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**Report of the Working Group on Chapter 4 of
the Law Reform Commission of Canada
Report 30, Vol. 1 "Recodifying Criminal Law"**

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ANALYTICAL TABLE OF CONTENTS

| | <u>PAGE</u> |
|--|-------------|
| I- <u>Introduction</u> | 1-2 |
| II- <u>General Overview of the Chapter concerning involvement in crime</u> | |
| a. Present law | 1 |
| b. Approach of the LRC | 3 |
| c. Approach of the Working Group | 3 |
| d. Conclusions of the study | 4 |
| III- <u>Analysis of Chapter 4</u> | |
| A) <u>INVOLVEMENT IN COMPLETE CRIME</u> | |
| <u>Clause 4(1) - Committing</u> | |
| 1. <u>LRC proposal</u> | |
| a. Recommendation | 5 |
| b. Draft legislation | 5 |
| 2. <u>Existing law</u> | 5 |
| 3. <u>Comments on the proposal</u> | |
| a. Position and points in issue | 5 |
| b. Recommendations | 5 |
| <u>Clause 4(2) - Furthering</u> | |
| 1. <u>LRC Proposal</u> | |
| a. Recommendation | 6 |
| b. Draft legislation | 6 |

- 2. Existing law
 - a. Criminal Code provisions 6
 - b. Jurisprudence 7
- 3. Comments on the proposal
 - a. Position and points in issue 8
 - b. Recommendations 9

B) INVOLVEMENT IN INCOMPLETE CRIMES

Clause 4(3) - Attempt

- 1. LRC proposal
 - a. Recommendation 10
 - b. Draft legislation 10
- 2. Existing law
 - a. Criminal Code provisions 10
 - b. Jurisprudence 10
- 3. Comments on the proposal
 - a. Posiotion and points in issue 11-12
 - b. Recommendations 13

Clause 4(4) - Attempted Furthering

- 1. LRC proposal
 - a. Recommendation 13
 - b. Draft legislation 13
- 2. Existing law
 - Criminal Code provisions 14

| | | |
|----|------------------------------------|----|
| 3. | <u>Comments on the proposal</u> | |
| a. | Position and points in issue | 14 |
| b. | Recommendations | 14 |

Clause 4(5) - Conspiracy

| | | |
|----|------------------------------------|----|
| 1. | <u>LRC proposal</u> | |
| a. | Recommendation | 15 |
| b. | Draft legislation | 15 |
| 2. | <u>Existing law</u> | |
| a. | Criminal Code provisions | 15 |
| b. | Jurisprudence | 16 |
| 3. | <u>Comments on the proposal</u> | |
| a. | Position and points in issue | 16 |
| b. | Recommendations | 17 |

Clause 4(6) - Different Crime Committed from that Furthered

| | | |
|----|------------------------------------|----|
| 1. | <u>LRC proposal</u> | |
| a. | Recommendation | 17 |
| b. | Draft legislation | 18 |
| 2. | <u>Existing law</u> | |
| | Criminal Code provisions | 18 |
| 3. | <u>Comments on the proposal</u> | |
| a. | Position and points in issue | 19 |
| b. | Recommendations | 19 |

Clause 4(7) - Alternative Convictions

| | | |
|------------------------|---------------------------------------|-------|
| 1. | <u>LRC proposal</u> | |
| | a. Recommendations | 19 |
| | b. Draft legislation | 20 |
| 2. | <u>Existing law</u> | |
| | Criminal Code provisions | 21 |
| 3. | <u>Comments on the proposal</u> | |
| | a. Position and points in issue | 21-22 |
| | b. Recommendations | 22 |
| C) | <u>OTHER POINTS</u> | |
| 1. | Abandonment | 22 |
| 2. | Impossibility | 23 |
| <u>APPENDIX</u> | | 24 |

I. Introduction

On December 3, 1986, the Law Reform Commission of Canada published the first volume of Report 30 entitled "Recodifying Criminal Law". Important element in the process of reforming the Criminal Code, it contains the first half of the draft Criminal Code proposed by the LRC. It comprises a General Part divided into five chapters and the first two sections of a Special Part, devoted to crimes against the person and crimes against property. The second volume remains unpublished. In this report, the LRC was already proposing a basic reform of the general principles of our criminal law. It is these reform proposals contained in the General Part of the Code which the Department of Justice was to study as part of the general review of the Criminal Code.

It also felt it should incorporate the usual provincial consultation into this study. From this viewpoint, a decision was made at the federal-provincial conference of Ministers responsible for Justice, at St-Andrew-by-the-Sea, to create working groups to examine and evaluate the draft Code. Following discussion between the federal Department of Justice and the provinces, it was decided that the study would concentrate on Chapters 2, 3 and 4 of the draft Code. Working groups made up of senior officials would present their reports to the Federal-Provincial Coordinating Committee of Senior Officials (CCSO) in February, 1988. These reports would then be submitted to the federal-provincial meeting of Ministers of Justice and Attorneys General in the Spring of 1988.

As a result of that decision provincial representatives met in Ottawa on June 29 and 30 to set up this committee. The work of the committee was divided among three working groups, each of which was to study one of the three chapters in the General Part of the draft Code.

This report is presented by the Working Group responsible for studying Chapter 4. It is composed of Denise Bellamy, of the province of Ontario, Robert Mulligan of British Columbia, Claude Provost of Quebec and J'sseline Bujold of the federal government. Michael Roche of Newfoundland and Robert Murray of New Brunswick also took part in a few meetings.

Ms Bellamy chaired the Group. It had been decided by the Group that the role of the federal Department of Justice's representative would be to act as secretary of the Working Group and take part in the research and discussions. Since this report is intended to reflect provincial consultation, the opinions expressed do not always reflect those of the Canadian government's representative.

The participants met on three occasions, on June 29 and 30, on September 8 and on October 1, 1987.

II- General overview of the chapter concerning Involvement in Crime

a) Present law

The rules covered by Chapter 4 are found primarily in sections 21, 22, 24, 421, 423 and 587 of the Criminal Code and in the common law. These rules provide that parties to offences and those committing inchoate offences are criminally responsible. The following principle underlies these rules: "When a crime is committed, liability should attach not only to the person actually committing it, but also to secondary offenders who help or encourage its commission, or who try to commit it or get others to commit it."¹ On the basis of this principle, our system is structured approximately as follows: each offence defined in the Criminal Code directly incriminates the person truly committing the offence, and makes no reference to other potential participants. Section 21 of the Criminal Code, which defines criminal involvement, provides that everyone is a party to an offence who actually commits it, does or omits to do anything for the purpose of aiding any person to commit it, or abets any person to commit it. Section 22 of the Criminal Code completes the definition with the provision that any person who counsels a person to commit an offence is a party to the offence.

On the question of incomplete offences, section 24 of the Criminal Code deals with attempts, and section 423 deals with conspiracy. Section 422 of the Criminal Code then provides that it is an offence punishable on indictment or on summary conviction, as the case may be, to counsel the commission of an offence if the offence is not committed. It is therefore clear

¹ LRC Report 30, Vol 1, "Recodifying Criminal Law", p. 40.

that present law makes a distinction between complete and incomplete offences and between parties who actually commit an offence and those who further the commission of the offence. At present, the principal committer of completed offences may be charged, as may those who helped, encouraged, urged, incited, counselled or used such person. In the case of incomplete offences, the committer of the attempt may be charged with the attempt, of conspiracy and counselling. By using subsection 21(1) of the Criminal Code it would even be possible to charge persons who helped, encouraged, incited, urged and used another person to commit an attempt, to conspire or to counsel, because they are criminal offences.

Finally, the present Code includes a number of rules of liability relating to offences committed in carrying out a common purpose (subsection 21(1) of the Criminal Code) and to offences committed in consequence of counselling (subsection 22(2) of the Criminal Code).

b) Approach of the LRC

In working paper No 45 on secondary liability, the LRC had identified four essential shortcomings in the present Code: lack of generality, poor arrangement, lack of comprehensiveness and objectivism, vagueness and inconsistency. In view of these problems, the LRC proposed a reform to meet two major objectives: to restructure the system and to provide for criminal liability for various types of involvement in crime. The new structure is based primarily on the division of crimes into two categories: choate and inchoate. Secondly, the LRC established within each of these categories a difference between persons who commit crimes and those who do other acts in furtherance of such crimes. Thirdly, it recognized the need to develop a set of specific rules for certain aspects of criminal involvement.

c) Approach of the Working Group

The goal of the working group was to react to the LRC's proposals for reform as contained in Chapter 4 of Report 30. The methodology used was discussed at length by the group, which examined both the shortcomings in the present law and the appropriateness of the LRC proposals in remedying these shortcomings. The working group also assessed the possible practical application of these proposals and the implications they presented for the future. Although the working group rejected some proposals, it was careful to note the positive elements which could be used in an upcoming revision of the

- 4 -

Code. On occasion it also suggested alternatives or possible approaches to be taken. Certainly, with the short time allowed to conduct this study, it was impossible to reconstruct the chapter. After a general examination of the principles of reform of this part, the participants discovered the chapter's cornerstone: the principle of criminal liability for the various types of involvement in crime. If this principle were to be rejected, the entire legislative structure of the reform would lose its justification. This question was therefore the most important. Another key question arose later out of our study of this chapter: the problem of the extent of liability for the unplanned actions of other persons in a joint criminal activity. The recent decision of the Supreme Court of Canada in Vaillancourt v The Queen and the Attorney General of Ontario, dated December 3, 1987, assisted in clarifying this issue.

d) Conclusions of the study

The participants reject Chapter 4 proposed by the LRC. They are of the view that the LRC's proposals do not always improve the law, raise serious problems and are not generally attractive. The reasons underlying the proposals are usually acceptable but the solutions proposed are not. It seems that in this chapter the LRC tried to reorganize the principles of criminal involvement and of inchoate offences, but hardly touched the basic principles. Its intellectual efforts result in a balanced legislative scheme in which the principles of inchoate offences and of criminal involvement are divided into two major ideas: involvement in an uncompleted offence and involvement in a completed offence. The legislative architecture is attractive, but the result is too risky in our law. It seems that the LRC has allowed itself to be carried away by this Cartesian exercise and unfortunately has dealt very superficially with some of the more important questions in this chapter, such as conspiracy and attempt. The LRC is therefore proposing unsatisfactory solutions on those two points. Moreover, it has omitted the question of complicity after the fact from this chapter. Further study of these offences should therefore be undertaken in order that they may be reformed properly.

III. Analysis of Chapter 4

The following is a more analytical statement of the Working Group's conclusions on the various clauses of the draft Code proposed by the LRC:

A- INVOLVEMENT IN COMPLETE CRIMES

Clause 4(1) - Committing

1. LRC proposal

a. Recommendation

Committing. A crime may be committed:

- (a) solely, where the committer is the only person doing the conduct defined as that crime; or
- (b) jointly, where the committer and another person (or other persons) together do the conduct so defined.

b. Draft legislation

26. The person who commits a crime is the person who, either solely or jointly with another person, engages in the conduct specified in the definition of the crime.

2. Existing law

This principal is not expressed in the Criminal Code, although it is recognized in our system of law.

3. Comments on the proposal

a. Position and points in issue

The idea underlying this provision is not rejected by the participants, although they hesitate to express it. They believe that this principle is so logical that it is superfluous to legislate on this point. On the other hand, if it is expressed as the LRC has done there is a risk that confusion will result.

The effect could be that a number of persons could be criminally liable for an offence they committed even though the act was not done "together". This possibility is not immediately evident on reading the LRC's proposal.

b. Recommendations

Maintain the status quo on this point and reject this proposal.

Clause 4(2) - Furthering

1. LRC proposal

a. Recommendation

- (a) General Rule. Everyone is liable for furthering a crime and is subject to the penalty for it if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition.
- (b) Exception. No one is liable under clause 4(2)(a) where the person who performs the conduct has a defence other than one under clauses 3(1) to 3(4), 3(6) to 3(8) and 3(16).

b. Draft legislation

28.(1) Every one who helps, advises, incites or uses another person to commit a crime is guilty of a crime and is liable to the punishment prescribed for the crime that was so furthered, where the crime intended to be committed was committed or some other crime was committed that involves a similar degree of harm or that differs from the crime intended to be committed by reason only of the identity of the victim.

(2) Subsection (1) does not apply where the other person has a defence under the law, except a defence under sections 13 to 19 and 25.

2. Existing law

a. Criminal Code provisions

The present law is found in sections 21 and 22 of the Criminal Code:

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

(2) 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.

22.(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) 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) For the purposes of this Act, "counsel" includes procure, solicit or incite.

b. Jurisprudence

A recent decision, R v W Colin Thatcher, [1987] 1 S.C.R. 652, [1987] 4 W.W.R. 193, 32 CCC (3d) 481, 39 D.L.R. (4d) 275, rendered on May 14, 1987, clearly explains the legal principles of criminal involvement in the present system. Although it may be true in theory that there is no specific provision in the Criminal Code for liability of accomplices, there is no doubt according to this decision that the present subsection 21(1) of the Criminal Code is intended to ensure that all participants in a criminal offence will be criminally liable regardless of the extent of their involvement. Chief Justice Dickson expressed his opinion on the question of subsection 21(1) of the Criminal Code as follows:

This provision is designed to make the difference between aiding and abetting and personally committing an offence legally irrelevant. It provides that either mode of committing an offence is equally culpable and, indeed, that whether a person personally commits or only aids and abets, he is guilty of that offence, in this case, causing the death of JoAnn Wilson, and not some separate distinct offence. This is in contrast with the provisions of the Code relating to accessories after the fact or conspirators (ss. 421 and 423) which create distinct offence for involvement falling short of personal commission.²

² 1987, S.C.R. p. 652, at p. 690.

3. Comments on the proposal

a. Position and points in issue

Existence of a separate offence for the various types of involvement in crime

The members of the working group do not accept the idea of making the various forms of criminal involvement offences. Even though the LRC does not say this in its report or in the Working Paper on Secondary Liability, they feel that the two main reasons which might justify this proposal are the fact that the accused may know what he is charged with and the fact that judges may know the nature of a previous conviction. At present, a person who participates in the commission of a theft, for example, by assisting in it, is accused of the theft on the same basis as the principal committer. If the person is convicted, his or her criminal record reflects the commission of the offence, and not simply aiding in committing it. The working group acknowledges that there are shortcomings in the present system, but believes that these reasons are procedural in nature and should not be considered in discussing general principles. Rather, the shortcomings should be corrected by changes in criminal procedure. Moreover, the working group sees no benefit in such a change, since the penalty proposed for such an offence would in any event be the same as the penalty for the principal offence, and clause 4(7) of that chapter proposes that a person could be convicted for committing a crime or for furthering the commission of the crime if charged with either of these offences. In short, the result would be the same as in our present law.

The participants question the appropriateness of such a change, particularly when the present system of liability does not contain any fundamental problem, in their view. The law has been clear since the Thatcher case, and the drastic change proposed by the LRC is not justified. On the contrary, the creation of distinct offences risks to bring procedural complications.

Other alternatives proposed

While the participants reject the LRC proposal, they do not, however, wish to close the door on any possibility for reforming the provisions of the Criminal Code relating to the principles of criminal involvement. They agree that it might be appropriate to express the existence of criminal liability for individuals who participate in a crime clearly in the Code, whether by means of an interpretive section or by extending the definition of the word "commit" which appears in the wording of

all offences in the Criminal Code. This solution would have the advantage of clarifying the present law without altering it drastically. Another solution would be to define criminal involvement as is proposed in the appendix to this document. It would also be appropriate to make a provision in criminal procedure requiring that the accused be given notice and sufficient detail. This measure would allow an individual to know whether he or she was accused of being the principal committer of the crime or simply a participant. The working group agrees that the present provisions of the Criminal Code would benefit from being simplified and made more comprehensible. The terms "aiding" and "abetting" should be eliminated from the English version of the Code, for example, since these terms are difficult for the general public to understand. A re-organization is no doubt necessary. It would therefore be appropriate for the provisions concerning committing and involvement to appear in the same chapter, which would be the General Part of the future Code.

Positive point: the defences

There are positive aspects, however, to be found in the proposal contained in clause 4(2). The idea of clearly providing for certain defences and excluding others in cases where the involvement is defined in sections 21 and 22 of the present Code may be useful.

b. Recommendations

- Reject the idea of creating a distinct offence for the various means of involvement in crime.
- Simplify the language of the present text of the Code to make it easier for the public to understand.
- Use the rules of criminal procedure to compensate for defects in the present system (the fact that a person may not know whether he or she is accused as the principal committer of the crime or as a participant).
- Reorganize the rules relating to commission and involvement by grouping them together in the same chapter, which would be the General Part of the future Code.
- To retain the idea of excluding or specifying certain defences.
- To study other alternatives (see Appendix).

B- INVOLVEMENT IN INCOMPLETE CRIME

Clause 4(3) - Attempt

1. LRC proposal

a. Recommendation

Attempt. Everyone is liable for attempt who, going beyond mere preparation, attempts to commit a crime, and is subject to half the penalty for it.

b. Draft legislation

29.(1) Every one who attempts to commit a crime is guilty of a crime and is liable to one-half the punishment prescribed for the crime that was attempted to be committed.

(2) Mere preparation for a crime does not constitute an attempt to commit that crime.

2. Existing law

a. Criminal Code provisions

24.(1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

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

(b) Jurisprudence

Two leading decisions have considered the issue of determining the threshold of criminal conduct which is the major problem in attempt charges: R v Cline (1956), 115 C.C.C. 18, 24 C.R. 58 (Ont CA), and more recently Deutsch v The Queen, [1986] S.C.R. 2, 27 C.C.C. (3d) 385, 52 C.R. (3d). In both cases the courts held that it was impossible to set out a general test to be used in distinguishing an attempt from simple preparation. In Cline, however, Laidlaw J set out a number of principles which should be used as a guide in determining whether an attempt has been committed. In Deutsch, LeDain J of the Supreme Court stated:

Several different tests for determining whether there is the actus reus of attempt, as distinct from mere preparation to commit an offence, have been identified as reflected at one time or another in judicial decisions and legislation. All of them have been pronounced by academic commentators to be unsatisfactory in some degree... It has been frequently observed that no satisfactory general criterion has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment... Despite academic appeals for greater clarity and certainty in this area of the law I find myself in essential agreement with this conclusion.

In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished.

The question of attempt raises a number of other problems relating to the issue of mens rea, the question of impossibility in fact and in law, and abandonment. On this point see Fortin, J and Viau, L, Traité de droit pénal général, Editions Thémis, Montreal, 457 pp.

3. Comments on the proposal

a. Position and points in issue

According to the participants, attempt and conspiracy are the two most important offences in Chapter 4. The problems generated by attempt under present law are highly complex. However, the LRC dodged these difficulties by a superficial study and an inoffensive approach. The participants are not convinced of the appropriateness of certain choices made by the LRC in its proposals, without much justification, such as the elimination of omission and the retention of the present criterion for determining the actus reus.

Test for determination of actus reus

This test has recently been the subject of considerable controversy, as may be seen in Deutsch, [1986] 2 S.C.R. 2. Present law does not seem to have settled the problem. In

Working Paper 45, Secondary Liability, the LRC wrote that the new system, based on an act in furtherance of the crime, would in any event obviate the need for the traditional distinction between preparation and attempt. "Instead of looking for attempt in contrast to preparation, courts would have to look for a substantial act in furtherance of the crime. Most acts of preparation would not meet this test. Some might, however, and would then justifiably incur liability."³ This proposal could result in an improvement in the present law, but it might be appropriate to substitute the word "significant" for "substantial" in the LRC proposal to describe the guilty conduct that would constitute an attempt. Another possibility would be to make special provision for acts in preparation for commission of crimes involving serious harm to persons or property.

Penalty

The participants clearly reject the LRC's proposal regarding penalty. The LRC was advocating a penalty of half the penalty for the main offence in all cases. Certain participants are in favour of a maximum penalty similar to the one for the main crime with the judge taking the facts of each case into account. They have advanced numerous reasons. They feel that in many cases attempt is as serious as the main crime. In addition, often the actus reus of attempt is not completed owing to purely circumstantial factors. An individual who commits an attempt always intends to commit the crime and therefore constitutes a social threat. There would also seem to be a certain inconsistency between the penalty for furthering and the penalty for attempt. In the former case the LRC is advocating a penalty similar to the one for the main crime while for the latter offence, which is also an inchoate offence, it is suggesting half the penalty for the main crime. Those who espouse this position believe that it might be appropriate to provide for a possibility of treating attempts simply as another manner of participating in a crime, according to a general principle like the one proposed in the appendix to this document, without reducing the maximum penalty. Finally, another participant suggested a scale of penalties corresponding to the seriousness of the main offence and the significance of the mental element as well as the actual outcome of the attempt. For example, the penalty for attempting a crime punishable by imprisonment for more than fourteen years would be similar to the penalty for that crime and the penalty for attempting a crime punishable by imprisonment for fourteen years or less would be half the penalty for that crime.

³ LRC Working Paper 45, "Secondary Liability", p. 41.

b. Recommendations

1. Reject the LRC proposal on attempt.
2. Undertake further study of the offence of attempt in order to reach a more satisfactory proposal. Examine the suggestions of the working group on this point.
3. Reject the principle of a penalty that would in all cases be half the penalty for the main offence. Examine the other alternatives proposed by the participants.

Clause 4(4)- Attempted Furthering

1. LRC proposal

a. Recommendation

Attempted Furthering.

- (a) General Rule. Everyone is liable for attempted furthering of a crime and is subject to half the penalty for that crime if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that other person does not completely perform the conduct specified by its definition.
- (b) Exception. No one is liable under clause 4(4)(a) where the person who performs the conduct has a defence other than one under clauses 3(1) to 3(4), 3(6) to 3(8) and 3(16).

b. Draft legislation

30.(1) Every one who helps, advises, incites or uses another person to commit a crime is, where that person does not completely perform the conduct specified in the definition of the crime, guilty of a crime and is liable to one-half the punishment prescribed for the crime.

(2) Subsection (1) does not apply where the other person has a defence under the law, except a defence under sections 13 to 19 and 25.

2. Existing law

Criminal Code provisions

422. Except where otherwise expressly provided by law, the following provisions apply in respect of persons who counsel other persons to commit offences, namely,

- (a) every one who counsels another person to commit an indictable offence is, if the offence is not committed, guilty of an indictable offence and is liable to the same punishment to which a person who attempts to commit that offence is liable; and
- (b) every one who counsels another person to commit an offence punishable on summary conviction is, if the offence is not committed, guilty of an offence on summary conviction.

3. Comments on the proposal

a. Position and points in issue

Existence of a separate offence for the various types of involvement

In view of the parallelism and similarity between clause 4(2) and clause 4(4), the same conclusions as those regarding clause 4(2) apply here.

Title of clause

The expression "Attempted furthering is obscure. The participants in the working group question the meaning of this expression. Should the LRC not rather have written "Furthering an incomplete offence"?

b. Recommendations

- Reject the idea of creating a distinct offence for the various types of criminal involvement.
- Maintain the status quo.
- To retain the idea of excluding or specifying certain defences.
- To study other alternatives (see Appendix).

Clause 4(5) - Conspiracy

1. LRC proposal

a. Recommendation

Conspiracy. Everyone is liable for conspiracy who agrees with another person to commit a crime and is subject to half the penalty for it.

b. Draft legislation

31. Every one who agrees with another person to commit a crime is guilty of a crime and is liable to one-half the punishment prescribed for the crime.

2. Existing law

a. Criminal Code provisions

The present Code does not contain any definition of conspiracy. Certain principles relating to conspiracy are set out in section 423 of the Criminal Code and in three special provisions (s 46 - treason; subs 60(3) - sedition; subs 424(1) - restraint of trade).

423.(1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy, namely,

- (a) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and is liable to a maximum term of imprisonment for life;
- (b) every one who conspires with any one to prosecute a person for an alleged offence, knowing that he did not commit that offence, is guilty of an indictable offence and is liable
 - (i) to imprisonment for ten years, if the alleged offence is one for which, upon conviction, that person would be liable to be sentenced to death or to imprisonment for life or for fourteen years, or
 - (ii) to imprisonment for five years, if the alleged offence is one for which, upon

conviction, that person would be liable to imprisonment for less than fourteen years; and

- (c) Repealed.
- (d) every one who conspires with any one to commit an indictable offence not provided for in paragraph (a), (b) or (c) is guilty of an indictable offence and is liable to the same punishment as that to which an accused who is guilty of that offence would, upon conviction, be liable; and
- (e) every one who conspires with anyone to commit an offence punishable on summary conviction is guilty of an offence punishable on summary conviction...

Conspiracy under the provisions of subsection 21(2) of the Criminal Code also constitutes a type of involvement in crime.

b. Jurisprudence

It was held in R v O'Brien, [1954 S.C.R. 666, and in R v McNamara et al (No 1) (1981), 56 C.C.C. (2d) 193 (Ont CA), that conspiracy includes the intent to further an agreement to commit a crime.

3. Comments on the proposal

a. Position and points in issue

Incomplete approach

The participants reject the LRC's proposal concerning conspiracy. The preceding remarks concerning the superficiality of the approach to attempt apply here as well. Conspiracy has never been codified, and the common law has had to make up for this shortcoming. We have the opportunity to accomplish this codification in reforming the Criminal Code. However, the participants feel that the LRC has adopted an extremely simplistic approach to the problem, and that there has not been a thorough study done. The LRC proposal does not take into consideration the decision in O'Brien, for example, and does not consider all the complexities in this area. The question that arises from actions which have numerous objectives, the question of limited involvement and the question of the rules of evidence do not appear to have been addressed. The participants note, among other things, that the LRC has without justification eliminated "intent to carry out a plan" from its proposal, whereas it had considered this mental element necessary in

conspiracy in its Working Paper on Secondary Liability, which was produced before the report. The LRC's work thus appears to have been done hastily, and there is a need to consider the question of conspiracy in greater depth.

Penalty

The conclusion of the participants with respect to penalties is the same as their conclusion with respect to attempt. They do not believe that the maximum penalty should be reduced. One participant proposes that this question be dealt with simply as another form of involvement in a crime, by virtue of a general principle such as is proposed in the appendix to this document.

b. Recommendations

1. Reject the LRC proposal on conspiracy.
2. Undertake further study of the offence of conspiracy in order to develop a more satisfactory proposal.
3. Reject the principle of a penalty which would in all cases be half the penalty for the offence. The participants recommend that the penalty be the same as for the main offence.

Clause 4(6) - Different Crime Committed from that Furthered

1. LRC proposal

a. Recommendation

Different Crime Committed from That Furthered.

- (a) General Rule. No one is liable for furthering or attempting to further any crime which is different from the crime he meant to further.
- (b) Exception. Clause 4(6)(a) does not apply where the crime differs only as to the victim's identity or the degree of harm or damage involved.
- (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.

b. Draft legislation

32. 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.

2. Existing law

Criminal Code provisions

21.(1) Every one is a party to an offence who

- (a) actually commits it,
- (b) does or omits to do anything for the purpose of aiding any person to commit it, or
- (c) abets any person in committing it.

(2) 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.

22.(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) 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) For the purposes of this Act, "counsel" includes procure, solicit or incite.

3. Comments on the proposal

a. Position and points in issue

The participants felt that the ideas underlying paragraphs (a) and (b) are acceptable. They do not disagree with the LRC's position concerning different purpose. One participant felt that paragraph 4(6)(c) should follow conspiracy instead.

Reference should be made to the analysis of paragraph 4(6)(c) by the working group on Chapter 2. This analysis dealt with the expression "ought to have known" in subsection 21(2) of the Criminal Code.

b. Recommendations

See the recommendations of the working group on Chapter 2 with respect to this paragraph.

Clause 4(7) - Alternative Convictions

1. LRC proposal

a. Recommendation

- (a) Committing. Everyone charged with committing a crime may, on appropriate evidence, be convicted of furthering it, of attempting to commit it, or of attempted furthering of it.
- (b) Furthering. Everyone charged with furthering a crime may, on appropriate evidence, be convicted of committing it, of attempting to commit it or of attempted furthering of it.
- (c) Attempting. Everyone charged with attempting to commit a crime may, on appropriate evidence, be convicted of attempted furthering of it, and, where the evidence shows that he committed or furthered it, may nevertheless be convicted of attempting to commit it.
- (d) Attempted Furthering. Everyone charged with attempted furthering of a crime may, on appropriate evidence, be convicted of attempting

to commit it, and, where the evidence shows that he committed or furthered it, may nevertheless be convicted of attempted furthering of it.

(e) Unclear Cases.

(i) Where two or more persons are involved in committing a crime but it is unclear which of them committed it and which of them furthered it, all may be convicted of furthering.

(ii) Where two or more persons are involved in attempting to commit a crime but it is unclear which of them attempted to commit it and which of them attempted to further it, all may be convicted of attempted furthering.

b. Draft legislation

33.(1) Every one charged with committing a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it or attempted furthering of it.

(2) Everyone charged with furthering the commission of a crime may on appropriate evidence be convicted of committing it, furthering it, attempting to commit it or attempted furthering of it.

(3) Every one charged with attempting to commit a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that he committed the crime or furthered the crime.

(4) Every one charged with attempted furthering of a crime may on appropriate evidence be convicted of attempting to commit it or attempted furthering of it, regardless of whether the evidence shows that he committed the crime or furthered the crime.

(5) Where two or more persons are involved in committing a crime but the evidence does not clearly establish which of them committed the crime and which of them furthered it, all of them may be convicted of furthering the crime.

(6) Where two or more persons are involved in attempting to commit a crime but the evidence does not clearly establish which of them attempted to commit the

crime and which of them attempted furtherance of the crime, all of them may be convicted of attempted furthering of the crime.

2. Existing law

Under present law, a person who commits a crime and a person who contributes to commission of the crime are on the same footing. These rules are therefore unnecessary. They become necessary in the proposed new legislative structure, which is based on the creation of specific offences for the various types of involvement in crime. There are, however, rules of this nature for inchoate offences in sections 587 and 588 of the Criminal Code.

Criminal Code provisions

587. Where the complete commission of an offence charged is not proved but the evidence establishes an attempt to commit the offence, the accused may be convicted of the attempt.

588.(1) Where an attempt to commit an offence is charged but the evidence establishes the commission of the complete offence, the accused is not entitled to be acquitted, but the jury may convict him of the attempt unless the judge presiding at the trial, in his discretion, discharges the jury from giving a verdict and directs that the accused be indicted for the complete offence.

(2) An accused who is convicted under this section is not liable to be tried again for the offence that he was charged with attempting to commit.

3. Comments on the proposal

a. Position and points in issue

1. Advantages of such a proposal

The participants recognize the utility of a provision such as the one proposed in clause 4(7).

They refer to the decision in R v W Colin Thatcher, [1987] 1 S.C.R. 652, in which it was impossible to establish whether the accused had killed his wife or had had her killed by someone else. The jury is not to determine the types of involvement, because he was guilty one way or another. The

participants in the working group therefore believe that this sensible procedure should be taken into consideration in reforming the law relating to involvement in crime. The ideas expressed in this proposal should therefore be examined more closely so that it can be used as a model and a similar provision created which would be in line with the alternatives for reform proposed by the working group with respect to Chapter 4.

2. Conspiracy

The working group feels that the rules contained in this clause should apply to conspiracy as well.

3. Changing a charge for an uncompleted crime to a conviction for a completed crime

A majority of the participants in the working group does not agree with the inclusion of a rule allowing a charge for an incomplete crime to be changed into a conviction for a complete crime in cases where the evidence shows that the complete crime was committed.

b. Recommendations

- In any reform of the law relating to involvement in crime and inchoate offences, consider the possibility of having similar rules which would be consistent with the new legislative proposals.
- These rules should also apply to conspiracy.
- Reject the principle in paragraph 4(7)(b).

C- OTHER POINTS

1. Abandonment

The question of abandonment in relation to attempt, conspiracy or any involvement in a crime was raised by the participants in the Working Group. This point had been discussed by the LRC in its Working Paper on Secondary Liability. The clauses proposed by the LRC do not mention anything in this regard, however. The participants therefore wondered whether abandonment should be made a defence. Their answer was no. They do not feel that abandonment can negate the offender's culpability. They suggested that the notion of withdrawal should instead be considered a factor in mitigating the sentence imposed

for committing attempt or conspiracy or for any involvement in crime. They recommend that this suggestion be examined when the government is implementing the report of the Canadian Sentencing Commission.

2. Impossibility

The participants feel that this notion applies to all complete and incomplete offences. The LRC has eliminated it from its proposals on attempt, however. Nor does it mention it in connection with the other clauses in Chapter 4. The participants would prefer to see the present rule concerning impossibility codified. They are not certain, however, that we should go any further than the present law on this point.

APPENDIX

DRAFT ALTERNATE PROVISION FOR INVOLVEMENT IN CRIME

1. Everyone is party to a crime and subject to the penalty for it who
 - (a) commits or attempts to commit the crime;
 - (b) assists or attempts to assist another person to commit the crime;
 - (c) procures or attempts to procure another person to commit the crime;
 - (d) uses or attempts to use another person to commit the crime;
 - (e) counsels, advises, encourages, urges or incites another person to commit the crime;
 - (f) conspires with another person to commit the crime;
 - (g) assists or attempts to assist a party to the crime to avoid detection or to escape.

Liability as a party to a crime extends to conduct and consequences intended, known or recklessly disregarded.