or criminal negligence) for surgery that is medically indicated and carried out with reasonable skill. There are several curiosities about it. For example, it is not clear how it operates in relation to consent to surgical procedures. It creates an immunity from *all* criminal liability but, by its terms, it appears more applicable to offences of negligence since it refers to requirements of reasonableness in the skill used to carry out the particular procedure and in the circumstances under which the procedure was performed.

Thus, section 45 appears to apply to situations where reasonableness (or, to put it another way, the absence of negligence) is in issue. This may not be the case where there was a question whether the patient consented. Paragraph 45(*b*) requires that it be "reasonable to perform the operation". If there was no consent to the operation, then it would be, presumably, unreasonable to perform it unless the patient was not in a position to provide consent. As such, as regards the question of consent, section 45 may also be directed at the question "When may the physician or other person performing the surgery neglect to obtain the patient's consent, or even proceed despite his resistance?"[138]

Further, it is unclear why the provision is limited to surgical procedures. It would seem desirable that if there is a risk of criminal liability for other less intrusive medical procedures, the *Criminal Code* should also protect physicians from prosecution.

Another provision that applies here is section 216 of the *Code*. It states that everyone who administers surgical or medical treatment that may endanger the life of the patient is under a duty to have and use reasonable knowledge, skill and care. Failure to do so could result in a prosecution for criminal negligence.

There is no justification, of course, for immunizing physicians from liability for criminal negligence. Where they administer medical treatment that represents a marked departure from the standard of care expected of a reasonable physician, they should be liable in criminal negligence. Thus, strictly speaking, sections 45 and 216, to the extent they require use of reasonable skill, are superfluous with respect to criminal negligence.

---

[138] Bernard Starkman "A Defence to Criminal Responsibility for Performing Surgical Operations: Section 45 of the Criminal Code" (1981), 26 *McGill Law Journal* 1048, at 1049.

In fact, given the drafting of section 45, it may in fact hold surgeons to a more strict standard than others and, therefore, actually expose them to a greater risk of prosecution. Section 45 says that surgeons will not be criminally liable if they act reasonably. Put another way, if they act unreasonably in performing surgery, they may be criminally liable. Section 216 is drafted similarly. As such, medical practitioners may be liable for criminal negligence causing bodily harm or death if they fail to perform surgical or other medical procedures with the standard of care expected of a reasonable surgeon. Generally speaking, one is only liable for criminal negligence if one engages in conduct that represents a *marked departure* from the expected standard of care. As a general rule, then, more than mere unreasonableness or negligence must be shown in order to sustain a conviction for criminal negligence. The conduct must be extremely unreasonable or grossly negligent. Sections 45 and 216 may be interpreted to impose a more strict test on medical practitioners and, thereby, actually increase the likelihood of prosecutions.

Given these failings of sections 45 and 216, it is fair to ask whether it continues to serve a useful function. As for the liability of surgeons in relation to assault and criminal negligence, the common law actually offers greater protection than does section 45. Under the law of assault, if the physician has the consent of the patient or has an honest belief (reasonable or otherwise) that the patient consented, then the offence is not made out. As for negligence, as mentioned above, the definition of negligence in the *Criminal Code* already provides the standard which physicians, as well as others, must meet in their treatment of others. Thus, it appears that sections 45 and 216 have outlived their usefulness in these areas. The question remains, however, whether a better-drafted provision which would recognize the legitimacy of medical treatment is necessary.

To answer this question, one must consider the areas, if any, beyond assault and criminal negligence, in which there continues to be a risk of criminal liability for legitimate medical treatment. There are two possibilities. One is in relation to assault causing bodily harm and the other is in relation to homicide.

According to the recent case of *R.* v. *Jobidon*,[139] the Supreme Court of Canada held that consent is not a defence to a charge of assault causing bodily harm. The case arose out of a fist fight in which one of the combatants died as a result of blows inflicted by the accused. As such, the Court's holding was limited to the circumstances before it. Gonthier J. speaking for the majority stated that the definition of assault in s. 265 of the *Criminal Code*, which specifically refers to the absence of consent as being an essential element of the offence, should be read as "vitiat[ing] consent between adults intentionally to apply force causing serious hurt or non-trivial bodily harm to each other in the course of a fist fight or brawl"[140].

It would obviously be a matter of serious concern for physicians if patients could not legally consent to have bodily harm inflicted on them. Many medical procedures result in, in fact are aimed at, serious bodily harm—removal of an organ, amputation, incisions, *etc.* In fact, the Supreme Court of Canada in *Jobidon* recognized that its ruling would, if not confined to its particular facts, have an

---

[139] [1991] 2 S.C.R. 766.

[140] *Ibid.* at 767.

impact on physicians. Gonthier J., for the majority, took pains to make clear that absence of consent would continue to be an essential element of the offence of assault in situations other than fist-fights or brawls. He stated:

> There is nothing in the preceding formulation which would prevent a person from consenting to medical treatment or appropriate surgical interventions. Nor, for example, would it necessarily nullify consent between stuntmen who agree in advance to perform risky sparring or daredevil activities in the creation of a socially valuable cultural product. A charge of assault would be barred if the Crown failed to prove absence of consent in these situations, insofar as the activities have a positive social value and the intent of the actors is to produce a social benefit for the good of the people involved, and often for a wider group of people as well. This is a far cry from the situation presented in this appeal, where Jobidon's sole objective was to strike the deceased as hard as he physically could, until his opponent either gave up or retreated. Fist fights are worlds apart from these other forms of conduct.[141]

Thus, while the general proposition that consent is not a defence to a charge of assault causing bodily harm would have a significant impact on the medical profession, it is clear that the Supreme Court of Canada confined this rule to situations where the activity involved had no social value. Still, there is no doubt that a more formal recognition of the social value of medical treatment, one which would more clearly immunize physicians from the risk of criminal prosecution for legitimate, consensual medical treatment, would be preferable to reliance on the common law.

The other area where there may be some concern about the existing criminal law and the medical profession is homicide. In particular, there is a concern that a physician who administered a treatment which had an ancillary, and perhaps even unintended, effect of accelerating a patient's death would be liable. Section 226 of the *Code* provides:

> 226. Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

A particular concern for physicians is in the area of palliative care. Treatment administered by physicians to relieve serious pain suffered by dying patients may have the effect of accelerating the patient's death. Nothing in the *Code* protects physicians against a possible prosecution in such a situation.

(b) The Sub-Committee's View

The Sub-Committee believes that it should be clear in a new General Part of the *Criminal Code* that proper medical treatment and procedures do not come within the definition of criminal conduct. While the Sub-Committee does not see risks to physicians in the common law of assault or in the area of criminal negligence, it believes that physicians have legitimate concerns in relation to the law of assault causing bodily harm and homicide.

---

[141] *Ibid.* at 274.

It seems clear that sections 45 and 216 are not satisfactory provisions for meeting physicians' concerns in this area. As pointed out above, they have serious failings. They may actually reduce the protections provided by the common law. Thus, some other means must be sought to meet physicians' concerns.

The Law Reform Commission in its *Report 31* included a medical treatment exception to offences against the person, namely assault by touching or hurting, and assault by harming. The Commission's provision was drafted as follows:

> 7(3)(*a*) Medical Treatment. Clauses 7(2)(*a*) and 7(2)(*b*) [creating the offences of assault by touching or hurting and assault by harming] do not apply to the administration of treatment with the patient's informed consent for therapeutic purposes, or for the purposes of medical research, involving risk of harm not disproportionate to the expected benefits.[142]

By way of explanation of the need for such a provision, the Law Reform Commission stated:

> Under present law, a person performing a surgical operation for the benefit of the patient is protected from criminal liability by section 45 [of the *Criminal Code*] if it is performed with reasonable skill and care and it is reasonable to perform the operation having regard to all the circumstances. This section, however, does not cover other kinds of therapeutic treatment. Nor does it cover surgical treatment for another's benefit, for example, an operation on D1, in order to transplant an organ into D2. Nor does it cover operations for the sake of medical research.[143]

The Sub-Committee agrees with the Commission's conclusion that section 45 of the *Criminal Code* does not adequately address situations of potential liability for physicians.

In its testimony before the Sub-Committee, the Canadian Medical Association agreed with the Law Reform Commission that the existing *Criminal Code* does not sufficiently recognize the legitimacy of medical treatment and, therefore, does not adequately protect physicians from criminal prosecutions for activities they may carry out in the delivery of medical services.

Dr. Ronald F. Whelan, President of the Canadian Medical Association, stated in his testimony:

> The Criminal Code protects bodily integrity by creating offences that penalize killing, causing bodily harm, or assaulting another person. Only in the case of less serious violations of bodily integrity will the consent of a victim constitute a defence. Consequently, many of the daily activities in which physicians engage could theoretically be offences. Certain of the code's current provisions and an implicit recognition of the legitimacy of a physician's activities ensure that this is not the result. However, the code's provisions are inadequate in scope and unclear as to the

---

142 *Report 31*, at 62.

143 *Ibid.*, at 63.

obligations imposed upon physicians by the criminal law. The CMA therefore recommends that any revision of the general part of the Criminal Code contain the following:

> With respect to the legality of medical treatment, a provision that legitimizes the provision of medical treatment.[144]

The Sub-Committee agrees generally with the assessment of the existing law made by the Canadian Medical Association. However, it prefers the solution offered by the Law Reform Commission. The Sub-Committee is wary of including in the *Criminal Code* a provision as broad as that sought by the CMA as it could be viewed as creating a general immunity from criminal liability for medical practitioners. That, of course, would be undesirable. If a doctor is criminally negligent or administers medical treatment to which the patient did not consent, then he or she should be liable. As such, the Sub-Committee would prefer to see in the *Criminal Code* the necessary provisions that would protect doctors where there exists the greatest risk of their being prosecuted for activities that would be considered to be legitimate medical treatment.

That being said, the Sub-Committee disagrees with some elements of the Law Reform Commission's recommended provision. In particular, the Sub-Committee does not believe that a provision recognizing a medical treatment exception should specifically require that the physician obtain the "informed consent" of the patient. The Sub-Committee would prefer to see the definition of what is a valid consent continue to evolve through the cases, rather than establish what may be an arbitrary or inappropriate requirement in the *Criminal Code*. The Sub-Committee notes that the Law Reform Commission itself did not recommend that informed consent be defined in the *Code*. Rather, it recommended that the meaning of consent "be determined by the courts in each particular case".[145]

Further, the Sub-Committee does not see the need for the proviso that the Law Reform Commission included in its exception—that the "risk of harm [be] not disproportionate to the expected benefits". This phrase would limit the extent of the physician's protection from criminal liability. As with the matter of consent, the Sub-Committee is loath to enact in criminal law standards or procedures that are best determined on a case-by-case basis or by way of regulation of the medical profession. The Sub-Committee would not include in the *Criminal Code* a risk-benefit equation to govern the delivery of medical treatment.

In addition to the provision set out above, the Law Reform Commission also proposed the inclusion in the General Part of a palliative care exception to offences of homicide and aiding suicide as follows:

> 6(6) Palliative Care. Clauses 6(1) to 6(5) [creating the offences of homicide and furthering suicide] do not apply to the administration of palliative care appropriate in the circumstances for the control or elimination of a person's pain and suffering even if such care shortens his life expectancy, unless the patient refuses such care.[146]

---

[144] Issue 6:6-7.

[145] See *Report 28, Some Aspects of Medical Treatment and Criminal Law* (Ottawa: LRCC, 1986) at 16.

[146] *Report 31,* at 60.

The Sub-Committee agrees that a provision along these lines should be added to the General Part of the *Criminal Code* to make clear that appropriate palliative care cannot result in liability of a physician for homicide unless, of course, the patient refuses it.

There are many other medical-legal issues that were addressed by the CMA in its brief to the Sub-Committee. The Sub-Committee is not in a position to make recommendations on all of those matters. However, it struck the Sub-Committee that many of the matters brought forward by the CMA were either ancillary to the central concept of consent or related more generally to the delivery of medical services and, that while there was a criminal aspect to many of them, the better place to deal with them may be in provincial legislation governing health and health services. In particular, the question as to what constitutes valid consent and the circumstances when a physician may proceed without express consent are general issues that physicians must encounter regularly in the delivery of medical services and should, the Sub-Committee believes, be addressed in the context of regulating health services rather than in the *Criminal Code*.

Recommendation Seventeen

The Sub-Committee recommends that a recodified General Part of the *Criminal Code* recognize the social value of the medical profession by including in the *Criminal Code* provisions that make clear that

(a) there is no offence of assault or assault causing bodily harm where a patient consents to medical treatment; and

(b) physicians administering palliative care are not criminally responsible for accelerating the patient's death, unless the patient refuses such care.

CHAPTER XIII

THE OFFENCE OF AIDING SUICIDE

(a) Current Situation

Until 1972,[147] it was an offence to attempt to commit suicide. The only remaining offence related to suicide now in the *Criminal Code* is provided in section 241:

> 241. Every one who
>
> (*a*) counsels a person to commit suicide, or
>
> (*b*) aids or abets a person to commit suicide,
>
> whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

This offence applies to anyone who encourages a person to commit suicide or actually assists a person in carrying out a suicide attempt. Thus, it would equally apply to a person who encouraged a person to jump from the ledge of a tall building and to someone who provided lethal drugs to a person who suffered from a terminal illness.

Related to section 241 is section 14 of the *Criminal Code*. It states that no one is entitled to consent to have death inflicted on him or her. Consent cannot be a defence to a charge involving the causing of death to another. As such, it is no defence to a charge under section 241 that the deceased consented to have his or her life terminated.

(b) The Sub-Committee's View

During the course of its deliberations, the Sub-Committee heard from a number of groups and organizations on the issue of physician-assisted suicide. Submissions tended to focus on existing sections 14 and 241 of the *Criminal Code*.

The Sub-Committee considered the following options:

- the issue of aiding suicide should be addressed as part of the reform of the Special Part of the *Criminal Code*; or
- the issue of aiding suicide should be addressed in the General Part; or

---

[147] Section 225 of the *Code* was repealed by S.C. 1972, c. 13, s. 16. It had provided:

> 225. Everyone who attempts to commit suicide is guilty of an offence punishable on summary conviction.

- the issue of aiding suicide is sufficiently complex and pressing to merit Parliament's further attention

On behalf of persons suffering from terminal illnesses, the Right to Die Society proposed amendments to sections 14 and 241 of the *Criminal Code*, to permit physician-assisted suicide.[148] The Society offered compelling testimony from a terminally ill woman seeking removal of the existing legal barriers to allow her to receive medical assistance in ending her life at the time of her choosing.

While those appearing on behalf of Dying With Dignity said that there will be a time when physician-assisted suicide "may be a consideration for Canada," they were of the view that *Criminal Code* amendments would be premature at this time.[149]

Representatives from Compassionate Health Care Network and from Campaign Life Coalition were opposed to any changes to the *Criminal Code* that would allow euthanasia or assisted suicide.[150] The latter group argued that those most vulnerable in our society require the protection offered by laws prohibiting such action.[151] In a written submission to the Sub-Committee, the Alliance for Life also objected to eliminating section 14 from the *Criminal Code*.[152]

The Sub-Committee believes that reform of the law concerning aided suicide would require amendments to provisions now contained in the Special Part of the *Criminal Code*. Indeed, the proposal for reform submitted to the Sub-Committee by the Right to Die Society concentrated on an amendment to section 241 of the *Code*. While the position of this group was that an amendment to section 14 of the *Code* would also be desirable, the Sub-Committee is not persuaded that this amendment would be necessary in order to accomplish the goals sought by the Right to Die Society or, even if such an amendment were necessary, that this would amount to a sufficient connection to reform of the General Part that it should make a recommendation at this time.

As mentioned earlier in this chapter, section 14 states that one cannot consent to have death "inflicted" on oneself. The Sub-Committee believes that in a situation where a person requests the assistance of another person in carrying out a suicide, this would not involve the "infliction" of death. What is contemplated is a situation where a person would be provided with the means to take his or her own life. The death-causing act would be taken by the person himself or herself, not by the assistant. Thus, strictly speaking, an amendment to section 14 would not be necessary to accomplish what is sought by groups advocating legal recognition of assisted suicides. A provision along the lines of section 14 should continue to exist in the General Part and the question of assisted suicide should be addressed separately.

---

148 Issue 8A:71.

149 Issue 7:7.

150 Issue 8:43-7.

151 Issue 8A:83.

152 Issue 8A:83.

Even if the issues could be resolved in the General Part, additional evidence and deliberation are required before adequate consideration can be given to the advisability of reform in this area of the law. The Sub-Committee heard a good deal of conflicting testimony on these matters. It is likely that many more individuals and groups would want to be heard before even preliminary decisions are taken on these issues.

For these reasons, the Sub-Committee does not suggest amendments to the General Part to address the issue of aiding suicide. Nevertheless, the Sub-Committee is convinced, from the level of debate and the testimony heard by it, that the issue of assisted suicide is one of pressing interest and concern to Canadians. The Sub-Committee also believes that public policy issues of such importance should be addressed by the parliamentary process.

Recommendation Eighteen

The Sub-Committee recommends that the issues surrounding assisted suicide not be addressed in a recodified General Part of the *Criminal Code*.

One Sub-Committee member would go further than recommending that the issue of aiding suicide be reviewed by the Minister and that consideration be given to the need for new legislation, which is proposed in Recommendation Nineteen below. He believes that recent developments in Canada and in other countries indicate clearly the need for new legislation in this area. As such, he would recommend that the Minister study the issue and present a bill to Parliament as soon as possible.

Recommendation Nineteen

The Sub-Committee further recommends that the Minister of Justice conduct a review of the legal and philosophical issues surrounding assisted suicide as a matter of priority and, if the Minister determines that this issue requires legislative attention, introduce a special bill for Parliament's consideration.

CHAPTER XIV

REMAINING ISSUES—TENTATIVE VIEWS

As mentioned in Chapter I, the Sub-Committee decided that it would concentrate in this report on the issues that emerged from its hearings as being of greatest importance or controversy. However, the Sub-Committee felt that it should provide its tentative views on the other matters that are likely to be addressed in a recodified General Part of the *Criminal Code*. On most of these issues, the Committee did not have the benefit of the views of any of the witnesses who appeared before it. On many of them, the CBA Task Force or the Law Reform Commission, or both, made recommendations. The comments that follow are, for the most part, the Sub-Committee's reactions to those recommendations. The Sub-Committee hopes that its preliminary views on these issues will be of assistance in drafting a comprehensive bill on the General Part.

(a) Immaturity

The Law Reform Commission recommended in *Report 31* that no one should be liable for conduct committed when under age 12.[153] This recommendation is in keeping with the current *Criminal Code* as amended by the *Young Offenders Act*.[154]

The Canadian Association of Chiefs of Police stated in their brief to the Sub-Committee that it was in favour of lowering the age of criminal liability or, in the alternative, providing a qualified defence of immaturity that would give a court a discretion to determine whether the accused had sufficient maturity to possess criminal intent.[155]

The Sub-Committee is aware of the controversy that has surrounded the threshold age for criminal liability in Canada over recent years. The position of the Canadian Association of Chiefs of Police is well known. However, the Sub-Committee is reluctant to deal with this issue in the context of the recodification of the General Part of the *Criminal Code*. Any amendment to s. 13 of the *Code* should come about, if at all, as a result of a review of the proper ambit of the *Young Offenders Act*. **For present purposes, the Sub-Committee would prefer to preserve the rule in s. 13 of the *Code* that no one should be criminally liable for conduct carried out when under the age of twelve years.**

---

[153] Recommendation 3(4), at 32.

[154] S. 13, as amended by S.C. 1980-81-82-83, c. 110, s. 72.

[155] Issue 10A:8.

(b) Extra-territorial Jurisdiction

The Law Reform Commission recommended in *Report 31*[156] that the basic rule that no one should be liable in Canada for an offence that takes place wholly outside Canada be set out in the General Part of the *Criminal Code*, as it is at present.[157] The Commission then proposed numerous exceptions to that rule similar to those which the *Code* and other federal statutes currently recognize.

No witnesses addressed this issue during the Sub-Committee's hearings.

The Sub-Committee recognizes that territoriality is the basic principle on which states exercise jurisdiction in criminal law. As such, **the Sub-Committee agrees with the thrust of the Law Reform Commission's proposal that the basic rule of territorial jurisdiction be set out in the General Part.**

The Sub-Committee is aware that exceptions to the rule of territoriality are made in order to fulfil Canada's international commitments, prevent evasion of prosecution by offenders, prosecute offences that are universally condemned or protect important Canadian interests. **The Sub-Committee believes that these exceptions should be stated clearly in the *Code*** but it hesitates to comment on the actual re-drafting of the exceptions by the Law Reform Commission without further consideration.

(c) Causation

Both the CBA Task Force[158] and the Law Reform Commission[159] have proposed codification in the General Part of a rule of causation along the lines set out by the Supreme Court of Canada in *Smithers* v. *The Queen*.[160]

Both groups would hold persons responsible for a particular result (*e.g.* a person's death) if their actions contributed significantly[161] to that result and there was no major intervening cause.

The most significant difference between the approaches of the two groups is that the CBA Task Force would rule out liability for causing harm or death to persons who are particularly vulnerable unless the accused knew about, or was reckless as to, the victim's weakness. The CBA Task Force's objection to the rule that one should take one's victim as found is that it imposes objective liability. A person could be convicted for causing someone's death through the infliction of an injury that he or she did not know would be fatal.

The Sub-Committee agrees that a rule of causation should be set out in a recodified General Part of the *Criminal Code*. However, the Sub-Committee would hesitate to legislate the so-called "thin-skull" rule out of existence. The question of liability for consequences should

---

156 Recommendation 5(1), at 49.

157 S. 6(2).

158 Issue 5A:26.

159 *Report 31*, Recommendation 2(6), at 27.

160 [1977] 1 S.C.R. 506.

161 The Law Reform Commission preferred the word "substantially".

be addressed instead by identifying the appropriate mental state within the definition of particular offences, taking into account the principles of fundamental justice and the general preference of the criminal law for subjective liability.

(d) Attempts

The CBA Task Force recommended that an attempt to commit an offence should be punishable if the accused has an intent to carry out the offence and takes steps toward doing so beyond mere preparation, whether or not it was impossible to commit the offence in the circumstances. The Task Force would also make it clear that it is a question of law whether the conduct amounts to an attempt.[162]

The Law Reform Commission had proposed a similar formulation, but which was silent on the issue of impossibility. The Commission would punish attempts with one-half the penalty for the full offence.[163]

The Sub-Committee generally prefers the formulation of the CBA Task Force on attempts since it sets out more clearly the mental element and the conduct that constitute an attempt.

However, the Sub-Committee hesitates to adopt the CBA Task Force recommendation on impossibility. The Task Force stated that one should be convicted of an attempt notwithstanding that it was factually or legally impossible to commit it. On the other hand, the Task Force suggested that a provision be added to the General Part making it clear that one should not be convicted of an attempt to do something that is not a crime.[164] **The Sub-Committee prefers the views of the Law Reform Commission on this issue[165] and would not make reference to impossibility in the definition of attempts.** If something is not a crime, one should not be liable for attempting it. It is unnecessary to state this in law. On the other hand, if something is factually impossible, the person is still blameworthy for attempting it. Again, it is not necessary for the General Part to state this expressly.

The Sub-Committee agrees with the CBA Task Force that the determination of whether conduct amounts to more than mere preparation should be a question of law.

On the question of the punishment of attempts, the Sub-Committee would prefer to see this dealt with in the sentencing parts of the *Criminal Code* rather than in the General Part.

(e) Conspiracy

The Law Reform Commission proposed a simple rule that an agreement to commit a crime is itself a crime. The Commission also proposed that conspiracies, like attempts, be punishable by half the penalty for the full offence.[166] As with attempts, **the Sub-Committee would not specify the punishment for conspriracies in the General Part of the *Criminal Code*.**

---

[162] Issue 5A:145.

[163] *Report 31*, Recommendation 4(3), at 45.

[164] Issue 5A:155.

[165] *Report 31*, at 48-9.

[166] *Report 31*, Recommendation 4(5), at 46.

The CBA Task Force proposed enactment of a detailed codification of the definition of conspiracy.[167] Its definition would make clear that spouses can be convicted of conspiring with one another. Under existing law, as set out in the case of *Kowbel* v. *The Queen*,[168] a husband and wife are not capable of entering into a conspiracy because spouses "form but one person, and are presumed to have but one will".[169] **The Sub-Committee agrees that the common law rule that spouses cannot conspire with one another should be expressly repealed.**

The CBA Task Force proposed that liability be limited to conspiracies to commit indictable offences. It would also create a defence for those who abandon the conspiracy. Finally, the Task Force suggested that conspiracies be punishable even where it was impossible to commit the offence.

On these latter issues, the Sub-Committee prefers the approach of the Law Reform Commission. **The Sub-Committee would hesitate to limit conspiracies to indictable offences.** It believes that it should be an offence to conspire to commit any offence created by an Act of Parliament. On the question of abandonment, the Sub-Committee agrees with the Law Reform Commission that those who abandon conspiracies may do so only because of fear of detection. This is not a sufficient basis to excuse them from liability. **The Sub-Committee does not support the creation of a defence of abandonment.** As for impossibility, the Sub-Committee takes the same view of impossible conspiracies as it does of impossible attempts. **It is not necessary to address impossibility expressly in the General Part.**

(f) Parties

The Law Reform Commission proposed rules governing the liability of those who commit crimes together[170] or engage in a common criminal purpose.[171] It also introduced the concept of "furthering" crime by helping, encouraging, urging, inciting or using another person to commit it.[172] These recommendations would replace the existing rules on aiding and abetting, counselling, procuring and having an intention in common. **The Sub-Committee is attracted to the idea of including under the heading "furthering" a variety of means of participating in the commission of offences.**

The CBA Task Force proposed that the rules on counselling and participation in offences be consolidated. It would repeal the existing rules on intention in common and accessories. The Sub-Committee does not agree with portions of the CBA Task Force's recommendations. The Task Force proposes that the current provision on aiding commission of an offence[173] be re-drafted so as to apply to those who do or omit to do anything "knowing that it will aid any person to commit" the

---

167 Issue 5A:156.

168 [1954] S.C.R. 498.

169 *Ibid.* at 499-500.

170 *Report 31*, Recommendation 4(1), at 43.

171 *Ibid.*, Recommendation 4(6), at 47.

172 *Ibid.*, Recommendation 4(2), at 44.

173 *Criminal Code*, s. 21(1)(*b*).

offence. This is considerably broader than the existing provision which applies only where someone does or omits to do anything "for the purpose of aiding any person to commit" the offence. The Sub-Committee agrees with the Canadian Association of Chiefs of Police which stated in its brief:

> Liability should not however be extended to a person who is merely present at the scene of the crime, even when that person knows that his or her presence will encourage another person to commit or continue the offence. Such an extension broadens the net of the criminal law considerably from its current state.[174]

The Law Reform Commission recommended that its offence of furthering be a crime of purpose.[175] This would be consistent with the existing law. **The Sub-Committee believes the rule on aiding and abetting, or "furthering," should apply to those who intentionally assist or encourage others in the commission of offences.**

The Sub-Committee does not see the need for elimination of the provision in the *Criminal Code* governing those who engage in a common purpose, as proposed by the CBA Task Force. The Sub-Committee is aware that the existing provision of the *Code*, as it applies to murder, has been found unconstitutional to the extent that it creates objective liability.[176] Still, the Sub-Committee does not see the need to repeal the entire provision. The Law Reform Commission proposed a rule on common purpose that is based on subjective liability. One would be liable for a crime which he or she knew was a probable consequence of pursuing the common purpose.[177] The Canadian Association of Chiefs of Police endorsed this approach.[178] **The Sub-Committee would prefer to keep a provision on common purpose that contained a subjective mental element rather than repeal the existing rule entirely.**

As for repealing section 23 of the *Criminal Code* dealing with accessories after the fact, the Sub-Committee is not convinced that the existing provision duplicates offences of obstructing justice. Therefore, until this question is given further study, **the Sub-Committee would prefer that the concept of an accessory after the fact be retained.**

(g) Double Jeopardy

The CBA Task Force recommended that the common law rule that no one should be convicted twice for the same delict be codified. The view of the Law Reform Commission was that this area is largely procedural and should be addressed as part of the reform of criminal procedures. The Criminal Law Teachers agreed with the Law Reform Commission's approach.[179]

---

[174] Issue 10A:19.

[175] *Report 31*, at 44.

[176] *R.* v. *Logan*, [1990] 2 S.C.R. 731; *R.* v. *Rodney*, [1990] 2 S.C.R. 687.

[177] *Report 31*, Recommendation 4(6)(*c*), at 47.

[178] Issue 10A:22-3.

[179] Issue 9A:53.

The Sub-Committee agrees that, while the concept of double jeopardy is a basic principle of criminal law, it is normally reflected in procedural protections. In addition, the *Charter of Rights and Freedoms* contains protections against being tried twice for an offence and double convictions.[180] As such, **the Sub-Committee feels there is no need to include a provision on double jeopardy in the General Part.**

(h) De Minimis

The Law Reform Commission believed that the concept of *de minimis non curat lex*—the law does not concern itself with trifles—should not be codified in the General Part of the *Criminal Code*. Rather, judges could invoke their inherent jurisdiction to dismiss trivial cases, as under the existing law.[181]

The CBA Task Force stated that this defence should be codified. It would give courts the power to enter a stay of proceedings where the offence was so trivial as not to warrant a conviction. In some respects, this rule would be similar to entrapment. *De minimis* would not be a true defence since it would not result in acquittal and would have to be proved by the accused on the balance of probabilities.

The Sub-Committee believes that codifying the concept of *de minimis* along the lines proposed by the CBA Task Force would be an improvement over the existing law.

(i) States of Mind

The CBA Task Force recommended codification of three different states of mind that would be used in defining particular offences: intent, knowledge and recklessness. Unless specifically provided, the prescribed state of mind for the offence would apply to all of its physical elements—conduct, circumstances and consequences. Also, the CBA Task Force suggested enactment of rules of interpretation stating that where a provision is silent it should be read as requiring intent and that where a provision requires a particular state of mind, a more subjective state of mind will suffice.

The Law Reform Commission also proposed codification of culpable states of mind: purpose and recklessness. Knowledge would not be a sufficient mental state but would form part of the definition of "purposely" and amount to the corresponding mental state in relation to circumstances.[182] The Commission proposed more complicated rules of fault than were recommended by the CBA Task Force by distinguishing between fault in relation to conduct, consequences and circumstances. The Commission proposed general rules of interpretation similar to those suggested by the CBA Task Force.

---

[180] S. 11(*h*).

[181] See the discussion in the *CBA Task Force Report* at Issue 5A:129-32.

[182] *Report 31*, Recommendations 2(4)(*b*)(i) and 2(4)(*a*(i) at 23 and 22, respectively.

With respect to the formulation of culpable mental states, the Sub-Committee prefers "intent" to "purpose". Intent is the more common term in Canadian law and has the advantage of not being confused with motive. This term was also favoured by the Criminal Law Teachers.[183]

As for "knowledge", the Sub-Committee prefers the approach of the Law Reform Commission. **The Sub-Committee sees knowledge as part of other mental states, such as intent or recklessness, not as a sufficient culpable mental state on its own.**

On the question whether the General Part should establish that the fault element for the offence applies to the conduct, circumstances and consequences (the CBA Task Force approach) or should set out more precise requirements for each physical element (the Law Reform Commission approach), the Sub-Committee is torn between the simplicity of the former and the clarity of the latter. In either case, in creating offences, Parliament will always have to consider the appropriate fault requirement for the various physical elements of the offences. The advantage of the Law Reform Commission's approach is that there would be standard rules in the General Part on the appropriate fault requirements applicable to the physical elements of each kind of offence. On balance, **the Sub-Committee would prefer to see general rules of culpability in the General Part that would link fault requirements and physical elements for the various types of offences found in the *Criminal Code*.**

(j) Mental Disorder

The provisions of the *Criminal Code* dealing with mental disorder have recently been amended.[184] Even so, the CBA Task Force made recommendations to improve the law in this area. In the main, the Task Force would preserve the existing law, but would expand the concept of mental disorder to include both "diseases" and "mental disabilities".[185] This would amount to an expansion of the current definition of mental disorder as a disease of the mind. The Law Reform Commission recommended including both "diseases" and "defects" of the mind within the term "mental disorder".[186]

As it stated in its recommendation on automatism, **the Sub-Committee is not in favour, at this point in time, of expanding on the definition of mental disorder,** although it recognizes that there may be merit in doing so after further thought has been given to the current definition and we have had some experience with the new legislation in this area.

The CBA Task Force also proposed that the mental disorder defence apply to "incapacity to conform to the requirements of the law". This wording is intended to codify the concept of an irresistible impulse. **The Sub-Committee is reluctant to include irresistible impulses in the definition of mental disorder.** This is not to say that the Sub-Committee would rule out any defence to a person who suffered from what the Task Force calls a "volitional inability". To the extent that this

---

[183] Issue 9A:48.

[184] S.C. 1991, c. 43.

[185] Issue 5A:65.

[186] *Report 31*, Recommendation 3(6), at 33.

form of conduct is involuntary, an accused who was unable to control his or her actions may be exempt from liability on the same basis as a person who was in a dissociative state. Thus, special provision for irresistible impulses does not appear to be necessary.

(k) Mistake of Fact

The CBA Task Force proposed that the defence of mistake of fact should apply where the accused made a mistake as to the circumstances under which he or she was acting. However, where appropriate, the accused could be convicted of an included offence. The trial court should consider all of the circumstances of the case, including any reasonable grounds for the accused's belief, in determining whether the accused really had a mistaken belief.[187]

The Law Reform Commission also recommended codification of this defence, but instead of providing for liability only for included offences, the Commission stated that the accused could be convicted of an included offence or an attempt to commit another offence. Further, instead of a clause directing courts to consider the presence of reasonable grounds for the accused's belief, the Commission states that the defence of mistake of fact should not be available for crimes of recklessness or negligence where the mistake is due to the accused's recklessness or negligence.

While the Sub-Committee is aware that there may be situations where a conviction for an attempt to commit an offence other than the offence the accused may have thought he or she was committing would be appropriate,[188] **the Sub-Committee does not agree with the Law Reform Commission that an accused, in raising the defence of mistake of fact, should be open to conviction for an attempt to commit *any* offence.** It would be unfair to convict an accused of an offence that may be quite remote from the offence with which he or she was charged.

The Sub-Committee agrees with the CBA Task Force that courts should consider all of the circumstances in determining whether the accused was indeed mistaken. It is unnecessary, in the Sub-Committee's view, to include an express provision as suggested by the Law Reform Commission dealing with the defence of mistake of fact to crimes of negligence or recklessness. In these cases, a reckless or negligent mistake would be consistent with liability and would not, therefore, provide an excuse.

(l) Mistake of Law

The CBA Task Force proposed an expansion of the exceptions to the rule that ignorance of the law is no excuse.[189] In its view, mistake of law should be a defence where the mistake relates to private rights, or stems from non-publication of the law, reliance on a judicial decision or the statement of a judge, government official, or police officer.

---

187 Issue 5A:56.

188 Such as in the situations arising in *R.* v. *Ladue*, [1965] 4 C.C.C. 264 (Y.T.C.A.) or *R.* v. *Kundeus*, [1976] 2 S.C.R. 272 (see especially the judgment of Laskin, C.J.C.).

189 Issue 5A:114.

The Sub-Committee is sympathetic to arguments that the existing law should be broadened. As Sheldon Pinx, a member of the CBA Task Force, stated before the Sub-Committee, it is simply unrealistic to expect people always to know what the law is at a given point in time. As such, an expanded defence of mistake of law "would reflect the times and the complexity of society."[190]

The Law Reform Commission's recommendation on this issue was to the same effect as that of the CBA Task Force, but somewhat narrower.[191] The Sub-Committee is inclined to think that it would be better to move slowly in this area. It agrees that the law should be expanded, but would not go so far as the proposal made by the CBA Task Force. **The Sub-Committee prefers the formulation suggested by the Law Reform Commission that would provide a defence where the mistake of law related to private rights, the law was not published, or there was reliance on a decision of the court of appeal in the province or the instructions of a competent administrative authority.**

(m) Self-Defence

Both the CBA Task Force[192] and the Law Reform Commission[193] have made recommendations that would simplify considerably the present law. **The Sub-Committee supports these efforts to simplify the existing law of self-defence so as to permit the use of reasonable force.** It prefers the formulation of the CBA Task Force in that it makes express the subjective and objective elements of the defence. The Law Reform Commission's proposal, in conjunction with its recommendation on mistaken belief as to a defence,[194] is similar but more difficult to understand and apply.

The CBA Task Force also proposed creation of a defence of excessive force in self-defence which would reduce murder to manslaughter.[195] **The Sub-Committee does not support creation of the defence of excessive force.** In its view, there is both sufficient elasticity in the concept of reasonable force in self-defence and strictness in the *mens rea* requirement for murder that such a defence is unnecessary.

The Law Reform Commission recommended that the defence of self-defence not be available where the person used force against a police officer who was executing a warrant of arrest.[196] The CBA Task Force strongly disapproved of this suggestion:

---

[190] Issue 5:26.

[191] *Report 31*, Recommendation 3(7), at 34.

[192] Issue 5A:77.

[193] *Report 31*, Recommendation 3(10), at 36.

[194] *Report 31*, Recommendation 3(17), at 41.

[195] Issue 5A:77.

[196] *Report 31*, Recommendation 3(10)(*b*), at 36.

> The [Task Force] can see no justification for fettering a citizen's right to defend oneself or another in these circumstances. The general law respecting resisting arrest and obstructing a peace officer is an adequate protection to the police when they are acting in the execution of their duties. If they are acting outside the scope of their authority, citizens are entitled to protect themselves and others.[197]

The Sub-Committee agrees. **Thus, the Sub-Committee does not support creation of an exception to the defence of self-defence when force is used against police officers acting without lawful authority.**

(n) Necessity

The Law Reform Commission recommended codifying this common law defence along the lines recognized by the Supreme Court of Canada in *Perka* v. *The Queen*.[198] The Commission suggested, however, that the defence be applicable both to harms to the person and damage to property. **The Sub-Committee agrees that the defence of necessity should be available for actions taken to avoid harms to the person or property.**

The Commission also proposed that the defence not be available to someone who caused bodily harm or death.[199] The Commission reasoned that no one should harm or kill another person in order to save himself or herself. While it is sympathetic to this reasoning, **the Sub-Committee would prefer not to put an express limitation on the actions that could be taken in necessitous circumstances.** Such a limit may prove to be arbitrary and unjust.[200]

The CBA Task Force recommended codifying the common law defence, but suggested that it be broadened by not requiring that the peril be immediate or that compliance with the law was impossible. The defence would not be available to someone who created the initial danger.

The Sub-Committee agrees that the defence of necessity should be broadened along the lines proposed by the CBA Task Force.

(o) Duress

The CBA Task Force proposed that the defence of duress be broadened by not requiring that the threat to the person be immediate or involve death or bodily harm.[201] The Sub-Committee accepts that the limits in the current law on the availability of the defence of duress are difficult to justify. Thus, **the Sub-Committee agrees with the CBA Task Force that the defence of duress should be available even where there exists no immediate threat or the threat does not involve death or bodily harm.**

---

197 Issue 5A:85.

198 [1984] 2 S.C.R. 232.

199 *Report 31*, Recommendation 3(9)(*b*), at 36.

200 See, *e.g.*, the examples cited by Eric Colvin, *Principles of Criminal Law, 2nd ed.* (Carswell, 1991), at 248.

201 Issue 5A:98.

The Law Reform Commission's recommendation on duress stated that the defence should not be available where the person caused serious bodily harm or death to another.[202] As with necessity, **the Sub-Committee is reluctant to place a statutory limit on the actions that may reasonably fall within the defence of duress.**

(p) Provocation

The position of the Law Reform Commission was that provocation should be a matter that goes to sentencing, not liability. It suggested that the mandatory period of parole ineligibility for second degree murder be abolished and, thereafter, evidence of provocation could be used to reduce the sentence imposed on the offender.[203]

The CBA Task Force recommended[204] preserving the essence of the existing law of provocation, but it would remove some of the criteria currently set out in s. 232 of the *Criminal Code*. The Task Force would not require that the source of the provocation be a wrongful act or insult and would not limit the defence to situations where the accused acted before his or her passion had cooled. These amendments would simplify and clarify the law in this area. In addition, the Task Force would open the defence to all offences, not just murder. This is a logical extension of the law given that the defence is a "limited concession to human infirmity."[205] **The Sub-Committee endorses the improvements on the law of provocation proposed by the CBA Task Force.**

(q) Persons Acting under Legal Authority

The Law Reform Commission recommended inclusion in the General Part of a provision stating that no one should be liable for performing an act required or authorized by law or for using force in doing so.[206] This is consistent with the existing law.[207] The Commission also suggested that no one should be entitled under this provision to use force causing serious harm or death. If there was a danger to personal safety, the defence of self-defence would apply. **The Sub-Committee endorses the improvements on the law in this area recommended by the Law Reform Commission.**

The Commission also recommended that no police officer be liable for using reasonable force to arrest a fleeing suspect or offender.[208] The Sub-Committee is aware that this issue is currently under study by the Minister of Justice. As such, **at present the Sub-Committee is reluctant to suggest any changes to the existing law on the degree of force available to police officers in apprehending fleeing suspects or offenders.**

---

[202] *Report 31*, Recommendation 3(8), at 35.

[203] *Working Paper 33, Homicide*, (Ottawa: LRCC, 1984), at 73.

[204] Issue 5A:122.

[205] According to the CBA Task Force: Issue 5A:123.

[206] *Report 31*, Recommendation 3(13), at 38.

[207] *Criminal Code*, s. 25(1).

[208] *Ibid.*, Recommendation 3(13)(*b*), at 39.

(r) Authority over Children

The Law Reform Commission proposed that no one be liable for an offence if, as parent or guardian, he or she touches, hurts or confines a child in the reasonable exercise of authority over the child.[209] A minority of the Commissioners would not have provided such a defence.

The Sub-Committee is aware that there is a great deal of controversy in Canada over the merits of the existing law on this issue.[210] In the absence of testimony from experts in this area, **the Sub-Committee is reluctant to make any recommendation as to whether the *Criminal Code* should permit the use of corrective force on children.**

(s) Superior Orders

The Law Reform Commission recommended that no one bound by military law be liable for anything done in obedience of a superior's orders, unless the orders are manifestly unlawful.[211] This recommendation would clarify the existing law. **The Sub-Committee supports the inclusion in the General Part of a provision recognizing the defence of obeying superior orders.**

(t) Lawful Assistance

The Law Reform Commission proposed inclusion of a general provision stating that no one is liable for assisting someone in the assertion of a defence permitted under the *Code*.[212] **The Sub-Committee agrees with the inclusion of a general provision on lawful assistance in the General Part in order to simplify and clarify the existing law.**

(u) Mistaken Belief as to Defence

The Law Reform Commission suggested that no one be liable if he or she would have had a defence on the facts as he or she believed them to be.[213] This is the means the Commission chose to use to introduce a subjective element into various defences. As mentioned in relation to self-defence, **the Sub-Committee would prefer to see the subjective elements of defences set out in each relevant provision, rather than in a general provision.** This, it believes, would make clearer the subjective aspect of each defence.

---

209 *Report 31,* Recommendation 3(14), at 40.

210 *Criminal Code*, s. 43.

211 *Report 31*, Recommendation 3(15), at 40.

212 *Report 31*, Recommendation 3(16), at 41.

213 *Ibid.*, Recommendation 3(17), at 41.

CHAPTER XV

IMPLEMENTING A RECODIFIED GENERAL PART

The Sub-Committee considered a variety of options for implementing a recodified General Part of the *Criminal Code*:

- the General Part could be enacted after amendments to the Special Part had been prepared;
- the General Part could be enacted without addressing the Special Part;
- the General Part could be enacted immediately and the Special Part addressed as a matter of priority;
- the General Part could be enacted immediately but not proclaimed in force until the necessary Special Part amendments had also been enacted;
- the General Part could be enacted immediately and proclaimed in force in instalments;
- the General Part could be enacted immediately, but contain a transitional provision stating that in the event of inconsistency between the General and Special Parts the latter should take precedence.

One argument for delaying the enactment or coming into force of the new General Part is that Canadians in general and the legal profession in particular should be given an opportunity to become acquainted with the new provisions before they come into force. The Sub-Committee is sympathetic to this argument. On the other hand, proposals for amending the General Part have been circulating for at least a decade already. Every opportunity has been provided to Canadians to become involved in the creation of a new General Part and to become familiar with the issues under consideration. The Law Reform Commission held extensive consultations and received comments and suggestions from the public prior to publishing its *Report 31*. This Sub-Committee heard from many groups and individuals and, no doubt, more witnesses will come forward to give their views after a bill has been introduced in Parliament. In this light, it strikes the Sub-Committee that there is no need to delay enactment of a recodified General Part purely to allow people to become familiar with it.

Another argument for delaying the enactment or coming into force of a new General Part is to provide an opportunity to bring the Special Part of the *Code* into line with it. No doubt there will need to be amendments to the Special Part to make it accord with a recodified General Part. Still, the Sub-Committee would be reluctant to recommend that the new General Part not take the force of law until the rest of the *Code* can be amended. There is momentum now in relation to the General Part. That momentum should not, in the Sub-Committee's view, be arrested at this point. It would prefer that a bill be prepared recodifying the General Part and that the bill be passed and come into force as soon as possible. However, in order to account for inconsistencies between the General Part and the Special Part, the Sub-Committee suggests that for the time being the Special Part take precedence over a new General Part. This approach would ensure that enactment of the General Part would not be unduly delayed. In addition, it may stimulate rapid consideration of the amendments required to bring the Special Part into line with the new General Part.

Recommendation Twenty

The Sub-Committee recommends that a bill be presented to Parliament recodifying the General Part of the *Criminal Code* and that the General Part be adopted and come into force without delay.

Recommendation Twenty-One

The Sub-Committee further recommends that as a transitional measure the General Part contain a provision stating that in the event of inconsistency between the General and Special Parts the latter shall take precedence.

Recommendation Twenty-Two

The Sub-Committee further recommends that amendments bringing the Special Part into line with a recodified General Part be introduced as soon as possible.

SUMMARY OF PRINCIPAL RECOMMENDATIONS

Set out below are the Sub-Committee's principal recommendations. In addition to these proposals, the Sub-Committee has expressed its tentative views on a range of other issues that should be addressed within a recodified General Part of the *Criminal Code*. These are set out in Chapter XIV.

RECODIFICATION

1. **The Sub-Committee recommends that the General Part of the *Criminal Code* be recodified. (p. 4)**

2. **The Sub-Committee further recommends that, to the extent possible, a recodified General Part of the *Criminal Code* be drafted in plain language. (p. 4)**

PREAMBLE/STATEMENT OF PURPOSES AND PRINCIPLES

3. **The Sub-Committee recommends that the bill introduced in Parliament dealing with a recodified General Part of the *Criminal Code* include a preamble or statement of principles so that this issue can be given further consideration and the contents of the proposed statement of legislative intent can be given closer examination. (p. 10)**

PRINCIPLE OF LEGALITY

4. **The Sub-Committee recommends that a recodified General Part of the *Criminal Code* contain the principle that no one should be convicted of an offence unless it is set out in an Act of Parliament (the principle of legality). (p. 12)**

5. **The Sub-Committee further recommends that the principle of legality should not be subject to an exception for the common law offences of contempt of court. Those offences should be codified. (p. 13)**

COMMON LAW DEFENCES

6. **The Sub-Committee recommends that a recodified General Part of the *Criminal Code* codify existing defences and continue to allow for the recognition of new defences. (p. 17)**

THE FAULT ELEMENT OF CRIMES

7. **The Sub-Committee recommends that a recodified General Part of the *Criminal Code* set out culpable mental states. (p. 22)**

8. The Sub-Committee further recommends that a recodified General Part be based on the principle that subjective fault is the usual minimum requirement for criminal liability and that objective fault should be used with restraint. (p. 22)

LIABILITY FOR OMISSIONS

9. The Sub-Committee recommends that a recodified General Part of the *Criminal Code* state that a person may be criminally liable for failure to perform duties imposed by an Act of Parliament or special duties imposed by the *Criminal Code*. (p. 27)

CORPORATE LIABILITY

10. The Sub-Committee recommends that a recodified General Part of the *Criminal Code* contain a provision on corporate liability that makes clear that corporations will be liable for conduct committed by those with authority over its actions, whether or not there is an individual who could be held personally liable for the conduct. (p. 31)

THE DEFENCE OF INTOXICATION

11. The Sub-Committee recommends that a recodified General Part of the *Criminal Code* recognize intoxication as a defence where any element of the offence is not present. The defence should not be available in relation to offences of negligence or offences for which intoxication forms part of the definition. (p. 38)

12. The Sub-Committee further recommends that a new offence be created in the *Criminal Code* of criminal intoxication leading to conduct prohibited by the *Code* (e.g. criminal intoxication leading to assault; criminal intoxication leading to robbery, etc.). The new offence should be recognized as an included offence to any offence for which intoxication would be available as a defence. (p. 38)

THE DEFENCE OF AUTOMATISM

13. The Sub-Committee recommends that a recodified General Part of the *Criminal Code* recognize the defence of automatism by providing that no one should be liable for conduct that is involuntary, whether the conduct is conscious or unconscious. (p. 43)

USE OF FORCE IN DEFENCE OF PROPERTY

14. The Sub-Committee recommends that a recodified General Part of the *Criminal Code* permit the use of reasonable force in the defence of property, without distinguishing between movable and immovable property. (p. 48)

15. **The Sub-Committee further recommends that a recodified General Part of the *Criminal Code* not state that use of deadly force may never be used to protect property. (p. 48)**

THE DEFENCE OF ENTRAPMENT

16. **The Sub-Committee recommends that a recodified General Part of the *Criminal Code* codify entrapment as including**

    (a) **a situation where authorities provide the accused an opportunity to commit an offence without reasonable suspicion that the accused is engaged in that conduct, or in the absence of a *bona fide* inquiry; or**

    (b) **a situation where the authorities have a reasonable suspicion that the accused is engaged in criminal conduct, or are engaged in a *bona fide* inquiry, and go beyond providing an opportunity to the accused and actually induce the accused to commit the offence. (p. 51)**

EXCEPTIONS FOR MEDICAL PRACTICE

17. **The Sub-Committee recommends that a recodified General Part of the *Criminal Code* recognize the social value of the medical profession by including in the *Criminal Code* provisions that make clear that**

    (a) **there is no offence of assault or assault causing bodily harm where a patient consents to medical treatment; and**

    (b) **physicians administering palliative care are not criminally responsible for accelerating the patient's death, unless the patient refuses such care. (p. 58)**

THE OFFENCE OF AIDING SUICIDE

18. **The Sub-Committee recommends that the issues surrounding assisted suicide not be addressed in a recodified General Part of the *Criminal Code*. (p. 61)**

19. **The Sub-Committee further recommends that the Minister of Justice conduct a review of the legal and philosophical issues surrounding assisted suicide as a matter of priority and, if the Minister determines that this issue requires legislative attention, introduce a special bill for Parliament's consideration. (p. 61)**

IMPLEMENTATION

20. **The Sub-Committee recommends that a bill be presented to Parliament recodifying the General Part of the *Criminal Code* and that the General Part be adopted and come into force without delay. (p. 76)**

21. **The Sub-Committee further recommends that as a transitional measure the General Part contain a provision stating that in the event of inconsistency between the General and Special Parts the latter shall take precedence. (p. 76)**

22. **The Sub-Committee further recommends that amendments bringing the Special Part into line with a recodified General Part be introduced as soon as possible. (p. 76)**

APPENDIX A

LETTER OF THE HON. KIM CAMPBELL THEN MINISTER OF JUSTICE AND ATTORNEY GENERAL TO THE CHAIRMAN OF THE STANDING COMMITTEE

May 28, 1990

Dr. Bob Horner, M.P.
Chairman, Standing committee of the House of Commons
on Justice and the Solicitor General
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Dr. Horner:

I write today to ask the Standing Committee on Justice and Solicitor General to undertake a review as to what amendments should be made to our present *Criminal Code* to ensure that it has a General Part which contains general principales and rules of general application which accord both with the fundamental values of Canadians and the requirements of a modern *Criminal Code*.

It would be most useful if the Standing Committee completed this study and reported its conclusions to the House by March 31, 1991.

The general part of a criminal code sets out, as legal principales, a number of rules of behaviour that affect the everyday lives of citizens. Our present Part I, for example, contains provisions that establish for the purposes of the criminal responsibility; define insanity for the purposes of the criminal law; provide that ignorance of the law is no excuse; and set out detailed rules as to what you can and can not do legally to defend yourself, those under your protection, and your property.

Most of these provisions have come down to us virtually unchanged since 1892. Although many of them have served us well over the years, the present Part I is, by the standards of modern criminal codes, at best incomplete. To date, the case law have filled in those general principles which the Code lacks. These principles also contain important norms of social behaviour such as the degree of criminal responsibility for prohibited acts committed when drunk or on drugs. These important norms, established through case law, have never been reviewed by Parliament. Parliament has also yet to review Part I of the *Code* in light of the *Charter of Rights and Freedoms*.

In its study, the Committee will wish to examine the Law Reform Commission of Canada's extensive work in this area in depth. As well, there are a number of documents produced by other working groups, task forces, and individuals who have made recommendations in this area. These are being forwarded to you under separate cover.

I will also forward to you in early summer a background document that is being prepared by my officials which outlines a number of options for amendments to the General Part which the Committee could consider in its review.

The study which today I am asking you to undertake is an important one which will have an enormous impact on the development of our criminal law as well as the everyday lives of Canadians.

I have asked Mr. Daniel C. Préfontaine Q.C., the Assistant Deputy Minister of Justice responsible for criminal law policy in the Department to meet with you and the Clerk of your Committee to discuss what assistance the Department might be able to provide you in this important task. Thank you for agreeing to undertake it.

Yours sincerely,

A. Kim Campbell, P.C., M.P.

APPENDIX B

ORDERS OF REFERENCE

ORDER OF REFERENCE FROM THE STANDING COMMITTEE

Extract from the Minutes of Proceedings of the Standing Committee on Justice and the Solicitor General of Thursday, June 13, 1991:

By unanimous consent, it was ordered,—That pursuant to Standing Order 108(1)(a) and (b) a Sub-Committee of the Standing Committee on Justice and the Solicitor General; composed of 3 members including 1 member of the Progressive Conservative Party, 1 from the Liberal Party, 1 from the New Democratic Party determined by the Chairman after the usual consultations, be established with all the powers of the Committee except the power to report to the House; and that pursuant to Standing Order 108(2) the mandate of the said Sub-Committee be to undertake a review as to what amendments should be made to our present Criminal Code to ensure that it has a General Part which contains general principles and rules of general application which accord both with the fundamental values of Canadians and the requirements of a modern Criminal Code.

ATTEST

RICHARD DUPUIS
Clerk of the Committee

ORDER OF REFERENCE FROM THE HOUSE

Extract from the Votes & Proceedings of the House of Commons of Wednesday, February 17, 1993 :

By unanimous consent, it was ordered,—That the Sub-Committee on the Recodification of the General Part of the *Criminal Code* of the Standing Committee on Justice and the Sollicitor General be authorized to report directly to the House.

ATTEST

ROBERT MARLEAU
The Clerk of the House of Commons

APPENDIX C

LIST OF WITNESSES

Association	Issue	Date
The Hon. Kim Campbell, Minister of Justice and Attorney General of Canada	1	Tuesday, May 12, 1992
Department of Justice: David Daubney, General Counsel, Criminal Law Policy Section; Heather Holmes, Counsel, Criminal Law Policy Section.	1	Thursday, March 26, 1992 Monday, March 30, 1992
The Law Reform Commission: The Hon. Mr. Justice Gilles Létourneau, former Chairman; Professor Patrick Fitzgerald, Coordinator of the Substantive Criminal Law Project.	1	Monday, June 8, 1992
The Criminal Law Reform Society: Vincent Del Buono, Chairman.	1	Monday, June 8, 1992
The University of Toronto, Faculty of Law: Sharon Nicklas; Orlando Da Silva; Professor Martin Friedland.	2	Monday, June 15, 1992
The Canadian Police Association: James Kingston, Chief Executive Officer; Robert Brennan, Editor.	3	Tuesday, June 16, 1992
The "Barreau du Québec": Me Louise Viau, President of the Committee concerning a new Codification of the General Part of the Criminal Code; Me Josée-Anne Simard, Lawyer, Legislation Section.	4	Tuesday, June 16, 1992

Association	Issue	Date
METRAC (Metro Action Committee on Public Violence against Women and Children): N. Jane Pepino, President; Susan McCree Vander Voet, Executive Director.	4	Tuesday, June 16, 1992
The Criminal Code Recodification Task Force of the Canadian Bar Association: Richard C. C. Peck, Q.C., (Vancouver), Chair; Sheldon Pinx, Q.C., (Winnipeg), Member; Michele Fuerst (Toronto), Member; Professor Gerry Ferguson, University of Victoria.	5	Wednesday, November 18, 1992
On mental disorder: Professor Gerry Ferguson, University of Victoria.	5	Wednesday, November 18, 1992
The Canadian Psychiatric Association: Dr. Maralyn J. MacKay, Board of Directors and Chair-Elect, Section on Women's Issues; Dr. Nizar Ladha, Provincial Director representing Newfoundland and Chair, Section on Forensic Psychiatry.	6	Thursday, November 19, 1992
The Canadian Police Association: Neal Jessop, President and Chairman of the Legislation Committee; Scott Newark, Legal Counsel; James M. Kingston, Chief Executive Officer.	6	Thursday, November 19, 1992

Association	Issue	Date
Dying with Dignity: Marilynne Seguin, Executive Director: Martin Campbell, Barrister & Solicitor.	7	Monday, November 23, 1992
The Canadian Medical Association: Dr. Ronald F. Whelan, President; Dr. J. Noel Doig, Chairman, Ethics Committee; Dr. John R. Williams, Ph.D., Director, Ethics and Legal Affairs; Carole Lucock, Assistant Director, Ethics and Legal Affairs;	8	Tuesday, November 24, 1992
The Right to Die Society of Canada: John Hofsess, Executive Director; Christopher Considine, Barrister & Solicitor.	8	Tuesday, November 24, 1992
The Campaign Life Coalition: Sue Hierlihy, Director, Public Affairs.		
Compassionate Healthcare Network: Cheryl Eckstein, Chief Executive Officer. Jessie Horner, Lawyer. Don Stuart, Faculty of Law, Queen's University. Professor Patrick Healy, Faculty of Law, McGill University. Anne Stalker, Associate Professor of Law, University of Calgary.	8 9 9	Tuesday, November 24, 1992 Thursday, November 26, 1992 Thursday, November 26, 1992

Association	Issue	Date
The Canadian Association of Chiefs of Police: Chief Tom Flanagan, Ottawa Police Force; Superintendent John Lindsay, Edmonton Police Force.	9	Thursday, November 26, 1992
The Criminal Trial Lawyers Association of Alberta: Marilena Carminati.	10	Tuesday, December 8, 1992

REQUEST FOR GOVERNMENT RESPONSE

The Sub-Committee requests that the Government provide a comprehensive response to its Report in accordance with Standing Order 109.

A copy of the Minutes of Proceedings and Evidence relating to the Sub-Committee on the Recodification of the General Part of the *Criminal Code* (*Issues Nos. 1 to 10 and 11 including the present Report*) is tabled.

Respectfully submitted,

BLAINE THACKER,
Chairman.

MINUTES OF PROCEEDINGS

THURSDAY, DECEMBER 10, 1992
(16)

[*Text*]

The Sub-Committee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code met *in camera* at 1:00 o'clock p.m. this day, in Room 536, Wellington Bldg., the Chairman, Blaine Thacker, presiding.

Members of the Sub-Committee present: Rod Laporte, George Rideout and Blaine Thacker.

In attendance: From the Research Branch of the Library of Parliament: Philip Rosen, Senior Analyst and Marilyn Pilon, Research Officer. James W. O'Reilly, Legal Counsel.

The Sub-Committee resumed consideration of its Order of Reference of June 13, 1991 of the Standing Committee on Justice and the Solicitor General to the Sub-Committee. (*See Minutes of Proceedings and Evidence, dated Wednesday, March 25, 1992, Issue No. 1*).

The Sub-Committee began consideration of a Draft Report.

At 3:05 o'clock p.m., the Sub-Committee adjourned to the call of the Chair.

TUESDAY, FEBRUARY 2, 1993
(17)

The Sub-Committee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code met *in camera* at 3:40 o'clock p.m. this day, in Room 536, Wellington Bldg., the Chairman, Blaine Thacker, presiding.

Members of the Sub-Committee present: Rod Laporte, George Rideout and Blaine Thacker.

In attendance: From the Research Branch of the Library of Parliament: Marilyn Pilon, Research Officer. James W. O'Reilly, Legal Counsel.

The Sub-Committee resumed consideration of its Order of Reference of June 13, 1991 of the Standing Committee on Justice and the Solicitor General to the Sub-Committee. (*See Minutes of Proceedings and Evidence, dated Wednesday, March 25, 1992, Issue No. 1*).

The Sub-Committee resumed consideration of its Draft Report.

At 4:50 o'clock p.m., the Sub-Committee adjourned to the call of the Chair.

THURSDAY, FEBRUARY 4, 1993
(18)

The Sub-Committee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code met *in camera* at 11:30 o'clock a.m. this day, in Room 307, West Block, the Chairman, Blaine Thacker, presiding.

Members of the Sub-Committee present: Rod Laporte, George Rideout and Blaine Thacker.

In attendance: From the Research Branch of the Library of Parliament: Marilyn Pilon, Research Officer. James W. O'Reilly, Legal Counsel.

The Sub-Committee resumed consideration of its Order of Reference of June 13, 1991 of the Standing Committee on Justice and the Solicitor General to the Sub-Committee. (*See Minutes of Proceedings and Evidence, dated Wednesday, March 25, 1992, Issue No. 1*).

The Sub-Committee resumed consideration of its Draft Report.

At 1:30 o'clock p.m., the Sub-Committee adjourned to the call of the Chair.

TUESDAY, FEBRUARY 16, 1993
(19)

The Sub-Committee of the Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code met *in camera* at 10:10 o'clock a.m. this day, in Room 536, Wellington Bldg., the Chairman, Blaine Thacker, presiding.

Members of the Sub-Committee present: Rod Laporte, George Rideout and Blaine Thacker.

In attendance: From the Research Branch of the Library of Parliament: Marilyn Pilon, Research Officer and James W. O'Reilly, Legal Counsel.

The Sub-Committee resumed consideration of its Order of Reference of June 13, 1991 of the Standing Committee on Justice and the Solicitor General to the Sub-Committee. (*See Minutes of Proceedings and Evidence, dated March 25, 1992, Issue No. 1*).

The Sub-Committee considered its Draft Report.

It was agreed,—That the Draft Report, as amended, be concurred in.

ORDERED,—That the Chairman table the Report to the House.

It was agreed,—That, pursuant to Standing Order 109, the Sub-Committee request that the Government provide a comprehensive response to this Report.

It was agreed,—That the Sub-Committee print an additional 3,000 copies of Issue No. 11, which includes the present Report and that the additional cost be charged to the budget of the Committee.

At 10:30 o'clock a.m., the Sub-Committee adjourned to the call of the Chair.

Richard Dupuis
Clerk of the Sub-Committee.