INTRODUCTION

This is a short commentary on the "White Paper" released by the then Minister of Justice of Canada on Monday, June 28, 1993 entitled "Proposals to amend the Criminal Code (general principles)". In fact, that document contains detailed draft legislation which would, if enacted, for the first time in history provide the Canadian Criminal Code with a relatively comprehensive "General Part". As traditionally understood the "general part" of criminal law establishes principles applicable to the definitional elements of criminal offences and to defences of general application to all offences. As its title indicates, this commentary is focused on those aspects of the White Paper which deal with the "actus reus" of offences, the voluntariness requirement, and the defence of "automatism". However, these particular aspects of the White Paper cannot be addressed without some comment on the way in which the draft legislation would structure the elements of offences in relation to general defences.

I ELEMENT ANALYSIS AND THE STRUCTURE OF THE GENERAL PART

The White Paper's proposed additions in what would become sections 12.1 through 12.7 of the Criminal Code provide statutory principles for the analysis and interpretation of the external elements (actus reus) and fault elements (mens rea) of criminal offences. The approach taken in these proposed sections represents a dramatic improvement over the present law. The external elements of offences are defined in proposed section 12.1 as conduct (in the

form of an act or omission), circumstances, and consequences. The fault elements of criminal offences are given comprehensive residual definition in relation to knowledge (section 12.3), intention (section 12.4), recklessness (section 12.5), criminal negligence (section 12.6), and negligence (section 12.7). While there are problems with the negligence standard which are beyond the scope of this commentary, it is important to emphasize that the overall approach of identifying the external and fault elements of offences in this precise manner will make for simpler and more accurate charges to juries, and will enable greater consistency and clarity where interpretive or constitutional issues are taken on appeal. More importantly, as the Supreme Court of Canada is frequently recognizing the need for symmetry between external and fault elements of offences,[1] the proposals provide a mechanism for marrying the symmetry principle with the flexibility of mixed fault level offences.[2] In all this, the proposed legislation should allow for an "element analysis" whereby external elements relate clearly to individual fault elements, rather than perpetuating the archaic and confusing "offence analysis" whereby courts have had a tendency to refer to a monolithic and undifferentiated "mens rea"

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[1]See R v. Creighton (1993) 83 C.C.C. (3d) 346 (S.C.C.) esp. per MacLachlin J. at p. 378; R. v. Theroux (1993), 79 C.C.C. (3d) 449 (S.C.C.) per MacLachlin, J. at p. 458; and R. v. Kelly (1992), 73 C.C.C. (3d) 385 (S.C.C.) per Cory and MacLachlin, J. But see the curious departure from this principle in R. v. DeSousa (1992), 15 C.R. (4th) 66 (S.C.C.) per Sopinka, J.

[2]For examples of mixed fault level offences see Nova Scotia Pharmaceuticals v. The Queen (1992), 15 C.R. (4th) 1 (S.C.C.) and R. v. L. (S.R.) (1992), 16 C.R. (4th) 311 (Ont. C.A.).

for "the offence".[3]

I have argued elsewhere that it is helpful to analyze general defences under three headings: justifications, excuses and non-exculpatory defences.[4] However, it also appears that there is sufficient doctrinal confusion among courts and commentators over the concepts involved[5] that it would be inopportune to lock the terms into rigid statutory language at this time. The White Paper's proposed draft would not do so. Defences of the person (proposed section 37) or defence of property (proposed section 38) can still be conceptualized as justifications, though not using the word, since the person claiming such justifications is described as "... not guilty of an offence ot the extent that ...", and there follows a statement of the relevant justifying circumstances. Similarly, the same general language of "is not guilty of an offence ... to the extent that ..." can allow the defence of duress (proposed section 36) to be conceptualized as an excuse. The defence of

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[3]On element analysis in the Canadian context, see Bruce P. Archibald, "Rehabilitating the Criminal Code: Rational and Constitutional Construction of the Elements of Offences" in R. Peck and J. Wood (eds) 100 Years of the Criminal Code in Canada. In the American context see Paul H. Robinson, "Criminal Law Defences: A Systematic Analysis" (1982), 82 Col. L. Rev. 199 or his Criminal Law Defences, West Publishing, St. Paul, 1984 (2 vols.).

[4]Bruce P. Archibald, "the Constitutionalization of the General Part of Criminal Law" (1988), 68 Can. Bar Rev. 403. See also, Paul H. Robinson, ibid.

[5]See the Supreme Court of Canada's problematic classification of necessity as an excuse in Perka v. R. (1984), 42 C.R. (3d) 113, and its questionable reference to the insanity defence as an "exemption" in R. v. Chaulk (1990), 2 C.R. (4th) 1 (S.C.C.). For a critique of Eric Colvin's approach to these issues see Bruce P. Archibald, "Review of Principles of Criminal Law by Eric Colvin", (1993) 3 Criminal Law Forum 525.

entrapment, however, is clearly conceptualized as a non-exculpatory defence (proposed section 39) with the far-reaching procedural consequences of the two stage trial, reversed burden of proof and stay of proceedings approved of in R. v. Mack.[6] In my view this approach is, for the reasons identified in the Mack decision, entirely defensible. Overall, the organization of the external and fault elements in relation to general defences ought to allow for flexible and creative doctrinal development.

For the narrower purposes of this commentary, it may be apposite to point out here that the issues surrounding the "voluntariness requirement" for conduct and the defence of "automatism" are problematic for the structure of the general part in that they have tended to blur distinctions between external elements (conduct), fault elements, and excuses. The voluntariness requirement, attached as it has traditionally been to conduct (and as is proposed in draft section 12.1(2)), introduces a "fault" aspect to an external element rather than rigidly separating conduct and fault. Moreover, to the extent that the defence of automatism has been said to rest on the voluntariness principles[7] it blurs the distinction between defences based on a "failure of proof" of the external element (conduct) and "excuses" concerned with mental disorder or mental disturbances such as insanity and intoxication. The manner in which these doctrinal controversies are

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[6] R. v. Mack (1988), 67 C.R. (3d) 1 (S.C.C.).

[7] See R. v. Rabey (1980), 15 C.R. (3d) 225 (S.C.C.) or R. v. K. [1971] 2 O.R. 401, 3 C.C.C. (2d) 84 (Ont. C.A.).

resolved can raise significant and substantial issues of "justice and fairness". On the other hand, the precise nature of the legal solution adopted may sometimes involve neutral or technical policy choices among equally rational doctrinal approaches which have similar criminal justice policy objectives. The remainder of this commentary will attempt to address issues in relation to voluntariness and automatism at both substantive and technical levels.

II THE VOLUNTARINESS REQUIREMENT FOR THE CONDUCT ELEMENT

The White Paper's proposal on voluntariness is disarmingly simple. The proposed section 12.1(2) would read:

> "No person commits an offence unless that person commits the act or makes the omission voluntarily".

This proposition can be seen simply as a codification of a well recognized common law principle that is unjust to punish someone for conduct over which he or she had no control. However, it is not clear on the face of the section to what extent all related common law rules would fall under its rubric. Two commonly recognized "voluntariness-related" defences come to mind as relevant for analysis here (other than automatism which will be discussed in the next section of this commentary). These two are: (a) physical compulsion and/or physical impossibility, and (b) involuntary intoxication.

Common law courts have, in rare instances, recognized physical

compulsion[8] or physical inability to comply with the requirements of the law[9] as being defences. In doing so they have relied on the common law principle enunciated above. The Law Reform Commission of Canada would have codified such a defence in explicit terms,[10] and as such would have clarified the defence, and its existence, on the point. It may be that the defence is of such rare use that the White Paper's rule on voluntariness would be a sufficient means to incorporate it into the statutory general part. Or it may be that the matter could be left to the common law under Criminal Code section 8(3). However, if comprehensiveness is a goal of the White Paper, it could be included as a separate rule.

Involuntary intoxication has long been thought recognized as a complete defence to a crime in Canada based on the voluntariness principle.[11] The unknowing and faultless ingestion of an intoxicant to an extent rendering conduct involuntary is classified doctrinally in a completely different category from the complex rules on voluntary intoxication as a defence.[12] This doctrinal

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[8] R. v. Lucki (1955), 17 W.W.R. 446 (Sask. Police Court). The case involved a charge of driving on the wrong side of the road when it was "impossible" to do otherwise because of "black ice". The courts reasoning is not entirely clear on the voluntariness point. Also Hill v. Baxter [1958] 1 Q.B. 227.

[9] Kilbride v. Lake, [1962] N.Z.L.R. 590 (S.C.) is usually cited as a leading authority. Of course, R. v. Larsonneur (1933), 24 Cr. App. R. 774 (C.C.A.) causes problems.

[10] Law Reform Commission of Canada, Report #34 Recodifying Criminal Law (Revised and Enlarged edition), Ottawa, 1988, at p. 29.

[11] R. v. King, [1962] S.C.R. 746.

[12] R. v. Bernard (1988), 67 C.R. (3d) 113 (S.C.C.).

bifurcation is presumably continued by the White Paper's draft. Complex rules relating to voluntary intoxication would be codified in draft section 35. However, the treatment of involuntary intoxication is covered by oblique reference only. Draft section 35(3) says "Nothing in this section shall be construed as affecting the operation of section 16 or 16.1". The intention here may be to have alcohol related diseases like delirium tremens treated as mental disorder and involuntary intoxication treated as automatism. Given the residual stigma which may attach to treating automatism and mental disorder in an identical fashion as done in the White Paper draft (see infra), there might be attempts by the defence counsel to bring involuntary intoxication under the "voluntariness rule" (section 12.1(2)) rather than the "automatism rule" (section 16.1). If this result is not desired, it would be well to state explicitly in the proposed section 35(3), or an equivalent, that intoxication which is not self-induced falls under the rubric of automatism if it renders conduct involuntary.

Before moving to a consideration of the automatism defence, two concluding remarks about the importance of the proposed section 12.1(2) "voluntariness rule" are in order. First, the explicit inclusion of the rule in relation to the conduct requirements would seem to assure the continuation of the idea that "voluntariness" goes to "conduct" not "fault", and therefore provides a defence even to so-called "absolute liability offences". While the Criminal Code ought not to contain any such offences, several of the sections in the proposed draft (though not section 12.1) are made

applicable to "this Act or any other Act of Parliament". Maintaining the "voluntariness rule" in these other "non-criminal" areas is of critical importance to the fairness of our justice system. Second, by ensuring that voluntariness is linked to an external element of offence definition, the persuasive burden to prove the voluntariness of the conduct beyond a reasonable doubt would undoubtedly fall by virtue of the application of general principles upon the Crown.[13]

In summary, the principle expressed in the voluntariness requirement of proposed section 12.1(2) is an important one. While the present draft effectively conveys the general policy by codifying the common law principle, certain issues as noted above ought to be considered in relation to physical impossibility/compulsion and involuntary intoxication.

III AUTOMATISM AS A "MENTAL DISTURBANCE" EXCUSE

In relation to the defence of automatism the White Paper proposes significant changes to the present law not so much in relation to the definition and application of automatism in proposed Criminal Code section 16.1(1) and (2), but rather in the reversed burden of proof in Section 16.1(3) and the dispositional provisions of proposed sections 672.96 to 672.99 which would treat automatism in a manner parallel to mental disorder. [As an aside at this juncture, I believe that proposed section 16.1(2) strikes the

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[13] R. v. Berger (1975), 27 C.C.C. (2d) 357 at 379 leave to appeal to S.C.C. refused at 27 C.C.C. (2d) 357; and R. v. Whyte (1988), 64 C.R. (3d) 123 (S.C.C.) at p. 136.

correct balance by providing a general definition of automatism, rather than going for the verbose and inelegant option of listing non-exhaustive examples of conditions which might constitute automatism. Surely it is the unconscious or involuntary behaviour which must be the principle here].

As the law presently stands, approaches to automatism vacillate between those which emphasize an external cause leading to a mental disturbance resulting in unconscious and uncontrollable behaviour[14] (thus excluding mental disorder based on a "disease of the mind with its concomitant treatment",[15] and those which emphasize that automatism is involuntary behaviour of a transient nature which represents no continuing danger and requires no treatment.[16] Both variants may be seen as leading to similar results in that a finding of automatism precludes a finding of mental disorder,[17] and unlike the defence of "not guilty by reason of mental disorder" results in a complete acquittal rather than the likelihood of a treatment oriented disposition pursuant to Criminal Code section 672.54. Moreover, the burden is on the Crown to disprove automatism beyond a reasonable doubt once the accused has met an evidential burden in the issue.

The White Paper proposals on automatism seemingly assume that

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[14] R. v. Rabey (1980, 54 C.C.C (2d) 1 (S.C.C.) per Ritche, J. for the majority of the court.

[15] See the definition in Cooper v. R. (1979), 13 C.R. (3d) 97 (S.C.C.).

[16] R. v. Rabey, supra footnote 18, per Dickson, J. in dissent.

[17] R. v. Parks (1992), 75 C.C.C. (3d) 287 (S.C.C.).

as a result of the new dispositional provisions relating to mental disorder, the traditional dispositional and procedural dichotomy between automatism and mental disorder can be abandoned. The 1991 mental disorder provisions of the Criminal Code[18] purport to reduce the stigma attached to a verdict of not criminally responsible by reason of mental disorder, and remove the mandatory and indefinite incarceration in a treatment facility by replacing it with reviewable judicial and/or administrative discretionary dispositions. On this basis the draft section 16.1(1) would codify an automatism defence (separate from the voluntariness rule simpliciter), place a burden of proof on a balance of probabilities on accused (or Crown) raising the issue (like mental disorder), create a new special verdict of "not criminally responsible on account of automatism", and accord the trial court discretionary authority to make, inter alia, a hospital custody order.

This proposed approach, with parallel provisions for automatism and mental disorder, appropriately recognizes that both constitute excuses centred on a mental disability, whether transient or permanent. This approach also severs the direct doctrinal link between the automatism defence and the "voluntariness principle" which would be restricted to the matters discussed earlier. Whether it is advisable depends upon, firstly, how one assesses the nature of the disabilities giving rise to claims of automatism, and secondly how one rates the success of the new mental disorder provisions. Each of these issues will be

[18]Criminal Code, Part XX.I, sections 672.1 to 672.95.

discussed in turn.

As to the nature of the disabilities, the commonly cited factual sources for successful automatism claims under the present law relate to physical blows, extraordinary psychological blows, involuntary intoxication, sleepwalking, strokes, hypoglycaemia, and physical illnesses. While some of these sources are clearly transitory and not susceptible to treatment, others might be thought to be potentially recurring conditions (even if not diseases of the mind) which could cause dangerous behaviour on subsequent occasions and ought to be treated. Sleepwalking is a case in point where the Supreme Court recently found this sleep disorder not to be a disease of the mind, but rather "normal" phenomenon.[19] However, the court split over whether a treatment order would be appropriate to "protect the public" where the accused had killed someone in his sleep, and where "sleep hygiene" techniques could reduce the, admittedly unlikely, recurrence of the accused's sleepwalking problems. At that point the Court had as tools only the automatism defence and an awkward proposal to use "peace bonds" under Code section 810 as a treatment order. The majority correctly held this might be an unconstitutional distortion of the peace bond procedures,[20] however, the White Paper proposals would give the courts the statutory procedures which they lacked in R. v. Parks.

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[19] R. v. Parks, supra, footnote 22.

[20] Only Lamer, C.J.C. held out for the use of the treatment order idea.

This solution from the White Paper seems attractive. Public fears of "marauding sleepwalkers" however irrational they might be, can be publicly placated by the reassurance that the automatism defence leads not to an automatic acquittals, but to a treatment order (conditional discharge or hospital custody) where that is deemed appropriate in the eyes of the trial court or the mental disorder review board. But at what cost to an accused this protection of the public? Will this procedure widen the net and lead to unnecessary restrictions on the liberty of persons who, while posing no actual threat to the public, have committed offences which lead courts not to discharge absolutely out of concern for the public reaction? Would the review provisions be adequate to correct any such errors? Would those not released absolutely following upon a verdict of "not criminally responsibly by reason of automatism" find the "stigma" of "mental disorder" attaching to them? If it did, would such a stigma be an unduly harsh or debilitating one?

On balance, I find the White Paper's assumptions in relation to the above questions to be sensible. The days of the mandatory L.G.W. are over. A discretionary treatment possibility in relation to causes of automatism which merit it, though not technical being "diseases of the mind", will be helpful in those circumstances. Courts regularly make those kinds of judgements in sentencing, and given proper standards for the exercise of the initial discretion and subsequent review, injustice can, for the most part, be avoided or corrected. There are some disquieting aspects to this last

statement, however. Some courts appear willing to give a restrictive interpretation to the "least onerous disposition" principle in relation to section 672.54 when dealing with mental disorder.[21] If wording in relation to the special automatism verdict led to the same approach, the impact on the liberty of the subject might not be justifiable. In this regard, the proposed wording of section 672.98 gives pause. Subsection (a) should be re-worded to require absolute discharge unless the accused is proved to be a significant threat to the safety of the public. Finally, what is the appropriate duration of such an order? Some reasonable limit must be imposed in the interests of the liberty of the subject.

In summary on the automatism proposals, I conclude that changes to the present law in the provisions is justifiable, although potentially controversial, particularly among committed advocates in the defence bar. Automatism is properly regarded as a mental disability based excuse, and a discretion to structure treatment conditions or, in extreme circumstances, require hospital custody is warranted to protect the public from proved risk of damage. However, greater care must be taken in wording the "least onerous" treatment alternative as described earlier.

IV GENERAL CONCLUSIONS

While outside the strict ambit of the stated objectives of

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[21] See Orlowski et. al. v. A.G.B.C. et. al. (1992), 75 C.C.C. (3d) 138 (B.C.C.A.).

this commentary, I think it important to state in conclusion that these proposals to codify a general part in our Criminal Code are the best effort in Canada to date. Clearly the drafters have studied many of the problems raised by previous work, such as that of the Law Reform Commission of Canada and that of the Canadian Bar Association Task Force. I do not agree with all of the White Paper proposals, and welcome the opportunity to provide constructive criticism. However, I believe it important for the Government to accept the fact that there will never be a complete consensus in relation to all the sensitive policy and technical issues raised by the codification of the General Part of criminal law. My advice is to refine these present proposals and then get them before Parliament in a non-partisan, all-party, co-operative procedure if that is at all possible. Canadian tax payers have paid millions of dollars in this Criminal Code reform process. The results are excellent. They deserve to be brought into effect. Let's get on with it.