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XII. INTOXICATION

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Intoxication

16. (1) No person is liable for a crime for which, by reason of intoxication, the person fails to satisfy the culpability requirements specified by its definition.

(2) Clause (1) does not apply where the voluntary consumption of an intoxicant is a material element of the offence charged.

(3) Notwithstanding clause (1), a person charged with a Schedule 1 offence who would, but for voluntary intoxication, be found guilty of that offence shall instead be found guilty of the included offence of criminal intoxication.

(4) A person found guilty under clause (3) is liable to the same punishment as if found guilty of an attempt to commit the offence charged.

B. The present law

1. Specific intent

In *Director of Public Prosecutions v. Beard*,[128] the House of Lords stated the law of drunkenness as follows:

> Evidence 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 . . . .

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[128] [1920] AC 479.

Beard became the law of Canada with the Supreme Court of Canada's decision in *MacAskill v. The King.*[129] Three decades later the same Court, in *R. v. George,*[130] gave *Beard* a strict, and arguably unintentional, interpretation, ruling that drunkenness could only negative the *mens rea* of offences requiring proof of a specific intent, and could not be advanced with respect to offences that required proof only of a general intent. Thus, drunkenness could be a defence to theft, if it negatived the accused's capacity to form the specific intent to steal, but it could not be a defence to assault, which requires only a general intent to apply force to another without consent.

In *Leary v. The Queen,*[131] the Supreme Court of Canada endorsed its earlier decision in *George*, and the House of Lords' decision in *DPP v. Majewski.*[132]

In *Commissioner of Police v. Caldwell,*[133] the House of Lords extended the principle stated in *Beard* to any offence which could be proved by recklessness. Drunkenness would not be a defence where the accused, if sober, would have been aware of the possibility of harmful consequences from his acts.

Finally, a majority of the Supreme Court of Canada retained the specific intent-general intent dichotomy in *Bernard v. The Queen.*[134]

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129 [1931] SCR 330.

130 (1960) 128 CCC 289.

131 (1977) 33 CCC (2d) 473.

132 [1977] AC 443.

133 (1982) AC 341.

134 [1988] 2 SCR 833.

2. Capacity to form the intent

The formulation in *Beard* refers to the accused's incapacity to form the intent, and a line of Supreme Court of Canada authorities has referred to "incapacity to form the necessary intent" as the appropriate test where the defence of drunkenness is in issue.[135]

Several recent decisions of the Ontario Court of Appeal have put that test into some doubt. In *R. v. MacKinlay*, Mr. Justice Martin, for the Court, stated:

> If the accused by reason of intoxication was incapable of forming the required intent, then obviously he could not have it. If the jury entertain a reasonable doubt whether the accused by reason of intoxication had the capacity to form the necessary intent, then the necessary intent has not been proved. If they are satisfied beyond a reasonable doubt that the accused had the capacity to form the necessary intent, *they must then go on to consider whether, taking into account the consumption of liquor and the other facts, the prosecution has satisfied them beyond a reasonable doubt that the accused in fact had the required intent.* (Italics in original judgment).[136]

However, in *R. v. Korpeza*,[137] the British Columbia Court of Appeal rejected the *MacKinlay* formulation. Mr. Justice Wood expressed "complete sympathy" for much of what Mr. Justice Martin had to say in that case, but felt compelled to apply the earlier Supreme Court of Canada decisions. He went on:

> The rules in *Beard* virtually absolve the Crown from having to prove actual intent in any case where a specific intent is alleged and intoxication is raised as a defence. For in such cases it need only prove the capacity of the accused to form the intent alleged, at which point the "reasonable, commonsense inference", which by then is immune to the reality of the accused's intoxicated condition, discharges the balance of their burden of proof. I am not the first to suggest that by limiting the burden of proof in such cases the law as it presently stands is inconsistent with the presumption of innocence.[138]

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135 *MacAskill v. The King*, *supra*, note 129, *Perreult v. The Queen* (1970) 5 CCC 217, *Alward and Mooney v. The Queen* (1977) 35 CCC (2d) 392 and *Swietlinski v. The Queen* (1980) 55 CCC (2d) 481.

136 (1986) 28 CCC (3d) 306 at 322.

137 May 24, 1991.

138 *Ibid.*, at 21-22.

This survey of relevant case law would not be complete without brief reference to two recent decisions in New Zealand and Australia. In *R. v. Kamipeli*, the New Zealand Court of Appeal rejected the contention that evidence of drunkenness is admissible only in specific intent offences. Further, the Court ruled that "it is the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry."[139]

Similarly, in *R. v. O'Connor*,[140] the High Court of Australia declined to follow *Majewski*, ruling that no distinction is to be drawn between offences of "basic" and "specific" intent for the purpose of determining whether the mental element of an offence can be established. For all offences requiring proof of a mental element, evidence of intoxication by drugs or alcohol, whether voluntarily self-induced or not, is relevant and admissible in determining whether the requisite mental element was present.

C. Shortcomings of the present law

1. Specific intent

The law in Canada is, at present, unprincipled and arbitrary. 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."[141]

The greatest injustice resulting from this artificial dichotomy is that it imposes an objective standard of liability; an accused

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[139] [1975] 2 NZLR 610 at 616.

[140] [1980] 4 A Crim R 348.

[141] *Supra*, note 131 at 490.

can be found guilty, not for the state of mind he or she actually had, but for the state of mind which the accused would have had (or might have had), if sober.

This violates the most fundamental principle of criminal liability, that an accused is culpable only if the Crown proves beyond a reasonable doubt that the accused committed the *actus reus* with the state of mind requisite for the offence.

The two arguments advanced for attaching criminal liability in such circumstances are equally unconvincing. First, it is argued that the accused was morally blameworthy for getting drunk. Some Courts go so far as to say that this conduct satisfies the *mens rea* of the resulting offence. Others are content to acknowledge the illogicality of the situation, but they find public policy arguments persuasive.

Second, it is argued that to allow evidence of drunkenness to negative the mental element in crimes of general intent would result in dangerous "drunk" criminals being set free. Such empirical evidence as does exist does not support that contention. Quigley[142] refers to an Australian study of 510 cases held in the immediate aftermath of *O'Connor*. The number of cases in which the defence of drunkenness was argued, but could not have been relied upon until *O'Connor*, was 11 out of 510. Of the three resulting acquittals, only one could safely be attributed to acceptance of the drunkenness defence.

2. Capacity

A second shortcoming of the present law is that it obligates the accused to raise a reasonable doubt as to his or her *capacity* to form the specific intent required, regardless of what was the accused's actual intent, if any. An accused may be attached with criminal liability even though the Crown has not proved that he or she had the intent necessary to constitute the crime.

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[142] "Reform of the Intoxication Defence" (1987) 33 McGill LJ 1 at 5.

3. Recklessness

It would be a logical extension of the law as stated in *Leary* and *Bernard*, for Canadian courts to follow the House of Lords' lead in *Caldwell*, precluding evidence of drunkenness in cases of recklessness.

D. Recommendations for reform

1. Specific intent

The Task Force wholeheartedly supports the Law Reform Commission of Canada's recommendation that the new *Criminal Code* do away with the specific intent/general intent dichotomy, and make evidence of drunkenness applicable to any offence.

2. Capacity

Similarly, the Task Force supports the Law Reform Commission's recommendation that the "capacity" threshold be removed.

3. Exclusions

The Task Force believes that the new *Criminal Code* should state clearly, as does the New Zealand draft *Crimes Bill*, that the defence of intoxication does not apply where the voluntary consumption of an intoxicant is a material element of the offence charged.

4. Included offence of criminal intoxication

There is considerable debate among academics and the judiciary, and there certainly was within the Task Force, as to whether it is enough to legislate a general rule in the new *Criminal Code* to the effect that evidence of self-induced drunkenness which raises a reasonable doubt as to whether the accused had the *mens rea* for the offence charged (or any lesser included offence) justifies an acquittal.

Those supporting that position argue that an accused acquitted of a more serious crime (such as robbery) due to drunkenness would almost invariably be convicted of a lesser included offence (such as assault) requiring only a minimal degree of *mens rea*. If the *Code's* sentencing provisions were strengthened to give judges greater flexibility to order curative treatment, the public would be protected and the root cause of the criminal behaviour would be addressed.

Others argue that the public would not countenance a regime in which an intoxicated offender might go free, and that the only way to protect the public, at least in cases involving bodily harm, death, sexual assault on another or destruction or damage to property that endangered life, would be to create a special verdict, an included offence or a new substantive offence of criminal intoxication.

On balance, the Task Force is persuaded that the public interest would be best served by having the new *Criminal Code* provide for a lesser included offence of criminal intoxication. Where an accused is charged with one of the enumerated offences listed in a Schedule to the *Criminal Code*, and is acquitted because of voluntary intoxication, then he or she would be convicted of the included offence of criminal intoxication. A person convicted of the included offence would be liable to the same punishment as if convicted of attempting to commit the substantive offence charged, and the sentencing powers of the Court should be expanded to include a mandatory treatment option.

The Task Force favours this approach over that recommended by the Law Reform Commission, which would impose a conviction for "committing that crime while intoxicated".[143] There are several shortcomings to that provision:

1. it is in one sense more harsh than the present law which, at least in the case of specific intent offences, grants a complete acquittal to an accused who raises a reasonable doubt as to intent based on drunkenness. Under the Law Reform Commission proposal, drunkenness as a "defence" reduces murder to manslaughter while intoxicated, but in all other cases it is eliminated as a defence;

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[143] Clause 3(3)(b).

2. it ascribes liability, even though the Crown has not proven the mental element. For example, an accused who is acquitted of theft because evidence of drunkenness negatived the specific intent necessary for conviction would still be convicted of theft, albeit "while intoxicated;" and

3. it mandates a conviction for manslaughter while intoxicated in the case of an accused charged with murder who negatives the *mens rea* required for murder through evidence of drunkenness, notwithstanding that such evidence might also negative the *mens rea* required for manslaughter.

XIII. MISTAKE OF LAW

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Mistake of law

17. No one is liable for a crime committed by reason of mistake or ignorance of law:

a. concerning private or other civil rights relevant to that crime, or

b. resulting from:

i. ignorance of the existence of the law, where the law has not been published or otherwise reasonably made known to the public or persons likely to be affected by it,

ii. reasonable reliance on a judicial decision, or

iii. reasonable reliance on a statement by a judge, government official or person in authority.

B. The present law

Section 19 of the present *Criminal Code* states:

> Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.

In *R. v. Molis*,[144] the Supreme Court ruled that section 19 precludes not only "ignorance" of the law but also "mistake as to the meaning, scope or application of the law" as an excuse for committing a crime.

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144 (1980) 55 CCC (2d) 568 (SCC).

1. Strict application

In keeping with the strict English tradition, Canadian courts have generally applied section 19 most rigidly. For example:

- reliance on a lawyer's legal opinion does not afford a defence, regardless of the fact that the accused acted in good faith on the mistaken advice;[145]

- a defence of "custom" has been rejected, as in the case of private detectives who argued that, because of custom long followed by their profession, they had the right to enter private property and remain thereon in order to carry out a lawful investigation;[146]

- reliance on judicial decisions, subsequently overruled, is not a defence;[147]

- the accused's "due diligence" in seeking to determine whether the drug which the accused was manufacturing had yet been listed as a restricted drug, was not a defence;[148]

- ignorance of the law by a foreigner does not excuse;[149]

- mistake based on the operation of a public law, especially a law criminal in nature, will generally not provide a defence, as, for example, where the accused mistakenly believed that under the *Customs Act* he did not have to declare or pay duty on gems.[150]

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145 *R. v. Brinkley* (1907) 12 CCC 454 (Ont CA).

146 *R. v. Andsten and Petrie* (1960) 128 CCC 311 (BCCA).

147 *R. v. Campbell* (1973) 10 CCC (2d) 26 (Alta Dist Ct).

148 *R. v. Molis, supra*, note 144.

149 *R. v. Kear and Johnson* (1969) 51 CCC (3d) 574 (Ont CA).

150 *R. v. Aryeh* (1971) 6 CCC (2d) 171 (Ont CA).

2. Emerging exceptions

The rigidity of the earlier law is giving way to several judicially-recognized exceptions based on a test of "reasonableness".

a. officially-induced error

When a mistake of law has arisen because of an accused's reliance on a statement made to him or her by a relevant official, mistake of law may operate as a defence.

In *R. v. Macdougall,*[151] the accused claimed he had relied on the mistaken advice of an official at the Registrar of Motor Vehicles. The Nova Scotia Court of Appeal upheld the defence. Although the Supreme Court of Canada reversed, finding that the accused had not been misled, it gave approval to the defence of officially-induced error.

In *R. v. Cancoil Thermal Corp.*, the Ontario Court of Appeal recognized this defence in the context of regulatory offences, and set out its requirements:

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors, including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.[152]

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[151] (1981) 60 CCC (2d) 137 (NSSC App Div).

[152] (1986) 52 CR (3d) 198 at 199.

b. Non-publication of the law

Section 11(2) of the Federal *Statutory Instruments Act,*[153] provides a defence for those charged under any non-published Federal *regulations* where there is a requirement that the regulation be published. Some provinces have similar provisions dealing with unpublished provincial regulations.

Several judicial decisions have applied the defence to cases where there was no publication of subordinate legislation, even though there was no requirement for publication.[154]

c. Mistake based on private rights or civil law

Canadian courts are divided on whether a mistaken belief with respect to the effect of civil law relating to a custody order can negative the *mens rea* of an offence.[155]

It is generally accepted that an accused may be acquitted on the basis of a mistake of law respecting a "colour of right." For example, the defence of "colour of right" will be available to an accused charged with theft who had an honest but mistaken belief that he or she had a right to the property, regardless of the fact that this belief was based on a mistake of law,[156] although a "colour of right" claim requires a prior proprietary interest.

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153 R.S.C. 1985, c. S-22.

154 *R. v. Ross* (1944) 84 CCC 107 (BC Co Ct), *R. v. Michelin Tires Manufacturing (Canada) Ltd.* (1975) 15 NSR (2d) 105, and *R. v. Catholique* (1980) 49 CCC (2d) 65 (NWTSC).

155 *R. v. Ilczyszyn* (1988) 45 CCC (3d) 91 (Ont CA), and *R. v. Cook* (1984) 12 CCC (3d) 471 (NSSC App Div).

156 *Lilly v. The Queen,* (1983) 5 CCC (3d) 1 (SCC).

d. Wilful breach of a probation order

In *R. v. Docherty*,[157] the Supreme Court of Canada ruled that an accused could not be convicted of breach of probation (for having committed the offence of sitting in a car while intoxicated) when the accused did not know that such conduct was against the law. A conviction cannot be sustained unless he or she was aware that the underlying offence which has been committed is against the law.

e. Characterizing the mistake as one of fact

Sometimes the task of distinguishing between mistake of fact and law is most difficult. Stuart states:

> A mistake of fact is said to occur when the accused is mistaken in his belief that facts exist when they do not, or that they do not exist when they do. On the other hand, a mistake of law is said to occur when the mistake is not as to the actual facts but rather as to their legal relevance, consequence or significance.[158]

Colvin adds that:

> Certain linguistic conventions may guide the terminology which is used. Yet since the availability of a defence may depend on how the mistake is characterized, the court's sense of what would be the appropriate result may also influence its choice of label. . . . The labels "mistake of fact" and "mistake of law" appear to have been used primarily as devices for rationalizing decisions which were taken on other grounds.[159]

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157 (1989) 51 CCC (3d) 1.

158 *Supra*, note 2 at 299.

159 *Supra*, note 101 at 160-161.

C. Recommendations for reform

1. Absence of *mens rea*

It has been argued that section 19 of the present *Criminal Code* should be abolished on the basis that it is inconsistent with the general fundamental principle of criminal law that lack of *mens rea* is a defence to a charge of criminal liability. In *Sault Ste. Marie*[160] and *Tutton*,[161] the Supreme Court of Canada determined that the imposition of criminal liability in the absence of proof of *mens rea* is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice, especially with respect to offences carrying long terms of imprisonment.

A less radical view is that a general defence could be based on the concept of "reasonableness". Colvin suggests that, while highly unlikely:

> it is conceivable that [section 7 of the *Charter*] could be taken to demand a general defence of reasonable mistake of law. Yet in view of the historical reluctance of the common law to admit defences based on normative ignorance, it is expected that the courts will proceed cautiously.[162]

Alternatively, the harshness of the present rule could be addressed through the recognition and expansion of existing exceptions and/or creation of new exceptions to section 19.

Those in favour of retaining the present rule argue that it is an implied term of the social contract upon which our society is based that everyone is presumed to know the law and to obey it.

Advocates of a "reasonable mistake of law" rule maintain that retaining the present rule imposes absolute liability; even adopting a "reasonable mistake of law" test would ground criminal liability for what amounts to civil negligence, a questionable standard in a criminal statute which in other respects requires proof at least of criminal negligence.

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160 *Supra*, note 10.

161 *Supra*, note 46.

162 *Supra*, note 101 at 262.

On balance, the Task Force favours retention of the general principle that mistake of law is no excuse, but extending the exceptions to this rule to protect from criminal liability those who acted "reasonably."

2. Exceptions

Consequently, the Task Force recommends that mistake of law constitute a defence in the following circumstances:

a. private or other civil rights

"Colour of right" defences have generally been confined by the Courts to the offences specified in various *Criminal Code* sections, such as defence of movable property (s. 39(1)), defence of a dwelling-house (s. 42(3)), theft (s. 322) and mischief (s. 429(2)).

The Task Force agrees with the Law Reform Commission recommendation that the General Part of the new *Criminal Code* include a provision to the effect that a mistake or ignorance of law concerning private rights relevant to the crime constitutes an excuse.

The Task Force's wording is intended to be as broad as possible, to extend to any mistake relating to provincial statutory and regulatory law, civil law, proprietary rights and all other non-criminal law.

b. publication

The Task Force believes that an accused's actual ignorance of the law should give rise to a defence if either of two situations exists:

i. the law has not been published, whether or not the law is statutory or delegated legislation, and whether or not there is a legislative requirement that it be published, and

ii. even where the law has been published, if it has not been otherwise reasonably made known to the public or persons likely to be affected by it.

The first provision is a logical and principled extension of the present law, and removes arbitrary distinctions.

The second provision effectively places an onus on Parliament to take reasonable steps to disseminate laws to those who are likely to be affected by them, before such citizens can be held criminally liable for acting in contravention of them. This goes further than the Law Reform Commission recommendation, and parallels provisions in the English Commission Report (s. 46(1)(b)), the U.S. *Model Penal Code* (s. 2.04(3)(a)) and the Australian Review Committee report (s. 3K(1)).

c. reasonable reliance on a judicial decision

The Task Force supports the thrust of the Law Reform Commission recommendation in clause 3(7)(b)(ii), but would extend it to "mistake or ignorance of law resulting from reasonable reliance on a judicial decision."

In the Task Force's view, it is arbitrary to limit this provision to decisions "of a court of appeal in the province having jurisdiction over the crime charged." A citizen ought to be entitled to rely on the law as stated by any level of court in any Canadian jurisdiction. The safeguard built into this provision is that the reliance must be reasonable. For example, it would be unreasonable to act on the basis of a court decision in another province where the accused should have known that there were contrary judgments of a higher court in his or her own province.

d. officially-induced error

The Task Force agrees with the thrust of the Law Reform Commission recommendation, but proposes broader language which would extend the defence to reliance on erroneous statements of the law by judges, government officials or those enforcing the law, such as police officers. Again, the safeguard is that the accused's reliance must be reasonable.

XIV. PROVOCATION

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Provocation

18. (1) An accused is provoked if, as a result of another's act or statement, the accused loses self-control where a person in the accused's situation, under the circumstances as the accused believes them to be, would lose self-control.

(2) An accused who, while provoked:

a. commits murder, shall be convicted of manslaughter, and

b. commits any offence included in the Schedule, shall be convicted of committing that offence under provocation, and shall be liable to half the penalty of the offence charged.

B. The present law

Section 232 of the present *Criminal Code* states:

(1) Culpable homicide that otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation.

(2) A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation enough for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

(3) For the purposes of this section the questions

(a) whether a particular wrongful act or insult amounted to provocation, and

(b) whether the accused was deprived of the power of self-control by the provocation that he alleges he received,

are questions of fact, but no one shall be deemed to have given provocation to another by doing anything that he had a legal right to do, or by doing anything that the accused incited him to do in order to provide the accused with an excuse for causing death or bodily harm to any human being.

(4) Culpable homicide that otherwise would be murder is not necessarily manslaughter by reason only that it was committed by a person who was being arrested illegally, but the fact that the illegality of the arrest was known to the accused may be evidence of provocation for the purpose of this section.

Provocation applies only in the case of murder,[163] reducing murder to manslaughter. It is seen as an ameliorating factor, reducing the harshness of the criminal law in the case of murder (with its minimum punishment of life imprisonment), standing as a limited concession to human infirmity.

[163] *R. v. Campbell* (1977) 38 CCC (2d) 6 (Ont CA).

Stuart describes section 232 as "one of the most complex formulations anywhere."[164] By its terms, an accused must meet four requirements:

1. Sudden provocation

In *R. v. Tripodi*, Mr. Justice Rand took "sudden provocation" in subsection (1):

> to mean that the wrongful act or insult must strike upon a mind unprepared for it, that it must make an unexpected impact that takes the understanding by surprise and sets the passions aflame.[165]

2. Wrongful act or insult

The law is not clear whether "wrongful" is limited to some act that is legally wrong, or is broad enough to cover acts which might be morally wrong.

The Oxford English Dictionary defines "insult" as including:

> injuriously contemptuous speech or behaviour; scornful utterance or action intended to wound self-respect; an affront; indignity.

There are three situations in which a person's conduct does not amount to a "wrongful act or insult:"

i. where the person was doing anything that he or she had a legal right to do, such as an act of self-defence;

ii. where the person was doing anything that the accused incited him or her to do in order to provide the accused with an excuse for causing death or bodily harm; and

iii. where the person was arresting the accused illegally (unless the accused knew that it was an illegal arrest).

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[164] *Supra*, note 2 at 449. The summary of the present law which follows borrows heavily from Stuart's analysis at 448-456.

[165] [1955] SCR 438 at 443.

3. Sufficient to deprive an ordinary person of self-control

There has in recent years been a considerable softening of the harsh, objective wording of this requirement. The earlier view was expressed in *R. v. Bedder*,[166] where the objective standard could not take account of the fact that the accused was sexually impotent, even though this was a most relevant factor to the alleged provocation by a prostitute insulting him at his lack of sexual prowess.

Bedder was applied by the Supreme Court of Canada in *R. v. Wright*,[167] where the Court ruled that any subjective factors such as the character, background, temperament, idiosyncracies or the drunkenness of the accused could not be considered. They were only relevant in the subsequent step, when determining whether the accused did in fact act "on the sudden and before there was time for his passion to cool."

In *R. v. Parnerkar*,[168] the Supreme Court of Canada maintained that view, ruling that no account should be taken that the accused was black, even though the provocation alleged was that of a racial slur.

The law of England changed dramatically in 1978 when the House of Lords in *R. v. Camplin*, declared that the *Bedder* rule could not survive, in light of section 3 of the *Homicide Act*. Trial judges should hereafter explain to juries that:

> the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did.[169]

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[166] [1954] 2 All E R 801 (HL).

[167] [1968] SCR 335.

[168] (1973) 21 CNRS 129.

[169] [1978] 2 All E R 168 at 718.

Thus, the trier of fact must take into account the personal characteristics of the accused, such as age, sex, race, impotence, dwarfism, immaturity, senility and pregnancy. However, evidence of exceptional excitability, pugnaciousness, quick temper and drunkenness ought to be excluded.

This approach was adopted by the Supreme Court of Canada in *R. v. Hill*,[170] where the accused, aged sixteen, raised the defence of provocation to a charge of first degree murder on the basis of the victim's conduct including a homosexual attack. All members of the Court accepted that age and sex can be relevant at the objective stage of the provocation inquiry.

Hill effectively overrules *Wright* and *Parnerkar* on this issue, and in its place substitutes a more flexible objective standard which takes into account some but not all individual factors.

4. Actual retaliation "on the sudden" in the heat of passion

Section 232(2) states that the accused must retaliate "on the sudden and before there was time for his passion to cool." This is an entirely subjective examination of the particular accused, and individual factors of every description, including idiosyncratic temperament and intoxication, may be taken into account.

C. Shortcomings of the present law

Section 232 has numerous shortcomings, well-known to the courts and to practitioners.

First, it is too complex and, in some instances, repetitive.

Second, some provisions are ambiguous. For example, no one knows for sure how "wrongful" in subsection (2) should be interpreted. "Wrongful" is not a requirement of the law in any other jurisdiction.

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[170] (1986) 51 CR (3d) 97.

Third, the objective test in subsection (2) ("ordinary person") ignores the reality that people's reactions are inextricably linked to their personal characteristics and psychological make-up. To require a child to react like an adult (trial judge in *Bedder*) or a black man to react to a racial slur like a white man (*Parnerkar*) imposes a form of absolute liability, which violates fundamental principles of criminal liability.

Fourth, the Supreme Court of Canada's judgment in *Hill* makes it clear that a trial judge is not required to instruct the jury that they must take some personal characteristics of the accused into account in determining whether or not the wrongful act or insult was sufficient to deprive an ordinary person of self-control. Such an instruction would not add significantly to the complexity of the charge, and would clarify an important element of the defence so as to ensure that the jury would not be misled.

Fifth, the requirement that the accused's retaliation be immediate is unduly restrictive. The real issue is whether the accused acted while provoked, and whether it was "on the sudden" or "before there was time for his passion to cool" may or may not be decisive. As Stuart notes, a lapse of time sometimes heats, rather than cools, passions.[171]

Sixth, there is no principled reason why provocation should apply only in the case of murder. While provocation has always been seen as an ameliorating influence, softening the harshness of the minimum life imprisonment penalty for murder, it is at the same time a form of societal recognition of human frailties which ought to apply equally to all offences. It is arbitrary in the extreme that an accused who attacks another under provocation may plead the provocation if the other person dies, but not if he or she survives.

[171] *Supra*, note 2 at 456.

D. Recommendations for reform

The Task Force's recommendation seeks to address all the shortcomings of section 232.

First, it eliminates the unnecessary limitation that the triggering act or statement be a "wrongful act or insult".

Second, it eliminates the arbitrary requirement that the triggering provocation be "sudden".

Third, it adopts an objective/subjective test with respect to the accused's response to the provocation. The Task Force strongly believes that all relevant personal characteristics of the accused, including his or her psychological make-up, ought to be considered in determining whether it was reasonable that he or she lost control. This is the position recommended in England and in the U.S. *Model Penal Code*.

Fourth, the timing of the accused's retaliation is tied to the continued existence of the provocation. Thus, the accused must have retaliated "while provoked", whether or not it was "on the sudden" or "before his passion had cooled."

Finally, it makes provocation a partial defence to a larger category of offences, not just murder. It is premature to identify the other offences to which provocation might apply. That must await the codification of new offences in the new *Criminal Code*.

XV. *DE MINIMIS NON CURAT LEX*

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Trivial violations

19. Where the Crown has proved all the essential elements of an offence the Court may, before a finding of guilt is entered, stay the proceedings against the accused with respect to that offence, where the accused satisfies the Court on the balance of probabilities that, having regard to the nature of the conduct and all the attendant circumstances, the violation was too trivial to warrant a finding of guilt, the entering of a conviction or the imposition of a criminal sanction.

B. The present law

De minimis non curat lex is an ancient maxim meaning "the law does not concern itself with trifles."

One of the first modern references to the common law maxim arose in *The "Reward"*,[172] which set out the four elements which must be established for an accused to be criminally excused:

1. an offence was committed,
2. the offence was of very slight consequence; the deviation was a mere trifle,
3. if the offence were continued in practice, it would weigh little or nothing on the public interest, and

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172 (1818) 165 ER 1482 (HC Adm).

4. the accused is exposed to the infliction of inflexibly severe penalties.

De minimis is raised most frequently in possession cases, usually involving liquor or narcotics, and in cases of theft and assault.

1. Possession of liquor or narcotics

A review of the case law discloses a real confusion on the part of some courts and counsel as to the application of the *de minimis* maxim. Many cases discuss *de minimis* in the context of whether a specific statute required proof of a minimum amount of the liquor or narcotic, and varying tests have been applied:

- a mere trace of the substance is enough to prove possession, the trace being the remnant or residue of a larger amount;[173]
- a conviction is warranted if the amount was measurable or capable of analysis;[174]
- there must be a usable amount;[175]
- an accused who did not know that the pipe he possessed contained a narcotics residue did not "possess" the narcotic;[176]
- the accused intended to possess the pipe but did not intend to possess the unusable trace of narcotic found in the pipe;[177] and

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[173] *R. v. Quigley* (1954) 111 CCC 81 (Alta CA) and *R. v. McLeod* (1955) 111 CCC 137 (BCCA).

[174] *Bocking v. Roberts* [1974] QB 307 (Eng CA), *R. v. Boyesen* [1982] AC 768 (HL), *R. v. Battis* (1985) 26 CCC (3d) 49 (BC Co Ct), and *R. v. Brett* (1986) 53 CR (3d) 189 (BCCA).

[175] *R. v. Peleshaty*, (1949) 96 CCC 147 (Man CA), and *R. v. Carver* [1978] QB 472 (CA).

[176] *R. v. Overvold* (1972) 9 CCC (2d) 517 (NWT Mag Ct).

[177] *R. v. McBurney*, (1974) 15 CCC (2d) 361 (BCSC).

- a minute trace of a narcotic is evidence only of earlier possession.[178]

R. v. S.[179] and *R. v. Cross*[180] are illustrative of *de minimis* being applied in its proper context; after the Crown has proved all essential elements of the offence (including that the accused "possessed" the substance within the meaning of the statute) the issue remains, was the offence too trifling to warrant a finding of guilt?

2. Theft

In *R. v. Jacobsen,*[181] the Ontario Court of Appeal applied *de minimis* to quash a guilty plea arising out of the theft of a library book.

However, in *R. v. Li,*[182] the Ontario High Court of Justice in a shoplifting case declared that *de minimis* has no application to the criminal law.

3. Assault

Both the Ontario and Saskatchewan Courts of Appeal have applied *de minimis* to excuse trifling assaults.[183]

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178 *R. v. McBurney*, (1975) 24 CCC (2d) 44 (BCCA).

179 (1974) 17 CCC (2d) 181 (Man Prov Ct).

180 (1976) 14 Nfld & PEI R 22 (Nfld Prov Ct).

181 (1972) 9 CCC (2d) 59.

182 (1984) 16 CCC (3d) 382.

183 *R. v. Wolfe* (1974) 20 CCC (2d) 382 (Ont CA) and *R. v. LePage* (1989) 74 CR (3d) 368 (Sask CA).

C. Shortcomings of the present law

This review of the case law discloses two important inadequacies in the current state of the law respecting *de minimis non curat lex*.

First, there is a disturbing judicial confusion over the stage during a criminal trial when the *de minimis* excuse should be addressed. In many cases involving possession of liquor and narcotics the real issue before the Courts was whether a minimum quantity of the proscribed substance was required, in order to constitute "possession" within the meaning of the statute. *De minimis* does not apply at this stage in the inquiry; it only comes into play if the trier of fact concludes that the accused did possess the prohibited substance and should be, in all other respects, convicted. Based on the criteria specified in *The "Reward"*, the *de minimis* excuse only applies after the Crown has proven that the accused committed the offence.

Second, notwithstanding several recent judicial pronouncements to the contrary, the weight of authority indicates that *de minimis* is recognized by Canadian courts as an excuse. It was the basis for the Ontario Court of Appeal's acquittals in *Jacobsen* and *Wolfe*, and was explicitly cited as an alternative ground for dismissal by the Saskatchewan Queen's Bench in *LePage*. While the Ontario High Court in *Li* stated that the principle of *de minimis* has no application to the criminal law, the three authorities cited do not support that conclusion:

- in *Quigley*, the Court was dealing with the issue of whether a certain minimum quantity of heroin was required to establish "possession" within the meaning of the *Opium and Narcotic Drug Act*; *de minimis* was not applicable;

- in *Bocking v. Roberts*, the issue again was whether a minimum quantity must be established, and the statement that "de minimis is not to be applied" was entirely appropriate to that stage of the analysis;

- in *Boyesen*, the issue again was whether the statute required a minimum quantity, and *de minimis* did not arise.

D. Recommendations for reform

1. Proposals for reform

The Law Reform Commission of Canada has not recommended that the General Part of the new *Criminal Code* should include an excuse of *de minimis non curat lex*. It is assumed that the common law excuse, to the extent that it does apply today, would survive.

The issue of *de minimis* is not addressed in the Australian *Review of Commonwealth Criminal Law* (July 1990), in the New Zealand *Crimes Bill* (1989) or in the English Law Commission's draft *Criminal Code*.

It is dealt with in the U.S. *Model Penal Code*, as follows:

> 2.12. The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct: . . .
>
> > (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction. . . .

2. Retaining the excuse of *de minimis*

The traditional arguments advanced in justification of a *de minimis* excuse are that:

- it reserves the application of the criminal law to serious misconduct,
- it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial misconduct, and
- it saves the courts from being swamped by an enormous number of trivial cases.

It might be contended that these arguments, however valid historically, are not persuasive today, having regard to the

availability of diversion programs, the discretion not to prosecute, an evolving doctrine of abuse of process, absolute and conditional discharges and pardons.

However, advocates of a *de minimis* excuse would respond that trivial cases do get through all these pre-trial screening devices, and the review of prosecutions referred to above suggests that, even today, inconsequential misconduct does get before the courts.

Similarly, the availability of discharges and pardons is not a complete answer, for two reasons. First, discharges are not available for corporate accuseds, or for accuseds facing an offence "for which a minimum punishment is prescribed by law or an offence punishable, in the proceedings commenced against him, by imprisonment for fourteen years or life."

Second, it is a pre-condition to the granting of a discharge that the accused plead or be found guilty. While the distinction may appear to some subtle, the *de minimis* doctrine would intervene to excuse an accused before a finding of guilt, once the Crown has proved all the constituent elements of the offence beyond a reasonable doubt.

3. Codifying *de minimis* in the new *Criminal Code*

The strongest argument for leaving any criminal law defence, excuse or justification to the common law is that it enables courts to develop the principle in the light of changing circumstances. Abuse of process, necessity and entrapment are recent examples.

However, an examination of the judicial development of *de minimis* does not instill confidence in the capacity of the common law to achieve this objective. The courts have frequently sought to examine *de minimis* in deciding whether a minimum quantity of a narcotic is required to prove possession, rather than in deciding whether an accused who has been found in possession of a trivial amount should bear the stigma of conviction or be subjected to criminal law sanctions.

Similarly, the courts appear to be divided as to whether *de minimis* in fact survives as an excuse, at least in relation to certain offences.

The advantages of codifying the excuse are that it would state clearly that the excuse exists, the offences to which it can be applied and the matters which must be established before it can be applied.

4. Judicial discretion

The Task Force believes that the court's acceptance of a *de minimis* argument should lead to a judicial stay rather than an acquittal, for several reasons.

First, the accused has committed all the essential elements of the offence, and the only reason that a finding of guilt is not made is that the court is exercising its discretion to protect the integrity of the court from frivolous prosecutions. In that sense, it is analogous to the court entering a stay for abuse of process.

Second, the "judicial stay" procedure permits the court to consider a wider range of evidence respecting, for example, the prevalence of the crime charged, and the impact of a stay on general deterrence.

5. Burden of proof

The Task Force believes that the onus should be on the accused to satisfy the court on the balance of probabilities that a judicial stay of proceedings should be entered. This parallels the Task Force's recommendation on entrapment.

XVI. ENTRAPMENT

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Entrapment

20. (1) Where:

a. the trier of fact is satisfied that the Crown has proved beyond a reasonable doubt all the essential elements of an offence, and

b. the Court is satisfied that the accused has established, on the balance of probabilities, that he or she was entrapped into committing that offence,

the Court shall stay the proceedings against the accused respecting that offence.

(2) Without limiting the generality of subsection (1), entrapment includes committing an offence when the authorities:

a. not having a reasonable suspicion that the accused is already engaged in that particular criminal activity, or 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, provide the accused with the opportunity to commit that offence; or

b. having a reasonable suspicion that the accused is already engaged in that particular criminal activity, or 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, go beyond providing an opportunity and induce the accused to commit that offence.

B. The present law

Two recent decisions of the Supreme Court of Canada have set out quite clearly what must be established for entrapment to succeed.

In *Mack v. The Queen*,[184] the accused was charged with possession of narcotics for the purpose of trafficking. He was a previous drug user, with several convictions, but had given up the use of drugs for some time. A former acquaintance, who was also a police informer, approached the accused and repeatedly asked the accused to supply him with narcotics. The informer once took the accused into the woods and demonstrated a hand-gun, which the accused interpreted as a threat.

After repeated urging, the accused agreed to meet the informer because he was terrified of him. At the meeting, the accused was shown a large amount of money by an undercover police officer, who was allegedly representing a drug syndicate. During the next several days the accused purchased 12 ounces of cocaine for the purpose of selling to the syndicate; he was arrested when delivering it to the informer.

The Supreme Court of Canada set aside the conviction, ordered a new trial and entered a stay of proceedings.

For the Court, Mr. Justice Lamer ruled that entrapment does not operate as an exculpatory defence which negatives *mens rea*, nor as a justifying defence such as necessity or duress. Rather, it precludes a conviction based on the need for the court to preserve the purity of the administration of justice and to prevent an abuse of its own processes.

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[184] (1988) 44 CCC (3d) 513.

Rather than focussing on the accused's pre-disposition to commit the crime, as is the American approach, the court's concern should be the conduct of the police, and whether it threatens to abuse the court's process. The Court stated the general rule as follows:

> . . . there is entrapment when,
>
> (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a *bona fide* inquiry, or
>
> (b) although having such a reasonable suspicion or acting in the course of a *bona fide* inquiry, they go beyond providing an opportunity and induce the commission of an offence.[185]

The Court also ruled that the question of whether the accused was entrapped should be decided by the judge, not the jury, on a balance of probabilities.

However, before considering whether a stay should be entered because of entrapment, it must be absolutely clear that the Crown has discharged its burden of proving beyond a reasonable doubt that the accused has committed all essential elements of the offence.

Here, the police conduct was unacceptable. While they had a reasonable suspicion that the accused had (in the past) been involved in criminal conduct, their efforts went beyond providing the accused with an opportunity and induced the commission of an offence.

Three years later the same Court decided *Barnes v. The Queen*.[186] The undercover officer was involved in a "buy-and-bust' operation on the Granville Mall in Vancouver. The officer approached the accused and his friend on the Mall because their scruffy appearance, style of dress and demeanour fit her profile of possible possessors.

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[185] *Ibid.*, at 559.

[186] (1991) 63 CCC (3d) 1.

The officer asked the accused if he had any "weed"; twice the accused responded negatively. The officer persisted, and the accused then agreed to sell a small amount of *cannabis* resin to the officer for $15. Shortly after, the accused was arrested and charged with trafficking.

The trial judge entered a stay of proceedings on the basis that the police were engaged in impermissible "random virtue testing", and that accordingly the defence of entrapment had been made out. The Court of Appeal ordered a new trial, to determine whether there had been entrapment in the sense that the officer's conduct went beyond providing an opportunity and induced the commission of an offence.

The Supreme Court of Canada dismissed the accused's appeal. In applying the test set out in *Mack*, the Court found that the police were involved in a *bona fide* inquiry. The police had reasonable grounds for believing that drug-related crimes were occurring throughout the six-block Granville Mall area, and the police may present the opportunity to commit a particular crime to any persons who are associated with a location where it is reasonably suspected that criminal activity is taking place. The notion of being "associated" with a particular area for these purposes does not require more than being *present* in the area.

C. Recommendations for reform

1. Codifying entrapment

The Task Force is in favour of codifying, in the new *Criminal Code*, a provision which entrenches the "defence" of entrapment.

2. The test for entrapment

The Task Force believes that the law as set out in *Mack* and *Barnes* reflects what the law should be; the recommendation set out above attempts to articulate that test in legislative language.

It will be noted that the Task Force's recommendation limits entrapment to instances where the *authorities* initiate the criminal activity. The Task Force would be reluctant to see entrapment extended to cases where an accused was entrapped by another civilian, for several reasons. First, there appears to be little evidence of such "private sector" entrapment warranting legislative attention at this time. Second, entrapment has historically been a device to protect the Court's process from abuses arising from police misconduct, and there seems to be no sound reason to resile from that position.

Subclauses (2)(a) and (b) of the Task Force's recommendation are intended only as illustrations of conduct which constitutes entrapment. The new *Criminal Code* should leave the door open for expansion of the doctrine of entrapment, as conditions warrant.

3. A decision for the court

A majority of the Task Force agrees with the view expressed by the Supreme Court of Canada in *Mack* that the question of whether or not entrapment exists in a specific case should be decided by the court, not the jury. This is consistent with characterizing entrapment as an abuse of the court's process, rather than a negation of *mens rea*.

4. Burden of proof

Similarly, a majority of the Task Force agrees with the Supreme Court that there should be an onus on the accused to satisfy the court, on a balance of probabilities, that he or she was entrapped into committing the offence. This is consistent with the position taken by the Task Force on *De Minimis Non Curat Lex*.

As Mr. Justice Lamer stated in *Mack*:

> I have come to the conclusion that it is not inconsistent with the requirement that the Crown prove the guilt of the accused beyond a reasonable doubt to place the onus on the accused to prove on a balance of probabilities that the conduct of the state is an abuse of process because of entrapment. I repeat: the guilt or innocence of the accused is not in issue. The accused has done nothing that entitles him or her to an acquittal; the Crown has engaged in conduct, however, that disentitles it to a conviction. . . . [T]he claim of entrapment is a very serious allegation against the state. The state must be given substantial room to develop techniques which assist it in its fight against crime in society. It is only when the police and their agents engage in a conduct which offends basic values of the community that the doctrine of entrapment can apply. To place a lighter onus on the accused would have the result of unnecessarily hampering state action against crime.[187]

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[187] *Supra*, note 184 at 567-568.

XVII. COMMON LAW DEFENCES

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Common law defences

21. No defence, justification or excuse shall be unavailable unless expressly prohibited by this *Code*.

B. The present rule

Section 8(3) of the present *Criminal Code* states:

> 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 insofar as they are altered by or are inconsistent with this Act or any other Act of Parliament.

This provision has been in the *Criminal Code* since its inception in 1892. It was necessary because the codifiers made no pretence at attempting to codify all existing common law defences.

Since then, section 8(3) has been relied on in Canada for uncodified defences such as intoxication, automatism, mistake of fact, officially-induced error, necessity, entrapment, *de minimis*, due diligence in the case of strict liability offences and the common law defence of duress for parties to an offence other than the principal offender.

The main advantage of section 8(3) is that it has facilitated a certain degree of growth in the area of common law defences.

C. Proposals for reform

In developing a new *Criminal Code*, consideration must be given to whether a provision preserving common law defences should be included. There are three possibilities:

1. **remain silent:** it is the stated objective of the Law Reform Commission of Canada to include in the new *Criminal Code* all substantive defences, in the interest of comprehensiveness. Thus, it has not recommended a residual clause for common law defences.

Under this approach, it would be open to an accused to argue that a defence, justification or excuse not specifically provided for in the new *Criminal Code* should be applied, so that he or she would not be deprived of life, liberty or security of the person "except in accordance with the principles of fundamental justice," within the meaning of section 7 of the *Charter*.

2. **include a "principles of fundamental justice" clause:** others argue that, for the sake of comprehensiveness, it would be preferable to include in the new *Criminal Code* a specific reference to section 7 of the *Charter*, as follows:

> 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.

3. **retain a "common law defences" clause:** some believe that the new *Criminal Code* should retain the concept presently embodied in section 8(3).

On balance, the Task Force favours the third option, for several reasons.

First, it is consistent with development of the new *Criminal Code* that, wherever possible, matters be stated explicitly, in the interests of comprehensiveness.

Second, it is preferable that the rule be contained in the new *Criminal Code* itself, rather than incorporating indirectly, and silently, section 7 of the *Charter*.

Third, a broadly-worded "common law defences" provision might permit defences to be argued in circumstances where they might not meet the constraints of section 7 of the *Charter*.

D. Essential elements

The Task Force recommendation incorporates two important features which should be highlighted.

First, the new provision should permit the courts to give effect to any existing common law defences and to create new common law defences which may arise in the future. Examples of the latter include pathological intoxication, the Vietnam Syndrome and pre-menstrual tension.

Second, any common law defence, justification or excuse should be available, unless expressly prohibited by *the new Criminal Code*. This is significantly different from present section 8(3), which excludes defences which are "altered by or are inconsistent with this Act *or any other Act of Parliament*."

The *Criminal Code* is our country's principal statement of criminal responsibility, and the Task Force believes that any Parliamentary initiative to curtail common law defences ought to done by amendment to the *Criminal Code*, not by amendment to any other federal legislation.

PART V: INCOMPLETE OFFENCES

XVIII. ATTEMPTS

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Attempts

22. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out that intention is guilty of an attempt to commit the offence, even if it was factually or legally impossible under the circumstances to commit the offence.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

(3) Except where otherwise expressly provided by law, every one who aids or encourages another person to commit an offence is, if that offence is not committed, guilty of an attempt to commit that offence.

B. The present law

The statutory definition of attempt first appeared in the 1892 *Criminal Code*. Subject to minor amendments in the 1955 consolidation, it remains substantially the same as when first enacted.

There are two public policy arguments in support of codification of an attempt to commit a crime as constituting a crime. The first is preventive; it allows the State to intervene and terminate dangerous or otherwise serious misconduct at any early stage, thereby avoiding the commission of a more serious criminal offence.

Second, the offender ought to be subjected to criminal law sanctions for having the intent to commit an offence, and for taking steps beyond mere preparation to fulfil that intention.

1. The mental element

Section 24(1) imposes liability on everyone who has "an intent to commit an offence". In *Lajoie v. The Queen*, a case of attempted murder, the Supreme Court of Canada interpreted this wording broadly. It observed that murder may be committed if the accused means to cause death, but it may also be committed if the accused means to cause bodily harm knowing that it is likely to cause death and is reckless whether death ensues or not. The Court ruled that any intent that would suffice for the offence of murder would suffice also for an attempt:

> If it can be established that the accused tried to cause bodily harm to another of a kind which he knew was likely to cause death, and that he was reckless as to whether or not death would ensue, then, under the wording of s. 210, if death did not ensue an attempt to commit murder has been proved.[188]

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[188] (1973) 109 CCC (2d) 313 at 317.

A decade later, the Supreme Court of Canada reversed itself, in *R. v. Ancio*,[189] a case of attempted murder where the Crown sought to extend the principle in *Lajoie* to a case of constructive murder. Not satisfied simply to distinguish *Lajoie*, and hold that the principle enunciated there should not be extended to cases of constructive murder, the Court went one step further and repudiated its earlier reasoning in *Lajoie*. Noting that section 24 defines the offence of attempt as "having an intent to commit an offence", Mr. Justice McIntyre added:

> The completed offence of murder involves a killing. The intention to commit the complete offence of murder must therefore include an intention to kill. I find it impossible to conclude that a person may intend to commit the unintentional killings described in ss. 212 and 213 of the *Code*. I am then of the view that the *mens rea* for an attempted murder cannot be less than the specific intent to kill.[190]

Mr. Justice McIntyre recognized that this position would lead to the somewhat illogical result that attempted murder would require a higher level of *mens rea* (i.e. intent) than is necessary for murder itself (i.e. recklessness as to whether death ensues). He found no merit in this argument:

> The intent to kill is the highest intent in murder and there is no reason in logic why an attempt to murder, aimed at the completion of the full crime of murder, should have any lesser intent. If there is any illogic in this matter, it is in the statutory characterization of unintentional killing as murder. The *mens rea* for attempted murder is, in my view, the specific intent to kill. A mental state falling short of that level may well lead to conviction for other offences, for example, one or other of the various aggravated assaults, but not a conviction for attempt at murder.[191]

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189 (1984) 10 CCC (3d) 385.

190 *Ibid.*, at 402.

191 *Ibid.*, at 404.

2. *Actus reus*

The thorniest issue to resolve in the law of attempts is where to draw the line between mere preparation and an attempt. In *Secondary Liability - Participation in Crime and Inchoate Offences*,[192] the Law Reform Commission of Canada identified 14 tests which the courts, legislatures and academics have developed in this futile quest to create one all-purpose articulation of the dividing line.

In *R. v. Cline*, Mr. Justice Laidlaw, for the Ontario Court of Appeal, discussed several of these tests, and then went on:

> It is my respectful opinion that there is no theory or test applicable in all cases, and I doubt whether a satisfactory one can be formulated. Each case must be determined on its own facts, having due regard to the nature of the offence and the particular acts in question.[193]

He then went on to identify six propositions which he had gleaned from the common law, the last three of which are:

> (4) It is not essential that the *actus reus* be a crime or a tort or even a moral wrong or social mischief;
>
> (5) The *actus reus* must be more than mere preparation to commit a crime;
>
> (6) When the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an *actus reus* sufficient in law to establish a criminal attempt to commit that crime.[194]

The most recent pronouncement of the Supreme Court of Canada on this issue is in *Deutsch v. The Queen*.[195] Mr. Justice LeDain canvassed the various tests referred to above, and observed that all of them have been pronounced by

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[192] Working Paper 45, (Ottawa: Law Reform Commission of Canada, 1985).

[193] (1956) 115 CCC 18 at 26.

[194] *Ibid.*, at 29.

[195] (1986) 52 CR (3d) 305.

academic commentators to be unsatisfactory to some degree. He agreed with those who have concluded that no satisfactory general criteria has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment. He added:

> In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. I find that view to be compatible with what has been said about the actus reus of attempt in this court and in other Canadian decisions that should be treated as authoritative on this question.[196]

Mr. Justice LeDain held that relative proximity may give an act which might otherwise appear to be mere preparation the quality of attempt, whereas an act which on its face is an act of commission does not lose its quality as the *actus reus* of attempt because further acts were required or because a significant period of time may have elapsed before the completion of the offence.

3. Abandonment

Section 24 of the *Criminal Code* makes no reference to voluntary desistance or abandonment. What Canadian law there is offers little support for such a defence.

In *R. v. Kosh*, the Saskatchewan Court of Appeal agreed with the trial judge's finding that the accused's acts went beyond mere preparation, and constituted an attempt to break and enter. On the issue of abandonment, the Court accepted that the accused desisted voluntarily, but stated:

> In my view, once the essential element of intent is established, together with overt acts towards the commission

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196 *Ibid.*, at 323.

> of the intended crime, the reason why the offence was not committed becomes immaterial. Once these elements are established, it makes no difference whether non-commission was due to interruption, frustration or a change of mind.[197]

In *R. v. Frankland*,[198] the Ontario Court of Appeal avoided the issue of abandonment by ruling that the accused's desistance after attempting to rape the complainant was relevant to the issue of his intent.

4. Impossibility

Section 24(1) of the *Criminal Code* appears to rule out any defence of impossibility, by stating that:

> Everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence *whether or not it was possible under the circumstances to commit the offence.*

Several Canadian cases discuss impossibility, but none articulate clearly the important distinction between factual and legal impossibility.

In *R. v. Scott*,[199] the accused was caught with his hand in the victim's back pocket. The wallet in that pocket contained valuable papers and a credit card, but no cash. The accused was charged with attempted theft of cash, and was convicted.

The Alberta Court of Appeal upheld the conviction, finding that the accused had the intent to commit the completed offence and did some act toward the accomplishment of that objective. Based on the wording of section 24(1), "the fact that the Crown failed to prove that there was money in [the victim's] pocket cannot, in my view, make the charge bad in law."[200]

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197 (1964) 44 CR 185 at 189.

198 (1985) 23 CCC (3d) 385.

199 [1964] 2 CCC 257 (Alta CA).

200 *Ibid.*, at 261.

A similar conclusion was reached in *R. v. Gagnon*.[201] The accused was observed to open the cash register in a store and then, without putting his hand into the cash drawers, leave the store. In entering a conviction on appeal, the Quebec Court of Appeal cited *Scott* with approval.

Finally, in *Detering v. The Queen*,[202] the accused was charged with fraudulently misrepresenting that a customer's car needed a rebuilt transmission, and later fraudulently misrepresenting that he had rebuilt it. The car owner paid for the work, but was not deceived because she was investigating the garage repair business on behalf of the government.

The Ontario Court of Appeal had substituted a conviction for attempted fraud, on the basis that, since the victim was not deceived, the full offence had not been proved.

The Supreme Court of Canada dismissed the appeal. The defence argued that, because the victim was not deceived, the accused could not be convicted of the offence of fraud, and neither could he be convicted of attempting the impossible. Chief Justice Laskin appears to have rejected that argument in the following terms:

> Nor do I find cogency in the appellant's submission that if there is impossibility this does not bring any act of the accused closer to realization so as to establish proximity. I read s. 24(1) as making a different distinction, one merely requiring proof of intent and of the accused going beyond mere preparation by making, as in this case, a false representation even though not resulting in full realization of his objective.[203]

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201 (1975) 24 CCC (2d) 339 (Que CA).

202 (1982) 31 CR (3d) 354 (SCC).

203 *Ibid.*, at 356.

C. Recommendations for reform

1. The mental element

Since *Ancio*, an accused can be convicted of an attempt only if he or she means to commit the completed offence. Thus, even though murder may be committed if the accused means to cause death, or means to cause bodily harm knowing that it is likely to cause death and is reckless whether death ensues, the same accused could be convicted of attempted murder (where the victim does not die) only in the former instance, where he or she means to cause death.

The Task Force agrees with this interpretation, and believes that it is the position which should be adopted in the new *Criminal Code*.

The Law Reform Commission of Canada's 1987 proposal is silent on this issue; it is not specifically dealt with in the clause making an attempt culpable (4(3)), nor is it discussed in the Comment. It appears that the Commission is in favour of retaining the present position, as clause 4(6) states that "No one is liable for furthering or attempting to further any crime which is different from the crime he *meant to* further."

2. *Actus reus*

The Task Force agrees with the Supreme Court of Canada's opinion in *Deutsch* and with the views of the Law Reform Commission of Canada[204] that it would be futile to attempt to draft a provision precisely distinguishing between preparation and attempt; it would be preferable to retain the present provision, which gives courts greater flexibility to apply the broad principle to unique fact situations.

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[204] Report 31, *supra*, note 6 at 45.

3. Question of law

The Task Force believes that whether an accused's acts are mere preparation to commit the offence and too remote to constitute an attempt, should be retained as a question of law for the trial judge, not the jury, to decide. It is particularly important that this issue be characterized as a question of law if the new *Criminal Code* does not set out in any detail the distinction between preparation and attempt.

The present rule does not appear to have caused problems in application. In *Canadian Criminal Jury Instructions*, Ferguson and Bouck recommend the following explanation to the jury on this issue:

> 16. What this means is that it is up to me, as the judge of the law, to decide whether or not the conduct of the accused, if proved, is an attempt. I direct you as a matter of law that if you find that the Crown has proven beyond a reasonable doubt the following conduct [list conduct] then that conduct amounts in law to an attempt, and is not mere preparation.
>
> 17. You are the judges of the facts. You, and you alone, must decide whether the accused actually did these things. If he/she did, I have directed you as a matter of law that these acts go beyond mere preparation and would constitute an attempt.[205]

4. Abandonment

Only the U.S. *Model Penal Code* recognizes a defence of abandonment.

Several arguments have been made in support of such a defence. A person who abandons a crime is less to blame than one who persists in it, and is less dangerous to the public. Indeed, having a legally-recognized defence of abandonment might induce some offenders to withdraw from the criminal enterprise.

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[205] 2d ed., Vol.I, (Vancouver: Continuing Legal Education Society of British Columbia, 1990) at 6.09.

On the other hand, an abandoner is more to blame than one who does not even attempt a crime, and may well have caused public concern, even though the full crime was not committed. Some argue that it would be difficult to tell whether an accused abandoned a crime because of genuine remorse, or because of fear of detection. Those who argue against a defence of abandonment believe that justice is best served by treating desistance as a mitigating factor in sentencing.

On balance, the Task Force favours the latter view.

5. Impossibility

In 1985 the Law Reform Commission reasoned[206] that there are really two kinds of factual impossibility and two kinds of legal impossibility:

a. **factual impossibility arising out of unknown circumstances** - an accused fires a gun at another person but, unknown to the accused, the gun is defective and no bullet is discharged. The accused should be convicted of attempted murder because had the circumstances been as the accused imagined them (*i.e.* that the gun was operational), murder would have occurred. Attempting to steal money from an empty pocket is another example.

b. **inherent factual impossibility** - attempting to kill another by voodoo is relatively harmless so, although the attempt is no less reprehensible than an attempt using more appropriate methods, it ought not to constitute a crime because it is "inherently impossible" to complete such an offence.

c. **legal impossibility in the circumstances** - a person who attempts to steal his own umbrella, thinking it belongs to another, ought not to be convicted of a crime. Unlike the case of the pickpocketer picking an empty pocket, the completed act of "stealing" one's own umbrella cannot be a crime.

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[206] *Secondary Liability, supra*, note 192 at 32-33.

d. inherent legal impossibility - a person attempts to commit adultery, thinking it to be a crime. Attempting to do that which, at law, is not a crime, cannot itself be a crime.

Two years later the Law Reform Commission in Report 31 modified its view, arguing that no special provision is necessary.[207]

The Task Force is satisfied that the four categories identified by the Commission cover all eventualities, and that criminal liability should attach in the first three instances, but not in the fourth. Consideration should be given to including a provision to the effect that "This section does not apply where an accused attempts to do that which, at law, is not a crime," so long as it is made clear that it does not exempt from liability those who attempt a crime where it is legally impossible in the circumstances to commit the crime (category c).

6. Penalty

The Task Force does not support the Law Reform Commission's recommendation that a person convicted of an attempt to commit a crime be "subject to half the penalty for it."

The issue of penalty for attempts should be left for consideration when the sentencing part of the new *Criminal Code* is developed. Having said that, the Task Force believes that a "one-half" rule is too inflexible; courts need to focus on the moral culpability of the accused, while taking into account the consequences of the offence. Judges should have considerable flexibility in imposing an appropriate sentence, and ought not to be bound by maximum and minimum sentences prescribed by law.

7. Parties to attempts

The Task Force believes that criminal liability should attach to an individual who aids or encourages another person to commit an offence, even though that offence is not committed.

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[207] *Supra*, note 6 at 28-29.

PART VI: PARTICIPATION

XIX. CONSPIRACY

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Conspiracy

23. (1) Every one is liable for conspiracy who agrees with another person, whether or not they are married to each other, to commit a *Criminal Code* offence which is indictable or which may be proceeded with by indictment.

(2) A person does not conspire unless he or she intends to commit an offence described in clause (1).

(3) A person who abandons a conspiracy to commit an offence described in clause (1), before that offence is attempted or committed, is not liable for the conspiracy.

(4) In determining whether a person abandoned a conspiracy the Court shall consider all relevant circumstances, including whether the person communicated his or her desistance to the other conspirators or to the authorities, or both.

(5) Every one who conspires to commit an offence described in clause (1) is liable, even if it was factually or legally impossible under the circumstances to commit the offence.

(6) Subject to diplomatic and other immunity under law, this *Code* applies to, and the Courts have jurisdiction over:

a. conduct engaged in outside Canada which constitutes a conspiracy to commit a crime in Canada, where the conduct took place on the high seas or in a state where the crime in question is also a crime in that state, and

b. conduct engaged in inside Canada which constitutes a conspiracy to commit a crime outside Canada if the crime in question is a crime in Canada and in the place where the crime is to be committed.

B. The present law

1. Legislative provisions

General liability for conspiring is established by section 465 of the present *Criminal Code*. In addition, the *Code* contains three specialized conspiracy provisions:

- section 46(2)(c) and (e) and section 46(4): conspiracy to commit treason;
- section 59(3): seditious conspiracy; and
- section 466(1): conspiracy in restraint of trade.

Finally, other federal statutes such as the *Competition Act,* the *Divorce Act* and the *National Defence Act* contain conspiracy provisions.

In 1955, section 408(2) was added to the *Criminal Code*, creating the offence of conspiring "to effect an unlawful purpose or to effect a lawful purpose by unlawful means." The courts quickly authorized the use of this provision to preserve common law conspiracies which extended beyond conspiracies

to commit crimes. However, in *Gralewicz v. R.*,[208] the Supreme Court of Canada, according to Stuart[209], "finally and firmly slammed the door on all conspiracies other than conspiracies to commit statutory offences."

2. Justification for the offence of conspiracy

Ewaschuk has articulated the rationale for imposing liability for conspiratorial agreements which have not progressed beyond mere preparation, as follows:

> [There is an] assumption that a combination of persons acting in concert presents a much greater danger to society than does a single person. Thus, conspiratorial overt acts between two or more persons are criminalized whereas similar overt acts by a single person are not, unless the conduct by the single person amounts to procuring, counselling or inciting an offence which is not later committed.[210]

3. Elements of conspiracy

a. Agreement to achieve a common purpose or a particular object

i. Agreement as the *actus reus* of conspiring

In *Papalia v. R.; R. v. Cotroni*, Mr. Justice Dickson stated that "the *actus reus* [of conspiracy] is the fact of agreement".[211]

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208 [1980] 2 SCR 493.

209 *Supra*, note 2 at 566.

210 E.Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2d ed., (Aurora: Canada Law Book, 1987) at 19-2.

211 [1979] 2 SCR 256 at 276.

ii. Achievement of a common purpose

In the same decision, Mr. Justice Dickson added that the fact of agreement involves a consensus or meeting of minds on the part of the conspirators to effect an unlawful common purpose.

iii. Tacit agreement

While passive acquiescence in, or mere knowledge or discussion of a plan of criminal conduct is insufficient to ground a charge of conspiracy,[212] an

> agreement to do a single act in furtherance of a general conspiracy is sufficient to attract liability for criminal conspiracy, so long as the conspirator knows the general nature of the conspiracy and intends to adhere to it.[213]

Agreement may be established by inference from the conduct of the parties,[214] such as where a person's course of conduct establishes tacit acceptance of the offer.[215]

iv. Ongoing agreements

A conspiracy may involve agreements to commit a number of different offences on an ongoing basis.[216]

v. Agreement for the purpose of contract

There is a continuing debate whether an agreement to buy or sell an illegal service or commodity is an appropriate basis to ground a charge of conspiracy. For example, if A contracts to sell a narcotic to B, have they "conspired" to traffic in the

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212 *R. v. McNamara (No. 1)* (1981) 56 CCC (2d) (Ont CA).

213 *Supra*, note 210 at 19-8.

214 *Paradis v. The King* [1934] SCR 185 (SCC).

215 *Atlantic Sugar Refineries Company v. A.G. Canada* [1980] 2 SCR 644 (SCC) at 655-656.

216 *R. v. Bengert et al (No. 5)* (1980) 53 CCC (2d) 481 (BCCA).

sense of agreeing to "achieve a common purpose?" Colvin thinks not:

> What stands outside the realm of conspiracy law is a commercial agreement under which the price is the dominant reason for selling. A "contract killer" may therefore not conspire with the persons who purchase his services.[217]

However, in *Sokoloski v. The Queen*,[218] the Supreme Court of Canada found a conspiracy to traffic in a controlled drug where the seller was apprehended while still in possession of the drugs which he had intended to sell. The conspiracy rested on the fact that the seller was aware that the purchaser intended to resell the drugs, and that established a common purpose. Chief Justice Laskin, in dissent, characterized this analysis as "an abuse if not also a distortion of the concept of conspiracy in our law",[219] and subsequent decisions have curtailed its application.[220]

b. Intention to adhere to the agreement - *mens rea*

i. Intention or purpose

In *R. v. O'Brien*, the Supreme Court of Canada separated the mental element of conspiracy into two parts, an intent to agree and an intent to carry out the common object:

> It is, of course, essential that the conspirators have the intention to agree, and this agreement must be complete. There must also be common design to do something unlawful . . . . Although it is not necessary that there should be an overt act in furtherance of the conspiracy, to complete the crime, I have no doubt that there must exist an intention to put the common design into effect. A common design necessarily involves an intention. Both are synonymous.

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217 *Supra*, note 101 at 348.

218 (1977) 33 CCC (2d) 496.

219 *Ibid.*, at 498.

220 *Sheppe v. The Queen* (1980) 2 SCR 22 and *R. v. Kelly* (1984) 41 CR (3d) 56 (Sask CA). But see *Genser v. The Queen* (1986) 27 CCC (3d) 264 (Man CA).

> The intention cannot be anything else but the will to attain the object of the agreement.[221]

ii. Recklessness, negligence and strict liability offences

There is no Canadian decision on the issue of whether *mens rea* is required to convict a person of conspiracy to commit an absolute or strict liability offence, or one which extends to negligence. In England, in *Churchill v. Walton*,[222] the House of Lords unanimously insisted on *mens rea* for conspiracies to commit absolute responsibility offences.

c. Knowledge of the general nature of the conspiracy

A conspirator need not know the identities of the other parties to the common design or the precise details of the agreement, but he or she must have knowledge of all of the substantial elements necessary to the eventual execution of the common scheme.[223]

d. Agreement between two or more persons

Although the gist of a conspiracy is an agreement between two or more persons, section 465 has been held to impose liability individually. One person alone can be convicted of conspiring with others and, because evidence against one co-conspirator may not be admissible against another, it is possible that A may be convicted of conspiring with B, even though B is acquitted of conspiring with A.[224]

Although there is no specific provision in the *Criminal Code*, it has been held that a husband and wife cannot conspire with

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221 [1954] SCR 666 at 668.

222 [1967] 1 All ER 497.

223 *R. v. McNamara, supra*, note 212.

224 *Guimond v. The Queen* (1979) 8 CR (3d) 185 (SCC).

each other. This is because, in legal fiction, they are regarded as a single entity and "are presumed to have but one will." However, it is possible that a husband and wife (as a single entity) can conspire with other parties.[225]

According to Ewaschuk,[226] children under 12 years of age, insane persons and persons with diplomatic immunity (unless waived by their home countries) are deemed incapable of committing conspiracy. Similarly, a person defined as the victim of a crime is deemed not to have conspired to commit that crime.

e. Purpose prohibited by statute

Section 465(1)(c) and (d) provides that there can be a conspiracy to commit either an indictable offence or an offence punishable on summary conviction. The law is not clear whether the latter is limited to summary conviction offences under the *Criminal Code*, under any federal legislation, or extends to provincial or even municipal infractions.

4. Merger of conspiracy with the substantive offence

Unlike the inchoate offence of attempt, which merges with the substantive offence once it is committed, an accused can sometimes be convicted of both conspiracy and the completed offence. For example, in *Sheppe v. The Queen,*[227] the accused was convicted of trafficking and conspiracy to traffic. The procedural defence of *res judicata* was not available to the accused because the conspiracy had a wider effect than the substantive offence.

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225 *Kowbel v. The Queen* [1964] SCR 498 (SCC).

226 *Supra*, note 210 at 19-15.

227 *Supra*, note 220.

5. Attempts

In *Dungey v. The Queen*,[228] it was held that there is no such thing as an attempt to conspire to commit another offence. Mr. Justice Dubin stated that it was neither necessary nor desirable to extend the law in that way because such an "attempted conspirator" would most probably be found guilty of inciting the substantive offence. Further, if the purpose of the offence of conspiracy is to prevent the commission of the full offence, there is no point in punishing an act which falls short of conspiracy.

6. Abandonment

In *R. v. O'Brien*, the Supreme Court of Canada rejected the defence of abandonment of a conspiracy:

> If a person, with one or several others, agrees to commit an unlawful act and later, after having had the intention to carry it through, refuses to put the plan into effect, that person is nevertheless guilty because all the ingredients of conspiracy can be found in the accused's conduct.[229]

7. Impossibility

While section 24(1) excludes the defence of impossibility for the inchoate offence of attempt, there is no such exclusion in the *Criminal Code* with respect to conspiracy. Although the question has not been fully argued in any Canadian case, a limited form of the defence was held to be available in *R. v. Chow Sik Wah and Quon Hong*, where the Ontario Court of Appeal stated:

> In a prosecution for conspiracy a conviction may not be registered if the operation for the commission of which the accused allegedly conspired would, if accomplished, not have made the accused guilty of the substantive offence.[230]

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228 (1980) 51 CCC (2d) 86 (Ont CA).

229 *Supra*, note 221 at 669.

230 [1964] 1 CCC 313 at 315.

8. Jurisdiction

Section 465(3) expressly provides that a conspiracy in Canada to commit an offence in a foreign country is an offence in Canada. In *Bolduc v. AG Quebec,*[231] it was held that the unlawful act of conspiracy must be an offence in the foreign country as well as in Canada.

Section 465(4) codifies the common law, expressly providing that a conspiracy in a foreign country to commit an offence in Canada is an offence in Canada.

C. Recommendations for reform

1. The offence of conspiracy should be retained

Some argue that the offence of conspiracy should be abolished, on the basis that most criminal conduct would be covered by substantive offences or attempts, and that the additional offence of conspiracy is unnecessary.

Proponents of preserving the offence maintain that it recognizes there is a greater risk of evil happening when two persons agree to commit an offence, it allows for conviction of those who cannot be proved to have done any overt act, and it is a particularly useful tool to combat organized crime, particularly abroad.

On balance, the Task Force agrees with the latter view, and supports retention of the offence of conspiracy. Having said that, the Task Force believes very strongly that there is an urgent need for reform:

- to prevent abuses in the prosecution of conspiracy charges, and
- to deal with evidentiary problems arising from the trial of conspiracy and a substantive offence.

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[231] [1982] 1 SCR 573.

2. *Actus reus*

The Task Force agrees with the Law Reform Commission that the new *Criminal Code* formulation should focus on the "agreement", and avoid phraseology such as "common design", "common purpose" or "joint pursuit of a common objective," which is found in the case law discussed earlier.

The effect of defining conspiracy to include such notions would be to broaden the scope of the offence to include acts in furtherance of the agreement, an extension which is not warranted.

3. Indictable offences under the *Criminal Code*

The Task Force believes that the scope of the *Criminal Code* offence of conspiracy should be restricted to agreements to commit only *Code* offences, and only such offences which are indictable or which may, at the Crown's option, be proceeded with by indictment.

The Task Force believes strongly that the conspiracy law should not criminalize agreements to commit less serious federal offences, let alone provincial or municipal offences. Similarly, if Parliament wishes to make it an offence to conspire to commit an offence under another federal statute, such as the *Narcotic Control Act* or the *Competition Act*, these Acts, not the *Criminal Code*, should be suitably amended.

4. The mental element

The Task Force believes that the *mens rea* for conspiracy should be an *intent* to agree. Given the earlier recommendation that silence in the *Criminal Code* respecting the mental element signifies that intent is required, no reference to the mental element is necessary.

The Task Force accepts the two-fold aspect of the *mens rea* requirement in *O'Brien*, being an intent to agree and an intent to carry out the common object. This latter aspect should be expressly stated in the new *Criminal Code*.

5. Attempts

The Task Force is opposed to the new *Criminal Code* creating an offence of attempted conspiracy. It agrees with the present common law rule, as stated by the Supreme Court of Canada in *R. v. Dungey*.

6. Abandonment

The Task Force believes that the new *Criminal Code* should excuse a conspirator who desists from the conspiracy, provided that the abandonment occurs before the substantive offence is attempted or committed.

In the Task Force's view, the principal rationale for a conspiracy offence is to assist the authorities in early detection and thereby prevent the commission of the substantive offence, and the law should encourage a conspirator to desist, and at as early a stage as possible. In this respect there is a qualitative difference between conspiracies and attempts; in the latter case the accused has already taken concrete action to commit the offence, while in the former there is still only an agreement.

Recognizing abandonment in the case of conspiracy places a higher priority on termination of the agreement at an early stage than on punishing, in every case, for having made an agreement to commit a crime.

7. Merger of conspiracy and the substantive offence

Strong differences of opinion were expressed within the Task Force as to whether an accused should be liable both for conspiracy to commit an offence, and for committing that offence.

On balance, the Task Force rejected the Law Reform Commission recommendation that merger should apply, and endorsed the present law as stated by the Supreme Court of Canada in *Sheppe*, that an accused may be convicted of both, at least in circumstances where the conspiracy had a wider effect than the substantive offence.

8. Impossibility

The Task Force's recommendation on this issue parallels its proposal for attempts, that conspiracy should be punishable, even if it was factually or legally impossible in the circumstances to commit the substantive offence.

As noted in the section on Attempts, consideration should be given to including a provision to the effect that "This section does not apply where a person conspires to do that which, at law, is not a crime," so long as it is made clear that it does not exempt from liability those who conspire to commit a crime where it is "legally impossible in the circumstances" to commit the crime.

9. Penalty

The Task Force does not endorse the Law Reform Commission recommendation that a person convicted of conspiracy to commit an offence be subject to half the penalty for that offence (clause 4(5)).

For the reasons stated in the section on Attempts, the issue of penalty should be addressed when the sentencing part of the new *Criminal Code* is developed. At that time, established policies of the Canadian Bar Association on sentencing should be given careful consideration.

10. Spousal immunity

The Task Force believes that the new *Criminal Code* should explicitly abolish the "spousal immunity" rule for conspiracy, as being an anachronism.

11. Extra-territoriality

The Task Force recommends adoption of the Law Reform Commission's proposal on jurisdictional rules for conspiracy.

XX. PARTIES

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Parties

24. Every one is a party to and guilty of an offence who:

a. actually commits it,

b. does or omits to do anything knowing that it will aid any person to commit it, or

c. does or omits to do anything with the intent of encouraging any person to commit it.

B. The present law

1. Historical development

The law of parties was first codified in 1275, and reflected a well-established body of common law. The essential rules comprising the law of parties, as codified at that time, which remain substantially unchanged today, are as follows:

i. only the person who actually carried out the criminal act was considered to be a principal offender;

ii. the other participants, whether or not they were present, were considered to be accessories; and

iii. the other participants were guilty of the same crime as the principal offender and were subject to the same penalties.

Gradually, elaborate distinctions developed between principals and accessories which reflected various modes of participation in crime. The law distinguished between "principals in the first degree", "principals in the second degree", "accessories before the fact" and "accessories after the fact."

These common law distinctions were abolished in 1892, in the first Canadian *Criminal Code*. Sections 61 to 63 created "parties to an offence", which encompassed all the previous categories except "accessories after the fact."

This approach is substantially retained in sections 21 to 23 of the present *Criminal Code*.

2. Secondary liability

A "secondary party" is a person who, through encouragement, aid or inducement, has contributed to the occurrence of an offence which was committed by a principal party. Secondary parties are guilty of the same crime as the principal offender and are subject to the same penalties.

Technically, an accessory after the fact (s. 23) is not a secondary party because he or she contributes to the escape of the offender, rather than to the commission of the offence. Similarly, one who counsels another to commit an offence which is not actually committed (s. 464) is not a secondary party, because there is no act to which the counsellor can be made a party. However, both have traditionally been treated as parties, because they are built upon similar principles and because they supplement the law on secondary participation in crime.

Secondary liability is derivative liability in the sense that it must be grounded upon the *actus reus* of the principal. However, they are independently liable, and a secondary party may be convicted, even if the principal has died, escaped, been convicted of a lesser charge or even been acquitted based on a defence, such as duress, which is not available to the secondary party.

3. The party provisions

Section 21(1) states:

> 21. (1) Every one is a party to an offence who
>
> (a) actually commits it;
>
> (b) does or omits to do anything for the purpose of aiding any person to commit it; or
>
> (c) abets any person in committing it.

a. Principals

A person who actually does or who contributes to the doing of the *actus reus* of an offence with the requisite *mens rea* is commonly referred to as the "principal" or "principal party." The principal actually commits the offence when he or she does a physical act toward the commission of the offence, omits to do an act when under a legal duty to act, or uses an innocent agent to commit an offence.

While a person must normally commit a positive act in order to be a principal to an offence, mere presence in some circumstances may satisfy that requirement, as where a person obstructs or interferes with the lawful use of property by forming part of a human barricade.[232]

b. Aiders and abettors

Mewett and Manning[233] describe "aiding" as assisting or helping without necessarily encouraging or instigating the actor.

"Abetting", on the other hand, denotes encouraging, instigating, promoting or inciting the commission of a crime, and has been termed indistinguishable from counselling.

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232 *R. v. Mammolita et al* (1983) 9 CCC (3d) 85 (Ont CA).

233 A. Mewett and M. Manning, *Criminal Law*, 2d ed. (Toronto: Butterworths, 1985) at 46.

It is important to distinguish between aiding and abetting, because each has its own *actus reus* and *mens rea*, and there are defences open to one which are not available to the other.

Although liability for aiding or abetting under section 21 is derived from the *actus reus* of the principal, the act requirements for both relate to the secondary party's own conduct. Section 21(1)(b) does not require that the conduct of the aider actually aided the principal, so long as it was done for that purpose.

It is significant that under section 21 one might aid by act or omission, but abet only by act. It has been suggested that "omits" in section 21(1)(b):

> merely refers to the situation where an omission is part of a wider criminal design involving action by other persons. Suppose for example that a chauffeur is directed to pick up a gangster outside of a restaurant, but fails to arrive, leaving the gangster exposed to an attack that would not otherwise have occurred. This would be a case where an omission makes a positive contribution to the offence.[234]

The general rule is that something more than passive presence or mere acquiescence is required to constitute the *actus reus* of both aiding and abetting. In the leading case of *Dunlop and Sylvester v. The Queen*, Mr. Justice Dickson spoke for the majority of the Supreme Court of Canada:

> Mere presence at a scene of a crime is not sufficient to ground culpability. Something more is needed:
>
> encouragement of the principal offenders; an act which facilitates the commission of the offence, such as keeping watch or enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit.[235]

Where a secondary party is under a legal duty to act, his or her failure to act (or passive acquiescence) may be viewed as

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234 Stuart, *supra*, note 2 at 504.

235 (1979) 47 CCC (2d) 93 at 106.

aiding and abetting, in that he or she facilitated the commission of the offence. For example, in *R. v. Nixon*,[236] a police officer breached his duty to prevent an assault on a prisoner and was held liable for aiding and abetting the assault. It may be inferred that the purpose of the failure to act was to aid in the commission of an offence.

In Canada (unlike the United Kingdom) aiders and abettors do not have to be physically or constructively present at the commission of an offence in order to be considered as parties to the offence.

Another significant difference between aiding and abetting is that under section 21(1)(b) an aider must do something "for the purpose of aiding any person", whereas abetting under section 21(1)(c) has no such ulterior *mens rea* component. Colvin concludes that, under section 21(1)(b):

> . . . it is insufficient that [the act or omission] be done "with the intent of aiding" and it is therefore insufficient that the actor knew that the conduct would aid. Aiding must have been the *reason* why the actor did what she did.[237]

He adds that normal rules of statutory interpretation would lead one to conclude that under section 21(1)(c) either an intention to encourage or recklessness with respect to encouraging would suffice. However, he cites several authorities for the proposition that intention is required, and observes:

> In effect, the traditional principles of secondary liability have here over-ridden the ordinary principles of statutory construction.[238]

The courts have produced an anomalous result when aiding and abetting has been applied to a charge of manslaughter. Despite the courts' general insistence on the importance of *mens rea* in aiding and abetting, it is well-established that the aiding or abetting of an assault which happens to kill will

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[236] (1990) 57 CCC (3d) 97 (BCCA).

[237] *Supra*, note 101 at 373.

[238] *Ibid.*, at 374.

constitute aiding or abetting of the manslaughter. This is so, even though death was not contemplated.[239]

c. Parties to a common intention

Section 21(2) provides that:

> Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

This applies only in those cases where one of the parties has exceeded the common plan, and a "collateral crime" is committed.

The *actus reus* of section 21(2) is, first, the formation of the unlawful common intention and secondly, the commission of a further offence as a consequence of carrying out the unlawful common intention.

A person may attract liability under section 21(2) for any additional offence committed during the commission of the intended offence, and it is not necessary for the collateral offence to have been pre-planned or that the principal was pursuing precisely the same plan, as long as it is recognizable within the scope of the common purpose.

The *mens rea* under this provision consists of:

i. an intention in common to carry out an unlawful purpose and to assist each other therein, and

ii. knowledge that the commission of the collateral offence would be a probable consequence of carrying out the common purpose.

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239 *Clutte v. The Queen* [1985] SCR 216 at 229-230.

In *R. v. Logan*,[240] the Supreme Court of Canada struck down the "ought to have known" aspect of section 21(2), as implying an objective test for liability which violated section 7 of the *Charter*.

4. Counselling an offence

a. Counselling an offence that is committed

Section 22 imposes liability on one who counsels another person to be a party to an offence. If that other person is afterwards a party to that offence or to another offence that the counsellor knew was likely to be committed in consequence of the counselling, the counsellor is a party to that offence, notwithstanding that it was committed in a way different from that counselled.

Counselling includes procuring, soliciting and inciting. There is a clear overlap with section 21(1)(c), as both relate to encouragement. It is generally understood that encouragement given before the commission of an offence falls under section 22(1) as counselling, and encouragement occurring during the commission of an offence falls under section 21(1)(c) as abetting.

The *mens rea* requirement under section 22(2) for the initial counselling is simply the intention to counsel the offence. However, the courts are divided on this issue and have sometimes concluded that recklessness is sufficient.[241] The *mens rea* requirement for further consequent offences under section 22(2) can be satisfied by full intention, recklessness or objective negligence.

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[240] (1990) 58 CCC (3d) 391.

[241] *R. v. Kyling* [1970] SCR 953.

b. Counselling an offence that is not committed

Section 464 imposes liability on one who counsels another person to commit an indictable offence, where the offence is not committed.

A counsellor in such circumstances faces a less severe penalty (the same as for an attempt) because, since there is no criminal act committed by a principal party, the counsellor is not considered to be a secondary party.

5. Accessories after the fact

Section 23 imposes liability on one who, "knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape."

6. Abandonment by a party

The defence of abandonment is available to an accused charged under either section 21(1) or 21(2).[242] In *R. v. Whitehouse*, it was held that a mere mental change of intention and physical change of place will be insufficient to raise the defence of abandonment and to relieve a person from liability for a further, consequent offence under section 21(2):

> [T]here must be timely communication of the intention to abandon the common purpose from those who wish to disassociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case.[243]

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[242] *R. v. Kirkness* (1990) 60 CCC (3d) 97 (SCC).

[243] (1941) 15 CCC 65 (BCCA).

C. Recommendations for reform

The Task Force is in favour of retaining the present structure of section 21, rather than introducing the new concept of furthering a crime, as proposed by the Law Reform Commission. Having said that, several reforms are necessary.

1. Aiding

The *mens rea* of aiding should be specified as "knowing that it will aid", rather than doing something "for the purpose of aiding."

In the Task Force's view, requiring proof of purpose, approximating desire, is too high a test. "Knowing" should be enough to establish criminal liability; as used by the Task Force in defining the mental elements, knowledge requires proof that the accused was virtually certain that the conduct exists or will occur.

2. Encouraging

The Task Force is recommending that "abetting" be changed to the broader concept of "encouraging", and that it parallel section 21(1)(b) by applying to both acts and omissions.

"Encourages" would be much more readily understood by the public than would "abetting". Further, to be consistent with clause (b) and with the Task Force's general views on culpability, a person should be criminally liable for encouraging another to commit a crime only if he or she does the act with the intent of encouraging the other person.

3. Common intention

The Task Force recommends that section 21(2) be repealed. It is inconsistent with the principle underlying the Task Force's general approach to criminal liability, that people should be liable only for their own subjective fault.

4. Counselling an offence which is committed

As a consequence of re-drafting clause (c) as proposed above, section 22 of the present *Code* is unnecessary and should be repealed, for two reasons. First, "counselling" is caught by "encouraging". Second, section 22(2) is inconsistent with the Task Force's view that criminal liability should attach only where there is subjective fault.

5. Counselling an offence which is not committed

The Task Force recommends that section 464 be repealed, as liability will attach to a counsellor under clause (c), whether or not the offence is actually committed.

6. Accessory after the fact

The Task Force recommends that section 23 be repealed, and agrees with Stuart that:

> The offence is better considered along with offences relating to obstruction of justice. There is an argument for not continuing the notion of derivative responsibility which attaches the responsibility of the accessory after the fact and certainly its penalty to the liability of the principal.[244]

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[244] *Supra*, note 2 at 522.

PART VII: MULTIPLE CONVICTIONS

XXI. DOUBLE JEOPARDY

A. The Task Force's recommendation

The Task Force recommends that the new *Criminal Code* contain a provision to the following effect:

Multiple convictions

25. No person shall be convicted twice for the same delict.

B. Comment

"Double jeopardy" has several constituent parts:

1. Special pleas:
   a. *Autrefois acquit*;
   b. *Autrefois convict*; and
   c. Pardon;
2. Rule against multiple convictions referred to as the *Kineapple* principle;
3. Procedural unfairness involved in splitting the Crown's case; and
4. *Res judicata*; issue estoppel.

The Task Force examined these issues in some detail, but concluded that most of them were procedural in nature, and do not belong in the General Part of the new *Criminal Code*.

However, the Task Force does believe that there should be a general statement of the rule against double jeopardy in the General Part.

PART VIII: SUMMARY OF RECOMMENDATIONS

The Canadian Bar Association's Criminal Code Recodification Task Force recommends that the General Part of the new *Criminal Code* contain provisions to the following effect:

DECLARATION OF PURPOSE AND PRINCIPLES

WHEREAS the purpose of the criminal law is to ensure the protection and security of all members of Canadian society;

AND WHEREAS that purpose is fulfilled by setting standards which represent the limits of acceptable conduct and by proscribing culpable conduct which falls outside those limits;

AND WHEREAS the criminal law should be used in a manner which least interferes with the rights and freedoms of individuals;

AND WHEREAS the purpose of the *Criminal Code of Canada* is to set out the principles of the criminal law in a single document;

It is declared that the following principles will guide the interpretation and application of the *Criminal Code of Canada*:

(a) no one shall be criminally sanctioned unless that person has the requisite wrongful state of mind;

(b) the criminal law should only be resorted to when other means of social control are inadequate or inappropriate;

(c) persons who commit crimes must bear the responsibility for their actions;

(d) the criminal law is to be administered in a fair and dispassionate manner while recognizing the principles of tolerance, compassion and mercy that are integral values of Canadian society.

Principle of legality

1. No one is criminally liable for conduct that, at the time of its occurrence, was not an offence under this *Code* or under any other Act of the Parliament of Canada.

Criminal liability

2. Except where otherwise specifically provided, no one is criminally liable for an offence unless that person engages in the prohibited conduct, with the required blameworthy state of mind, in the absence of a lawful justification, excuse or other defence.

Prohibited conduct

3. Prohibited conduct consists of an act, omission or state of affairs committed or occurring in specified circumstances or with specified consequences.

Omissions

4. No one is liable for an omission unless:

(a) that person fails to perform a duty imposed by this Act, or

(b) the omission is itself defined as an offence by this Act.

Causation

5. (1) **A person causes a result when that person's acts or omissions significantly contribute to the result.**

(2) **A person may significantly contribute to a result even though that person's acts or omissions are not the sole cause or the main cause of the result.**

(3) **No one causes a result if an independent, intervening cause so overwhelms that person's acts or omissions as to render those acts or omissions as merely part of the history or setting for another independent, intervening cause to take effect.**

Conscious involuntary conduct

6. (1) **No one is liable for prohibited conduct which, although conscious, is involuntary.**

(2) **Prohibited conduct is involuntary if it was not within one's ability physically to control. Without limiting the generality of the foregoing, this includes:**

(a) **a spasm, twitch or reflex action,**

(b) **an act or movement physically caused by an external force, and**

(c) **an omission or failure to act as legally required due to physical impossibility.**

(3) **This section does not apply to conscious involuntary conduct due to provocation, rage, loss of temper, mental disorder, voluntary intoxication or automatism.**

(4) **If the involuntary prohibited conduct occurred because of a person's prior,**

voluntary blameworthy conduct, then that person may be held liable for that prior blameworthy conduct.

Automatism

7. (1) No one shall be convicted of an offence where the prohibited conduct occurred while that person was in a state of automatism.

(2) For the purposes of this section, automatism means unconscious, involuntary behaviour whereby a person, though capable of action, is not conscious of what he or she is doing, and includes unconscious, involuntary behaviour of a transient nature caused by external factors such as:

(a) a physical blow,

(b) a psychological blow from an extraordinary external event which might reasonably be expected to cause a dissociative state in an average, normal person,

(c) inhalation of toxic fumes, accidental poisoning or involuntary intoxication,

(d) sleepwalking,

(e) a stroke,

(f) hypoglycaemia,

(g) a flu or virus, and

(h) other similar factors.

(3) Subsection (1) does not apply to automatism which is caused by:

(a) mental disorder,

(b) voluntary intoxication, or

(c) fault as defined in subsection (5).

(4) For the purposes of this section, automatism is caused by mental disorder when the unconscious, involuntary behaviour arises primarily from an internal, subjective condition or weakness in the accused's own psychological, emotional or organic make-up, including dissociative states caused by the ordinary stresses and disappointments of life.

(5) Notwithstanding subsection (1), automatism is not a defence:

(a) to an intentional offence if a person voluntarily induces automatism with the intention of causing the prohibited conduct of that offence,

(b) to a knowledge offence if a person voluntarily induces automatism knowing that it is virtually certain that he or she will commit the prohibited conduct of that offence while in that state of automatism, or

(c) to a reckless offence if a person voluntarily induces automatism notwithstanding the fact that the person is aware of a risk that he or she will commit the prohibited conduct of that offence while in that state of automatism, and it is highly unreasonable to take that risk.

Mental elements of an offence

8. (1) For the purposes of criminal liability, the mental elements of an offence are:

(a) intent,

(b) knowledge, and

(c) recklessness.

Intent

(2) A person acts intentionally with respect to prohibited conduct when the person wants it to exist or occur.

Knowledge

(3) A person acts knowingly with respect to prohibited conduct when the person is virtually certain that it exists or will occur.

Recklessness

(4) A person acts recklessly with respect to prohibited conduct when, in the circumstances actually known to the person:

(a) the person is aware of a risk that his or her act or omission will result in the prohibited conduct, and

(b) it is highly unreasonable to take the risk.

Prescribed state of mind applies to all aspects of prohibited conduct

(5) When the law defining an offence prescribes the state of mind required for the commission of an offence, without distinguishing among aspects of the prohibited conduct, that state of mind shall apply to all aspects of the prohibited conduct of the offence, unless a contrary intent plainly appears.

Residual rule

(6) **Where the definition of a crime does not explicitly specify the requisite state of mind, it shall be interpreted as requiring proof of intent.**

(7) **Where the definition of a crime requires knowledge, a person may be liable if the person acts or omits to act intentionally or knowingly as to one or more aspects of the prohibited conduct in that definition.**

Greater culpability requirement satisfies lesser

(8) **Where the definition of a crime requires recklessness, a person may be liable if the person acts, or omits to act, intentionally or knowingly as to one or more aspects of the prohibited conduct in that definition.**

Mistaken belief in facts

9. **No person is liable for an offence committed through lack of knowledge which is due to mistake or ignorance as to the relevant circumstances; but where on the facts as the person believed them he or she would have committed an included offence, the person shall be liable for committing that included offence.**

Caution respecting belief

10. **A court or jury, in determining whether a person had a particular belief in a set of facts, shall have regard to all the evidence including, where appropriate, the presence or absence of reasonable grounds for having that belief.**

11. **No one is criminally liable for conduct if, through disease or mental disability, the person at the time:**

(a) **was incapable of appreciating the nature or consequences of such conduct, or**

(b) believed what he or she was doing was morally right, or

(c) was incapable of conforming to the requirements of the law.

Defence of the person

12. (1) Every person is justified in using, in self-defence or in the defence of another, such force as, in the circumstances as that person believes them to be, it is reasonable to use.

Excessive force

(2) A person who uses excessive force in self-defence or in the defence of another and thereby causes the death of another human being is not guilty of murder, but is guilty of manslaughter.

Defence of property

13. (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.

Necessity

14. (1) **No one is criminally responsible for acting to avoid harm to oneself or another person or to avoid immediate serious damage to property, if the danger which he or she knows or believes to exist is such that in all the circumstances (including any of his or her personal characteristics that affect its gravity) he or she cannot reasonably be expected to act otherwise.**

(2) **Clause (1) does not apply to anyone who has knowingly and without reasonable excuse exposed himself or herself to the danger.**

Duress

15. No one is liable for committing a crime in response to a threat of harm to oneself or another person if the threat is one which in all the circumstances (including any of his or her personal characteristics that affect its gravity) he or she cannot reasonably be expected to resist.

Intoxication

16. (1) **No person is liable for a crime for which, by reason of intoxication, the person fails to satisfy the culpability requirements specified by its definition.**

(2) **Clause (1) does not apply where the voluntary consumption of an intoxicant is a material element of the offence charged.**

(3) **Notwithstanding clause (1), a person charged with a Schedule 1 offence who would, but for voluntary intoxication, be found guilty of that offence shall instead be found guilty of the included offence of criminal intoxication.**

(4) A person found guilty under clause (3) is liable to the same punishment as if found guilty of an attempt to commit the offence charged.

Mistake of law

17. No one is liable for a crime committed by reason of mistake or ignorance of law:

a. concerning private or other civil rights relevant to that crime, or

b. resulting from:

i. ignorance of the existence of the law, where the law has not been published or otherwise reasonably made known to the public or persons likely to be affected by it,

ii. reasonable reliance on a judicial decision, or

iii. reasonable reliance on a statement by a judge, government official or person in authority.

Provocation

18. (1) An accused is provoked if, as a result of another's act or statement, the accused loses self-control where a person in the accused's situation, under the circumstances as the accused believes them to be, would lose self-control.

(2) An accused who, while provoked:

a. commits murder, shall be convicted of manslaughter, and

b. commits any offence included in the Schedule, shall be convicted of committing that offence under provocation, and shall be liable to half the penalty of the offence charged.

Trivial violations

19. Where the Crown has proved all the essential elements of an offence the Court may, before a finding of guilt is entered, stay the proceedings against the accused with respect to that offence, where the accused satisfies the Court on the balance of probabilities that, having regard to the nature of the conduct and all the attendant circumstances, the violation was too trivial to warrant a finding of guilt, the entering of a conviction or the imposition of a criminal sanction.

Entrapment

20. (1) Where:

a. the trier of fact is satisfied that the Crown has proved beyond a reasonable doubt all the essential elements of an offence, and

b. the Court is satisfied that the accused has established, on the balance of probabilities, that he or she was entrapped into committing that offence,

the Court shall stay the proceedings against the accused respecting that offence.

(2) Without limiting the generality of subsection (1), entrapment includes committing an offence when the authorities:

a. not having a reasonable suspicion that the accused is already engaged in that particular criminal activity, or 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, provide the accused with the opportunity to commit that offence; or

b. having a reasonable suspicion that the accused is already engaged in that particular criminal activity, or 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, go beyond providing an opportunity and induce the accused to commit that offence.

Common law defences

21. No defence, justification or excuse shall be unavailable unless expressly prohibited by this *Code*.

Attempts

22. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out that intention is guilty of an attempt to commit the offence, even if it was factually or legally impossible under the circumstances to commit the offence.

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

(3) Except where otherwise expressly provided by law, every one who aids or encourages another person to commit an offence is, if that offence is not committed, guilty of an attempt to commit that offence.

Conspiracy

23. (1) **Every one is liable for conspiracy who agrees with another person, whether or not they are married to each other, to commit a *Criminal Code* offence which is indictable or which may be proceeded with by indictment.**

(2) **A person does not conspire unless he or she intends to commit an offence described in clause (1).**

(3) **A person who abandons a conspiracy to commit an offence described in clause (1), before that offence is attempted or committed, is not liable for the conspiracy.**

(4) **In determining whether a person abandoned a conspiracy the Court shall consider all relevant circumstances, including whether the person communicated his or her desistance to the other conspirators or to the authorities, or both.**

(5) **Every one who conspires to commit an offence described in clause (1) is liable, even if it was factually or legally impossible under the circumstances to commit the offence.**

(6) **Subject to diplomatic and other immunity under law, this *Code* applies to, and the Courts have jurisdiction over:**

a. conduct engaged in outside Canada which constitutes a conspiracy to commit a crime in Canada, where the conduct took place on the high seas or in a state where the crime in question is also a crime in that state, and

b. conduct engaged in inside Canada which constitutes a conspiracy to commit a crime outside Canada if the crime in question is a crime in Canada and in the place where the crime is to be committed.

Parties

24. Every one is a party to and guilty of an offence who:

a. actually commits it,

b. does or omits to do anything knowing that it will aid any person to commit it, or

c. does or omits to do anything with the intent of encouraging any person to commit it.

Multiple convictions

25. No person shall be convicted twice for the same delict.

ANNEX "A"

LIST OF DISCUSSION PAPERS

The Task Force commissioned the following discussion papers:

1. Actus Reus and Automatism, by Gerry Ferguson; February 1992.

2. The Fault Element, by Gil D. McKinnon; April 1991.

3. Mistake of Fact, by Gil D. McKinnon; May 1991.

4. Defence of the Person, by Keith R. Hamilton; March 1991.

5. Defence of Property, by John Williams; February 1992.

6. Necessity, by Sharon Samuels and Gil D. McKinnon; December 1991.

7. Drunkenness, by Keith R. Hamilton; August 1991.

8. Mental Disorder, by Gil D. McKinnon; June 1992.

9. Mistake of Law, by Sharon Samuels and Gil D. McKinnon; December 1991.

10. The Excuse of Duress, by George K. Bryce; December 1991.

11. De Minimis Non Curat Lex, by Keith R. Hamilton; December 1991.

12. Entrapment, by Manitoba Working Group; November 1991.

13. Criminal Attempts, by Keith R. Hamilton; February 1992.

14. Conspiracy, by Sharon Samuels and Gil D. McKinnon; March 1992.

15. Parties, by Sharon Samuels and Gil D. McKinnon; February 1992.

16. Common Law Defences, by Gerry Ferguson, March 1992.

17. Double Jeopardy, by Clyde Bond, May 1992.