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Report of the Working Group on Chapter 2 of the Law Reform Commission of Canada Report 30 "Recodifying Criminal Law Volume I"

January 1988

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Report of the Working Group on Chapter 2, "Principles of Liability", of the Law Reform Commission's Report 30 "Recodifying Criminal Law Volume I"

Introduction

This is the report of the Working Group on chapter 2 of the LRC Report 30, Recodifying Criminal Law - Volume I, to the Federal-Provincial Coordination Committee of Senior Officials.

Members. The Working Group was chaired by Mr. Howard F. Morton, Q.C., Director, Criminal Law Policy, Crown Law Office - Criminal, Ontario Ministry of the Attorney General and Mr. Jean-François Dionne, Chief Crown Attorney, Director of Criminal Matters, Quebec Department of Justice.

The other members of the Working Group were Mrs. Linda Garber, Solicitor, Nova Scotia Department of the Attorney General; François Lareau, Counsel, Criminal Law Review, Department of Justice Canada who acted as secretary; Mr. James Blacklock, Senior Counsel, Crown Law Office - Criminal, Ontario Ministry of the Attorney General; Mr. D. M. Brown, Assistant Director, Public Prosecutions, Saskatchewan Department of Justice; Mr. Yaroslaw Roslak, Q.C., formerly Director, Appeals, Research and Special Projects, Alberta Department of the Attorney General; and Mr. Robert A. Mulligan, Crown Counsel, Criminal Justice Branch, British Columbia Ministry of the Attorney General.

Mrs. Garber of Nova Scotia attended only the first meeting and was not replaced at subsequent meetings. Mr. Yaroslaw Roslak, Q.C. was appointed to the Court of Queen's Bench of Alberta on December 18, 1987, and took no part in the work of the Group after that date.

Other participants. Other individuals who attended one or more of the working sessions and took an active part in the discussions were: Mr. E. A. Tollefson Q.C., Coordinator, Criminal Law Review, Department of Justice Canada; Mr. D. K. Piragoff, Senior Counsel, Criminal Law Policy Section, Department of Justice Canada; and Mr. Daniel Grégoire, Directorate of Criminal and Penal Matters, Quebec Department of Justice. Finally, individuals who have written papers for the Working Committee are Messrs. Bruce Duncan, Rick Libman and John C. Pearson, Crown Law Office - Criminal, Ontario Ministry of the Attorney General, Mr. Michael Watson, Appellate Counsel, Appeals, Research and Special Projects, Alberta Department of the Attorney General and Mr. Daniel Grégoire, Directorate of Criminal and Penal Matters, Quebec Department of Justice.

Mandate. The mandate of the Coordination Committee of Senior Officials was vague. The members decided that their primary task was to evaluate the LRC recommendations and that their secondary task was to find elements of solution.

Time constraints. The time constraint imposed on the Working Group to complete an appropriate mandate was insufficient. Of necessity, the vast majority of the members' time was devoted to a consideration of the merit or lack thereof of the LRC recommendations. While the members are of the view that they were able to fairly assess the LRC proposals, they would have preferred to have had additional time to thoroughly consider various alternatives to those proposals.

Meetings. The members met on five occasions (June 29-30, September 10-11, September 28-29, October 14-15, and November 16-17) and had discussions for a total of about 55 hours.

Documents. The documents forwarded to the members before the first meeting and the documents prepared by the members or on their behalf are listed at Appendix A to this report. They have been put together in a cerlox binder that accompanies this report.

Minutes. The minutes of the first four meetings have been completed. The minutes of the last meeting still needs to be reviewed and completed. Eventually, they will be completed and all the minutes will be gathered together.

Disclaimer. The opinions expressed in this report are those of the individual members, and are not to be taken as representing official positions of the Government of Canada or any province, or of the federal Minister of Justice or Department of Justice, or any provincial minister or ministry responsible for criminal justice.

Limitation to the Criminal Code. By virtue of LRC clause 1(4), application in law, the General Part is meant to apply to all offences found in an "Act of the Parliament of Canada" for which a person could be sentenced to a term of imprisonment. The members limited their discussions on chapter 2 of the Report to some of the LRC crimes found in the Special Part of the Report and to the Criminal Code.

Lack of appropriate comments. The members' task in trying to understand and appreciate the LRC clauses was rendered more difficult by the paucity of their comment. For example, the LRC comment at p. 17 of the Report on the important clause 2(3)(d),

medical treatment exception, merely repeats the recommendation.

Differences in the versions. The members point out that the corresponding draft legislative provisions of Appendix A sometimes modify the legal concepts enunciated in the recommendations. Also, the French and English versions often have differences that rendered the intention of the LRC difficult to ascertain.

Methodology followed in our analysis. For each clause analysed, we have tried to adhere to a set pattern. First, we have set out the LRC proposals as reflected in the recommendation and in the corresponding legislative draft provision of Appendix A to the Report. Second, we have looked at the existing law on the clause concerned by a) setting out the corresponding Criminal Code provisions; b) where relevant, setting out the relevant Canadian Charter of Rights and Freedoms provisions; and c) analysing briefly the subject matter according to case law and textbooks. The third part of our analysis for each clause is our comments on the proposals. It consists of a) our position on the clause under the study and the points in issue; b) our thinking on codifying the matter under study; and c) our recommendations.

Our philosophy. In our view, the provisions dealing with the principles of liability of a General Part should be workable, just, simple, clear, and avoid unnecessary provisions.

Summary of our analysis. In summary, we have rejected all LRC clauses (except for the duties listed in clause 2(3)(c), where we have recommended that their formulation be studied and reviewed in light of our comments) and, where necessary, have offered solutions or elements of solutions.

Clause 2(1) Principle of Legality

1. LRC Proposals

a. Recommendation

> **2(1) Principle of legality. No one is liable except for conduct defined at the time of its occurrence as a crime by this Code or by some other Act of the Parliament of Canada.**
>
> [p. 14 of the Report]

b. Appendix A Provision (Draft Legislation)

> **3. [Principle of legality and non-retroactivity] No person shall be found guilty of a crime for conduct that, at the time of the conduct, was not defined by this Code or another Act of Parliament to be a crime.**
>
> [p. 98 of the Report]

2. Existing Law

a. Criminal Code Provisions

> **5.(1) [Presumption of innocence] Where an enactment creates an offence and authorizes a punishment to be imposed in respect thereof...**
>
> **(b) a person who is convicted or discharged under s.662.1 of the offence is not liable to any punishment in respect thereof other than the punishment prescribed by this Act or by the enactment that creates the offence.**
>
> **6.(1.91) [Jurisdiction: war crimes and crimes against humanity] Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,**
>
> **(a) at the time of the act or omission,**
>
> **(i) that person is a Canadian citizen or is employed by Canada in a civilian or military**

capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada, and subsequent to the time of the act or omission the person is present in Canada.

8. [Criminal offences to be under law of Canada] Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under s.662.1

(a) of an offence at common law,

(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before the 1st day of April 1955, to impose punishment for contempt of court.

The principle nullum crimen nulla poena sine lege, there is no crime nor punishment except in accordance with law, is articulated in two sections of the Criminal Code. Section 5 covers the legality of the sentence and section 8, the legality of the charge. Section 6.(9.1) of the Criminal Code, the provision dealing with jurisdiction for war crimes and crimes against humanity, came into force on September 16, 1987 which date is subsequent to the December 3, 1986 tabling in the House of Commons of the LRC's Report 30.

b. Canadian Charter of Rights and Freedoms

> **11. [Proceedings in criminal and penal matters] Any person charged with an offence has the right**
>
> **(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; ...**
>
> **(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.**

Sections 11(g) and (i) enshrine the principle of legality. In Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1982), Mr. Chevrette states at p. 329:

> As pointed out during the debates of the Joint Committee on the Committee on the Constitution, s.11(g) does not exclude the necessity for an empowering statutory provision before Canada can prosecute war criminals. Its effect is simply to remove any constitutional impediment to the enactment of the necessary provision, provided that the act or omission in question was at the relevant time prohibited by the municipal law of Canada, by international law or by generally recognized principles of law.

3. Comments on Proposals

a. Position and Points in Issue

Position of the members on c.2(1). The members unanimously disapprove clause 2(1) for the following reasons:

1) The word "conduct". The members agree that there is confusion in the use of the word "conduct" in chapter 2. The word "conduct" in clause 2(1) includes both the actus reus, the physical element of a crime, and the mens rea, the mental element of a crime. The word "conduct" in clause 2(2) refers only to the actus reus as opposed to the mens rea. The heading "conduct" in clause 2(3) refers to an act or omission. The word "conduct" in clause 2(4)(a) refers to the objective essential element of a crime

known as "conduct" which excludes "circumstances" or "consequences". One member suggests that the word "conduct" in clause 2(4)(a) has the same meaning as in clause 2(3), namely "act or omission". Finally, the word "conduct" in the comments to clause 2(4) refers to the "initiating act". Also, one member raised the issue if the word "conduct" would cover status crimes like s. 193(2)(b), being found in a common bawdy-house.

2) The word "defined" and the issue of sufficiency. Some members are concerned with the use of the word "defined" in the recommendation as the requirement that conduct be "defined" may lead to arguments about the sufficiency of general terms used in the prescribed elements of crimes set out in the Special Part. In other words, if a crime is not precisely defined, it could be argued in a motion to quash that the crime is void for vagueness. In this connection, the offence of fraud in s.338(1) of the Criminal Code was given as an example where the courts have expanded on the definition of fraud. It was also pointed out by some members that s.11(g) of the Charter does not require that the unlawful conduct be defined but rather that the "act or omission ... constituted an offence". Associated with the use of the word "defined" is the issue of defining or codifying contempt of court which is dealt with below.

3) The words "defined" and the issue of "some other Act of the Parliament of Canada". By virtue of clause 1(4), "application in law", the General Part was meant to apply to all offences found in an "Act of the Parliament of Canada" for which a person could be sentenced to a term of imprisonment. The members of the Committee did not have the time to consider federal statutes other than the Criminal Code. It was pointed out during a meeting that many contraventions of federal statutes are not defined as offences but constitute offences by virtue of s.115 of the Criminal Code, the offence of disobeying a statute. It was also pointed out during a meeting that offences could be created and defined by regulations as opposed by an "Act" but that "Act of the Parliament of Canada" might in the future be defined as to include regulations.

4) LRC clause 2(1), s.11(g) of the Charter and s.8 of the Criminal Code. The members point out that clause 2(1) would limit Parliament to a greater extent than s.11(g) of the Charter because the LRC clause does not permit the creation of crimes that could be created by virtue of the following terminology of s.11(g) of the Charter: "unless, at the time of the act or omission, it constituted an offence under ... international law or was criminal according to the general principles of law recognized by the community of nations". Some members are against clause 2(1) because of this limitation on Parliament. Some members are of the view that the recent amendments to the Criminal Code to deal with war criminals would have run counter to clause 2(1). [The members

do not know what the LRC would say about "International Crimes" which are to be dealt with in Volume 2 of the Draft Code.] The members point out that while s.11(g) of the Charter is subject to s.1 of the Charter, i.e. "to such reasonable limits prescribed by law as can be demonstrated justified in a free and democratic society", clause 2(1) is not subject to any exceptions. A research paper (Document 10 at Appendix A) was prepared by one of the members comparing clause 2(1) of the LRC Draft Code, s.8 of the Criminal Code and s.11(g) of the Charter. That paper concludes that clause 2(1) and s.8 of the Criminal Code preclude the prosecution of any offence not in existence at the time the conduct was committed and also preclude the prosecution of any offence not created by Parliament, but that clause 2(1) goes further than s.8 by eliminating the common law offence of contempt (to be discussed below) and prohibiting convictions for offences retroactive in application. The paper concludes that clause 2(1) in relation to s.11(g) of the Charter, "effectively prevents the federal government from using the power reserved to it in s.11(g) of the Charter of Rights." This is the point discussed at the beginning of this paragraph.

b. Codification

Should the principle of legality be codified? All the members are in favour of the principle of legality. The real issue is whether a new Code should articulate a principle of legality, given s.11(g) of the Charter.

The stumbling block of contempt of court. It was agreed early in the discussions that clause 2(1), if enacted, would require that the present offence of contempt of court be defined. While section 8 of the Criminal Code abolished common law offences, it preserved the courts' power and jurisdiction to punish for contempt of court. The "offence" of contempt of court is not defined in the Criminal Code. S.11(g) of the Charter does not require that offences be defined as it only requires that the act or omission "constituted an offence"; in view of this, it was further agreed that if contempt of court was codified, that this codification would be a further reason militating in favour of the uselessness of clause 2(1), given s.11(g) of the Charter.

Papers on criminal contempt. Document 10 at Appendix A (see supra) says in passing that the 1955 reformers did not codify contempt possibly because of "a perceived difficulty in adequately codifying contempt of court coupled with the desire to leave the courts as much flexibility as possible in such matters." Two papers were prepared by members of the committee specifically on contempt of court. The purpose of both papers was to ascertain the reason why contempt of court had not been codified. One paper (Document 9 at Appendix A) concludes that apart from [Translation]

"certain indications that the courts have exerted very great pressure over the years to retain powers they describe as 'administrative'", no reason had been found why an attempt for codification had not been undertaken until 1984. In 1984, Bill C-19 gave effect to certain recommendations of the Law Reform Commission regarding codification of contempt but died on the order paper. The Judicial Council reacted to Bill C-19 by forming a committee which produced a working paper in 1986. The Court's working paper favours maintaining the status quo and sets out the reasons why the contempt provisions in Bill C-19 would interfere with the effective administration of justice. The second paper (Document 11 at Appendix A) points out that the Court's powers relating to contempt had remained uncodified as "a matter of conscious policy-making since at least 1892 in this country." This second paper concludes in part that "The tension is between those who would have greater certainty as to what conduct can result in criminal conviction and those who would want to preserve flexibility in the concept of contempt so as to leave a broad scope of power in the hands of the courts for purpose of the preservation of the due administration of justice."

Position of the members on contempt of court. The members are unanimous that contempt of court should be codified unless it is not feasible. The members wish to indicate that they did not have the time to carry out any detailed examination of the issues involved with such a task.

Two schools of thought on codification. On the matter of codifying the principle of legality, there are two schools of thought. One school, the minority school, is not opposed to the codification of the principle of legality in the Code even though such a provision was unnecessary because of the Charter, as long as the provision mirrors the Charter provision. It may be advanced that this school of thought is not opposed to such a provision reflecting the Charter provision for the sake of having a self-contained, complete and educative criminal code. The other school is of the view that the Charter provision is "in" the Code and that no provision is necessary. One member went so far as to say that it would be a "derogation" of the Constitution of Canada to have one of its provisions repeated in a different way in its statutes.

Position of the members on codifying the principle of legality. It is clear from the discussions and the papers that the members are unanimous that the articulation of a principle of legality is not necessary in view of the Charter provision. However, from the papers, it can be stated that a minority is not opposed in having a principle of legality if it mirrors s.11(g) of the Charter.

c. Recommendations

The members unanimously recommend:

1) the rejection of clause 2(1) as now worded;

2) that there be no codification of the principle of legality;

3) that if it is decided to codify this principle, the wording used in clause 2(1) be amended to bring it into line with section 11(g) of the Charter; and

4) that the rules relating to contempt of court be codified, if feasible.

Clause 2(2) Conduct and Liability

1. LRC Proposals

a. Recommendation

> **2(2) Conduct and Culpability. No one is liable for a crime without engaging in the conduct and having the level of culpability specified by its definition.**
>
> [p. 14 of the Report]

b. Appendix A Provisions (Draft Legislation)

> **5. [Physical and mental elements of crime] A person commits a crime only by engaging in the relevant conduct with the state of mind specified in the definition of the crime or section 8.**
>
> **8. [Purpose] Where the definition of a crime specifies purpose as the relevant state of mind, or where the definition does not specify the relevant state of mind, a person has the relevant state of mind, if**
>
> **(a) the person purposely engages in the conduct specified in the definition of the crime;**
>
> **(b) the conduct is engaged in purposely in respect of any result so specified; and**
>
> **(c) the person knows of any circumstance so specified when he engages in the conduct or is reckless as to whether the circumstance exists or not.**
>
> [p. 99 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no similar provision in the Criminal Code.

b. Canadian Charter of Rights and Freedoms

> **7. [Life, Liberty and Security of Person] Everyone has the right to life, liberty and security of the**

> **person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.**
>
> **11. [Proceedings in criminal and penal matters] Any person charged with an offence has the right ...**
>
> **(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;**

c. Common Law/Legal Writings

actus non facit reum nisi mens sit rea

The legal maxim actus non facit reum nisi mens sit rea, the act itself does not constitute guilt unless done with a guilty intent, was first recognized in English law by Sir Edward Coke (Fortin and Viau, Traité de droit pénal général, Montreal, Thémis, 1982 at p. 69). In Leary v. The Queen, [1978] 1 S.C.R. 29 at p. 34, Dickson J., dissenting on other grounds, stated that "To subject the offender to punishment, a mental element as well as a physical element is an essential concomitant of the crime."

Actus reus

The term "actus reus", the physical element of a crime, was "not employed in the older classical treatises or by Stephen, Holmes or Bishop. It seems, in fact to have introduced in this century by Kenny .... " in his editions of Outlines of Criminal Law (Hall, General Principles of Criminal Law, Indianapolis: Bobbs-Merrill, 1960, at p. 222). Professor Stuart in his treatise, Canadian Criminal Law (Toronto: Carswell, 1982) at p. 55 states:

> ... the term actus reus serves a useful function in the criminal courts as a well-known and convenient shorthand to refer to a large variety of behaviour, some of which lay-persons and philosophers alike would have difficulty in classifying as an "act". If the meaning of "act" in criminal law is technical it seems unwise to abandon accepted legal terminology. We need merely guard against assuming the phrase actus reus has an accepted meaning.

Fortin and Viau, supra, state at p. 77 that [Translation] "According to the literature and jurisprudence, that term refers to the prohibited conduct" and that it [Translation] "indicates two requirements: first, a manifestation of the fact prohibited by law;

and then, a conduct on the part of the author of the prohibited fact." Stuart, supra, states at p. 56 that the "actus reus requirement asserts the need to particularize the penalized conduct." Colvin in Principles of Criminal Law (Toronto: Carswell, 1986) states at p. 51 that "The actus reus of an offence is the conduct which its definition required to have occurred." Mewett and Manning in Criminal Law (Toronto: Butterworths, 1985) state at p. 68 that the "act that is said to be required before there can be criminal conduct is known as the actus reus, or 'guilty act' and it may be asserted that an actus reus is required for every crime."

More will be said on the actus reus in our analysis of the existing law for clause 2(3)(a), conduct.

Mens rea

Stuart in Canadian Criminal Law, supra, states at p. 113 that "More ink has been spilt over the guilty mind concept than any other substantive criminal law topic....There can be few subjects where the basic principles are the subject of such dispute."

Under Canadian law, there are three categories of offences. In R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299 at pp. 1325-1326, Dickson, J. described those categories as follows:

> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences [of strict liability] in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act imports the offence.... The defence will be available if the accused reasonably believed in a mistaken of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event....
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category.

During one of the meetings of the working group, it was advanced that the Charter, Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 and R. v. Oakes, [1986] 1 S.C.R. 103 may have changed the above

trilogy.

In R. v. Prue; R. v. Baril, [1979] 2 S.C.R. 547 at p. 553, Laskin, C.J.C. stated for the majority that "the inclusion of an offence in the Criminal Code by that very fact must be taken to import mens rea, and there would have to be clear indication against it before a Court would be justified in denying its essentiality."

In Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at p. 517, Lamer, J. for the majority stated that a) in "penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence"; b) an offence of absolute liability violates s.7 of the Charter if as a result a person "is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest"; and c) such violation may be "salvaged for reasons of public interest under s.1." Lamer, J. stated at p. 514, adopting the words of Dickson, J. in City of Sault Ste. Marie, supra, that the principles of fundamental justice that were offended by absolute liability were those to the effect that "there is a generally held revulsion against punishment of the morally innocent". Lamer, J. analysed the "principle of mens rea" by saying at p. 513:

> It has from time immemorial been part of our system of laws that the innocent not be punished.... It is so old that its first enunciation was in Latin actus non facit reum nisi mens sit rea.

Lamer, J. went on at p. 514 to cite Lord Goddard C.J. in Harding v. Price,[1948] 1 K.B. 695 at p. 700 which statement he qualified "of the highest authority":

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in Brend v. Wood (1946), 62 T.L.R. 462, 463: "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

In Vaillancourt v. R. (Unreported, December 3, 1987), the Supreme Court rendered a significant judgment dealing with mens rea. Lamer J. speaking for the majority stated that for each offence for which a sentence of imprisonment was possible, mens rea was an element of that offence and that the mens rea had to proven beyond a

reasonable doubt by the Crown. Lamer, J. stated:

> Under s.7, if a conviction, given either the stigma attached to the offence or the available penalties, will result in a deprivation of the life, liberty or security of the person of the accused, then Parliament must respect the principles of fundamental justice.... [per Lamer, J. at p. 13]
>
> ....
>
> ...In effect, Re B.C. Motor Vehicle Act acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in Re B.C. Motor Vehicle Act, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated mens rea from a presumed element in Sault Ste. Marie, supra, to a constitutionally required element. Re B.C. Motor Vehicle Act did not decide what level of mens rea was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. In Sault Ste. Marie, Dickson J. stated at pp. 1309-10:
>
> > Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.
>
> It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act, in order to avoid punishing the "morally innocent". It must be remembered, however, that Dickson J. was dealing with the mens rea to be presumed in the absence of an express legislative disposition, and not the mens rea to be required in all legislative disposition, providing for a restriction on the accused's life, liberty or security of the person. In any event, this

> case involves criminal liability for the result of an intentional criminal act, and it is arguable that different considerations should apply to the mental element required with respect to that result. There are many provisions in the Code requiring only objective foreseeability of the result or even only a causal link between the act and the result. As I would prefer not to cast doubt on the validity of such provisions in this case, I will assume, but only for the purposes of this appeal, that something less than subjective foresight may, sometimes, suffice for the imposition of criminal liability for causing that result through intentional criminal conduct....[per Lamer J. at pp. 14-15]
>
> ....
>
> ... [B]efore an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s.7 of the Charter. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss.7 and 11(d). [per Lamer J. at p. 17]

The principles that may be advanced following Vaillancourt and the issues arising from that case will be discussed under the heading "Existing Law" for clauses 2(4)(a), (b), and (d).

In Working Paper 29, The General Part - Liability and Defences (1982), the LRC explained at p. 24 that mens rea had either a descriptive or normative meaning:

> ...mens rea can be understood in two different ways. It can refer to mental facts - intent, recklessness or knowledge. In this sense, it has a purely descriptive meaning, with criminal liability involving three things: (1) an actus reus, (2) a mens rea, and (3) lack of a defence, so that there may be actus reus without liability on account of some defence. Alternatively mens rea has a normative connotation. In this sense to say that someone had mens rea is to say that he is at fault in that he did the prohibited act with the required state of mind and had no excuse or justification for doing it. In other words mens rea means guilt or blame.

The members of the Working Group are generally in agreement that mens rea has been used in both of these senses. The descriptive meaning of mens rea is illustrated above in R. v. City of Sault Ste. Marie, supra, where the Court stated that mens rea consists "of some positive state of mind such as intent, knowledge, or recklessness...." In Re B.C. Motor Vehicle Act, supra, the Supreme Court of Canada seemed to have adopted the normative meaning of mens rea when Lamer, J., analysing the principle of mens rea, stated "It has from time immemorial been part of our system of laws that the innocent not be punished." In Vaillancourt, Lamer J. focuses mainly on the descriptive meaning of mens rea but in addition supports the normative meaning of mens rea when he suggests that:

> It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act, in order to avoid punishing the "morally innocent".

More will be said on the mens rea when the existing law is analysed under clauses 2(4)(a), (b), and (d).

3. Comments on Proposals

a. Position and Points in Issue

Position of the members on clause 2(2) The members are unanimous that clause 2(2) as it reads should be rejected for the following reasons:

1) Disagreement with clauses 2(4)(a), (b) and (d). All members are of the view that clause 2(2) must be viewed in light of clauses 2(4)(a) and (b) either directly or via c.2(4)(d) and that the members disagree with clauses 2(4)(a), (b) and (d). The wording of clause 2(2) "having the level of culpability specified by its definition" requires that each crime in the Special Part be looked at. If the wording of the crime in the Special Part specifies the "level of culpability", then clauses 2(4)(a) and (b) are applicable in order to understand the meaning of the form of culpability mentioned in the crime. If the wording of the crime in the Special Part does not specify the level of culpability or descriptive mens rea, then clause 2(4)(d) is applicable and "purpose" is the applicable level of culpability and clauses 2(4)(a) and (b) are then also applicable in order to interpret the meaning of "purpose" (level of of culpability). In a code, various clauses "speak" to each other, and if one is in error, it causes a chain reaction. Since clause 2(2) speaks to clauses 2(4)(a), (b) and (d) and since the members do not agree with clauses 2(4)(a), (b) and (d), the members cannot agree with clause 2(2). The reasons why the members disagree with clauses 2(4)(a), (b) and (d)

are found in the analysis of these clauses.

2) The meaning of the word "conduct". The members unanimously agree that there is considerable confusion inherent in the use of the word "conduct" in chapter 2 of the LRC report (see reason 1), re clause 2(1), supra). Some members are also opposed to the use of the word "conduct" because that word "imports a degree of continuous action [course of action] which may have a tendency to blend into circumstances and the result and therefore is ill suited for this and other provisions of the draft Code" (Document 7 at Appendix A).

3) The use of the word "definition" and resulting ambiguity therefrom. By way of example, if murder is to be defined as "intentionally killing another person", has the accused committed murder within that aspect of the definition if he has intentionally killed in self defence? What is the role and effect of justifications and excuses in the "definition" of a crime? Possibly, the LRC has in mind, the elements of the crime as specified in the Special Part, rather than a global "definition" of the crime. Professor Fletcher made the following comment with respect to this problem:

> If the Code is going to use the word "definition" it might be preferable to clarify at some point whether the concept of "definition" includes the absence of claims of justification and of excuse. Does this provision, s.2(2), apply, for example, to the determination of the culpability level required for self defense?
>
> [Comments to the Department of Justice Canada]

4) The use of the words "specified by its definition". Another reason advanced by some members is that the use of the phrase "specified by its definition" creates an assumption that the essential elements of a crime be specified in the Special Part and may add to the clause 2(1) problem by inviting arguments with respect to the sufficiency of general terms in the Code (see document 6 in Appendix A). This reason is akin to the criticism advanced for the word "defined" in clause 2(1), under "Points in Issue" for that clause.

5) Unnecessary for reasons of logic. The members are of the view that this clause "does not require that every crime must be constituted to include the classic elements [requirements] of actus reus and mens rea. If each crime is so constituted, it is redundant to say that both are required. That is equivalent of saying 'no one is liable for a crime unless he commits the crime'"

(Document 6 in Appendix A). Since the prohibited conduct is already specified in the crime creating section in the Special Part and since the level of culpability will be either specified in the crime creating section or will be "purpose" in accordance with clause 2(4)(d), clause 2(2) is redundant and serves no purpose in that it merely states that no one is liable for a crime without engaging in the conduct specified in the crime of the Special Part and having the level of culpability specified in/or for that crime in the Special Part.

6) The level of culpability not always specified. The words in clause 2(2) "the level of culpability specified by its definition" imply that the essential elements of the crime in the Special Part will specify the level of culpability. However, this is not always the case as some crimes do not so specify and resort must be had to clause 2(4)(d), the residual rule. The members recognize, however, that clause 8 of Appendix A, the legislative draft, would seem to avoid this problem.

7) Redundant or unnecessary. A majority of members are of the opinion that this clause is redundant or unnecessary for various reasons arising mainly from the way the members would draft the Code or the General Part. These reasons will be canvassed below, under the heading entitled "Codification".

8) Will lead to ambiguity and create problems of interpretation. Some of the members who are of the view that the clause was redundant are also of the opinion that the clause may prove to cause mischief. This opinion is best articulated in the following comment made by one of the members:

> Those who interpret statutes generally presume against redundancy within its [sic] provisions. In looking at this provision we are concerned that the courts will strain to give it some meaning it was never intended to have. Since this provision is unnecessary to begin with, any suggestion that it might create problems is reason enough to omit it.
>
> [Document 8 in Appendix A]

9) Negative style and false impression. Some members point out that they favour a positive style and not the negative style used in this clause, i.e., "No one is liable...." Some members agree that the principle of liability enunciated in clause 2(2) is somewhat misleading as suggesting that an accused is guilty if there is conduct and culpability on the part of the accused, which is not the case when the accused benefits from a justification such as self-defence or an excuse such as duress. There was a discussion of whether a code should articulate the whole structure of liability, but there was insufficient time to explore and report

on this matter thoroughly.

10) The issue of concomitance. Some members point out that there is a need at least for the French version of clause 2(2) to reflect more the requirement of concomitance between the physical and mental element of a crime. In other words, clause 2(2) must more precisely reflect the "rule that the actus reus and the mens rea of an offence must not only exist but must also concur." (Colvin, Principles of Criminal Law, supra, pp. 72-73). Some members point out that this rule is subject to exceptions which are illustrated by the exception for conspiracy in the defence of duress (s.17 of the Criminal Code) and the situation of the person who gets intoxicated to give him "dutch courage" as illustrated in the case of A.G. for Northern Ireland v. Gallagher, [1963] A.C. 349 (H.L.). Some members are of the view that clause 2(2) should have addressed these matters.

b. Codification

Other proposals by members. At our last meeting, after it had been unanimously decided by the members that clause 2(2) as it reads was both unnecessary and undesirable, the following proposal was put forward: "It would be desirable in the General Part to have a statement that unless otherwise provided, in order to be liable for a crime, there must be an actus reus and a mens rea." A majority of members voted against such a proposal. In the discussion that followed the vote, it became evident that some members who had voted in favour of that proposal, had done so in order to exclude absolute liability and that one member had voted in favour because the words "unless otherwise provided" would permit absolute liability in exceptional situations. A second proposal was put forward that subject to constitutional limitations, "Parliament should be empowered to prescribe criminal law offences requiring no greater mental state then absolute liability in exceptional circumstances such as the protection of the environment and the handling of dangerous material such as atomic material". This proposal was defeated by a majority.

Analysis of the reasons why codification was rejected. There is a mosaic of reasons besides the ones advanced above relating specifically to clause 2(2), why a majority of the members decided not to opt for codification of a principle that an actus reus and a mens rea are required for conviction. Some members are of the view that the Code could be so drafted as to make it clear that there is for each crime an actus reus and a mens rea; for example, some members are of the view that the need for the actus reus would be found in the description of the crime in the Special Part and that for the mens rea, there should be a provision in the General Part to the effect that unless otherwise provided, intention which would include recklessness would be the mens rea for all offences; this last proposal will be later

discussed in our comments below under the heading "Codification" of clauses 2(4)(a), (b), and (d). Some members went so far as to suggest that wherever possible, each offence in the Special Part should specify the mental element. Another reason suggested by one member is that the principle of actus reus and mens rea is so basic to our law that there was no requirement to state it. Another member stated that there was no need to state the requirement of a mens rea because that protection is given by the Charter and that the meaning of that term can not be captured by words.

The members wish to point out that they were asked to comment on the LRC recommendations and that due to the time constraints imposed on them, they regretfully did not have sufficient time to discuss alternatives or other approaches.

c. Recommendations

The members recommend

(1) unanimously that clause 2(2) as it reads be rejected; and

(2) by a majority that there be no codification in the General Part of a specific statement to the effect that criminal liability requires a physical and mental element for each crime.

Clause 2(3)(a) Conduct - General Rule

1. LRC Proposals

a. Recommendation

2(3) Conduct

(a) General Rule. Unless otherwise provided in the definition of a crime, a person is only liable for an act or omission performed by that person.

[p. 15 of the Report]

b. Appendix A Provision (Draft Legislation)

4. [Liability for personal conduct] A person is only criminally liable for conduct engaged in by that person unless otherwise provided in this Code or another Act of Parliament.

[p. 98 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no provision in the Criminal Code that explains the concept of the actus reus or physical element of an offence.

Section 21 and 22 of the Criminal Code provide four modes by which a person can be a party to an offence.

s.21. (1) [Parties to offence] 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.

(2) [Common intention] 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.

s.22. (1) [Person counselling offence] (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) [idem] Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) [Definition of "counsel"] For the purpose of this Act, "counsel" includes procure, solicit or incite.

b. Canadian Charter of Rights and Freedoms

11. [Proceedings in criminal and penal matters] Any person charged with an offence has the right...

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

[Emphasis added]

c. Common Law/Legal Writings

The actus reus or physical element of an offence has been dealt partly above, under the heading " Existing Law" for clause 2(2), conduct and culpability.

Fortin and Viau, in Traité de droit pénal général, supra, at pp. 77-86, classify offences in five categories according to the characteristics of the physical element or actus reus. These categories are 1) offences of commission, e.g. s.245, assault; [Translation] "An offence of commission consists in doing what the law prohibits. It necessarily supposes proof of the act describe in the offence"; 2) offences of possession, e.g. s.85, possession

of a weapon; [Translation] "Even if possession manifests itself by conduct, e.g. handling, it is not conduct; rather, it is the behaviour of the person towards the thing that allows the court to decide if there is possession according to law"; 3) status offences such as s.185, being found in a common gaming house in which case [Translation] "the fact of being found is the consequence of an act, that of having entered"; 4) offences of omission, such as s.236(1), failing to stop at the scene of an accident; and 5) result offences, e.g. s.203, criminal negligence causing death; [Translation] "These offences are characterized by the physical result...."

The common law requires that the physical act must have been voluntary. Colvin in Principles of Criminal Law, supra, at p. 39 states:

> ... current orthodoxy insists that conduct must have been "voluntary" in order to constitute an actus reus. This means (i) in the case of an act, that there must have been a conscious choice directing the conduct, and (ii) in the case of an omission, that there must have been an immediate capacity to exercise powers of choice to act.

For example, a person acting under of state of "automatism" has no voluntary conduct. In Perka v. R., [1984] 2 S.C.R. 232 at p. 249, the Court describes voluntariness as follows:

> ... the actions constituting the actus reus of an offence must be voluntary. Literally this voluntariness requirement simply refers to the need that the prohibited physical acts must have been under the conscious control of the actor. Without such control, there is, for purposes of the criminal law, no act.

As to the concept of being a "party" to an offence which the Criminal Code provides for in ss.21 and 22, Fortin and Viau in Traité de droit pénal général, supra, at p. 345 explain the law in this principled way:

> [Translation] A person is criminally liable for his personal conduct. This principle of personal attribution is interpreted in light of the rules on parties to an offence. Every offence defined by law is attributable not only to the person who actually commits it, that is to say the person who does the actus reus of the offence with the required culpability, but also to the person who because of a conduct on his part, contributes to the offence. The law sets down the conditions for which a person can be

> liable for an offence that is actually committed by another. The common denominator of these conditions is a personal conduct on the part of the party to the offence which ties him to the perpetration of that offence. This conduct consists in an incitation, aid, or abetment given to the commission of the offence or a participation to an agreement with the perpetrator of the offence.

On this topic of parties, the Supreme Court of Canada has recently stated in Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662 at p. 692 that:

> In the criminal law, a natural person is responsible only for those crimes in which he is the primary actor either actually or by express or implied authorization. There is no vicarious liability in the pure sense in the case of the natural person. That is to say that the doctrine of respondeat superior is unknown in the criminal law where the defendant is an individual.

3. Comments on Proposals

a. Position and Points in Issue

Position of the members on the clause. The members are unanimous that the principle as articulated in clause 2(3)(a) is unacceptable for the following reasons:

1) Rejection of the separate scheme of furthering. Chapter 4 of the LRC Report changes the law of "parties" to an offence. For example, under chapter 4, those who encourage another to commit an offence are no longer "parties" and guilty of the same offence as that of committed by the actual perpetrator; under chapter 4, those who encourage would be guilty of what we believe is the separate crime of furthering (clause 4(2)). The members are unanimous in rejecting the scheme of "furthering" advanced in chapter 4. Since the words "Unless otherwise provided in the definition of a crime" in clause 2(3)(a) are intended to recognize and cover those crimes of furthering and since the members disagree with that concept, the members cannot agree with the clause.

2) The use of the phrase "definition of a crime". The members again point out that the use of the word "definition" in phrase "definition of a crime" is ambiguous. This matter has been dealt with in our comments above for clause 2(2), conduct and culpability.

3) The word "conduct". The word "conduct" is used as the heading of clause 2(3)(a). The members are opposed to the use of that word as used in chapter 2. This matter has been dealt with in our comments above for clause 2(1), principle of legality, and in our comments for clause 2(2), conduct and liability. The members wish to point out the different wording between the recommendation of clause 2(3)(a) and clause 4 of Appendix A.

4) Certain offences not covered. Some members are of the view that the words "act or omission" in clause 2(3)(a) would not cover status offences such as s.185, being found in a common gaming house. One member suggested the view that "act or omission" would not cover possession offences. As one member has stated "this is a problematic section without any positive benefit". On the issue of whether status offences would be covered, one member has written:

> [Translation] However, it is not obvious that, for example, by sanctioning the fact of being found in a common bawdy-house under paragraph 193(2)(b) of the Criminal Code, that the legislator is sanctioning an act. The fact is that he is not prohibiting the fact of going to a common bawdy-house but rather being found there. It is true that in paragraph 11(g) of the Charter, only acts and omissions are mentioned and that is understandable. In criminal matters, however, one must be more exhaustive....
>
> [Document 3 at Appendix A]

5) Confusion surrounding the voluntariness requirement of the actus reus. In the comment, the LRC states that "non-acts" like twitches should not be considered as an act performed by an accused. During one of the discussions, several members agreed with the following comment made by Professor Mewett on this clause:

> ... when this clause is considered together with the proposals on automation which are set out in 3(1), I see enormous difficulties. If by "act" is meant something along the lines of "voluntary muscular movement", then whatever 3(1) says, you have not avoided the difficulties of non-insane automatism....
>
> [Comments to the Department of Justice Canada]

On the same topic, one member has stated (document 3 at Appendix A) that the LRC has dealt with the volitional aspect of conduct as part of the mental element:

> [Translation] ... the LRC's comment on this subclause shows that it seeks not so much to state that the

> person is only liable for his own acts as opposed to the acts of others, but particularly to state that a person is only responsible in so far as his conduct is "voluntary". However, the Commission says nothing about the "volitional" aspect of conduct, which is normally part of the physical element. Since the LRC uses the French term "volontairement" (translated literally in English by "voluntarily") to define the mental element "à dessein" ("purposely") in clause 2(4)(b), one must conclude that the "volition" of the conduct is henceforth part of the mental element. Hence the LRC causes rather than dissipates conceptual confusion.

That same member thinks that the "volitional" aspect of conduct should be dealt with at the level of the mental element.

6) Unnecessary. Some members stated that this clause is unnecessary even if the scheme of "furthering" was accepted. For the accused who is the actual perpetrator, his liability would be provided for by the words "Everyone commits a crime..." used in the crimes of chapter 6 to 18. As for other accused involved in the commission of a crime, their liability would be provided for by the words defining their crime (see chapter 4 where the words "Everyone is liable..." and their corresponding clauses in Appendix A where it is made clear that they commit a crime). As one member put it aptly "There is no need for this provision when crimes are constituted by the standard reference to "everyone ... who ..." (Document 6 at Appendix A). There are also problems flowing from such an unnecessary provision, as one member put it "interpreters abhor redundancy; it produces confusion not clarity" (Document 8 at Appendix A).

7) Other reasons. One reason advanced is that this clause with the words "Unless otherwise provided" may be "misleading in the merely oblique reference to the large area of criminal liability arising from being party to the conduct of others" (Document 6 at Appendix A). Another reason was that "There is no realistic concern about acts of God or 'non-acts like twitches'" as referred to in the LRC's comment (Document 6 at Appendix A). Finally on the matter of drafting, the negative style was criticized and one member stated that "There is obvious incongruity in the phrase 'omission performed by that person', but that idea may just pose a drafting challenge" (Document 6 at Appendix A).

b. Codification

First proposal. A majority of members voted against a proposal to the effect that "Unless otherwise provided in this

Code, a person is only liable for his own acts, omissions or states". The purpose of this proposal was to put forward the general rule that persons were only liable for their own acts, omissions and states and that the exceptions to the general rule covered by the words "Unless otherwise provided", would be the other present situations by which persons are parties to an offence.

Second proposal. Following the first proposal, the members voted unanimously in favour of a proposal to the effect that there should be a provision in the Code, reflecting the principle that the same crime can be committed either by the actual perpetrator or by a secondary participant. Such an underlying principle is presently found in ss.21 and 22 of the Criminal Code.

3. Recommendations

The members unanimously recommend that:

1) clause 2(3)(a) be rejected;

2) the concept of furthering of chapter 4 of the LRC Report be rejected.

3) there should be a provision in the Code reflecting the principle that the same crime can be committed either by the actual perpetrator or by a secondary participant.

Clause 2(3)(b)(i) - Omissions

1. LRC Proposals

a. Recommendation

> **2(3)(b) Omissions. No one is liable for an omission unless:**
>
> **(i) it is defined as a crime by this Code or by some other Act of the Parliament of Canada; or**
>
> [p. 15 of the Report]

b. Appendix A Provision (Legislative Draft)

> **6. (1) [Omission] A person is criminally liable for an omission only if**
>
> **(a) the omission is specified in the definition of the crime; or**
>
> [p. 99 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no general provision with respect to omissions in the Criminal Code.

Research done by one of the members indicates that as of August 1987, there were about 66 offences in the Criminal Code which are non-acts explicitly prohibited as omissions. Among the well known are s.197(2)(a)(i), failure of a parent to provide necessaries of life for his child under the age of sixteen years if the child is in destitute or necessitous circumstances, s.236(1), failure to stop at the scene of an accident and s.238(5), failure to provide samples of breath. Others are not well known, such as s.297, failure by a public servant to deliver property of Her Majesty in right of Canada or in right of a province.

b. Canadian Charter of Rights and Freedoms

> **11. [Proceedings in criminal and penal matters] Any person charged with an offence has the right ...**

> **(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;**
>
> [Emphasis added]

c. Common Law/Legal Writings

Professor Stuart in Canadian Criminal Law, supra, at p. 66 states that "criminal responsibility for omissions in Canada can only arise if: 1. the offence definition includes omissions and 2. there is a legal duty to act recognized by statute...." On this topic, Professor Stuart analyses three possibilities, and part of his comments at p. 66 on the first possibility are relevant to the LRC's clause 2(3)(b)(i):

> The first comprises offences extending to mere omission and also imposing a legal duty to act. Examples are the offences of failing to report treason (section 50(b)), failing to disperse after a reading of the riot provisions (section 69)....
>
> In such cases this is no conceptual problem. The legislature intended to declare an offence of omission to act in certain defined circumstances.

3. Comments on Proposals

a. Position and Points in Issue

Position of the members. The members unanimously reject clause 2(3)(b)(i), with the rider that the wording of clause 2(3)(b) has to be changed. The reason why the members reject this clause is as follows:

Unnecessary. The purpose of that clause is to ensure that a person can be held liable for such crimes as clause 10(2), failure to rescue, and clause 10(7), failure to stop at the scene of an accident. The members are of the view that clause 2(3)(b)(i) is unnecessary for two reasons. First, because it is already provided for in the principle of legality of s.11(g) of the Canadian Charter of Rights and Freedoms which reads in part that "Any person charged with an offence has the right ... not to be found guilty on account of any ... omission unless, at the time of the ... omission, it constituted an offence...." Second, because the constitutive elements of such crimes as clause 10(2), failure to rescue, or clause 10(7), failure to stop at the scene of an

accident, make it clear that it is an omission that constitutes the crime. Clause 2(3)(b)(i) is thus unnecessary and redundant. The members add the rider that the wording of clause 2(3)(b) would have to be changed because if only clause 2(3)(b)(i) is eliminated, clause 2(3)(b)(ii) would remain with the opening words of that clause "No one is liable for an omission unless"; if that was so, specific omissions constituted as crimes, e.g., failing to stop at the scene of an accident, would no longer be offences.

b. Recommendations

The members unanimously recommend that:

1) clause 2(3)(b)(i) be rejected and in consequence, the wording of c.2(3)(b) be amended; and

2) the statement in clause 2(3)(b)(i) not be codified.

Clause 2(3)(b)(ii) - Omissions and Clause 2(3)(c) - Duties

1. LRC Proposals

a. Recommendations

2(3)(b) Omissions. No one is liable for an omission unless:

(ii) it consists of a failure to perform a duty specified in this clause.

(c) Duties. Everyone has a duty to take reasonable steps, where failure to do so endangers life, to:

(i) provide necessaries to

(A) his spouse,

(B) his children under eighteen years of age,

(C) other family members living in the same household, or

(D) anyone under his care

if such person is unable to provide himself with necessaries of life;

(ii) carry out an undertaking he has given or assumed;

(iii) assist those in a shared hazardous and lawful enterprise with him; and

(iv) rectify dangers of his own creation or within his control.

[pp. 15-17 of the Report]

b. Appendix A Provision (Draft Legislation)

6. (1) [Omissions] A person is criminally liable for an omission only if...

(b) the omission endangers human life and consists of a failure by the person to take reasonable steps

(i) to provide the necessaries of life to his spouse, his child, any other member of his family

> **who lives in the same household or anyone under his care, if such person is unable to provide himself with the necessaries of life,**
>
> **(ii) to do that which he undertook to do,**
>
> **(iii) to assist those joining with him in a lawful and hazardous enterprise, or**
>
> **(iv) to remedy a dangerous situation created by him or within his control.**
>
> [p. 99 of the Report]

2. Existing Law

a. Criminal Code Provisions

Commission by omission

There is no general provision in the Criminal Code dealing with "commission by omission". Commission by omission is the commission of a result-crime by failure to perform a legal duty. This is usually dealt on an ad hoc basis in the Criminal Code. A member has prepared a paper on omissions and duties, in which he has enumerated all the offences of commission by omission in the Criminal Code (Document 12 at Appendix A). This ad hoc approach is illustrated first by the offence of criminal negligence causing death (s.203) with the definition of criminal negligence found in s.202 and second with one of the offence of mischief (s.387(1)(a)) with the accompanying definition of "wilfully" (s.386(1)):

> **203. [Causing death by criminal negligence] Every one who by criminal negligence causes death to another person is guilty of an indictable offence and is liable to imprisonment for life.**
>
> **202. (1) [Criminal negligence] Every one is criminally negligent who**
>
> **(a) in doing anything, or**
>
> **(b) in omitting to do anything that it is his duty to do,**
>
> **shows wanton or reckless disregard for the lives or safety of other persons.**
>
> **(2) For the purposes of this section, "duty" means a duty imposed by law.**

387. (1) [Mischief] Every one commits mischief who wilfully

(a) destroys or damages property...

386. (1) [Wilfully causing event to occur] Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

Duties

As it will be seen below, under the heading "Common Law/Legal Writings", the Criminal Code does not list all legal duties. Quite often the section creating the offence, or an accompanying definition, only refers to a "legal duty". The Criminal Code defines the following relevant duties: Sections 29(1) and (2) (duty of person arresting), s. 33(1) (duty of officers if rioters do not disperse), s. 197 (duty of persons to provide necessaries), s. 198 (duty of persons undertaking acts dangerous to life), s. 199 (duty of persons undertaking acts) and s. 243.3(1) and (2) (duty to safeguard opening in ice and excavation on land).

b. Canadian Charter of Rights and Freedoms

11. [Proceedings in criminal and penal matters] Any person charged with an offence has the right

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

[Emphasis added]

c. Common Law/Legal Writings

General Principle

Fortin and Viau in Traité de droit pénal général, supra, state at p. 83 that [Translation] "...the literature and case law insists on the necessity of a legal duty in order that an abstention or an omission be punishable." (R. v. Barrett (1846), 175 E.R. 142 and R. v. Salmond (1880), 6 L. R. 79 (Q.B.)).

Professor Stuart in Canadian Criminal Law, supra, at p. 66 states that "criminal responsibility for omissions in Canada can only arise if: 1. the offence definition includes omissions and 2. there is a legal duty to act recognized by statute (which may expressly invoke common law duties)". On this topic, Professor Stuart analyses three possibilities; part of his comments at p. 67 on the third possibility is relevant to the LRC's clauses 2(3)(b)(ii) and 2(3)(c):

> In the third situation the offence extends to omissions but does not create a legal duty to act. Under this heading there are two main categories.
>
> The first one is where the Code offences refer to a duty without defining it....Further important examples exist in the definition of criminal negligence under section 202 which includes "omitting to do anything that it is his duty to do" where the duty is defined as "a duty imposed by law", and in section 386(1) which deems wilful "omitting to do an act that it is his duty to do" for the purpose of Part IX property offences....
>
> ....
>
> The other type of case arises where the defining section uses wide words such "causes" (as in the case of all homicides (s.205(1)), unlawfully causing bodily harm...), which could refer to acts of commission or omission but make no reference to a legal duty to act.

Meaning of "duty" in s. 202(2) of the Criminal Code

The definition of criminal negligence set out in section 202(1) provides in part that a person can be criminally negligent "in omitting to do anything that it is his duty to do". Section 202(2) provides that for the purpose of criminal negligence, the word "duty" means "a duty imposed by law". These words have been

interpreted to mean in the common law provinces "a duty arising by virtue of either the common law or by statute" (R. v. Coyne (1958), 124 C.C.C. 176 at p. 179 (N.B. C.A.); see also R. v. Popen (1981), 60 C.C.C. (2d) 232 at p. 240 (Ont. C.A.)). The words of the code "a duty imposed by law" read in French "une obligation imposée par la loi"; in St-Germain v. R., [1976] C.A. 185 at p. 191, the Quebec Court of Appeal stated that "loi" means "all legislative provisions adopted by a competent authority" ("loi" is defined at s.2 of the Criminal Code, while "law" is not; the equivalent of "loi" is "Act" which is defined in s.2); it would thus seem that in the Province of Quebec, "a duty imposed by law" is limited to a statutory duty.

Duties may vary from one province to another. One example is the duty of aid to another whose life is in peril under s.2 of the Quebec's Charter of Human Rights and Freedoms (1977, R.S.Q., c. C-12). That duty does not exist in the other provinces either under the common law or under a statute. In R. v. Fortier (1980, Que. S.C.), Fortier was convicted of a homicide offence on the basis of the Quebec duty for "failure to provide necessaries to a dying common law 'spouse'" (see the LRC W.P. 46, Omissions, Negligence and Endangering, 1985, at p. 18).

Common law duties.

An example of a common law duty not codified in the Criminal Code is referred to in R. v. Popen, supra, at p. 240: "a parent is under a legal duty at common law to take reasonable steps to protect his or her child from illegal violence used by the other parent or by a third person towards the child which the parent foresees or ought to foresee". A more general common law duty that used to be codified in the Criminal Code until its repeal in 1955, was the "duty of persons in charge of dangerous things" (s.247 in the 1927 Criminal Code) which read as follows:

> 247. Every one who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

Case law analysis.

A detailed analysis of the case law decisions pertaining to the duty sections of the Criminal Code is found in Document 12 at Appendix A. As an illustration, Document 12 explains that case

law has defined "necessaries of life" for the legal duty to provide necessaries of life of s.197(1) of the Criminal Code, as including medical treatment and assistance, food, clothing, shelter, succour, care, provision of care, safe transportation in situations of drunkenness, and possibly protection of a child from harm.

3. Comments on Proposals

a. Position on Clause 2(3)(b)(ii) and the Opening Words of Clause 2(3)(c) and Points in Issue

Position of the members. The members are unanimously opposed to clause 2(3)(b)(ii) and the opening words of clause 2(3)(c) which reads "Everyone has a duty to take reasonable steps, where failure to do so endangers life, to..." for the following reasons:

1) "Endangers life" is too limitative. All the members agree that commission by omission should not be limited to situations where life is endangered as it so limited by clause 2(3)(c). On the contrary, all the members are of the view that it should be clear that an offence of assault causing bodily harm, where life is not endangered can be committed by an omission, if there is a duty to act. Under the part entitled "Codification" below, the members indicate the areas or legal interests that the Criminal Code ought to protect by having liability for commission by omission.

2) Lack of clarity. The members agree that "commission by omission" is the subject which gave us the most difficulty. For the benefit of the readers, it is thought useful to explain what is meant by the expression "commission by omission". In W.P. 46, Omissions, Negligence and Endangering, the LRC explained that expression as follows at p. 12:

> "Commission by omission" as it is called by civilian lawyers, is the commission of a result-crime by failure to perform a legal duty....[T]he harm prohibited by such a crime may be imputed legally to not acting where the act in question is required by law....
>
> ...[I]n commission by omission it is the causation of harm by the omission that qualifies as an offence.

Gordon in the Criminal Law of Scotland (Edinburgh: W. Green, 1978) states at p. 82:

> A distinction must be drawn between crimes of omission on the one hand, and crimes of commission committed by means of omissions on the other.... The second class [commission by omission] comprises result-crimes where it is not the omission itself but its consequence which constitutes the actus reus. To commit homicide by refraining from feeding a child is to commit a crime of commission by means of omission: the omission is the criminal conduct which leads to the actus reus of homicide.

The members agree with the following statement made by Professor Fletcher with respect to clause 2(3)(b)(ii):

> if one did not know what the problem was, I am not sure that this statutory provision would provide any assistance. The problem is assimilating cases of commission by omission to cases of affirmatively violating sections of the special part.
>
> [Comments made to Department of Justice Canada]

Some members are of the view that the way these two clauses are drafted, an argument can be made that liability for homicide offences resulting from a failure to perform a legal duty would not be covered, as liability under clause 2(3)(c) is limited to "where failure to so endangers life", and, thus, the only liability, if death occurs, would be for the offence of "endangering" (clause 10(1)). For the members who think that there should be a rule on commission by omission in the General Part, the rule should make it clear what crimes it covers.

3) Clause 2(3)(c) creates a wrong impression as to when the duty is owed. The members are of the view that the drafting of the opening words of clause 2(3)(c) gives the false impression to the public that the duties are only owed "where failure to do so endangers life". For example, the legal duty of parents to provide necessaries of life to their children is not owed only when it endangers life but at all times. While the LRC wishes to limit liability only to situations where failing to act in accordance with the duty endangers life, the drafting leaves the impression that there is no duty to act unless failure to act may endanger life.

4) Negative style. The members are of the view that a rule on liability such as that intended in clauses 2(3)(b)(ii) and (c) should be drafted in a positive style. In this connection, see our proposal on commission by omission infra.

5) The words "reasonable steps". The members are of the view that having the words "reasonable steps" in the rule of commission by omission confuses the culpability or mens rea with liability for commission by omission. For example, on a charge of negligent homicide by failing to provide necessaries of life, the Crown would have to prove, inter alia, that the behaviour constituted a "marked departure" which is more than the civil test of negligence but that the failure to provide necessaries was only a failure to "take reasonable steps" which is a civil test of negligence. Under the existing law, the limitation expressed by the words "reasonable steps" is sometimes resolved by the use of such words as "reasonable excuse" (s.118(b)) or "lawful excuse" (s.197(2)). One member suggested that the question of "reasonable steps" ought to be found in the section creating the duty which is separate from the general rule on commission by omission. The members wish to point out that they had insufficient time to resolve this issue.

6) Other reason. One reason mentioned in one of the papers which the members did not have the time to discuss, concerns accessories. Under s.21(1)(b) of the Criminal Code, a person can be a party to an offence if he "omits to do anything for the purpose of aiding any person to commit it". Since liability for result-crimes by omission is limited to "endangers life" situations, it would seem that a person omitting to do something for the purpose of furthering a crime under clause 4(2) could not be guilty of furthering a result-crime unless life is endangered.

b. Codification In Regard to Clause 2(3)(b)(ii) and the Opening Words of Clause 2(3)(c)

The legal interests that should be protected. As discussed above, the members are of the view that commission by omission should not be limited to "endangering life" situations. The recommendation of the LRC does not reflect the present law and this is not indicated in the LRC comment. For example, the result-crime of mischief found in s.387 of the Criminal Code can be committed by omission if there is a duty to act. This is so because of the definition of "wilfully" found at s.386(1) which applies to the crimes of Part IX of the Criminal Code (see "Existing Law" above). Under the LRC's Draft Code, a person could not be convicted of "vandalism" (clause 17(1)), if only property damage was caused as a result of a failure to act in accordance with a duty specified in clause 2(3)(c) (see the LRC comment at p. 85).

The members unanimously agree that the result-offences dealing with "life, health and safety" of the person ought to be be able to be committed by omission when a failure to act in accordance with a legal duty caused the prohibited result. A majority of members

agree that commission by omission should also apply property offences. The members did not have the time to discuss nor analyse all the offences found in the present Criminal Code to decide what other offences could also be committed by omission where there was a failure to act in accordance with a legal duty. This could be done when the Special Part offences are analysed. However, the members do not oppose the idea that certain offences concerning the security of the State such as one pertaining to the communication of State secrets could or should be able to be committed by an omission where there is a legal duty to act. A minority of members are of the view that the law should be that all result-crimes can be committed by omission if there was a duty to act and the failure to act caused the prohibited result.

The formulation of a rule on commission by omission. As stated above, the members are unanimously of the view that the LRC rule lacks clarity. The members examined alternatives. One member proposed the following general rule for all result-crimes:

> Commission by omission. If to cause a certain result is punishable by law, a person can also be punished for having caused that result by an omission, if that person failed to act in accordance with a legal duty to act so as to avoid the occurrence of the result.

Another member was of the view that commission by omission was best explained by legal causation and proposed for discussion, the following part of a rule on causation "Every one causes a result when his act or omission to perform a legal duty significantly contributes to its result...."

A majority of members favours the first approach over the causation approach, with the proviso that the rule should be limited to certain result offences as explained above instead of applying to all result-crimes.

The Group discussed the issue of whether there was the same "moral blameworthiness" in commission by omission as in positive acting. Since our last meeting, one member has brought to our attention that in certain jurisdictions where there is a rule on commission by omission along the lines proposed above, their provision also includes an equivalence requirement in that the omission must be tantamount to the realization of the constitutive elements of the crime by way of commission. This member has stated that his understanding of that requirement is that it only applies in result-crimes where the constitutive element includes an element that normally requires a positive act.

The members wish to point out that the above proposal is only a starting point for a more in depth analysis of commission by omission.

The members are of the view that if clause 2(3)(b)(i) is deleted for the reasons analysed under that clause, and if a rule on commission by omission is formulated along the lines proposed above, it would not preclude having offences, the constitutive elements of which would consist of a mere breach of a legal duty, or offences where an omission is defined as a crime, i.e. situations intended to be covered under clause 2(3)(b)(i), e.g. s.197(2)(a)(i), failure of a parent to provide necessaries of life for his child under the age of sixteen years if the child is in destitute or necessitous circumstances, or s. 236(1), failure to stop at the scene of an accident.

c. Position with Respect to an "Exhaustive List" of Duties As Found in Clause 2(3)(c) and Points in Issue

Position of the members. Under the LRC proposal of clauses 2(3)(b)(ii) and (c), a person can only be guilty of a result-crime pertaining to endangering life, if the offence was caused by a breach of a duty specified in clause 2(3)(c). A majority, if not all the members, agree that the Code should not list the legal duties in an exhaustive way. Their reasons are as follows:

1) Common law and other statutory duties should not be excluded. Unless the Code expressly deals with a duty, a majority of members are of the view that common law duties and other statutory duties should not be excluded. This position is best articulated in the following statements made by the members:

> Omissions to perform duties can properly be a basis for criminal liability even though the duties may differ from jurisdiction to jurisdiction. Where there is a duty there is also reliance by others in that jurisdiction and reliance is a key element of culpability for breach of duty.
>
> [Document 4 at Appendix A]

> The fact that the shape of the duties may vary from province to province does not trouble me. I agree with the argument that people who live in the various provinces should be entitled to rely on the fact that others around them will live up to the duties imposed

> others around them will live up to the duties imposed upon them by local law. The fact that the different provinces have different senses of what are appropriate duties to impose upon their citizens [is] in a sense beside the point. The fact remains that the people who live in those localities are entitled to rely on the duties that are created under their laws.
>
> [Document 1 at Appendix A]

> ... we are of the view that the breach of provincial law if it produces a consequence punished by the criminal law, for example the causing of death, should be capable of forming the basis of a prosecution. The public has a right to depend on the observance of all laws and when failure to observe the law produces some serious result of the type punished by criminal law, then it should not matter whether the provincial or federal legislature created the duty.
>
> [Document 8 at Appendix A]

2) The difficulty in classifying a particular conduct as an act or an omission. If a particular conduct is classified as an omission instead of an act and a crime of result is involved, it is necessary for liability that there was a breach of a legal duty that caused the result. In Report 30, the LRC stated at pp. 15-16 that some omissions may be regarded as part of a wider whole consisting of acting:

> ... not acting may itself form part of a wider whole consisting of acting, for example failure to keep a proper look-out on the road which is part of driving dangerously. Whether in any such case the accused's conduct is more appropriately to be regarded as doing or not doing must be decided in the particular circumstances by the trier of fact.
>
> [Emphasis added]

The members are of the view that this approach is unsatisfactory. Some judges, for lack of clear rules in this area, may view a particular conduct as acting while others may view the same conduct as an omission, in which case, the omission would require a breach of duty in order to be punishable. This is an area which one of the members has analysed (see Document 12 at Appendix A). The member's paper states that there is presently a difficulty in case law in characterizing a conduct in particular circumstances as an act, an omission, or both. In R. v. Forgeron (1958), 121 C.C.C. 310 at p. 313 (N.S. C.A.) driving at an excessive speed was characterized either as an omission to do something, i.e. to drive

at a reasonable speed or to take reasonable care or as an act. In R. v. Doubrough (1977), 35 C.C.C. (2d) 46 (Ont. Co. Ct.), a case dealing with a charge of criminal negligence causing death, the court was of the opinion that the fact of leaving a loaded firearm in an room where juveniles had access was not an act but a failure to unload the firearm, a failure to secure the firearms from access by the juveniles and the failure to take precautions to secure the room; the court relied in part on the common law duty that "anyone carrying such a dangerous weapon as a rifle is under the duty to take such precautions in its use as, in the circumstances, would be observed by a reasonably careful man" (p.59 of C.C.C.). The member concludes in his paper that at the present time, where it is ambiguous if conduct should be characterized as an act or omission, courts apply their own interpretation and that no rules have been formulated to distinguish the two forms of conduct. While the member's paper mentions rules that have been developed by scholars, the member is unsure if the courts are ready to adopt these theoretical rules. By keeping common law duties such as the former s.247, of the Criminal Code of 1927 (see supra, "Existing Law"), it would ensure that a legal duty is always found in appropriate cases. On this same topic, see also the comments made at pp. 3-4 of Document 25 at Appendix A.

3) The non feasibility of the task. Some members are of the view that it is just not feasible to list all the duties in the Criminal Code. Support can be found for that argument in the fact that no other modern criminal code in any jurisdiction has achieved that feat.

4) The chicken-and-egg problem. Some members are of the view that it was impossible to consider a closed list of duties until a decision had been taken as to what crimes of commission by omission we intend to have in the Code.

The minority view. One member in principle favoured listing in the General Part all the duties attracting criminal liability until he was satisfied upon further research that it impossible to do so. If no further research was to be done, that member is of the view that the list should not be a closed one. It is in that sense that the member is in agreement with the others that the list should not be a closed list (see above on position of the members). Two arguments are presented in favour of a closed list. First, the principle of legality requires that Canadians know the duties that can give rise to liability for crimes of commission by omission. Second, it is advanced that the Criminal Code should apply equally through Canada and that this principle is recognized in s.15 of the Charter. Of particular concern to the member was that it seemed unfair to him that a person could be found guilty of a homicide offence in the Province of Quebec for a breach of a duty to rescue under the Quebec Charter, while another person in Ontario, for

example, could not be found guilty of the same offence given an identical fact situation. On this second point, the other members were of the view that any issue of constitutionality on this matter would have to be decided by the courts.

d. Position on the Duties Listed in Clause 2(3)(c)(i) to (iv) and Points in Issue

Position of the members. The members had insufficient time to discuss thoroughly the duties specified in clauses 2(3)(c)(i) to (iv) and the wording of these provisions. No formal vote was taken on each of these duties. The comments made by some members on some of these duties indicate that these duties and their formulation need to be studied and reviewed.

Comments on clause 2(3)(c)(i). One member stated the following about clause 2(3)(c)(i):

> In regard to c.2(3)(c)(i)(A), s.197(1)(b) of the Criminal Code seems more precise as it excludes "common law" spouses. As to c.2(3)(c)(i)(B), the word "children" is undefined while the word "child" is defined in s.196. Nothing is said about the obligation of a "foster parent, guardian, or head of a family" referred to in s.197(1)(a). Under c.2(3)(c)(i)(A) and (B), the person must be "unable to provide himself with necessaries of life"; there is no such reservation under ss.197[1](a) and (b). As to c.2(3)(c)(i)(C) and (D), I much prefer the precise wording of c.197(1)(c).
>
> [Document 2 at Appendix A]

One member thinks that clause 2(3)(c)(i)(C), the duty to provide necessaries to "other family members living in the same household", is "a good illustration where an attempt to generalize creates difficulties" and should be restricted as "it may extend liability to unacceptable limits" (Document 7 at Appendix A). The member is of the view that this provision is vague as "family members" is not defined.

Comments on clause 2(3)(c)(ii). It was pointed that the wording of clause 2(3)(c)(ii) was problematic, while in clause 2(3)(c)(iii), there is a requirement that the enterprise be "lawful", there is no requirement under clause 2(3)(c)(ii) that the undertaking be "lawful". It was pointed out in one of the papers that the wording of clause 2(3)(c)(ii) is different from clause 6(1)(b)(ii) of Appendix A of the Report, the legislative draft clause.

Comments on clause 2(3)(c)(iii). This duty would be new. A comparative law research indicates that it is not found at common law and that it is controversial in a European country where it is discussed. One member stated that "The possible clarification or extension of legal duties to protect others should be addressed in the context of proposed new crimes in the Special Part, such as the proposal in ch. 10(2) for a crime of failure to rescue" (Document 6 at Appendix A). The following issues were raised but not resolved: first, is it necessary to have clause 2(3)(c)(iii) in view of clause 10(2), the failure to rescue offence? Second, since the LRC has in a previous draft removed the duty to rescue from the general duty section to put it in the Special Part as a specific offence of failing to rescue (clause 10(2)), possibly because it might be too harsh to convict someone of a homicide offence for having failed to rescue, does the same rationale apply for clause 2(3)(c)(iii)? Third, the members have some difficulty with the word "lawful" in "lawful enterprise"; does it mean "lawful" at large or only "lawful" under this Code; for example if some persons on board a ship import drugs into Canada and while in the territorial waters a mishap occurs where a person may drown, where is the distinction drawn? Fourth, one member is concerned that clause 2(3)(c)(iii) "does not specify the level or extent of assistance to be provided and this should be addressed as well" (Document 7 at Appendix A). Some members are very concerned that, in relation to the carrying out of a medical treatment, the level of duty is only "to take reasonable steps"; these members think that the level should be much higher.

Clause 2(3)(c)(iv). On the duty to "rectify dangers of his own creation or within his control", the LRC writes at p. 17 that this duty "generalizes specific provisions such as Criminal Code subsection 243.3(1) (duty to safeguard opening in ice)". Again, the members see some problems in such "generalizations". One issue that was discussed is that this provision seems to incorporate a duty to rescue with the words "rectify dangers...within his control". This is an issue that was brought out to our attention by Professor Mewett who stated in his comments that this clause "seems to me that it is far too sweeping and amounts to good samaritan legislation" (Comments by Professor Mewett to the Department of Justice Canada, 1987). One member stated that to rectify dangers that one had created was one thing but to rectify any danger created by others but within his control was going too far.

e. Codification of Duties

Proposition as to where the duties should be. A majority of members are of the opinion that the duties listed in the Criminal Code should be specified in the General Part and not in

the Special Part. Two reasons were advanced. First, it would be educative and would advance the cause of codification; another reason advanced was the rationale that if the duties are of general application for several result-crimes, a generalization is required and the General Part serves that purpose. It was stated that if Parliament wishes to make a crime out of the mere breach of a duty without any result, reference could be made to the duty in the General Part. As for the minority, one member suggested after the last meeting that if there is a duty the mere breach of which would be an offence, then all the offences, including result-crimes, pertaining to the breach of that duty should be dealt together in the Special Part.

Proposition on "basket clause". As stated above, a majority, if not all the members, agree that the Code should not list in an exhaustive way the duties. On how this could be achieved, a majority are of the view that a basket clause must be used in the provision setting out the duties. One member proposed that that this basket clause include the words "any other duty imposed by law". The minority took the view that while there should be a clause in the General Part that would make it clear that a result-crime can be caused by an omission where there was a legal duty to act, we should not defined any "legal duty" unless a legal duty was not dealt in provincial law, a legal duty needed to be dealt with specifically in the Special Part, or it was necessary to codify the common law or standardize the law in regard to a legal duty.

Discussion as to the duties in the list. The members are generally in agreement that the duties listed in the Code should be the most important ones, that the work of the LRC in this area should be taken into consideration and that more work was required as evidenced by the comments made on these duties.

f. Recommendations

The members recommend:

1) unanimously that clause 2(3)(b)(ii) and the opening words of clause 2(3)(c), "Everyone has a duty to take reasonable steps, where failure to do so endangers life, to" be rejected;

2) unanimously that the result-crimes dealing with "life, health and safety" of the person can be committed by omission when the failure to act in accordance with a legal duty causes the prohibited result;

3) by a majority that commission by omission also apply to property offences;

4) unanimously that the identification of other crimes that can be committed by omission be done when the Special Part crimes are examined;

5) by a majority that there be a rule on commission by omission in the General Part and that the following proposal be the starting point for more work:

> Commission by omission. If to cause a certain result [as limited by the above recommendations] is punishable by law, a person can also be punished for having caused that result by an omission, if that person failed to act in accordance with a legal duty to act so as to avoid the occurrence of the result.

6) by a majority that the Code not list in an exhaustive way the legal duties as attempted in clause 2(3)(c);

7) unanimously that the duties of clause 2(3)(c) and their formulation be studied and reviewed in view of the comments made;

8) by a majority that the duties listed in the Criminal Code be specified in the General Part and not in the Special Part;

9) by a majority that a basket clause be used in the provision of the General Part, setting out the duties in order that the list of legal duties be not exhaustive but include common law duties and statutory duties not otherwise provided in the Code; and

10) unanimously that a further examination and study be conducted as to the duties that should be listed in the Code.

Clause 2(3)(d) Medical Treatment Exception

1. LRC Proposals

a. Recommendation

> **2(3)(d) Medical Treatment Exception. No one has a duty to provide or continue medical treatment which is therapeutically useless or for which informed consent is expressly refused or withdrawn.**
>
> [p. 17 of the Report]

b. Appendix A Provision (Legislative Draft)

> **6(2) [Exception] No person is criminally liable for an omission to provide or continue medical treatment that is therapeutically useless or medical treatment for which consent is expressly refused or withdrawn.**
>
> [p. 99 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no comparable provision in the Criminal Code. Section 45 of the Criminal Code protects from criminal responsibility a person performing a surgical operation under certain circumstances:

> **45. Everyone is protected from criminal responsibility for performing a surgical operation upon any person for the benefit of that person if**
>
> **(a) the operation is performed with reasonable care and skill, and**
>
> **(b) it is reasonable to perform the operation, having regard to the state of health of the person at the time the operation is performed and to all the circumstances of the case.**

Other relevant provisions are ss. 198 (duty of persons undertaking acts dangerous to life) and 199 (duty of persons undertaking acts) which read as follows:

> **198. [Duty of persons undertaking acts dangerous to life] Every one who undertakes to administer surgical or medical treatment to another person or to do any other lawful acts that may endanger the life of another person is, except in cases of necessity, under a legal duty to have and to use reasonable knowledge, skill and care in so doing.**
>
> **199. [Duty of persons undertaking acts] Every one who undertakes to do an act is under a legal duty to do it if an omission to do the act is or may be dangerous to life.**

b. Common Law/Legal Writings

Section 45 of the Criminal Code

In Morgentaler v. The Queen, [1976] 1 S.C.R. 616 at p. 676, Dickson J. for the majority of the Court stated that s.45 "may be available as an answer to a charge arising out of a surgical operation performed on an unconscious patient...." B. Starkman, in "A defence to Criminal Responsibility for Performing Surgical Operations: Section 45 of the Criminal Code", [1981] 26 McGill L.J. 1048 at p. 1052 states that "it would appear that section 45 of the Criminal Code was intended to deal with the situation where the patient is not capable of consenting."

Medical Treatment and Refusal of Consent

Professor Williams in Texbook of Criminal Law (London: Stevens, 1983) writes at p. 267:

> ... a sane adult cannot be subjected to compulsory medical treatment when he is ill. To interfere with a person by force without his consent and without authority of law is an assault; and there is no authority for allowing paternal interference except in limited circumstances.... This freedom from a duty to submit to compulsory treatment is what is sometimes called the citizen's right of self-determination.

Under the Criminal Code, one of the ways of committing an assault (s.244)(1) is to apply force to another person without his consent. Accordingly, if a competent adult refuses treatment, a doctor would be committing an assault if he was to provide or continue treatment, contrary to the patient' wishes. On this topic, the LRC has explained the law as follows at pp. 70-72 of Working Paper 26, Medical Treatment and Criminal Law (1980):

> The requirement of consent infers the corollary right to refuse treatment....
>
> ....
>
> The Criminal Code has preserved the basic common law approach which upholds the right to refuse treatment except where otherwise provided. Specific exceptions to the right of refusal include the compulsory treatment for alcoholism or drug abuse [s.239(5)] and the ordering of a mental examination. Notwithstanding, the Criminal Code only provides for the ordering of the custody of insane persons and the custody and care of the mentally ill, thus implying the continuation of their right to refuse treatment. The right to refuse intrusion on one's body has been upheld in ... undergoing surgery for the purpose of obtaining evidence [Laporte v. Laganière (1972), 18 C.R.N.S. 357 (Que. Q.B.)].... The approach of the Criminal Code, then, is to uphold an individual's right to refuse intrusion on one's body, unless there is a specific statutory exception.
>
> The Commission has concluded that the preponderance of legislative, judicial, professional and public attitudes favour the recognition of the right to refuse treatment. The general approach of the Criminal Code is supported by the common law dealing with private matters. The overwhelming majority of these cases support the right of a competent adult to refuse treatment [list of cases cited in endnote].... The denial of a right to refuse treatment has been suggested only in relation to the likely result of death. It is based on the priority of the preservation of life over the autonomy of the individual.

3. Comments on Proposals

a. Position and Points in Issue

Position of the members. The members are unanimously opposed to the adoption of this clause and are of the view that all issues pertaining to medical treatment in the criminal law should be examined carefully and dealt with in a comprehensive manner. We oppose the current proposal for the following reasons:

1) LRC's comment unacceptable in view of the importance of the subject. The members are very concerned with this clause. One member stated that it was "a questionable attempt by the LRC to open the door to euthanasia". Another member stated that this

clause "came awfully close to countenancing euthanasia". The members notice that the comment at p. 17 of the Report only restates the proposal without explaining the provision. This is totally unacceptable in view of the importance of the subject. The members also note that the LRC has previously made the following recommendation on this same subject in Report 20, Euthanasia, Aiding Suicide and Cessation of Treatment (1983) at p. 32:

> The Commission recommends the following amendments to the Criminal Code:
>
> 199.1* Nothing in sections 14, 45, 198, 199 and 229 shall be interpreted as requiring a physician
>
> (a) to continue to administer or to undertake medical treatment against the expressed wishes of the person for whom such treatment is intended;
>
> (b) to continue to administer or undertake medical treatment, when such treatment has become therapeutically useless in the circumstances and is not in the best interests of the person for whom it is intended.

The LRC's comment does not allude to that previous recommendation nor does explain the changes.

2) The determination of "therapeutically useless". Several members are of the view that the phrase "medical treatment which is therapeutically useless" suggests that it would be the medical personnel who would make the determination. Several members are of the view or are concerned that this determination should not be left in the hands of the doctor only as it involved important moral, religious, social, ethical, legal and policy decisions they have not been addressed and which must be examined closely. In this connection, several members are of the view that cessation of treatment should not be viewed as a footnote or tied as an exception to a duty provision (clause 2(3)(c)(ii)).

3) "Therapeutically useless" and the burden of proof. The members are of the view that it is unclear if a) clause 2(3)(d) should be interpreted as a defence, in which case, the Crown would only have to prove, inter alia, a duty and the breach of duty causing the prohibited result and the doctor, benefitting from any reasonable doubt on the issue raised by him that he had been justified under this provision to cease to provide or continue medical treatment because the treatment was therapeutically useless; or b) if clause 2(3)(d) should be interpreted as requiring the Crown to prove, inter alia, as part of its case, not only the duty and the the breach of duty that caused the prohibited

consequence, but also that the medical treatment was useful.

4) The meaning of "therapeutically useless". The members agree that the words "therapeutically useless" should be defined. On this subject, one member wrote:

> While it obviously includes the provision of treatment designed to make a person well again or arguably more comfortable, would it include keeping a person alive until illness or natural degeneration takes its inevitable end?
>
> [Document 8 at Appendix A]

5) "Consent". The members raise the very important issue as to whom can give or withdraw the consent referred to in the phrase "for which informed consent is expressly refused or withdrawn" (contrary to the French version, the English version of the recommendation does not mention who can give or withdraw the consent). On this subject, some members wrote:

> ...the use of the word or in the second line is troubling. Does the LRC mean to suggest that therapeutically useful treatment may be stopped if consent is given to stop it? Consider for example the situation of an unconscious child who with proper care will recover. Should anyone have the right to terminate the care and cause the loss of life involved or risked by such withdrawal of care?
>
> [Document 8 at Appendix A]

> Subsection (d) seems to be too broad. It will allow parents with the religious views inconsistent with the medical needs of their children to interfere with the necessary treatment. The provision should specify that the "informed consent" should be given by the person involved.
>
> [Document 7 at Appendix A]

6) "Informed consent" and "withdrawn". Some members question the meaning of "informed consent"; one member is not sure if the intent is to import in the criminal law, the common law tort meaning of "informed consent" and if that meaning is appropriate for the criminal law. One member is not sure if "consent ... withdrawn" means that it is irreversible.

b. Codification

All the provisions concerning medical treatment should be studied together. The members wish to point out that there are other provisions in the LRC Code which deal with medical treatment. The other recommendations relevant to medical treatment are the recommendation pertaining to the exception of palliative care (clause 6(6)) for the homicide offences and for the offence of furthering suicide at p. 57 of the Report and the recommendation of an exception for the proposed offences of harming another purposely or recklessly (clause 7(3)(a)) at p. 59 of the Report. These recommendations read as follows:

> 6(6) Palliative Care. Clauses 6(1) to 6(5) do not apply to the administration of palliative appropriate care in the circumstances for the control or elimination of a person's pain and suffering even if such care shortens his life expectancy, unless the patient refuses such care.
>
> 7(3) Exceptions.
>
> (a) Medical Treatment. Clauses 7(2)(a) and 7(2)(b) do not apply to the administration of treatment with the patient's informed consent for therapeutic purposes or for purposes of medical research involving risk of harm not disproportionate to the expected benefits.

The members are unanimously of the view that all issues pertaining to medical treatment in the criminal law should be studied carefully and dealt with together. The members are of the view that it was impossible for them to study this matter thoroughly in the time frame given to them.

c. Recommendations

The members recommend unanimously that:

1) clause 2(3)(d) be rejected; and

2) all issues pertaining to medical treatment in the criminal law should be examined and studied carefully and dealt with in a comprehensive manner.

Clauses 2(4)(a) General Requirements As to Level of Culpability, 2(4)(b) Definitions and 2(4)(d) Residual Rule

1. LRC Proposals

a. Recommendations

2(4)(a) General Requirements As to Level of Culpability. Unless otherwise provided:

(i) where the definition of a crime requires purpose, no one is liable unless as concerns its elements he acts

(A) purposely as to the conduct specified by that definition,

(B) purposely as to the consequences, if any, so specified, and

(C) knowingly or recklessly as to the circumstances, if any, so specified;

(ii) where the definition of a crime requires recklessness, no one is liable unless as concerns its elements he acts

(A) purposely as to the conduct specified by that definition,

(B) recklessly as to the consequences, if any, so specified, and

(C) recklessly as to the circumstances, if any, so specified;

(iii) where the definition of a crime requires negligence, no one is liable unless as concerns its elements he acts

(A) negligently as to the conduct specified by that definition,

(B) negligently as to the consequences, if any, so specified, and

(C) negligently as to the circumstances, if

any, so specified.

(b) Definitions.

"Purposely"

(i) A person acts purposely as to conduct if he means to engage in such conduct, and, in the case of an omission, if he also knows the circumstances giving rise to the duty to act or is reckless as to their existence.

(ii) A person acts purposely as to a consequence if he acts in order to effect:

(A) that consequence; or

(B) another consequence which he knows involves that consequence.

"Recklessly" A person is reckless as to consequences or circumstances (whether the circumstances specified in the definition of a crime or, in the case of an omission, the circumstances giving rise to the duty to act) if, in acting as he does, he is conscious that such consequences will probably result or that such circumstances probably obtain.

[Alternative - A person is reckless as to consequences or circumstances (whether the circumstances specified in the definition of a crime or, in the case of an omission, the circumstances giving rise to the duty to act) if, in acting as he does, he consciously takes a risk, which in the circumstances known to him is highly unreasonable to take, that such circumstances may obtain or that such consequences may result.]

"Negligently" A person is negligent as to conduct, circumstances or consequences if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such consequences will result, or to take the risk (conscious or otherwise) that such circumstances obtain.

[pp. 18-21 of the Report]

2(4)(d) Residual Rule. Where the definition of a crime

does not explicitly specify the requisite level of culpability, it shall be interpreted as requiring purpose.

[p. 22 of the Report]

b. Appendix A Provisions (Draft Legislation)

Mental Element

8. [Purpose] Where the definition of a crime specifies purpose as the relevant state of mind, or where the definition does not specify the relevant state of mind, a person has the relevant state of mind, if

(a) the person purposely engages in the conduct specified in the definition of the crime;

(b) the conduct is engaged in purposely in respect of any result so specified; and

(c) the person knows of any circumstance so specified when he engages in the conduct or is reckless as to whether the circumstance exists or not.

9. [Recklessness] Where the definition of a crime specifies recklessness as the relevant state of mind, a person has the relevant state of mind if

(a) the person purposely engages in the conduct; and

(b) the conduct is engaged in recklessly in respect of any result or circumstance so specified.

10. [Negligence] Where the definition of a crime specifies negligence as the relevant state of mind, a person has the relevant state of mind if

(a) the person negligently engages in the conduct; and

(b) the conduct is engaged in negligently in respect of any result or circumstance so specified.

11. [Definitions] For the purposes of this Code and the provisions of other Acts of Parliament that define crimes,

> **(a) a person purposely engages in conduct if the person means to engage in the conduct and if, in the case of an omission, the person knows of the circumstances giving rise to the duty to act or is reckless as to the existence of those circumstances;**
>
> **(b) conduct is engaged in purposely in respect of a result if the person engages in the conduct for the purpose of bringing about the result or a result that the person knows must bring about that result;**
>
> **(c) conduct is engaged in recklessly in respect of a result or circumstance including, in the case of an omission, a circumstance giving rise to the duty to act, if the person is aware that the result will probably come about or that the circumstance probably exists;**
>
> **(d) a person negligently engages in conduct if the conduct is a marked departure from the ordinary standard of reasonable care; and**
>
> **(e) conduct is engaged in negligently in respect of a result or circumstance if it is a marked departure from the ordinary standard of reasonable care to take the risk that the result will come about or that the circumstance exists.**
>
> [pp. 99-100 of the Report]

2. Existing Law

a. Criminal Code Provisions

The Criminal Code does not have any provision similar to the LRC's clauses 2(4)(a), (b), and (d). Part I of our Criminal Code, which is entitled "General", does not deal with the mental element, except as part of the defences. There are no general rules and no general definitions of the mental element. These matters are left to the common law.

However, the Criminal Code does provide certain definitions of the mental element for certain offences. Section 202 defines criminal negligence for the offences of criminal negligence causing death (s.203), criminal negligence causing bodily harm (s.204) and manslaughter (by criminal negligence: ss.205(5)(b), 217 and 219). It reads as follows:

> **202. (1) [Criminal negligence] Every one is criminally**

negligent who

(a) in doing anything, or

(b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

Similarly, s.386(1) defines "wilfully" for the purpose of offences in Part IX of the Criminal Code, "Wilful and Forbidden Acts In Respect of Certain Property". That definition reads as follows:

386. (1) [Wilfully causing event to occur] Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

The majority of the offences in the Criminal Code specify a mental element. A research paper on this topic (Document 28 at Appendix A) indicates that the following mental element terms are used in the Criminal Code provisions:

1) "believe", "believes", and "belief";

2) "careless";

3) "corruptly";

4) "deliberate", and "deliberately";

5) "desire";

6) "falsely";

7) "for a purpose", "for such a purpose", "for that purpose", "some purpose of", "his purpose", "for any such purpose", "for the purpose of", "for the purposes of", "common purpose", "for a fraudulent purpose", and "for an unlawful purpose";

8) "fraudulently", "fraudulent", "fraud", and "defrauds";

9) "improperly or indecently";

10) "intended", "intention", "intent", "with intent" and "intends";

11) "knowingly", "knowledge", "knowing", "knew", and "knows";

12) "maliciously";

13) "means to";

14) "negligence";

15) "ought to know" and "ought to have known";

16) "reasonable care";

17) "reckless";

18) "wanton"; and

19) "wilful", "wilfully", "wilfully and knowingly", "knowingly and "wilfully", and "wilful neglect".

b. Canadian Charter of Rights and Freedoms

1. [Rights and Freedoms in Canada] The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

7. [Life, Liberty and Security of Person] Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. [Proceedings in criminal and penal matters] Any person charged with an offence has the right ...

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

For a discussion of the case law on the Charter, see the next heading.

c. Common Law/Legal Writings

We have already partly discussed mens rea under the heading "Existing Law" at clause 2(2), conduct and culpability. In this part, we will try to advance certain mens rea rules from the recent decision of the Supreme Court of Canada in Vaillancourt v. R., supra. Following this, we will say a few words about the following descriptive mens rea : "intention", "recklessness", "knowingly" and "for the purpose of". Finally, we will explain the doctrine of "wilful blindness".

The decision of Vaillancourt v. R.

As we have mentioned before, the Supreme Court of Canada in Vaillancourt v. R. rendered a significant decision dealing with mens rea. Following that decision, a certain number of constitutional principles can be advanced regarding the mens rea of criminal offences punishable by imprisonment. These constitutional principles would apply to all offences unless in a particular case, the violation of these principles could be demonstrated to be reasonable limits within s. 1 of the Charter.

Post Vaillancourt, it may very well be that that there is now a constitutional principle that Parliament can not punish the "morally innocent" or that mens rea in its normative sense has been constitutionally entranched. The normative meaning of mens rea has been explained under the heading of "Existing Law" for clause 2(2).

It may be advanced that Vaillancourt establishes that mens rea is an element of every crime for which the punishment involves "the restriction of liberty such as imprisonment" and raises the following issues:

1) whether mens rea has to be proven beyond a reasonable doubt by the Crown in regard to each essential element of a crime;

2) whether where the offence does not specify a particular mens rea, the Crown must prove beyond a reasonable doubt that the accused committed the prohibited conduct intentionally or recklessly, with knowledge of the facts or with wilful blindness as to them; and

3) whether negligence is an appropriate descriptive mens rea when it is specified by Parliament in an offence.

The members believe that Vaillancourt has not explained fully or dealt exhaustively with the difficult meaning of the concept of mens rea. Members believe that the following excerpt of Martin J.A. in R. v. MacCannel (1980), 54 C.C.C. (2d) 188 at pp. 192-193 (Ont. C.A.) is still very useful:

> When the concept of mens rea emerged in the criminal law, it meant moral guilt, but ... mens rea has come to connote many different shades of guilt in different connections, and has become a technical conception with different meanings in different contexts.... Stephen, J., pointed out that the latin maxim actus non facit reum nisi mens sit rea which expresses that basic principle of the criminal law that both a guilty act and a guilty mind are necessary for criminal law, is misleading in that it suggests that there is one single, precise state of mind, called a mens rea, proof of which is required for criminal liability; whereas the state of mind which is necessary for criminal guilt varies with different crimes....
>
> Later students of the criminal law, however, discerned in the different mental states, varying with the definitions of particular crimes, common characteristics from which they developed a generalization of tremendous value. This generalization is that the mental state which is required, and which suffices for criminal liability in most crimes consists in either:
>
> (a) an intention to bring about the actus reus of the crime or to put the matter in another way, an intention to bring about the forbidden result or state of affairs, or
>
> (b) recklessness with respect to the actus reus, i.e., foresight that his conduct may cause or produce the actus reus.
>
> ....
>
> In R. v. Buzzanga and Durocher (1979), 49 C.C.C. (2d) 369...this Court said, at p. 381:
>
> > The general mens rea which is required and which suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result which the law, in creating the offence, seeks

to prevent....

> A crime may, of course, be so defined as to require proof of a more complex mental state than is required for the ordinary mens rea, e.g. theft. Sometimes less than the intentional or reckless causing of the actus reus will suffice to constitute the necessary blameworthy mental element.... As a general rule, the necessary mental element must be brought home to the accused subjectively, but in some offences liability is based on objective fault, e.g., dangerous driving.

Dickson, J., dissenting in Pappajohn v. The Queen, [1980] 2 S.C.R. 120 at p.139 explained that the nature and extent of the concept of mens rea could only be ascertained from the analysis of the offence:

> The mens rea which is required, and its nature and extent, will vary with the particular crime; it can only be determined by detailed examination of the actus reus of the offence. Speaking generally, at least where the circumstance is not "morally indifferent", the mental element must be proved with respect to all circumstances that form part of the actus reus.

Intention

As we have stated above, the Criminal Code does not define intention or acting intentionally. However, several offences in the Criminal Code require proof of that form of mental state (see Document 28 at Appendix A). The most well known offence that requires to be committed intentionally is murder as defined in s.212(a)(i): "Culpable homicide is murder where the person who causes the death of a human being means to cause his death". There are very few cases that have tried to define "intention". The following definition of intention as it relates to consequences (for example death in murder) was given by Martin, J.A. in R. v. Buzzanga and Durocher, supra, at pp. 384-385:

> I agree, however (assuming without deciding that there may be cases in which intended consequences are confined to those which it is the actor's conscious purpose to bring about), that, as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he

> decided to bring it about (albeit regretfully), in order to achieve his ultimate purpose. His intention encompasses the means as well as to his ultimate objective.

In criminal law, we also speak of "crimes of general intent" and "crimes of specific intent" in connection with the defence of voluntary intoxication by drugs or alcohol. The defence of intoxication is only available for crimes of specific intent, e.g. murder, theft etc. Case law has determined which crimes in the Criminal Code are of general or specific intent. The law on this matter is being reviewed by the Supreme Court of Canada in R. v. Quin, on appeal from the judgment of the Ontario Court of Appeal (1983), 9 C.C.C. (3d) 94. The Supreme Court of Canada has reserved judgment on the proposition that the distinction between crimes of "specific" intent and those of "general" intent is illogical and potentially unfair.

Aside from its utility for the defence of intoxication, the expressions "crime of general intent" or "crimes of basic intent" are also used by scholars and judges to describe crimes which can be committed either by intention or recklessness, i.e. crimes where the minimum mens rea or mental element sufficient for culpability is recklessness. On this subject, Dickson, J., dissenting in Leary v. The Queen, supra, stated at p. 34 that the "mental state basic to criminal liability consists in most crimes in either (a) an intention to cause the actus reus of the crime, i.e. an intention to do the act which constitutes the crime in question, or (b) [recklessness]". Recklessness will be examined in more details infra. The authors Fortin and Viau in Traité de droit pénal général, supra, have written the following about general intent at pp. 109 and 114:

> [Translation] In general, intention used in the sense of desire or foreseeability of a result that is almost certain is called specific intent or ulterior intent. In the absence of that qualification, intention means the foreseeability of the probability of a consequence; intention is then designated by the expression "general intent" and intermingles with recklessness.
>
> ....
>
> Contrary to offences that require by the commission of the actus reus, the pursuit of an aim or the will to realize a particular consequence, the majority of offences are of general intent.... These offences are defined regardless of the aim of the actor, solely in relation to a conduct and circumstances to which is occasionally added a result.... This is the case of mischief for example, which consists essentially in

> damaging or destroying property. It thus supposes a conduct on the part of the actor that results in the damage of property. This crime is of general intent since it is sufficient that the actor foresaw the probable result of his conduct.

Recklessness

The Criminal Code does not define "recklessness" or "acting recklessly". However, the definition of "wilfully" at s.386(1) of the Criminal Code, supra, is in fact a definition of the "traditional" meaning of "recklessness" in criminal law.

There are very few Canadian cases that have attempted to categorically define the meaning of recklessness. This is a matter that is usually left to the theoretical literature. Three cases, however, merit to be cited.

In Leary v. The Queen, supra, at p.34, Dickson J., in dissent, defined recklessness as follows:

> [Recklessness is] foresight or realization on the part of the person that his conduct will probably cause or may cause the actus reus, together with assumption of or indifference to a risk, which in all the circumstances is substantial or unjustifiable. This latter mental element is sometimes characterized as recklessness.

In R. v. Buzzanga and Durocher, supra, Martin J.A. stated at p. 379 that "recklessly" denotes "the subjective state of mind of a person who foresees that his conduct may cause the prohibited result but, nevertheless, takes a deliberate and unjustifiable risk of bringing it about...."

Finally, the Supreme Court of Canada in Sansregret v. The Queen, [1985] 1 S.C.R. 570 at pp. 581-582 has distinguished negligence and recklessness as follows:

> Negligence, the failure to take reasonable care, is a creature of the civil law and is not generally a concept having a place in determining criminal liability. Nevertheless, it is frequently confused with recklessness in the criminal sense and care should be taken to separate the two concepts. Negligence is tested by the objective standard of the reasonable man.... In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal mens rea,

> must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despites the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term "recklessness" is used in the criminal law and it is clearly distinct from the concept of civil negligence.

For a discussion of "recklessness", see Documents 38 and 39 at Appendix A.

Negligence

As we have seen above, s.202 of the Criminal Code defines criminal negligence which definition applies to a very limited number of offences.

In O'Grady v. Sparling, [1960] S.C.R. 804, the Supreme Court of Canada has stated that our definition of criminal negligence was a definition of "advertent negligence" and that "inadvertent negligence" was not covered under the definition. It can be said that "inadvertent" negligence" means "unconscious" negligence, in that the actor is negligent without being conscious, adverting or thinking about the risk of harm. As to what is meant by advertent negligence, it would appear that, under O'Grady v. Sparling, it means "recklessness".

Since most cases of criminal negligence arise from inadvertence, the Appellate Courts of the provinces have simply ignored this requirement of subjectivity spelled in O'Grady v. Sparling, supra, and have applied a test of gross negligence measured objectively (see the history in R. v. Waite (1986), 28 C.C.C. (3d) 326 (Ont. C.A.), leave to appeal to the Supreme Court granted).

The Ontario Court of Appeal in R. v. Barron (1985), 23 C.C.C. (3d) 544 at p. 550 has stated that "For behaviour to constitute criminal negligence, however, there must be a marked and substantial departure from the standard of a reasonable person" and in R. v. Waite, supra, the same Court has clearly indicated that the test of negligence for acts as opposed to omissions is an objective one and that there is no need to address the issues of advertence and inadvertence.

Finally, it should be noted that in Ontario, the Court of Appeal in R. v. Tutton and Tutton (1985), 18 C.C.C. (3d) 328 leave to appeal to the S.C.C. granted, has ruled that in cases of criminal negligence arising from an omission or failure to act, the test is not an objective one as in cases of acting. In cases of omissions, the Court has stated that the test for criminal negligence is subjective in that the Crown must prove that the accused knew of the unjustified risk or closed his mind to it out of disregard for the life or safety of the victim.

The cases of R. v. Waite and R. v. Tutton and Tutton have been argued before the Supreme Court of Canada and the Court has reserved judgments.

Another important issue regarding negligence and the objective test of the reasonable man, is how much the trier of fact can take into consideration, the personal characteristics of the accused. This was a matter alluded to recently in R. v. Waite, supra, at pp. 342-343, where Mr. Justice Cory stated:

> Those who criticize the inclusion of the concept of negligence in criminal law do so in part on the grounds that it may be unfair to infer the mens rea from the act itself. An example put forward would be of a mentally retarded accused who sets a fire in a crowded building. It is said that such an accused can have no realization of the consequences of his act, nor can he possess a subjective intent to kill or injure others. It is thus argued that subjective intent should always be demonstrated by the Crown in criminal cases. It is also argued that such a handicapped accused could not learn from the deterrence of punishment. However, it should be observed that even the view that a marked departure from the standard of a reasonable person supplies the fault or mens rea necessary for criminal negligence does not preclude taking into account the disabilities of a handicapped person. In the excellent text, Canadian Criminal Law by D. Stuart, the following appears at p. 185:
>
> > There is now growing acceptance that there are valid arguments in favour of resorting to objective negligence, especially if we are referring to the Hart/Pickard concept of objective negligence, which makes generous allowance for individual factors. However, arguments justifying a general fault approach apply with considerably less force.

[Document 37 at Appendix A]

For a discussion of negligence, see Document 37 at Appendix A.

"Knowingly" etc.

Several offences in the Criminal Code use the expressions "knowingly", "knowing", etc. (see Document 23 at Appendix A). Acting "knowingly" is not defined in the Criminal Code.

Colvin in Principles of Criminal Law, supra, states at p.95 that this expression "excludes mere recklessness". Mewett & Manning in Criminal Law, supra, state at p.120 that if "the statute uses the actual word 'knowingly' it would be difficult to argue that such an offence could also be committed recklessly".

"For the purpose of"

Several offences in the Criminal Code use the expression "for the purpose of".

Colvin in Principles of Criminal Law, supra, states at p.92 that purpose "is often regarded as the paradigm form of intention and of criminal culpability in general.... In ordinary language description of action, the concept of purpose usually refers to an actor's reasons for doing what he did." In support of his position, Professor Colvin then cites the following part of White's article "Intention, Purpose, Foresight and Desire" (1976), 92 L.Q. Rev. 569 at p. 574:

> My purpose in doing something is my reason for it, in the sense of what I am trying to do or what I want to accomplish by doing it. Hence, to specify a purpose is to give an explanation, whereas to specify an intention is not necessarily to do so. We do things with an intention, but for a purpose, since the intention may only accompany the action, whereas the purpose must be a reason for it. We do not naturally speak of "the reason or intention" and "the point or intention" in the way that we do speak of "the reason or purpose" and "the point or purpose" of an action.

Colvin adds at p.92 that "an actor's purpose was to accomplish something if the prospect of its occurrence played a causal role in his decision to do what he did" and that an actor may several purposes "one of which can be isolated and used to ground criminal liability." A good example of Colvin's opinion is the treason offence of s.46(2)(a): "Everyone commits treason who, in Canada,

uses force or violence for the purpose of overthrowing the the government of Canada or a province" (emphasis added). For Colvin, "purpose" is only one of the forms of intention.

In R. v. George, [1960] S.C.R. 871, a case dealing with the defence of intoxication, Fauteux J. at p. 877 made a distinction between specific intent and general intent. The part of his judgment concerning "intention as applied to acts considered in relation to their purposes" is useful in understanding the special form of intention conveyed by the use of the word "purpose":

> In considering the question of mens rea, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

Wilful Blindness

In Sansregret v. The Queen, supra, the Supreme Court of Canada has recently had the occasion to examine the rule of "wilful blindness" in connection with recklessness. McIntyre J. speaking for the majority of the Court stated at p. 584:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is a reason for inquiry.

In Sansregret, the Court pointed out that the rule of wilful blindness "has its dangers" and "is of narrow application". On this point, at p. 586 it cited Professor Williams:

> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law.... A court can properly find wilful

> blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to deny knowledge. This, and this alone, is wilful blindness.

In Vaillancourt v. R., supra, Lamer J. reaffirmed the importance of wilful blindness when he repeated the followed words of Dickson, J. in R. v. City of Sault Ste. Marie:

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them.

3. Comments on Proposals

a. Position on Clauses 2(4)(a), (b) and (d) and Points In Issue

Position of the members. The members are unanimously of the view that clauses 2(4)(a), (b), and (d) should be rejected. In summary, they are opposed to a scheme of culpability based on an identification of elements as "conduct, circumstance, or consequence". The reasons why the members reject these clauses are as follows:

1) Complexity. The LRC scheme of culpability is incredibly complex. Trying to understand it, aside from ascertaining its validity, is in itself a difficult task. The LRC scheme of culpability is explained as follows in one of the papers (pp. 8-9 of Document 30 at Appendix A):

> C.2(4)(a) (General requirements as to the level of culpability) of the General Part introduces a scheme of element analysis in the interpretation of the appropriate culpability" (descriptive mens rea) of the crimes found in the Special Part. Clause 2(4)(a) requires that the elements of each offence be broken down into "conduct", "circumstances" or "consequences".
>
> First, it is necessary to establish that an element of an offence is ... "conduct", "circumstance" or "consequence".
>
> Second, it is necessary to look at the definitional elements of the crime, to see if a form of culpability is mentioned in regard to the element(s). If none is mentioned, then "purpose" is applicable in view of

> c.2(4)(d) (residual rule).
>
> Third, it is then necessary to go to c.2(4)(a) and apply that form of culpability to the accompanying element identified, in order to see what is the form of culpability applicable to that element.
>
> Fourth, it is then necessary to go to c.2(4)(b) in order to interpret the culpability applicable in regard to that element.

The members, all experienced criminal law lawyers, have found it extremely difficult to understand how the complex scheme of clauses 2(4)(a) and (b) work. One member has stated at one of the meetings that "if there is one cause for codification, it is simplification and that [the LRC scheme] was the opposite of simplification". This scheme would be new to the legal community and the members doubt very much if other lawyers would not have the same difficulty in understanding it. The members firmly believe that the public would not understand it.

2) The problem of identifying the elements. One of the major difficulties in the LRC scheme is the exercise of identifying each of the elements of a crime as a "conduct", "circumstance" or "consequence". This difficulty is a major concern to the members. This problem is mentioned in four of the research papers that have verified the scheme with some of the LRC crimes of the Special Part (see Documents 15, 25, 29 and 30 at Appendix A). The members are of the view that it would take several years of litigation before all the elements of the crimes are identified. At one of the meetings, the members have verified the offence of manslaughter in connection with clauses 2(4)(a) and (b). The manslaughter crime (clause 6(2)) reads in English and in French as follows:

> 6(2) Manslaughter. Everyone commits a crime who recklessly kills another.
>
> 6(2) Homicide involontaire. Commet un crime quiconque cause la mort d'autrui par témérité.

In relation to the application of clause 2(4)(a)(ii) to the English version of clause 6(2), there was some disagreement if "kills another person" was conduct or a consequence, or if only "kills" was conduct or a consequence and "another person" a circumstance. One member stated that there was a conceptual difficulty for him and no doubt for a member of a jury, to be told that a person is a circumstance. In regard to the French version and the words "cause la mort" which translated literally means "causing the death", these words were interpreted as a consequence, or "cause" was interpreted as conduct and "mort" as a consequence. It was stated that an element of a crime should not fall in two categories of

objective elements. For example, if "kills" is conduct, under clause 2(4)(a)(ii), the person has to act purposely; consequently, with clause 2(4)(b)(i) - purposely, it would mean that for reckless killing, the actor has to engage purposely in the act of killing! The members point out that if "cause la mort" is interpreted as a consequence that there would be no conduct as required by the words "specified by that definition" in clause 2(4)(a)(ii)(A) and by clause 2(2) which reads "No one is liable for a crime without engaging in the conduct and having the level of culpability specified by its definition".

3) Difficulty for judges and juries. The members are of the view that the scheme is difficult and troublesome for lawyers, it follows that it will be extremely difficult for a judge to charge a jury and for a jury to understand the instructions. Any law that can not be satisfactorily explained to a jury will not achieve the clarity the LRC seeks to achieve. On this topic, here is a sample of the views expressed:

> It would be impossible to satisfactorily explain these prolix definitions to juries and there would be endless unnecessary and frustrating litigation. Consider only, for example, the references to recklessness in the LRC concept of purposely in sec. 2(4)(a)(i) and (b) and the reference to purposely in the concept of recklessness in sec. 2(4)(a)(ii).
>
> [Document 6 at Appendix A]

> The proposals of the LRCC contained in this section are most troublesome because of its structure around new concepts and the complexity in application. Practical exercises conducted have shown that it would be very difficult if not impossible to explain these concepts in a charge used to the jury.
>
> [Document 7 at Appendix A]

> We are of the view that the proposed scheme is unworkably complex and would pose a nightmare for both judges and juries. It creates a scheme in which every aspect of a crime must be evaluated with respect to the mental element required for its completion. Far from clarifying the law these proposals and the additional uncertainty of results that would depend on how the court views particular aspects of the crime, whether as conduct, consequences or circumstances and what mental element the court interprets the offence provisions as requiring for each. By throwing out the existing and reasonably understood terminology for mens rea and proposing in its place a complex scheme with new terms

> and new aspects (conduct, consequences and circumstances) the LRC has not advanced the simplification of a difficult area of law one bit. Nor in our view, have they made a sufficient case for embarking in such fashion into so muddled a morass.
>
> [Document 8 at Appendix A]

While the members are of the view that it may very well be a question of law for the judge to determine if an element is "conduct, circumstance or a consequence", they are also of the view that the judge would have to tell the jury, after the addresses of counsel, a) if a particular element was conduct, circumstance or a consequence; b) what the law was on that particular element; and c) what evidence related to that particular objective element. The instructions would be extremely complex when a crime contains three different objective elements, when there are several charges and when there are included offences. The members agree that "the complexity of the charge will undoubtedly lead to a field day for appellate counsel who are already prone to reading a judge's charge with a magnifying glass" (p. 12, Document 25 at Appendix A).

4) Abandonment of the concept of intention. The members are unanimously of the view that the word "intention" should not replaced by "purpose". The word intention is well understood from the public. The members think that the words "purpose" or "purposely" have an ordinary language meaning which is inappropriate to describe the concept of intention. On this topic, see supra, White's article "Intention, Purpose, Foresight and Desire". As an illustration of one of the comments, one person has written:

> The word is used as a substitute for "intent" which the comment at p.18 of the new Code says is a term that has caused difficulties. The word "purpose" has created even more difficulties as demonstrated by the inordinate amount of litigation over s.85 of the Code, possession of a weapon for a purpose dangerous to the public peace. "Purpose" carries a connotation of ultimate object or motive which is lacking in the word "intention" which has a more direct and immediate meaning... We are not aware of any great difficulties with the word "intention" and would prefer in any event to stick with the devil we know rather than one we don't.
>
> [pp. 9-10, Document 25 at Appendix A]

The members point out that the concept of "intention" is used in the French text of Appendix A to the Report while the LRC recommendations use the French expression "à dessein" for the English word "purposely". As an illustration, see clause 8 in

French at p. 99 of the Report.

5) Intention should include recklessness. The members are unanimously of the view that rather than divide intention ("purpose" or "purposely" in the LRC scheme) and recklessness, the law should make it clear that acting intentionally includes acting recklessly. In other words, intention should include recklessness. This point will be developed below, under the heading "Codification".

6) Consciousness in "recklessly" and "negligently". The members are concerned with the difficulty in distinguishing "recklessly" from "negligently" as the former involves consciousness of the risk and the later may also involve consciousness of the risk. On this topic, as illustrations of the concerns, see at Appendix A: Documents 3 at p. 8, 15 at p.2, 25 at p.7, and 30 at p. 15. In the last document, the member writes:

> The problem with the second definition of "recklessness" is in relation with the definition of "negligently". Both of these definitions involve conscious risk taking and the test suggested to differentiate them in the comment at p.21 of the Draft Code is as follows:
>
> > Where the risk is taken consciously, the difference between negligence and recklessness is that, in the latter instance, it is much more unreasonable to take it; this calls for a value judgment in each individual case.
>
> ...I have pointed out [in Document 39] that the distinction between two important mens rea definitions should not be based on the value judgment of the prosecuting authorities as such a test opens the door to arbitrariness and unequal treatment of accused persons under the law.

7) Negligently as to conduct etc. The members do not think that it is possible to act "negligently" as to conduct as proposed at clause 2(4)(a)(iii). On this topic, see at Appendix A, p. 11 of Document 25 and pp. 16-17 of Document 30. The first paper states:

> The third category of crime, negligence, requires only that the conduct be negligent defined as a marked departure from the ordinary standard of care in one's conduct. At first blush this seems reasonable, but on closer inspection this becomes a difficult concept to apply to conduct. Purposeful and reckless crime

> require that the conduct be purposeful by which is meant intentional and volitional in the simplest sense. It is difficult to view negligent crime as not also requiring that the conduct itself (except for omissions) be equally purposeful in that simple sense. In fact, it seems that the whole concept of negligence does not lend itself to the type of three stage consideration attempted here of negligence as to conduct, negligence as to consequence and negligence as to circumstances.

As to the particular inappropriateness of the concepts of conduct, circumstances and consequence to negligence, one member in a paper, quoted Professor Fletcher on this point:

> I do not think it makes sense to apply the term negligence specifically to conduct, to consequences and circumstances. The term negligence can be understood to apply either to the risk of harm or to the attitude of the actor relative to that risk. The object of risk of harm must be unreasonable, and the posture of the actor toward that risk must be understood as a departure from the "ordinary standard of reasonable care". The notions of conduct, consequences and circumstances do not enter into the proper analysis of negligence and, in my view, in the proper analysis of recklessness.
>
> [p. 18 of Document 30 at Appendix A]

8) Wilful blindness. The members are of the view that the doctrine of "wilful blindness" (see under the heading "Existing Law" is not dealt with appropriately and directly in the Report and that it should. This reason will be developed under the heading "Codification".

9) Inappropriate standard of culpability. The members are of the view that the LRC scheme sets a standard of culpability that is inappropriate for a fair regime of culpability. Our opinion is illustrated in the following analysis of the crime of "Aggravated Criminal Intrusion" (clause 12(2) at p.72 of the Report) which crime requires "purpose" as the requisite level of culpability in view of clause 2(4)(d), the residual rule:

> ... on a charge of breaking and entering a dwelling house (s.12(2)), the accused must know the place is probably a dwelling house. If he testifies to the effect "I thought it may have been a dwelling house but that it equally may have been a business office", his whole conduct is deemed to have not been purposeful, notwithstanding that he acted purposely. It would

> appear that to deem this conduct to be not purposeful but merely reckless or negligent is a serious understatement of the accused's conduct.... [W]e still feel that these provisions set a standard of prescience on the part of the accused that goes beyond what is now required and which is unnecessary for a fair regime of criminal liability.
>
> The problem seems to be in the definition of recklessness and the requirement of at least that level of culpability as to consequences and circumstances to deem the accused's conduct anything other than negligent. The standard of probability is too high.
>
> [pp. 6-7 of Document 25 at Appendix A]

All the members agree that the standard imposed by the word "probably" (i.e., greater than 50% likelihood)) in the first definition of "recklessly" is too a high a standard. As another illustration of our position, the following example and comment are given:

> For example, a person knows one of five hundred guns contains one bullet and he then, not knowing which gun does contain the bullet, picks up one of the five hundred revolvers and fires it at a passerby, I would suggest that he is reckless ... on the basis that there is absolutely no social utility in his conduct....
>
> [pp. 1-2 of Appendix A (Revised) to Document 1 at Appendix A]

It is to be noted that contrary to clause 2(4)(d), the current law is that when no mental element is mentioned, intention (called by the LRC "purposely") or recklessness in regard to the prohibited act or omission will suffice. Under clause 2(4)(d), "purpose" is the required mental element of the crime when none is mentioned in the crime of the Special Part.

10) Circumstances specified versus circumstances not specified. Several members are of the view that the distinction made in the comment to clause 2(4)(a)(i)(C) at pp. 18-19 of the Report between circumstances specified in the "definition" of a crime in which case purposely as to circumstances means "knowingly or recklessly" and circumstances not specified in the "definition" of a crime in which case "purposely" as to circumstances only means "knowingly" is not valid. On this complex issue, see at Appendix A, pp. 1-2 of Document 15, p. 2 of Document 17, and p.11 of Document 30. It is the understanding of the members that the LRC may bring some changes in this regard in Volume 2 of its Draft Code.

11) Confusion surrounding the meaning of "conduct". We have already mentioned in our comments for clauses 2(1), 2(2) and 2(3)(a) the confusion surrounding the use of the word "conduct" in chapter 2 of the LRC Report, This is particular true in clauses 2(4)(a)(i)(A), 2(4)(a)(ii)(A) and 2(4)(a)(iii)(A) where we find the words "conduct specified by that definition" but where the comment refers to the "initiating act" in the narrow meaning of muscular contraction. In Document 30 at p. 14, one member has quoted the following comment of Professor Fletcher who has reviewed the LRC clauses:

> There is obviously a major confusion in the interpretation of the word "conduct". On the one hand, the Code repeatedly refers to the "conduct specified by [the] definition". Yet the commentary interprets the word "conduct" to refer to the narrow notion of muscular contraction.

12) Other reasons. Other reasons of lesser importance that have played a role in the rejection of clauses 2(4)(a), (b), and (d) are as follows:

- differences between the recommendations in French and the provisions in French of Appendix A to the Report (see p. 12 of Document 30 at Appendix A). The French speaking members would like to state for the record that they much prefer the concept of "l'insouciance" used in the textbooks and in case law to the expression "témérité";

- the absence of a definition of "knowingly", which level of culpability is mentioned at clause 2(4)(a)(i)(C) but unlike "purposely", "recklessly" and "negligently" is left undefined (see p. 9 of Document 2 and p. 9 of Document 30);

- the definition of "purposely" at clause 2(4)(b)(ii)(B) not reflecting the law as in Buzzanga and Durocher (see at Appendix A, pp. 8-9 of Document 25 and p. 10 of Document 2); and

- lack of comprehensiveness of the General Part with regard to level of culpability with the use of the words "unless otherwise provided" in clause 2(4)(a) (see p. 1 of Document 15 at Appendix A).

Summary. The members unanimously reject clauses 2(4)(a), (b), and (d) because the LRC scheme is incredibly complex and flawed. The members view clause 2(4) as the most important clause in the Report and they regret to say that this clause does not meet the high expectations raised by Mr. Justice Linden and Professor Fitzgerald in the recent article "Recodifying Criminal Law" [1987] 66 Can. Bar Rev. 529 where they state at p. 545 that "[Report 30] should ultimately lead to a ...Code that is just, clear, comprehensive, contemporary, coherent, effective...."

b. Codification

Introduction. Having rejected clause 2(4), the members did some work in order to find out if some consensus could be achieved in some areas. The details of their work in this area are reflected in the documents at Appendix A and in the minutes of the meetings. The members are unanimously of the view that their work in this area is incomplete due to the time constraint imposed on the Working Group. It is to be remembered also that the members completed their work before the important decision of Vaillancourt v. R. on mens rea which no doubt would have facilitated their work, had it been rendered prior to the deliberations of the Working Group.

Nevertheless, in the short time at their disposal, the members believe that they have done a fair amount of work and have come to some important decisions that will be useful for those who will continue our task, if such a decision is taken. These decisions are:

1) The integration of recklessness into intention. In Document 38 at p. 1, there is a reference to the following statement by Professor Howard: "As a matter of history, recklessness emerged as an extension of responsibility for intention". It was pointed out during the discussions that in the Continental system, intention includes dolus eventualis which is akin to recklessness (see Document 39 at Appendix A). As we have seen under the heading "Existing Law" for clauses 2(4)(a), (b) and (d), the basic or general mens rea for offences where there is no mental element mentioned is either intention or recklessness.

The members believe that it is wrong to try to separate the two concepts as the LRC has done in their Report. All the members agree that it state in the General Part that intention includes recklessness. Put differently, one could say that for acting intentionally, it is sufficient if the person acted recklessly or that recklessness is equal to intention. On this topic, the following are some of the views expressed:

> The reason given for replacing the word "intent" with "purpose" is the "blurring in the case law of the distinction between intention and recklessness". [Report 30 at p.18] These notions ought to be merged rather than separated.
>
> [p. 5 of Document 6 at Appendix A]

> When intention is an element of the offence, it is sufficient to show that the accused was reckless.
>
> [Appendix A revised of Document 1 at Appendix A]

> Has any thought been given to rolling purposely and recklessly into one? The distinction between the two set out in 2(4)(a)(i) and (ii) is not that great. Both require purpose for (A) and adding "purposely or recklessly" to (B) makes little difference given the level of consciousness required for the definition of recklessness. We already use recklessness as a means of supplying "purposeful intent" in the doctrine of wilful blindness and in the second branch of the definition of murder which requires that someone cause grievous bodily harm knowing that it is likely to cause death and being reckless as to whether death ensues or not.
>
> [pp. 4-5 of Document 24 at Appendix A]

2) The residual rule. A majority of members are of the opinion that there should be a rule in the General Part to the effect that "unless otherwise provided", intention which includes recklessness is the mental element for all offences. This would be the residual rule in the sense that where no mental element is mentioned in an offence, the offence would require that it be committed by intention which includes recklessness. In other words, it would be sufficient for the Crown to prove as a minimum recklessness as to the essential elements of the crime in order to get a conviction.

Two schools of thought were represented during the discussions on this topic. The first school was interested in elaborating the principle without being excessively concerned about the present offences, as these offences would be reviewed and would follow the General Part. The second school, while recognizing the validity of the rule, was very much concerned with the effect of such a rule on present offences.

Serious concerns were expressed about such a presumptive rule. One concern is that it would change the law for the offence of assault causing bodily harm where the Crown has only to prove the intentional application of force and no mental element in regard to the resulting bodily harm. In Vaillancourt v. R., supra, Lamer J. by way of obiter dictum stated:

> There are many provisions in the Code requiring only ... a causal link between the act and the result. As I would prefer not to cast doubt on the validity of such provisions in this case....

It is possible that the Supreme Court of Canada may rule one day that a subjective mens rea in regard to the result of bodily harm is required.

Another concern is that such a rule would require very careful drafting as each element of the offence would have to be proven by the Crown. Several members are concerned of the effect of such a rule on the common drinking and driving offences where quite often mens rea is supplied by the voluntary consumption of liquor. One member stated that these drinking and driving offences needed to be restructured; another stated that these particular offences should not stop us from formulating the general rule. One member expressed his concerns in Documents 16 and 6 at Appendix A and in the last document, he writes:

> This sort of general residual rule of mens rea could be problematic by requiring that it be negatived by specific provision in the constitution of each crime where it is not readily applicable for at least one of the elements. Examples of present Criminal Code offences where this could be difficult include driving over .08, impaired or dangerous driving causing death, causing a disturbance, carrying a concealed weapon and assault causing bodily harm. It may be better to take a positive approach by endeavouring to constitute individual crimes in a way in which the requisite mens rea is readily recognizable, without creating the hazard of a comprehensive presumption.

One member explained that the benefit of such a rule would be to simplify the offences; for example, under such a rule, a special form of intent like "knowingly" would be put only where required and it would permit the deletion of unnecessary mental elements such as "wilfully" in the offence of mischief.

3) Special forms of intention. All the members agreed that there should be one or more special forms of intention for particular crimes in the Special Part. As examples of such

particular forms of intention, some members mentioned during the discussions "knowingly" and "for the purpose of". For lack of time, no formal decision was taken if such terms should be mentioned or defined in the General Part. The members wish to point that without a complete analysis of the crimes of the Special Part, it is difficult to assess the importance of such special forms of intent as they do not know how many revised offences would require such special terms. Some members believe that there would be very few offences requiring "knowingly" for example. The members also realize that there are some expressions which seem peculiar to certain offences, for example "fraudulently" in certain provisions, and "dishonesty" in the case law on fraud. The members did not have the time to explore the relation, if any, of such terms with intention.

4) Wilful blindness. All the members agree that the General Part should contain a provision specifically addressing wilful blindness. The members do not believe that it is addressed appropriately in clause 3(2) of the Draft Code. The doctrine of wilful blindness is different from recklessness. In support, the members rely on the following statement of Williams in Criminal Law: The General Part (London: Stevens, 1961) at p.159:

> Recklessness and "not caring" are not quite the same thing as wilful blindness; such words express the latter doctrine too widely.

5) Negligence. The members are unanimously of the view that negligence is an appropriate form of culpability. The degree of negligence and the test of negligence are discussed below.

6) Definitions - Introduction. The members spent several hours at the meetings and at their respective places of work on the subject of defining intention and negligence and, in the case of one member, on defining also "knowingly" and "for the purpose of".

The members wish to make it clear that no consensus was achieved on any definitions proposed by a member. Any proposal of a definition that will be quoted in this report must be so interpreted.

The two schools of thought. It can be said that there were two schools of thought on the issue on whether the mental elements ought to be defined. One school felt that there should be no definitions of mental elements. The second school thought that there should be definitions.

The first school of thought. Several reasons were advanced why there ought not be definitions of mental states in a code. First, the common law is flexible, can correct itself and can evolve with times and changes while Code definitions are rigid and freeze the law. This opinion is reflected in Jayasena v. Reginam, [1970] 1 All E.R. 219 at p. 222 (P.C.) where the Court stated: "The common law is shaped as much by the way in which it is practiced as by judicial dicta. The common law is malleable to an extent that a Code is not" (see Document 21 at Appendix A). Second, it is advanced that mens rea can not be defined and that only a generalization can be achieved on mental states, which generalization only applies in most cases (see R. v. MacCannel, supra). Third, whatever definitions are achieved in a working group like ours, such a definition would be subsequently modified in response to pressure groups or by the legislative process. Fourth, some members think that language has its limits. On this topic, one member wrote:

> The effort to elucidate mental states by elements such as conduct, consequences, and circumstances is an illustration of the limits of language. Some words cannot be enhanced and definitions merely introduce words to define with no advance in certainty. Intention and negligence should not be defined as they have well understood meanings.... All that is needed then is a statement of policy equating recklessness with intention and wilful blindness with knowledge (see Appendix A)...
>
> ....
>
> APPENDIX A
>
> 1. Everyone who causes a result by conduct, knowing that conduct could cause the result and being reckless whether the result occurs or not, shall be deemed to have intentionally caused the result.
>
> [Document 6 at Appendix A]

The first school of thought is not without its followers even in countries where there is a long tradition of codification. For example, in the modern Penal Code of the Federal Republic of Germany (1975), intention and negligence are not defined and their principal provision on the mental element simply says: "Only intentional acting will be punishable unless the law expressly imposes punishment for negligent acting." However, it must be said also that in the Federal Republic of Germany, the courts and the doctrine generally agree as to the meaning of these terms. Recently, Professor Colvin, in Principles of Criminal Law, supra, has pointed out at p. 99, the difficulties that will have to face the persons working on definitions such as recklessness:

> The authorities on the role and meaning of recklessness in the law of criminal culpability are therefore fairly recent and still subject to interpretational disputes.

The second school of thought. There are shades of opinions in this second school of thought. One member, would define negligence, but would only define recklessness as a part of intention. His proposal and reasons are as follows:

> (1) When intention is an element of the offence, it is sufficient to show that the accused was reckless.
>
> (2) A person is reckless when he is conscious that there is a risk that he may bring about a state of affairs prohibited by law and he unreasonably proceeds in the face of that risk....
>
> ....
>
> As can be seen, I have chosen not to define the term 'intention'. I adhere to Mr. Mulligan's position that the word 'intention" really cannot be improved upon and the definitions we might come up with would only lead to greater problems of interpretation. I do think worthwhile to state that intention does include a concept of being reckless.
>
> [Appendix A (Revised) of Document 1 at Appendix A]

That same member did not express a position on such forms of mental states such as "knowingly" or "for the purpose of". This can be explained by the fact that the efforts of the members in this area was devoted entirely to finding appropriate definitions of intention that includes recklessness and of negligence.

One member believes that recklessness in intention and negligence ought to be defined also. While he would like to see intention defined, he was not convinced as a result of the work of the Working Group that a satisfactory definition is possible. That member did not express a position on defining such terms as "knowingly" and "for the purpose of".

Another member is of the view that negligence ought to be defined and that it should be possible to define mens rea but that he was not satisfied with the results achieved in the Working Group; he felt that it could be a long process and that for the present, it would be better to choose the common law. That member was also in favour of defining such a term as "knowingly". That member wrote:

> ... while it would be perhaps desirable to define "mens rea" which should include intention and recklessness, practically speaking it may be impossible to do so.
>
> [Document 7 at Appendix A]

One member believes intention that includes recklessness, negligence, "knowingly" and "for the purpose of" should be defined. That member stated the following about intention:

> I have wrestled with the issue if "intention" should be defined. I would live with the compromise that intention does not have to be defined but then, I believe that as a minimum the General part should say that acting intentionally includes acting recklessly and that acting recklessly should be defined. My preferred position is that intention should be defined....
>
> ....
>
> Intention
>
> (1) A person acts intentionally when he has the will to realize the state of affairs prohibited by law; it is sufficient if that person is conscious that there is a risk that he may cause that state of affairs and accepts or is indifferent to such a risk which is unreasonable.
>
> [p. 11 of Document 2 at Appendix A]

Finally, one member is of the view that there should be a complete definition of intention which includes recklessness (general intent), a definition of a specific intent (possibly called "for the purpose of") and negligence.

Conclusion. From the above, it would appear that a majority of members favour defining intention and negligence but that it may be very difficult to arrive at a consensus on definitions.

Elements of definitions - Introduction

The members spent some time on the definitions and the issues relating to them. Sometimes, the members achieved a consensus, e.g. that the test for negligence ought to be objective. However, most of the time, no consensus was achieved or decision taken on

the issues involved. Nevertheless, the members feel that a summary of the unresolved issues may be useful to others, should the decision be taken that our work be continued. The decisions or issues are as follows:

1) Replacing the scheme of "conduct, circumstances and consequences". A major hurdle faced by the members who worked on definitions was to try to find a method of avoiding the scheme of "conduct, circumstances, and consequences" used by the LRC in clause 2(4)(a) and (b). One member pointed out at the outset of the discussions that Dickson J. in Leary, supra, had achieved that feat by simply referring to the actus reus of the offence in his definitions of intention and recklessness. For example, he defined recklessness as follows at p. 34:

> [Recklessness is] foresight or realization on the part of the person that his conduct will probably cause or may cause the actus reus, together with assumption of or indifference to a risk, which in all the circumstances is substantial or unjustifiable. This latter mental element is sometimes characterized as recklessness.

While no consensus was achieved or decision taken on this point, the technique used by some members in their definitions indicates that it is possible, at least for intention and negligence, to replace the LRC scheme of "conduct, circumstances and consequences". The expressions used are "state of affairs that corresponds to the definitional elements of an offence" (Document 23 at Appendix A), "a state of affairs prohibited by law" (Documents 1 and 2 at Appendix A), "act or omission prohibited by law" (Documents 7 and 21 at Appendix A), "actus reus (act or omission) of the offence" (Document 21 at Appendix A), "conduct or omission prohibited by law" (Document 22 at Appendix A).

2) The elements in intention. All the members are in agreement that in intention, there is an element of knowledge. This element of knowledge is made clear in Vaillancourt, supra for clause 2(2), where Lamer J. cites Dickson J. in City of Sault Ste. Marie:

> Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them.
>
> [Emphasis added]

One member pointed out that it may be more appropriate to talk in terms of an element of "consciousness" or "awareness" rather than an element of knowledge, if there is to be a definition of "knowingly". Although no consensus was achieved or decision taken, some members believe that "knowingly" requires a degree of knowledge that is close to certainty.

One member also stated that there was a second element in intention which was the volitional element. For example in murder under s.212(a)(i), the actor must "mean" to cause death. The members discussed this element particularly as to its applicability to recklessness. The members also discussed this element and its relation, if any, to the traditional requirement that the actus reus be voluntary. This area was largely left unexplored for lack of time.

3) The degree of risk in recklessness. As we have stated above, the degree of risk expressed by the words "probably" in the LRC definition of recklessness is too high. Our example above in regard to the 500 guns proves this point. The members discussed the appropriate wording that should be used to describe the degree of risk which is unacceptable and should give rise to liability. This issue is discussed in the following papers: Documents 1, 2, and 38). This is another issue that needs further analysis.

4) Objective test for negligence. The members are unanimously of the view that the test for negligence should be objective.

5) The requisite degree of negligence. A majority of the members are of the view that the degree for negligence necessary for liability should be a "marked and substantial departure" or "marked departure". This position reflects the law as found in Ontario at the present time. A minority of the members are of the view that the degree of negligence should be the ordinary civil standard of negligence. However, it should be noted that some members of the majority also believe that a lower standard can be used for certain offences such as in s. 84(2) of the Criminal Code, careless use of a firearm, where the word "careless" is used. The members wish to state that this part of their work has been one of the most interesting and innovative. The minority has argued, inter alia, that the sole reason that criminal negligence must be a "marked and substantial departure" is only the expression of an evidentiary concern to ensure that the negligence is clear and evident. It was pointed out that in the Continental system, there are some countries that do not require a higher degree of negligence for criminal negligence. One member of the majority felt that the following reason by Stephen given in 1883 was still

valid for a higher degree of negligence than in civil negligence:

> There must be more, but no one can say how much more, carelessness than is required in order to create civil liability.... No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case.
>
> [p. 13 of Document 2 at Appendix A]

For the minority, one member wrote:

> In my view the standard for criminal negligence should be a departure from the standard of conduct of a reasonably prudent man having regard to the risk posed by the conduct engaged in. No attempt should be made to quantify the degree of negligence required beyond this by means of such expressions as "gross negligence" or "marked departure"....
>
> By framing the test as I have we signal two things. First, the test is an objective one at the level of the civil standard. Second, we allow the courts to do what they will do anyway (and arguably must do) and that is to measure the potential danger of the conduct involved when setting the standard of care that will be required. If this test is properly applied it should produce the results that we desire: criminalize irresponsible conduct in relation to dangerous activities. The argument that we will catch too much conduct in the criminal net is met I believe by restricting the application of criminal negligence to activities that possess the element of inherent danger and are activities that require an extra degree of care to be conducted safely. If that is the case then there can be no argument that the civil standard is too low because the activity itself and the potential danger it creates mandates special caution.
>
> [Document 22 at Appendix A]

6) Inadvertent and advertent negligence. Although no consensus or decision were achieved on this point, some members are of the view that a definition of negligence should make it clear that negligence can be inadvertent (see Documents 1 and 2). On this point, one member stated that if the standard for negligence is a "marked departure" then those favouring that position may wish to indicate that inadvertence is covered but that the difficulty then with that standard, is whether we can say that it is inadvertent because "marked departure" would provide evidence of advertence. Some members also believe that negligence can also arise from an error of judgment. Document 39 at Appendix A

contains the views of a member on "conscious negligence" and how it differs from recklessness. These are matters that need to be further explored, if our work is to be continued.

7) Personal characteristics of the actor in negligence. Another issue in negligence that was briefly discussed by the members is if we can hold against an individual his physical or intellectual characteristics over which he had no possibility of control, e.g. his physical infirmity. One member believes that a definition of negligence ought to stipulate that we can not. Others are of the opinion that the common law notion of the "reasonable man" is flexible enough to take these particularities of the actor into consideration. No decision was taken on this point. Again, this is a matter that ought to be explored, if further work is done.

c. Recommendations

The members recommend:

1) unanimously that clauses 2(4)(a), (b) and (d) be rejected;

2) unanimously that the General Part specifically provide that intention includes recklessness so that to prove intention, it is sufficient to prove the accused acted recklessly;

3) by a majority that the General Part provide that "unless otherwise provided", the mental element for all crimes is intention (which includes recklessness);

4) unanimously that there can be special form or forms of intention for particular crimes in the Special Part;

5) unanimously that the General Part contain a provision specifically addressing wilful blindness;

6) unanimously that negligence is an appropriate form of culpability;

7) by a majority that there should be definitions of "intention" and "negligence" and that the efforts of this Working Group be continued in order to try to achieve these definitions;

8) unanimously that the test for negligence be an objective test;

9) by a majority that the degree of negligence be one of "marked and substantial departure" or "marked departure"; and

10) unanimously that further be work be done in the area of the mental element in crime and that the work of this Working Group be taken into consideration.

Clause 2(4)(c) Greater Culpability Requirement Satisfies Lesser

1. LRC Proposals

a. Recommendation

2(4)(c) Greater Culpability Requirement Satisfies Lesser.

(i) Where the definition of a crime requires negligence, a person may be liable if he acts or omits to act purposely or recklessly as to one or more of the elements in that definition.

(ii) Where the definition of a crime requires recklessness, a person may be liable if he acts or omits to act purposely as to one or more of the elements in that definition.

[p. 22 of the Report]

b. Appendix A Provision (Draft Legislation)

12. (1) [Presumption] Proof of purpose satisfies a requirement of recklessness or negligence.

(2) [Idem] Proof of recklessness satisfies a requirement of negligence.

[p. 100 of the Report]

2. Existing Law

a. Criminal Code Provisions

None.

b. Common Law

While our courts have not explicitly stated that there exists a broad rule to the effect that a greater culpability or mental element satisfies a lesser culpability or mental element, the common law has implicitly recognized that rule on a case by case basis. In Arthurs v. R., [1974] S.C.R. 287 and in R. v. Shettler (1984), 11 W.C.B. 439 (Ont. C.A.), the courts have accepted that criminal negligence (s.202) can be satisfied by deliberate conduct.

3. Comments On Proposals

a. Position and Points in Issue

The members unanimously reject clause 2(4)(c) as the rejection of clauses 2(4)(a), (b), and (d) necessarily implies the rejection of clause 2(4)(c).

b. Codification

The members discussed whether there should be a provision in a code reflecting the rule that a greater culpability requirement satisfies a lesser one.

On this subject, some members are in favour of such a rule in a code either as a provision of substantive law or procedural law for three reasons. First, they are afraid that some judges will not follow this rule of logic, giving the most favourable interpretation to the accused and acquitting him. Second, there is the problem of the relevancy of the evidence; for example, on a charge involving negligence, there can be objections to the admissibility of evidence to the effect that the commission of the offence was intentional on the grounds of irrelevancy. Third, if no mischief is caused by the insertion of such a rule, it would be beneficial in order to avoid possible decisions or arguments described in the previous two reasons.

Other members are of the view that there is no necessity to codify logic. Some added that our courts have demonstrated their capacity to deal with this possible problem. Others are of the view that it would be better to wait for other proposals on the mental element before deciding on the appropriateness of inserting such a provision.

A majority voted against a resolution that there should be such a rule of substantive or procedural law in a Code. However, in view of the abstentions and the discussion that followed the vote indicating that some members had voted against such a resolution because they wanted to see the other proposals it related to, the members are of the view that no recommendation should be made at this time on the subject of codifying such a rule.

c. Recommendation

The members unanimously recommend that clause 2(4)(c) be rejected.

Clause 2(5) Corporate Liability

1. LRC Proposals

a. Recommendation

2(5) Corporate Liability

(a) With respect to crimes requiring purpose or recklessness, a corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy.

(b) With respect to crimes requiring negligence a corporation is liable as above, notwithstanding that no director, officer or employee may be held individually liable for the same offence.

[pp. 22-23 of the Report]

[Alternative

2(5) A corporation is liable for conduct committed on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy, notwithstanding that no director, officer or employee may be held individually liable for the same offence.]

[p. 23 of the Report]

b. Appendix A Provision (Draft Legislation)

c.27 [Corporate liability] With respect to crimes requiring purpose or recklessness as the relevant state of mind, a corporation is criminally liable for conduct engaged in on its behalf by its directors, officers or employees acting within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy.

(2) [Idem] With respect to crimes requiring negligence as the relevant state of mind, a corporation is criminally liable for conduct engaged in on its behalf by its directors, officers or employees acting

> **within the scope of their authority and identifiable as persons with authority over the formulation or implementation of corporate policy, notwithstanding that no such director, officer or employee may be held individually liable for the same offence.**
>
> [p. 103 of the Report]

2. Existing Law

a. Criminal Code Provisions

Section 2 of the Criminal Code ensures that corporations can be held criminally liable for an offence since that section defines a "person" as including corporations:

> **s.2 ["every one" "person" "owner"] "every one", "person", "owner", and similar expressions include Her Majesty and public bodies, bodies corporate, societies, companies and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively;**

Since a corporation is not a human person, the Criminal Code provides special rules of procedure for a corporation:

- s.466 (appearance of a corporation at a preliminary inquiry by counsel or agent; procedure when non-appearance);
- s.486 (appearance, non-appearance and corporation not electing at trial by provincial court judge);
- s.548 (appearance by counsel or agent);
- s.549 (notice of indictment to corporation);
- s.550 (procedure on default of appearance);
- s.551 (trial of corporation);
- s.592(4) (procedure for greater punishment for previous conviction where non-appearance);
- s.631.2 (service of process on a corporation); and
- s.735(3) (appearance by corporation in summary conviction proceedings).

Since a corporation can not serve a sentence of imprisonment, a corporation is liable, in lieu of imprisonment, to a fine. Section 647 reads as follows:

> **647. [Fines on corporations] Notwithstanding section 646, a corporation that is convicted of an offence is liable, in lieu of any imprisonment that is prescribed as punishment for that offence, to be fined in an amount, except where otherwise provided by law,**
>
> **(a) that is in the discretion of the court, where the offence is an indictable offence; or**
>
> **(b) not exceeding twenty-five thousand dollars, where the offence is a summary conviction offence.**

Finally, s.648 provides for the procedure to enforce fines on corporations.

b. Common Law

A corporation can be liable for an offence of absolute liability, strict liability or an offence requiring mens rea. For a discussion of these categories of offences and the meaning of mens rea, see the heading "Existing Law" for clause 2(2), conduct and liability.

A corporation will be found guilty of an offence of absolute liability, if the corporation's employee committed the actus reus or prohibited conduct of the offence; a corporation will be found guilty of a crime of strict liability, if the corporation's employee committed the actus reus of the offence and the corporation can not establish a defence of due diligence. On the defence of due diligence for corporations, the Supreme Court of Canada stated in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 at p. 1331:

> The due diligence which must be established is that of the accused alone.... The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself.

The rest of our comments will concern crimes having a mens rea.

In R. v. McNamara et al. (No.1) (1981), 56 C.C.C. (2d) 193 at p. 312, the Ontario Court of Appeal approved the direction of the trial judge that one of the bases of corporate liability was as

follows:

> A company may be responsible for the criminal acts of its servant ... if the servant has authority, express or implied, to do the act. [p. 308]

On appeal to the Supreme Court of Canada, Canadian Dredge & Dock Co. v. The Queen, [1985] 1 S.C.R. 662 at pp. 701-702, the Court did refer to the above basis of liability but did not deal with it as it was concerned with the second ground of liability for corporations, the identification theory. It seems, however, from p. 675 of the report, that the authority given to the servant for the first ground of liability would have to come from the board of directors.

In Canadian Dredge & Dock Co., the Supreme Court of Canada dealt exclusively with the identification theory as a ground of liability for corporations. The law is difficult to sum up without citing a few excerpts of the Supreme Court decision:

> It [the identification theory] produces the element of mens rea in the corporate entity, otherwise absent from the legal entity but present in the natural person, the directing mind. This establishes the "identity" between the directing mind and the corporation which results in the corporation being found guilty for the act of the natural person, the employee....[p. 682]
>
> ....
>
> The essence of the test is that identity of the directing mind and the company coincide so long as the actions of the former are performed by the manager within the sector of corporation assigned to him by the corporation. The sector may be functional, or geographic, or may embrace the entire undertaking of the corporation. The requirement is better stated when it is said that the act in question must be done by the directing force of the company when carrying out his assigned function in the corporation.... [p. 685]
>
> ....
>
> The identity doctrine merges the board of directors, the managing director, the superintendent, the manager or anyone else delegated by the board of directors to whom is delegated the governing executive authority of the corporation, and the conduct of any of the merged entities is thereby attributed to the corporation.... [A] corporation may ... have more than one directing mind. This must be particularly so in a

> country such as Canada....[p. 693; emphasis added]
>
> ....
>
> ...[T]he identification doctrine only operates where the Crown demonstrates that the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company. [pp. 713-714]

When the corporation is found guilty of the offence, it means generally that the directing mind is also guilty of the offence (Canadian Dredge & Dock Co., supra, at pp. 685-686). The Crown can bring charges against the directing mind (the directors involved etc.), the corporation or both.

There has been no decision by the Supreme Court of Canada if s.7 or any of the provisions of s.11 of the Charter apply to corporations. In Re B.C. Motor Vehicle Act, supra, Lamer J. speaking for the majority of the Court stated:

> ...I understand the concern of many as regards corporate offences, specially, as was mentioned by the Court of Appeal, in certain sensitive areas such as the preservation of our vital environment and our natural resources. This concern might well be dispelled were it to be decided, given the proper case, that s.7 affords protection to human persons only and does not extend to corporations.
>
> Even if it be decided that s.7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give different results from that of balancing public interest and the liberty or security of the person of a human being.

3. Comments on Proposals

a. Position on Clause 2(5)(a) and Points in Issue

Position of the members on clause 2(5)(a). The members are unanimously opposed to clause 2(5)(a) as drafted for the following reasons:

Reasons raised in one of the papers. All the members agreed generally with the comments made in one of the papers (Document 31 at Appendix A):

a) Individuals Capable of Giving Rise to Corporate Liability

The LRC proposal states that a corporation is liable for conduct committed on its behalf by its "directors, officers or employees". This class of individuals is too restricted. Any person given authority by the corporation to act on its behalf should be capable of giving rise to corporate liability. The term "agent", which is referred to in s.1(2) of the draft Code, should be utilized to properly include all corporate representatives within the class of individuals capable of giving rise to corporate liability.

b) "On Its Behalf"

The phrase "on its behalf" will give rise, I suspect, to considerable litigation. Corporate lawyers will argue that only acts authorized at the Annual Meeting or by the Board of Directors are done "on behalf" of the corporation. It will also be argued that conduct which benefits the individual who performed it, as well as the corporation, cannot be said to have been done "on behalf" of the corporation. The common law is now clear that if the corporation obtained any benefit from conduct performed by a corporate directing mind, the corporation will be liable notwithstanding that the conduct also benefitted the directing mind personally. This issue will probably be re-litigated if the draft Code becomes law.

c) "Scope of Their Authority"

This is another phrase much litigated in the past. Originally, it was thought that no illegal act was within the scope of a corporate agent's authority. The phrase now refers to the area of corporate activity over which the corporate agent has responsibility. The phrase belongs to the delegation theory, which is not specifically addressed in the draft Code (see infra). It is a term of art. To the extent that the draft Code seeks to articulate its principles in language understandable to laymen, this phrase is not very useful.

d) "Authority Over the Formulation or Implementation of Corporate Policy"

Once again, this phrase will give rise to substantial litigation. The trick is to arrive at a formulation which will make the corporation liable for the criminal conduct of those members of its personnel who can truly be said to "represent" the corporation, but not liable for the crimes of every corporate agent. To a certain extent it can be said that all corporate employees, no matter how menial the tasks they perform, have "authority ... over the ... implementation of corporate policy".

On the other hand, the phrase could be interpreted narrowly and restricted in its application to very few senior corporate agents (as in the Tesco case). This would ignore the reality of corporate structures in Canada, where corporate decision making is often geographically spread out. The delegation theory, developed in the St. Lawrence case, recognizes that corporations often delegate authority to regional or division managers whose authority, while effective in the area over which they have responsibility, is quite limited having regard to the overall structure of the corporation.

e) Low level Employees Acting on Instruction

The LRC draft Code does not appear to address situations where decision making officers instruct lower level employees to engage in conduct that is criminal. The draft Code refers to "conduct" by the corporation's directing minds giving rise to corporate liability. However, in most cases the senior executive will not perform the conduct himself; the actual conduct itself will most likely be performed by someone else. On a strict reading of the draft Code, it could be said that the conduct in such circumstances was not committed by a person capable of giving rise to corporate liability.

In connection with point a) above, several members are of the view that the LRC proposal is too narrow in that it does not reflect today's corporate structuring or functioning. This is especially true for corporations acting through contractors who provide services or handle part of the corporation's activities or corporations' agents that are not "directors, officers or employees".

In connection with point e) above, one member pointed out that

clause 2(5)(a) did not cover the ground of liability referred to in R. v. McNamara et al., supra (Document 2 at Annex A).

b. Position on Clause 2(5)(b) and Points in Issue

Position of the members on clause 2(5)(b). The members are opposed to c.2(5)(b) as drafted for the following reasons:

1) Reasons raised in one of the papers. All the members agreed generally with the first paragraph and a majority of members agreed generally with the second paragraph of one of the papers (Document 31 in Appendix A) that state:

> f) Negligence
>
> Draft Code s.2(5)(b) addresses corporate liability for negligence. The LRC's stated intention to cover negligence flowing from "organizational process" rather than the conduct of individuals is commendable and reflects developments in United States law. However, I am not sure that the words of the section make this intention as clear as the Comment suggests.
>
> A deficiency in the section is its restriction to the conduct of "directing minds". When it comes to crimes requiring negligence, I do not see why negligence of any corporate agent should not give rise to corporate liability, unless the corporation should not give rise to corporate liability, unless the corporation can show that it exercised due diligence in its attempts to prevent negligence by its employees.

2) Different meaning of negligence. Some members stated that the offence referred to "crimes requiring negligence" but that the definition of negligence at clause 2(4)(b) is not appropriate for the "negligence in the organizational process" referred to in that clause. On this point, one member wrote:

> As to c.2(5)(b), the LRC abandons the identification theory in favour of a concept of negligence which it refers to in the comment as "negligence in the organizational process rather than in the conduct of any single individual". Nothing is said about the definition or test for that sort of negligence which would be different from the definition of negligence found in c.2(4)(b). In the absence of more information and discussion, I find the proposal to be vague and I cannot agree with.
>
> [Document 2 at Appendix A]

c. Clause 2(5) - The Alternative

The members did not have the time to thoroughly discuss the alternative and will make no recommendation as to it. One member commented on that alternative by writing that "this proposal does not discuss the issue if such an extension of the criminal law is required and if in practice such a provision is required. Again, in the absence of a more in depth discussion, I cannot agree with it" (Document 2 at Appendix A).

d. Codification

Retention of criminal corporate liability. The members discussed a proposal made in one of the papers (Document 31 of Appendix A) that corporate liability should be abolished. All the members are in favour of the retention of criminal corporate liability. One reason is that the abolition of criminal corporate liability would deprive the provinces of a most effective way of prohibiting or limiting an activity, in the event that it needs to be prohibited or limited. Another reason is that it may be easier to prove a case against a corporation than against an individual because the Crown can call as witnesses all the individuals of the corporation that have made the decision. Finally, fining a corporation is a viable alternative to fining insolvent directors.

In the paper advancing that criminal corporate liability ought to be abolished, it was proposed that where human agents of the corporation had committed a crime and that a corporation had profited from it, "a sentencing mechanism could be developed that required the corporation to make restitution...." Members were opposed to such a scheme because the whole part of such a trial would focus on the issue of guilt of an individual and at the time of sentencing, the corporation, another legal entity, would be penalized.

Proposal for further study. The LRC acknowledges at p. 24 of the Report that more work is required in the area of corporate liability. A majority of members voted in favour of the following resolution:

> A further examination should be made with a view towards making corporations liable where individuals acted under the apparent authority of the company. The corporation would be liable unless it shows that it took all reasonable steps to prevent the commission of the crime. This resolution only applies to crimes of negligence.

Mosaic of opinions expressed on corporate liability. The members expressed a mosaic of views on corporate criminal liability. One member thought that the identification theory should continue to apply to crimes of negligence and that there was no place in the Criminal Code for strict liability offences. One member is in favour of the above resolution because, inter alia, he does not think that s.7 of the Charter applies to corporations. One member wrote that there "should be liability for all criminal conduct attributable to the organization but not to any individual officers because of diffuse participation" and that a "case can also be made for criminal liability in some cases where an officer or agent acted outside formal authority, especially where there is acquiescence and a potential benefit to the organization" (Document 6 at Appendix A). One member thinks that vicarious liability for corporations is appropriate in some areas. One member thinks that a strict liability type of offence for corporations could possibly be applied for some particular areas such as environmental crimes. One member is of the view that the principle of restraint should guide any extension of liability for corporations. Several members are of the view that criminal liability for corporations should be expanded. This mosaic of views substantiate the need for further work.

e. Recommendations

The members recommend:

1) unanimously that clauses 2(5)(a) and (b) be rejected;

2) unanimously that criminal corporate liability be retained;

3) by a majority that a further examination of corporate liability should be made with a view towards making corporations liable for a crime of negligence where individuals acted under the apparent authority of the company; the corporation would be liable unless it shows that it took all reasonable steps to prevent the commission of the crime; and

4) unanimously that more work and study is required in the area of corporate liability.

Clause 2(6) Causation

1. LRC Proposals

a. Recommendation

> **2(6) Causation. Everyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes it.**
>
> [p. 24 of the Report]

b. Appendix A Provision (Draft Legislation)

> **7. [Causation] A person causes a result only if the conduct of the person substantially contributes to its occurrence and no other subsequent unforeseeable cause supersedes the conduct.**
>
> [p. 99 of the Report]

2. Existing Law

a. Criminal Code Provisions

There is no general rule on causation in the Criminal Code that applies to all offences. However, for the offences of murder, manslaughter and infanticide, there are several special causation rules. These rules are ss.205(1) (when a person commits homicide), 205(5)(c) and (d) (culpable homicide), 205(6)(exception to culpable homicide, procuring death by false evidence), 206(2)(injury before or during birth causing death), 207 (death which might have been prevented), 208 (death from treatment of injury), 209 (acceleration of death), 210 (death within year and a day) and 211 (killing by influence of the mind). Section 209 is given as an illustration:

> **209. [Acceleration of death] Where a person causes bodily injury to a human being that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.**

b. Common Law/Legal Writings

General Remarks

Causation is only relevant to result crimes, since causation concerns causing a result. In practice, causation is rarely an issue for courts. One member who has researched the current law has stated that causation "has a long history of unusual cases with difficult causation issues due to elements such as remoteness, unanticipated results, multiple factors, intervening events, and extraordinary victim behaviour. See, for example, R. v. Blaue (1975), 3 All R.R. 446" (Document 35 at Appendix A).

The Smithers' Decision

The leading Canadian case on causation is Smithers v. The Queen, [1978] 1 S.C.R. 506. The facts of that case are important. After a hockey game, Smithers attacked a person and kicked him in the abdomen. The victim died within a few minutes. The head-note of the case states that "The medical evidence indicated that the deceased had died from asphyxia from aspiration of foreign materials due to vomiting and that the malfunctioning of the epiglottis was probably caused by the kick but could have resulted from fear." Smithers was charged and convicted of manslaughter. His appeal to the Supreme Court of Canada was dismissed.

Mr. Justice Dickson who delivered the judgment of the Court stated that it was important to distinguish between "causation as a question of fact and causation as a question of law." He explained causation as a question of fact and the role of expert evidence on that type of causation as follows at p. 518:

> The factual determination is whether A caused B. The answer to the factual question can only come from the evidence of witnesses. It has nothing to do with intention, foresight or risk.... Thus if D shoots P or stabs him and death follows within moments, there being no intervening cause, jurors would have little difficulty in resolving the issue of causality from their own experience and knowledge.
>
> Expert evidence is admissible, of course, to establish factual cause.... [I]t does not require them [the experts] to distinguish between what is a "cause", i.e. a real and contributing cause of death, and what is merely a "condition," i.e. part of the background of the death. Nor should they be expected to say, where two or more causes combine to produce a result, which of these causes contributes the more.

Mr. Justice Dickson explained that in Smithers, the Crown had the burden of proving beyond a reasonable doubt "factual causation", i.e. that the kick caused the death. On this issue, the Court stated at p. 519 that all the Crown was required to prove was that "the kick was at least a contributing cause of death, outside the de minimis range...." The Court added that "No question of remoteness or of incorrect treatment arises in this case." Later on the Court added at p. 520:

> Once evidence had been led concerning the relationship between the kick and the vomiting, leading to aspiration of stomach contents and asphyxia, the contributing condition of a malfunctioning epiglottis would not prevent conviction for manslaughter.

The Court stated that for manslaughter by unlawful act, the Crown did not have to prove an intention to cause death or injury and that "foreseeability" was not in issue. Mr. Dickson added that the only intent required was "of delivering the kick" to the victim and adopted the opinion that "the most trivial assault, if it should, through some unforeseen weakness in the deceased, cause death, will render the actor guilty of culpable homicide."

Causation as a Question of Law

Causation as a question of law is very much a matter that is left to scholars in textbooks. This is because the cases are almost non-existent on issues involving "causation as a question of law".

In regard to causation as a question of fact, Stuart at p.104 of Canadian Criminal Law, supra, prefers the "but-for test" or sine qua non test to the Supreme Court of Canada test of "contributing cause ... outside the de minimis range". He describes "imputable cause" (his expression for causation as a question of law) as follows at pp. 104-105:

> [Imputable cause] is more descriptive of the true nature of inquiry that arises after the but-for test has sifted out cases in which there has been no preliminary proof of factual causation. The question is then, "given that the accused's conduct was at least a cause of the consequence, is he criminally responsible for causing it"? This is not a scientific inquiry, rather one of fixing moral blame similar to, but distinguishable from, the moral inquiry involving the requirement of fault.

Stuart also states at p. 106 that "Canadian courts have ... resorted to imprecise labelling in distinguishing the situation of an 'intervening cause' [Smithers], 'intervening agency',

'remoteness' [Smithers] and in speaking of an operating cause that was not necessarily the sole 'effective' cause."

Colvin in Principles of Criminal Law, supra, at p. 63 uses the expression "causal responsibility" rather than the expression "causation as a question of law" used in Smithers. For Colvin, "causal responsibility" deals with the "significance of a causal connection when measured against other causal factors." Colvin articulates at pp. 63-65 the following principles of causal responsibility which are useful in supplementing the LRC comment:

> ... foresight [of a consequence] adds an element to a causal connection which always forecloses the issue of responsibility. Responsibility is more typically in issue where a consequence is unforeseen.... An actor [in the law of torts] is generally held responsible for those unexpected consequences ... which were reasonably foreseeable.... The test is whether or not its occurrence falls within the normal range of possible outcomes. If it does, the intermediate steps which led to that consequence generally need not have been foreseeable. The same holds for cases where the consequence was actually foreseen. Under exceptional circumstances, where the sequence of events is bizarre, the causal chain may be held to have been broken. This usually happens in the special case of a novus actus interveniens which is considered later.
>
> ....
>
> ...[T]he criminal law has generally rejected the notion that two independent actors can both cause the same injury. Where there are two independent contributions to the same causal chain, the issue is who bears the greater responsibility. This has not always been recognized in the cases. It underlies, however, the doctrine of novus actus interveniens, which is invoked where a subsequent act is held to eliminate the responsibility of the original actor.
>
> The assessment of relative causal responsibility does not permit anything akin to mathematical calculation. Indeed, in the present state of the law's development, all that can be attempted at the level of general principle is a rough identification and weighing of some of the most important factors. One of these is proximity to the resulting injury.... Another important factor is the relative culpability of the actors' states of mind.... At the level of general principle, the best approach is perhaps to consider how the ideas of reasonable foreseeability, proximity and relative culpability help to elucidate some well known but

problematic cases.

3. Comments on Proposals

a. Position and Points in Issue

Position of the members on clause 2(6). The members are unanimously of the view that clause 2(6) should be rejected for the following reasons:

1) Opposition to the word "substantially". All the members are of the view that the word "substantially" in "substantially contributes" is a higher standard than the Supreme Court of Canada standard of Smithers, supra, of "at least a contributing cause of [the result] ... outside the de minimis range...." The members wish to point out that the LRC comment at p. 24 that states that case-law suggests "that there must be a significant or substantial link between the accused's conduct and the result..." is not accurate in view of Smithers. The members are of the view that the standard in Smithers is proper. The members note that the French version of the Supreme Court of Canada report uses the words "de façon plus que mineure" for the English words "outside the de minimis range". It is to be noted also that the French version of clause 2(6) uses the words "y contribue de façon concrète" which translated literally means "contributes to it in a concrete way". Some members are of the view that an English expression would be more appropriate than the Latin words de minimis but that "substantial" must be ruled out. One member pointed out that the word "substantial" is ambiguous in English as it can have opposite meanings. The members did not agree as to what words would be more appropriate than "outside de minimis range". The following expressions were used during the discussions or in the papers: "significant", "in a more than insignificant way", "more than in a minor way", "more than trifling", and "more than negligible".

2) The word "supersedes". One member is of the view that the word "supersedes" is "open to wide-ranging interpretation and may be troublesome in cases where the original cause continues to operate notwithstanding a greater impetus from a subsequent act" (Document 6 at Appendix A). Another member has written that "supersedes" is "a word designed to create mischief as it implies that the court must weigh the various causal factors and determine which is the most to blame for the result" (Document 8 at Appendix A). The members wish to point out that the French version of the English words "and no other unforeseen and unforeseeable cause supersedes it" read in French "si le résultat n'est imputable à une autre cause imprévue et imprévisible" which translated literally means "if the result is not imputable to another unforeseen and unforeseeable cause". These different versions have rendered the task of assessing the proposals very difficult.

3) The words "and no other unforeseen and unforeseeable cause". Several members were opposed to the word "unforeseen" as it introduced a "subjective element of knowledge" (Document 6 at Appendix A). The comment of the LRC is not very useful in this connection as it does not even allude as to this requirement. The members note that while clause 2(6) refers to "unforeseen and unforeseeable", clause 7 of Appendix A only mentions "unforeseeable" and adds the further requirement that the unforeseeable cause be "subsequent". One member questions if the "thin skull" condition would not be an "unforeseen and unforeseeable" cause. Another member is of the view that under the test proposed, Smithers would have been acquitted. On the issue of "unforeseen and unforeeable", one member wrote:

> [Translation] ... the term "unforeseen" added by the LRC refers to the state of mind with respect to the circumstances. It requires the mental state of the accused at the time of the link between the conduct and the consequence to be taken into account, The further qualification of "unforeseeable" does not appear to us to be any more relevant; the issue is rather to know whether another cause superseded and broke the causal link.
>
> [Document 3 at Appendix A]

4) Against Codification. Several members are against having a general causation rule in the General Part. This reason may be interpreted by some as a further reason for disapproving of the LRC's clause. This position will be discussed below under the heading "Codification".

5) Special rules and a general rule. As it will be discussed below, there may very well be a need for special causation rules for special crimes such as homicide. If it is so, one member is of the opinion that a general rule may create problems. That member wrote:

> The interpretation of specific rules will not be helped by the inclusion of a general rule. It is likely that if a problem occurs in the application of a specific rule resort will be had to the general rule which was never intended to apply to the situation. Such resort can only produce distorted results and frustrate the intention of the legislation.
>
> [Document 8 at Appendix A]

6) Causation by omission. Some members are of the view that if there is to be a causation rule in the General Part, that it should deal specifically with the situation of causing a result by an omission to perform a legal duty. The LRC's clause does not address that issue, nor the comment discuss this important theoretical point. The comparative law paper on causation (Document 34 at Appendix A) and the minutes of our meetings discuss that issue.

b. Codification

Policy decisions may dictate special causation rules. The LRC's proposal would entail the repeal of the special homicide causation provisions. The members did not have the time to discuss these special rules. This should be done when the offences of the Special Part are reviewed or in a separate study. One member who has researched causation for us has written:

> While homicide cases have been the most common source, causation issues can arise in many other cases. The new offence of impaired driving causing bodily harm is a common example. It is possible to conceive of troublesome questions in crimes involving major property and environmental damage. The responses to many difficult causation questions are not merely matters of logic which can be confidently left for application under a general rule. They are matters of policy.
>
> [Emphasis added; document 35 at Appendix A]

> But, notwithstanding the LRC contention to the contrary, a general causation rule should not be regarded as obliviating [sic] some special causation rules such as found in the present Criminal Code with respect to homicide. Each of these special rules ought to be reconsidered on its merits and there may be a need to add some to settle troublesome questions in other crimes.... That is because the answers are not merely logical applications of the general rule [the member's rule], but matters of criminal liability policy that should be determined by Parliament and proclaimed for all to know.
>
> [Document 6 at Appendix A]

A majority of members are of the view that for reasons of policy, there may be a need to have special causation rules for particular offences such as homicide or environmental offences but that this matter should be considered when the Special Part offences are

considered. The minority is of the view that there is actually a need for special causation rules. As an illustration that special causation rules may be required for policy reasons, one member pointed that while s.210 (death within a year and a day) is viewed by the LRC in W.P. 33, Homicide, as being "anachronistic, in view of modern medical and scientific knowledge", an "argument for retaining such a rule is to avoid long uncertainty regarding a criminal charge and prosecution." (Document 35 at Appendix A).

Should there be a general rule on causation in the General Part? A majority of members are of the view that there should not be a causation rule in the General Part that would apply to all the Special Part offences.

The minority school. A minority of members is of the view that there should be a rule on causation in the General Part. The main arguments are that causation is a fundamental principle of liability without which the General Part would be incomplete and that there should be "a general rule on causation as the limit of criminal liability is an important policy" (Document 6 at Appendix A). Some members of that school have made proposals on a general rule of causation and are given as illustrations:

> Everyone shall be deemed to have caused a result when his conduct significantly contributes to the result, notwithstanding that there may be other contributory factors and that such conduct may not alone have caused the result.
>
> [Document 4 at Appendix A]

> [Translation] "A person does not cause a result unless he contributes to its occurrence in more than a minor fashion". (It is not necessary to refer to any other cause, because this is implicit)
>
> [Document 3 at Appendix A]

The rationale for this last proposal is discussed in the minutes and in document 32 at Appendix A.

The majority school. The members of the majority were opposed to having a causation rule in the General Part. For them, causation is first a matter of common sense and logic which need not to be codified. In unique and difficult cases where causation is an issue, these members prefer the flexibility of the common law over the rigidity of a fixed rule. Some members are of the view that Smithers, supra, has not dealt with intervening causes, remoteness etc. and that the law is not yet settled for

codification. Concern was also expressed that such a rule could possibly change the existing law on causation: "Some members of the judiciary would undoubtedly see this provision as a license to reconsider the whole area of causation in the context of the criminal law" (p. 14 of Document 25 at Appendix A). Our comparative law research has indicated that in Europe, where all countries have a penal code, only the Penal Code of Italy has a causation rule (Document 34 at Appendix A). The following views of the members illustrate their rationale:

> I agree with Professor Fletcher's opinion made in his review of the LRC's proposals that causation is an issue that should be left to the theoretical literature and to case law. The experience of other countries proves that point.
>
> [Document 2 at Appendix A]

> Causation is a concept that will always be situation specific and one that flows from logic and reason. In most situations, no general rule is necessary because the causal connection is obvious. In the difficult situations, the only ones for which reference to such a rule will be had, we are concerned that the creation of such a general rule will be more of a restrictive hindrance to the development of the law than a help.
>
> [Document 8 at Appendix A]

> In general we are against codification of this concept in the criminal law as the concept is subject to and dependent on too many variables existing in individual cases and should be resolved by application of common sense to factual situations having in mind guidelines already existing by way of jurisprudence.
>
> [Document 7 at Appendix A]

c. Recommendations

The members recommend:

1) unanimously that clause 2(6) be rejected;

2) by a majority that there be no codification of a causation rule in the General Part; and

3) unanimously that policy reasons can dictate the need for specific causation rules for specific circumstances of certain offences.

Clause 4(6)(c) Different Crime Committed From That Furthered

Introduction

Members of Working Group on chapter 4 of the LRC Draft Code referred clause 4(6)(c) to our consideration because it dealt with the mental element with the words "knows is a probable consequence" and because it recommends the deletion of the objective foreseeability test now existing with the words "ought to have known" in the common purpose rule of s.21(2) of the Criminal Code. Clause 4(6)(c) is intended to replace s.21(2).

The members wish to caution the readers that their discussions on clause 4(6)(c) of the LRC Report and s.21(2) of the Criminal Code were held before the Supreme Court decision of Vaillancourt v. R. (Unreported, December 3, 1987).

The discussion focused mostly of whether s.21(2) should be preferred over clause 4(6)(c).

1. LRC Proposals

a. Recommendation

> **4(6)(c) Qualification. A person who agrees with another person to commit a crime and who also otherwise furthers it, is liable not only for the crime he agrees to commit and intends to further, but also for any crime which he knows is a probable consequence of such agreement or furthering.**
>
> [p. 44 of the Report]

b. Appendix A Provision (Draft Legislation)

> **32. [Different crime committed] Every one who agrees with another person to commit a crime and helps, advises, incites or uses that person to commit the crime is liable to the punishment prescribed for any other crime that**
>
> **(a) is committed as a result of that conduct; and**

> **(b) is, to his knowledge, a probable consequence of that conduct.**
>
> [p. 104 of the Report]

2. Existing Law

a. Criminal Code Provision

> **21. (2) [Common intention] 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.**
>
> [Emphasis added]

b. Common Law

In the recent decision of Vaillancourt v. R., supra, Lamer J. stated in obiter dictum at p. 15 of his judgment that:

> It may well be [emphasis added] that, as a general rule, the principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act, in order to avoid punishing the "morally innocent".... There are many provisions in the Code requiring only objective foreseeability of the result or even only a causal link between the act and the result. As I would prefer not to cast doubt on the validity of such provisions in this case, I will assume, but only for the purposes of this appeal, that something less than subjective foresight of the result may, sometimes, suffice for the imposition of criminal liability for causing that result through intentional criminal conduct.

In Vaillancourt, Lamer J. also examined the words "ought to know" in the murder definition of s.212(c) of the Criminal Code and stated that these words "eliminates the requirement of actual subjective foresight and replaces it with objective foreseeability or negligence." In regard to s.21(2), Lamer J. stated specifically at p.8:

> I should add that there appears to be a further relaxation of the mental state when the accused is a party to the murder through s.21(2) of the Code as in this case. However, as I have said, it is sufficient to deal with s.213(d) in order to dispose of this appeal.

Leave to appeal was granted to the Supreme Court of Canada on March 26, 1987 in the case of Hayes v. The Queen (1985), 67 N.S.R. (2d) 234. One of the grounds in the notice of appeal to the Supreme Court of Canada is whether s.11(d) of the Charter, the presumption of innocence, was infringed where the conviction for first degree murder could have resulted from a combination of ss.21 and 214(5) (murder during the commission of certain offences). A reading of the appellant's reasons clearly indicate that the constitutional validity of s.21(2) with its "objective foreseeability" test is an issue.

3. Comments on Proposals

a. Position and Points in Issue

Position of the members. The members unanimously reject clause 4(6)(c) for the following reasons:

1) Position on the scheme of furthering. Since the members unanimously recommend in their comments referable to clause 2(3)(a) that the concept of chapter 4 be rejected, it follows that clause 4(6)(c) must be rejected as it incorporates it.

2) The phrase "and who also otherwise furthers it". All the members are opposed to clause 4(6)(c) because it contains a requirement for liability not found in s. 21(2) of the Criminal Code. Clause 4(6)(c) not only requires an agreement to commit a crime as does s.21(2) of the Criminal Code, but also requires that the accused, inter alia, "furthers" the crime agreed upon. Under s.21(2), the requirement is only that the members agree "to assist each other".

3) S. 21(2) is wider than clause 4(6)(c). A majority of members reject clause 4(6)(c) because under s.21(2) it is sufficient that the accused "knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose..." while under clause 4(6)(c), the accused is guilty, inter alia, "for any crime which he knows is a probable consequence of such agreement or

furthering". Objective foreseeability is thus sufficient under s.21(2) while under clause 4(6)(c), only a subjective mens rea will suffice.

b. Codification

Introduction. The members did not have the time to thoroughly discuss the issues involved with a common purpose rule. However, they wish to point out some of the issues discussed:

1) The word "probable". The members wish to point out that clause 4(6)(c) requires the accused to know that the other crime is probable. Several members are of the view that "probable" may set a standard that is too high as "probable" means more than a 50% chance. One member stated also that "to know" requires a very high degree of certainty. A discussion followed as to whether the minimum threshold for liability should not be recklessness.

2) Difficulty in understanding negligence in a common purpose rule. Several members have difficulty with the last sentence of the comment of the LRC at p.45 which states that in the context of a "common purpose" rule, "negligence has no place". It seems to them that the words "ought to have known" refer rather to an objective foreseeability test, than to negligence. One member is of the view that the LRC refers to negligence in its broad sense; another member thinks that it is negligence because the actor has not actually thought about the other crime; finally, one member is of the view that negligence refers to the present test where you take the accused's knowledge of the circumstances, and you transfer it to a reasonable man and ask if the reasonable man would have known.

3) Objective foreseeability. At the time of the last meeting of the members held on November 17, 1986, the majority of members were in favour of the objective foreseeability test because it is a policy choice that Parliament has made to deal with criminal enterprises. The minority was of the view that it is fundamentally unjust to require a subjective mens rea for the actual perpetrator and only an objective mens rea for the other party who "ought to have known". For example, if the common purpose is to kidnap somebody, and an assault is committed on a guard in order to get to the person to be kidnapped, the Crown would have to prove for the perpetrator of the assault that he intentionally applied force and for the party to the common purpose that he "ought to have known" that an assault would be committed. The minority was also of the view that Parliament's policy is subject to the Charter and in this case to ss.7 and 15. Several members of the majority were in agreement with the rationale of the minority that it is illogical to treat the party to the common purpose differently than the actual perpetrator but that it was a

policy choice made by Parliament. As to the Charter, several members were of the view that it was up to the courts to decide that issue and that the "policy" reflected in s.21(2) was valid until it was struck down. As a halfway house approach, one member proposed that the party to the common purpose that "ought to have known" should not be found guilty of the same offence as the perpetrator but of an included offence of negligence, if there is one (see Document 23 at Appendix A).

The Vaillancourt decision. Since the members did not have the time to discuss the common purpose rule in light of Vaillancourt, no recommendation regarding s. 21(2) can be made.

b. Recommendation

The members unanimously recommend that clause 4(6)(c) be rejected.

Papers Prepared, Period of June 29 to November 23, 1987

General

Doc. 1 - "Comments on Chapter II of the LRC Report #30, submitted November 16, 1987 and as amended by "Appendix A (Revised)", dated November 23, 1987, Ontario;

2 - "Comments on Chapter 2 of the LRC Report #30", dated November 8, 1987, Ottawa;

3 - "Comments on the General Part of the LRC's Criminal Code (Report 30, Vol.1)" [Translation], dated November 12, 1987, Quebec;

4 - "Discussion Paper, Re: Mens Rea, Causation and Omissions, Chapter 2 LRC Report #30, Volume I", dated September 22, 1987, British Columbia;

5 - "General Comments on LRC Report #30, Vol.1, Recodifying Criminal Law", dated October 21, 1987, British Columbia;

6 - "LRC Report #30 Vol.1, Chapter 2, Principles of Liability", dated October 21, 1987, British Columbia;

7 - "LRCC Report Volume 30, 'Recodifying Criminal Law'", submitted November 16, 1987, Alberta;

8 - "Saskatchewan's Position on Report 30, Volume 1 - Recodifying the Criminal Law", dated November 10, 1987, Saskatchewan;

Clause 2(1) - Principle of Legality

9 - "Contempt of Court" [Translation], dated September 4, 1987, Quebec;

10- "Distinction Between the Principle of Legality in Section 2(1) of the Draft, Section 11(g) of the Charter of Rights and Section 8 of the Criminal Code, dated August 31, 1987, Saskatchewan;

11- "The Codification of Contempt - A Background Paper", dated August 26, 1987, Ontario;

Clause 2(3)(b) - Omissions

12- "Omissions and Duties", dated August 19, 1987, Ottawa;

Clause 2(4) - Requirements for Culpability

13- "Application of s.2(4) to the Offence of Confinement Contained in Section 9(1) of the Draft Code", dated September 1, 1987, Saskatchewan;

14- "Codification Negligence", dated October 13, 1987, Alberta;

15- "Comments on Clause 2(4) of LRCC Report 30" [Translation], dated September 9, 1987, Quebec;

16- "Discussion Paper, Chapter 2 LRC Report #30, Volume 1, Issue: Should there be a statement in the General Part that intention is the presumptive mens rea for criminal culpability?", dated October 6, 1987, British Columbia;

17- "Discussion Paper, Re: Mens Rea, Chapter 2(4) L.R.C. Report #30, Vol.1", dated August 14, 1987, British Columbia;

18- "Draft Code - Section 2(4)", dated September 25, 1987, Alberta;

19- "General Rules", dated October 14, 1987, Ottawa;

20- "Intention", dated September 1987, Ontario;

21- "Intention", dated October 1987, Ontario;

22- "LRC Consultation - October 14 & 15", submitted October 14, 1987, Saskatchewan;

23- "Mens Rea Definitions", dated September 1987, Ottawa;

24- "Musings on Section 2(4) of the Law Reform Commission's Draft Criminal Code", dated September 1, 1987, Saskatchewan;

25- "Recodifying the Criminal Law - The Driving Offences, dated August 1987, Ontario;

26- "Recodifying the Criminal Law", dated September 23, 1987, Ontario;

27- "Recodifying the Criminal Law", dated October 1987, Ontario;

28- "Research of Terms in the Criminal Code", dated September 1987, Ottawa;

29- "Section 2(4) and the Offence of Arson", dated August 1987, Nova Scotia;

30- "Volume I of the LRC Draft Code - The Homicide Offences (Chapter 6) and C.2(4) (Requirements for Culpability)", dated

August 28, 1987, Ottawa;

C.2(5) Corporate Liability

31- "LRC Draft Criminal Code - Corporate Criminal Liability", dated September 22, 1987, Ontario;

C.2(6) Causation

32- "Causality" [Translation], dated September 28, 1987, Quebec;

33- "Causation", dated October 1987, Saskatchewan;

34- "Causation - Comparative law", dated September 1987, Ottawa; and

35- "Discussion Paper Re: Causation, Chapter 2(6) L.R.C. Report #30 Volume 1, August 13, 1987, British Columbia.

Documents Forwarded Before The First Meeting And Dealing With Chapter 2

36- "C.2(4)(a) General Requirements as to Culpability", dated June 8, 1987, Ottawa;

37- "C.2(4)(b) Negligently", dated May 22, 1987, Ottawa;

38- "C.2(4)(b) Recklessly", dated May 12, 1987, Ottawa; and

39- "The Difference Between Negligent Homicide and Reckless Homicide when Both of them Involve Consciousness of the Risk", dated May 21, 1987.