I would like to thank Orlando Da Silva for his permission to reproduce his part of the brief.

François Lareau

APPENDIX "CODE-3"

Submission to

The Subcommittee on Justice and the Solicitor General

on

The Proposed General Part of the Canadian Criminal Code

from

The Faculty of Law, University of Toronto

Advanced Criminal Law Seminar

under the supervision of

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INTRODUCTION

The History of Criminal Law Codification and Reform Initiatives

In 1892, Canada became the first major common law country to enact a comprehensive codification of criminal law. The majority of the provisions in this *Criminal Code* were originally drafted by a British Royal Commission in 1879 under the guidance of James Fitzjames Stephen. This draft was reshaped with reference to various Canadian criminal law statutes, Stephen's 'Digest of the Criminal Law in England' and Burbidge's 1889 'Digest of the Canadian Criminal Law'[1]. The Canadian Code reflected Stephen's philosophy of codification - that it is "the reduction of the existing law to an orderly written system"[2]. It was thus consolidated by looking to the past, and did not attempt to look forward or to reshape the criminal law in terms of purpose or principle[3].

Since 1892, there has been only one major legislative effort to reshape the Code. This effort stemmed from a concern that our criminal law was in a disorderly and unsatisfactory state. The task was given to a Royal Commission appointed in 1949; however, their mandate contemplated a simplified restatement of the current law, rather than a fundamental re-evaluation of criminal law according to first principles[4]. As a result, the product of their work, the 1955 *Criminal Code*, was very similar in substance, language and design to the 1892 Code.

The Code has been amended often on an ad hoc basis since 1955 so that the criminal law can respond to the changing needs of Canadian society. These amendments are scattered throughout the Code as they are inserted in what is considered to be the appropriate place in the Code.

There have been several attempts at general reform of the criminal law in the last twenty-five years. It appears that the surge for reform began in the afterglow of a heightened national consciousness following Canada's Centennial Year in 1967, and the growing belief in the efficacy of law both as an instrument of social reform and as a guarantee of individual rights and freedoms[5]. There were several initiatives with respect to criminal law. In 1969, the Ouimet Committee Report

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[1] For a complete history of criminal law codification in Canada, see A.M. Linden, "Recodifying Criminal Law" (1989) 14 Queen's L.J. 3. See also D.H. Brown, The Genesis of the Canadian Criminal Code of 1892 (Toronto: The Osgoode Society, 1989).

[2] Sir James Fitzjames Stephen, A History of the Criminal Law of England, vol.III (London: 1883) at 350. Reprinted (New York: Burt Franklin, 1964).

[3] A.M. Linden, & P. Fitzgerald, "Recodifying Criminal Law" (1987) 66 Can. Bar. Rev. 529 at 530.

[4] Linden, *supra*, note 1 at 8.

[5] V. M. Del Buono, "Toward a New Criminal Code for Canada" (1986) 28 Crim. L.Q. 370 at 371.

set out the need for a coherent criminal justice policy[6]. Also the report recommended that a Committee or Royal Commission be established to examine the substantive criminal law.

In 1970, the Law Reform Commission of Canada (LRCC) was created[7]. One of the first projects that the Commission undertook was to carry out a deep philosophical probe of Canada's criminal law[8]. In its report to Parliament in 1976[9], the Commission articulated a philosophy which stressed the need for restraint in the use of the criminal sanction - it should be used only in the last resort and only in the case of real crimes[10].

By the late 1970's, there was a growing impatience with the pace of criminal law reform. This impatience was illustrated by the increased involvement of the Supreme Court of Canada in criminal matters[11], and the emergence of a body of academic writings on criminal law[12]. Also, additional government schemes were organized to further reform[13]. The most notable scheme was that which was developed in 1979, by the then Minister of Justice, Senator Jacques Flynn, in conjunction with the provincial ministers responsible for the administration of justice. A detailed workplan with the LRCC at the helm was devised and was known as The Criminal Law Review. By 1987, there was to be a Code of crimes, a Code of criminal procedure, a Code of sentencing and a new Evidence Act[14].

The Review quickly fell behind schedule owing to the channeling of energies into the constitutional debate in the early 1980's and because the LRCC was not prepared for such a massive undertaking. In order to get back on track, the LRCC decided to consolidate its work into a new Draft *Criminal Code*[15]. This Code was to be based on numerous working papers and reports on specific topics which were being compiled by the LRCC after consultation with judges, government officials, lawyers, police chiefs and scholars.

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[6] Report of the Canadian Committee on Corrections, Towards Unity: Criminal Justice and Corrections (Ottawa: Queen's Printer, 1969).

[7] Law Reform Commission Act, S.C. 1969-1970, c.64.

[8] LRCC, Research Program (Ottawa: LRCC, 1972) at 12-15.

[9] LRCC, Our Criminal Law: Report 3 (Ottawa: LRCC, 1976).

[10] In 1982, the Federal Government's first comprehensive statement of policy in the criminal justice field reflected the substance of this LRCC Report. See Government of Canada, The Criminal Law in Canadian Society (Ottawa: Government of Canada, 1982).

[11] This began with R. v. City of Sault Ste. Marie (1978), 40 C.C.C.(2d) 353. See W.J. Braithwaite, "Developments in Criminal Law and Procedure: The 1978-79 Term" (1980) 1 S.C.L.R. 187.

[12] This began with the publication of the first Canadian textbook on criminal law, A.W. Mewett, & M. Manning, Criminal Law (Toronto: Butterworths, 1978).

[13] Criminal justice policy units were established in the Department of Justice and the Ministry of the Solicitor-General.

[14] *Supra*, note 5 at 375.

[15] *Ibid.* at 377.

In drafting a new *Criminal Code*, the LRCC's objectives were to achieve comprehensiveness, simplicity and systematization. To meet these goals, initiatives for reform focused separately on the Special Part and the General Part of the *Criminal Code*.

The Special Part deals with the provisions with respect to specific crimes. In this part, one finds amid the modern day amendments to the *Criminal Code* several archaic and obsolete offences such as those which prohibit dueling (s.71), advertising a reward with no questions asked (s.143), dealing in crime comics (s.163(1b)), and pretending to practice witchcraft (s.365). As V.M. Del Buono stated:

> " To wander through the present Code is to stare into the faces of the ghosts of all the social evils thought, at one time, to threaten the very fabric of Canadian society... it is a depository of fossils of social conflicts long since spent"[16].

The Special Part of the Code drafted by the LRCC reduces the number of substantive provisions from over 400 to under 200[17].

A more basic problem and a more difficult problem to solve concerns the General Part of the *Criminal Code*. A General Part performs three functions[18]. Firstly, it organizes the criminal law by providing general rules to avoid repetition in the offence-creating section. Secondly, it rationalizes the criminal law by setting the rules out logically and systematically. Thirdly, it illuminates the criminal law by articulating and enshrining its underlying social values.

The present General Part has been criticized for being illogical and incoherent[19]. The rules belonging to the General Part may be found also in the Special Part, such as the provisions on the duties tending to preservation of life (s.215-218). Other rules will be found in the common law. For example, with respect to the most central and fundamental matter in the criminal law - criminal liability - our *Criminal Code* says virtually nothing. Only the common law can answer the questions of what conduct can someone be criminally liable for, how far can one be liable for omissions, and what state of mind is necessary in general for responsibility. With respect to the general defences, no mention is made in the *Criminal Code* of the defences of necessity, automatism or intoxication, except that they may be brought into our criminal law through s.8(3) of the *Criminal Code*.

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16 *Ibid.* at 370.
17 *Supra*, note 1 at 13.
18 Department of Justice, Toward a New General Part For The Criminal Code of Canada (Ottawa: Department of Justice, 1991) at 8.
19 *Supra*, note 3 at 536-7.

The LRCC has drafted a General Part which repairs these deficiencies[20]. The immediate response from the judiciary, academics and the public concerning this draft was very positive[21]. The draft soon became a springboard for discussion. Other reform bodies, such as the Department of Justice and the Working Group on the General Part, have made recommendations with respect to specific provisions in this new document. Academics have written responses to provisions which are within their particular areas of expertise. The discussion should ultimately lead to the enactment of a distinctive new *Criminal Code* that is just, clear, comprehensive, contemporary, coherent, effective, restrained where possible and strong where necessary, reflecting the fundamental values of modern Canadian society[22].

Introduction to this Submission

The papers included in this submission to the House of Commons Subcommittee on Justice and the Solicitor General focus on key areas of the proposed new General Part of the *Criminal Code* as well as sentencing. These areas, which were identified in the Department of Justice publication Toward a New General Part For The Criminal Code of Canada, were explored in depth by upper-year students at the University of Toronto Faculty of Law, under the direction of Prof. M.L. Friedland. The recommendations contained in these papers, which are shortened versions of the original works, come from a thorough analysis of proposals made by Canadian law reform bodies and of scholarly responses to these proposals. Reference may also be made to the American Law Institute's Model Penal Code,[23] the English law Commission's Draft Criminal Code,[24] and to recommendations made by law reform bodies in Australia and New Zealand.

As will be evident from a thorough examination of the papers, each of the authors has his/her own perspective of the principles underlying the criminal law which is in turn reflected in the recommendations made on each particular topic. However, all of the authors see the need for a more comprehensive, coherent and contemporary *Criminal Code*. We hope that although the constitutional crisis continues and even though there is no longer a Law Reform Commission of Canada, there is enough momentum to put Canada once again in the forefront of codification of criminal law in the year of the 100th anniversary of the *Criminal Code* of Canada.

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[20] The draft General Part and the draft Special Part are found in LRCC, Report 31: Recodifying Criminal Law (Ottawa: LRCC, 1988). It was tabled in Parliament on May 19, 1988 by the Minister of Justice, the Honourable Mr. Ray Hnatyshyn.

[21] *Supra*, note 1 at 21.

[22] *Supra*, note 3 at 545.

[23] The American Law Institute, Model Penal Code and Commentaries (Philadelphia: The American Law Institute, 1985) [hereinafter "Model Penal Code"].

[24] The Law Commission, A Criminal Code for England and Wales, Vol. 2: Commentary on Draft Criminal Code Bill (London: Her Majesty's Stationery Office, 1989) [hereinafter "English Draft Code"].

EXECUTIVE SUMMARY

Omissions:

The first paper deals with the place of omissions in the criminal law. The author supports the need for a general statement in the General Part that omissions should not attract liability unless there is some legal duty to act, and supports a listing in the General Part of duties requiring acts. He supports the inclusion of the duties proposed by the LRCC except for the duty to rescue, which is discussed in detail. With respect to the defence of physical impossibility for crimes of omission, the author feels this is not only redundant, but may also be too restrictive.

The Mental Element:

The LRCC proposals are discussed and the author believes that they have achieved comprehensiveness, but have equated simplicity with compression and have sacrificed systematization in the process. Its application section, although achieving definitional convenience and clarity, has, unfortunately, succumbed to undue complexity. Rather, the legislature should adopt a section similar to the American Law Institute's s. 2.02(1) which would apply the definitions of purpose, knowledge, recklessness, and negligence with greater specificity and reach.

The author suggests that the legislature, contrary to the LRCC's recommendations, should provide for a definition of "knowledge" which would incorporate the concept of "willful blindness" and recognize the logical and inherent distinctions between "knowledge" and "purpose." Lastly, the legislature should adopt the LRCC's alternative formulation of "recklessness" and alter the "Residual Rule" such that the mental element would default at "recklessness" and not "purpose" where the requisite *mens rea* is not specified in the definition of the crime.

Mistake of Fact:

The author of this paper suggests that the contradictory, highly contrived and at times unprincipled decisions emanating from the courts constitutes a clear signal to Parliament to codify a mistake of fact defence. The LRCC proposals are consistent with the traditional approach to mistake of fact and are, accordingly, supported.

However, when the crime involved is a sexual assault, the "mistake of fact" doctrine should be applied differently in determining the existence of consent. Namely, given the tendency and danger of sexist views and stereotypes invading the court's determination of when consent is present (even when a "reasonable mistake" standard is used), the issue should be treated as a question of law rather than a question of fact. Except where there is a genuine breakdown in

communication between the sexual partners, the operation of the "mistake of fact" defence would effectively be precluded, thereby preventing social norms and beliefs (however sexist) from being used to usurp women's rights and safety.

Intoxication:

The LRCC proposals are discussed in this paper and the author believes that they should be adopted because, compared to the alternatives, they are the most consistent with the policy objectives of criminal law reform. Despite the fact that the provisions represent a departure from the subjective standard of criminal liability, very few accused would be affected, given how rarely evidence of intoxication is used successfully to negate *mens rea*. In addition, the LRCC provisions accord with society's view that people who commit harmful acts while intoxicated should be punished and they also correspond with the public's interest in deterring harmful behavior.

The Insanity Defence:

The paper on the insanity defence begins with the author looking at the principles behind criminal responsibility. It is assumed that humans are rational and autonomous beings, and therefore, the insanity defence should exempt from criminal liability those who are incapable of rational choice. The discussion that follows reveals that the current law in Canada and the proposals by Canadian law reform bodies do not exempt those incapable of rational choice, but rather only those who are incapable of rational thought. After an analysis of proposals for reform in other jurisdictions, the author proposes draft legislation which fully exempts from criminal liability those who are incapable of rational thought and those incapable of rational choice. A partial exemption is also proposed for those whose abilities for rational choice are substantially impaired by mental illness.

Necessity and Duress:

Traditionally, the law distinguishes between duress and necessity; the former relates to threats made against the person by other people; the latter covers threats against persons arising out of circumstances. The author suggests that although the LRCC maintains this bifurcation, it is clearly an untenable distinction in so far as events can be just as lethal as people and subject the actor to the same sorts of pressures. What matters is not the source of the compulsion but the motive of the actor. Consequently, the General Part should incorporate "Duress" and "Choice of Evils" provisions that would distinguish between cases where the actor decided to act in his or her own interest at the expense of society and cases where he or she promoted the interests of society irrespective of personal cost.

This author proposes that to qualify for the defence, the accused would have to demonstrate that the harm was "objectively" serious and that it genuinely caused him or her to respond the way he or she did. The harm must also be imminent and of such a nature that there are no reasonable or reasonably apparent means to avoid the harm legally. One would be precluded from raising the defence if one recklessly or negligently (if negligence is sufficient to ground the offence charged) exposed oneself to the likelihood of compulsion. The defence would only be available if the harm avoided (or sought to be avoided)"substantially" outweighed the harm created. Moreover, the defence should be flexible enough to apply, if the jury so decides, even if the accused killed or caused serious physical or psychological harm.

Entrapment

The two dominant approaches to entrapment - the subjective and objective approaches - are discussed, and it is illustrated that the Canadian courts have chosen primarily an objective approach. The author supports the codification of the test as developed by the courts, as opposed to continuing to develop the defence at common law. However, it is recognized that the notion of entrapment does not fit well within the confines of the General Part of the *Criminal Code*. The preferable approach would be to codify entrapment as a procedural defence which would maintain the focus of the judiciary on the maintenance of the good repute of the administration of justice.

Attempts and Conspiracy:

The author of this paper believes that the law of attempts should be codified as enunciated in Deutsch (S.C.C., 1986) such that the accused must take a "substantial step" toward a course of criminal conduct and that step must be sufficiently proximate to the harm attempted. In sentencing an individual guilty of an attempt, the judge should have enough discretion to take into account all of the surrounding circumstances and impose the full penalty of the completed offence for the attempt. This maximum sentence, combined with a defence of abandoned intention, would provide strong incentives to actors to renounce their criminal purposes at any stage in their courses of conduct.

With respect to conspiracy, the author states that the LRCC's recommendations should be adopted because they are clear and concise, they codify the accepted definition of "conspiring," they are consistent with the current Canadian common law, and do not create any further complications. The only addendum recommended is the addition of an "abandoned intention" defence which would breathe life into the justification for the law against criminal conspiracy, i.e., that certain activities must be stopped before they cause harm.

Parties to an Offence:

In this paper, the author states that the LRCC's "furthering" provisions are a marked improvement over the current law in so far as simplicity is concerned. However, in attempting to make the provisions simpler, the LRCC neglected to recognize the difficulty in applying their *mens rea* provisions as structured in their Application Section to accomplices. A preferable approach would be to carefully delineate the *mens rea* requirements for accomplices in their capacity as accomplices. Moreover, the legislature's approach to *mens rea* should be guided by the fact that the scope of accomplice liability has been inappropriately broadened by the inherent difficulties in applying causation doctrine to the activity of accomplices. In short, the author feels that there should be two levels of moral culpability reflected in the law: full culpability for those who act with "purpose" and less than full culpability for those who act merely with "knowledge" or some lower level of *mens rea*.

Corporate Criminal Liability:

With respect to corporate criminal liability, the author supports the decision of the LRCC to codify a provision and to base the content of the provision on Canadian Dredge and Dock Co. Ltd. v. The Queen (1985), the leading Supreme Court of Canada case. However, the author believes that the requirement that individual culpability be established as a basis for imputing liability to the corporation must be jettisoned. The author also discusses the scope of such a provision and the implications of its inclusion on the law governing criminal sanctions and other areas of the criminal law.

Sentencing:

A paper on sentencing is included in this submission. The author of this paper discusses the traditional objectives of sentencing and suggests that the "just deserts" rationale (that punishment be in proportion to the particular crime committed), tempered with the secondary objectives of rehabilitation and redress to victims be used to guide Canada's sentencing process. The objectives of general deterrence and incapacitation are explicitly rejected. The author makes several recommendations with respect to this new approach to sentencing, such as abolition of the current concept of parole, creation of a "Sentencing Supervision Board," revocation of the "dangerous offender" provisions, and consideration of a list of factors in the course of sentencing.