

## RECODIFYING CRIMINAL LAW

Allen M. Linden\*  
Patrick Fitzgerald\*\*  
Ottawa

---

*When Parliament enacted our first Criminal Code in 1892, Canada was in the vanguard of criminal law reform. The present Code, however, is no longer adequate to our needs. Even though it has been amended many times (including a major revision in 1955), it remains much the same in structure, style and content as it was in 1892. With the help of some of our country's most outstanding jurists, as well as the support of both the federal and provincial governments, the Law Reform Commission of Canada undertook a "deep philosophical probe" of the criminal law, which has culminated in Report 30, "Recodifying Criminal Law". The proposed Code is evolutionary, not revolutionary. It seeks to reflect our current values and the principles of the Charter of Rights and Freedoms. It contains a General Part that sets out the general principles of criminal law. It seeks to express the criminal law in modern and simple language, and addresses modern day social ills such as pollution, terrorism, drunkenness and endangering lives. Built on a sound philosophical base, expounding just and rational principles, the proposed Code has been made entirely in Canada, by Canadians for Canadians. If it is enacted by Parliament, Canada will once again be in the vanguard of criminal law reform.*

---

*Quand le Parlement promulga le premier Code criminel en 1892, Canada était à l'avant-garde de la réforme du droit criminel. Le code actuel cependant ne répond plus à nos besoins et quoiqu'il ait été amendé de nombreuses fois (y compris la profonde révision de 1955), il n'a pour ainsi dire changé ni de style, ni de forme, ni de fond depuis 1892. La Commission de réforme du droit du Canada, avec l'aide de quelques-uns des hommes de droit les plus connus et l'appui des gouvernements fédéral et provinciaux, a entrepris une "exploration philosophique profonde" du droit criminel dont le Rapport 30 "Pour une nouvelle codification du droit pénal" contient les résultats. On y suggère un code évolutionnaire et non révolutionnaire. On a essayé d'y refléter les valeurs actuelles et les principes de la Charte des droits et libertés. Les principes généraux de droit criminel sont présentés dans une partie générale. On s'est efforcé de traduire le droit criminel en termes simples et modernes et de traiter des maux de la société actuelle tels que pollution, terrorisme, ébriété et atteinte à la vie. Ces suggestions qui ont pour base une philosophie solide et énoncent des principes justes et raisonnables ont été préparées entièrement au Canada par des Canadiens pour les Canadiens. Si le Parlement décide de les promulguer, le Canada recouvrera sa place à l'avant-garde du droit criminel.*

---

\*The Honourable Mr. Justice Allen M. Linden, Supreme Court of Ontario, President, Law Reform Commission of Canada.

\*\*Patrick Fitzgerald, Professor of Law, Carleton University, Principal Consultant, Substantive Criminal Law Project, Law Reform Commission of Canada.

The authors would like to thank Joyce Miller, of the Ontario Bar, for her valuable research assistance.

### *Introduction*

Canada was once in the vanguard of criminal law reform. When Parliament enacted our Criminal Code in 1892, we were in the forefront of the codification movement.<sup>1</sup> That Code, prepared by Sir John A. MacDonal'd's generation of Canadians, has served us well for ninety-five years.

If, however, the enactment of a Criminal Code was an event in which the new Canadian nation could justifiably take pride, from the outset it carried within it the seeds of its own decay. Speaking on the second reading of the Bill to enact the Code, Sir John Thompson, the Minister of Justice, who was responsible for the legislation, emphasized that the codification effort was merely the "reduction of the existing law to an orderly system, freed from needless technicalities, obscurities and other defects which the experience of its administration has disclosed".<sup>2</sup> This in part may have been the politician seeking to disarm opposition, but what Thompson said also contained a large measure of truth. The Code was not of the type envisioned by Bentham, the father of codification. For Bentham, codes should be drafted by "learned 'philosophers', removed from the political process, proceeding systematically from basic principles to practical corollary to the construction of an internally harmonious and philosophically grounded system. . .".<sup>3</sup> The Code was more like that envisaged by James Fitzjames Stephen, on whose work in England the Code was largely based. For Stephen, codification did not involve the enumeration of major principles;<sup>4</sup> for him, codification meant "the reduction of the existing laws to an orderly written system".<sup>5</sup>

The Code thus consolidated by looking to the past, and did not attempt to look forward or to reshape the criminal law in terms of purpose and principle. The many amendments that have been made to the Code since its enactment have not changed its basic character. Even the major revisions of 1955 contemplated merely a restatement of the current law, rather than a fundamental reevaluation.<sup>6</sup>

Thus, despite the many amendments and the 1955 revision, our Code remains much the same in structure, style and content as it was in

<sup>1</sup> G.H. Crouse, *A Critique of Canadian Criminal Legislation* (1934), 12 Can. Bar Rev. 545, at p. 546.

<sup>2</sup> Debates, House of Commons, Vol. I, col. 1312. Here Thompson is quoting directly from the Report of the Royal Commission on the English Draft Code.

<sup>3</sup> S.H. Kadish, *Codifiers of the Criminal Law: Weschler's Predecessors* (1978), 78 Colum. L. Rev. 1098, at p. 1099.

<sup>4</sup> G. Parker, *The Origins of the Canadian Criminal Code*, in D. Flaherty (ed.), *Essays in the History of Canadian Law*, Vol. I (1981), p. 251.

<sup>5</sup> Sir James Fitzjames Stephen, *A History of the Criminal law of England*, Vol. III (1892), p. 350.

<sup>6</sup> P. Healy, *The Cause of Legislative Reform in Canadian Criminal Law* (LL.M. Thesis, University of Toronto, 1984), p. 31.

1892. It is not surprising therefore that it is no longer adequate to the needs of the latter part of the twentieth century. It is poorly organized, contains archaic language. It is hard to understand. There are many gaps, some of which had to be filled by the judiciary. It contains obsolete provisions. It overextends the proper scope of the criminal law. And it fails to address some serious current problems. It is clearly time for renewal. It is time for a new Criminal Code, made entirely in Canada by Canadians for Canadians.

### I. *The Current Recodification Effort*

After the 1955 revision, the pattern of *ad hoc* amendments continued, as during the previous six decades.<sup>7</sup> Controversial issues, which were put off during the revision of the Code so that its passage would not be impeded, were now being dealt with in a piecemeal fashion.<sup>8</sup> Committees or Commissions of inquiry were appointed to investigate substantial matters such as insanity,<sup>9</sup> capital and corporal punishment,<sup>10</sup> and parole.<sup>11</sup> By the 1960s our society was beginning to go through the stresses and strains of the shift from an industrial age to the nuclear age. In the face of the rapid social and technological changes that were taking place it became apparent that our *ad hoc* approach to reforming and amending our *Criminal Code* was no longer adequate. What was needed was a redefinition and reformulation of the scope and function of our criminal law.<sup>12</sup>

#### A. *The Ouimet Committee*

One response to this perceived need was the appointment in 1965 of the Canadian Committee on Corrections<sup>13</sup> (generally known as the

<sup>7</sup> P. Healy, *The Process of Reform in Canadian Criminal Law* (1984), 42 U.T. Fac. L. Rev. 1, at p. 5.

<sup>8</sup> House of Commons, Debates, December 15, 1953, Vol. I, pp. 940-994.

<sup>9</sup> In March 1954, two Royal Commissions were appointed under the Chairmanship of the Honourable Mr. Justice McRuer, Chief Justice of the High Court of Ontario, to inquire into the law of insanity as a defence in criminal cases and the state of law concerning criminal sexual psychopaths; see A.J. MacLeod and J.C. Martin, *The Revision of the Criminal Code* (1955), 33 Can. Bar Rev. 2, at pp. 17-18.

<sup>10</sup> See Hansard (House of Commons) 15 December 1953, p. 941, where the Minister of Justice, introducing the Criminal Code Bill, recommended the establishment of a joint parliamentary committee to inquire and report whether the criminal law should be amended, in what manner and to what extent.

<sup>11</sup> In 1973 the Minister of Justice appointed Mr. Justice Fauteux of the Supreme Court of Canada to inquire into and report upon the policies and practices followed in the remission service of the Department and make recommendations for improvement; MacLeod and Martin, *loc. cit.*, footnote 9, at p. 5.

<sup>12</sup> Healy, *loc. cit.*, footnote 7, at pp. 5-6.

<sup>13</sup> The Committee was made up of five members: Chairman, Hon. Mr. Justice Roger Ouimet; Vice Chairman, Mr. G. Arthur Martin, Q.C.; Mr. J.R. Lemieux; Mrs. (S.P.) Dorothy McArton; and Mr. W.T. McGrath. Appointed June 1, 1965, pursuant to P.C. 1965-998, reproduced in Report of Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections* (1969), pp. 1-2.

Quimet Committee), which was mandated "to study the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner or parole. . .".<sup>14</sup> When the Quimet Committee presented its final report in 1969 it included a statement of eight general principles which were to become the foundation of our present day criminal law policy.<sup>15</sup> One of the first recommendations that the Committee made was for the establishment of a Committee or Royal Commission to examine the substantive law.<sup>16</sup> The recommendation represented one of many of such calls for not only a comprehensive review of our criminal law, but "for. . . [the] establishment of a permanent institution of government to monitor the need for reform in all areas of the criminal law".<sup>17</sup>

### B. *The Law Reform Commission of Canada*

In 1971 the Law Reform Commission of Canada was created<sup>18</sup> as a permanent body and endowed with broad objects and powers. Briefly, the Commission was mandated to review on a continuing basis all the federal laws of Canada and make recommendations for their improvement, modernization and reform; to develop new approaches to the law that were in keeping with, and responsive to, the changing needs of modern Canadian society; and to reflect in its recommendations the distinctive concepts and institutions of the common law and civil law.<sup>19</sup> One of the first projects that the Commission undertook was to carry out "a deep philosophical probe" of Canada's criminal law, leading to the enactment of a comprehensive Criminal Code reflecting contemporary values.<sup>20</sup>

In beginning this enormous task the first problem for the early Commission was one of strategy and of methodology. On the one hand there was the desire for swift action and immediate reform. On the other hand, the Commission was aware that important social issues could not be answered with *ad hoc* responses. Thorough analysis of long range implications was required. The Commission, therefore, adopted a compromise, by developing a "theoretical-practical" approach—a dialectic between

---

<sup>14</sup> *Ibid.*, p. 1.

<sup>15</sup> *Ibid.*, pp. 11-19.

<sup>16</sup> *Ibid.*, p. 15.

<sup>17</sup> Healy, *loc. cit.*, footnote 7, at p. 8. See also, J. Ll. J. Edwards, Penal Reform and the Machinery of Criminal Justice in Canada (1965-66), 8 Crim. L.Q. 408, at pp. 415-417; His Honour, Judge C. Henry (Chairman), National Law Reform Commission (Panel Discussion), [1966] Can. Bar Ass. Papers 1; A.M. Linden, The Challenge of Law Reform (1966), 9 Can. Bar J. 268; A.M. Linden, The Laggard Law: Machinery of Law Reform, in J.B. Fotheringham, Transition: Policies for Social Action (1966), 141; A.W. Mewett, The Criminal Law, 1867-1967 (1967), 45 Can. Bar Rev. 726.

<sup>18</sup> Law Reform Commission Act, R.S.C. 1970, c.23 (1st Supp.).

<sup>19</sup> *Ibid.*, s. 11.

<sup>20</sup> Law Reform Commission of Canada, Research Program (1972), pp. 12-15.

theory and practice. Succinctly, the Commission explored real social and legal problems, while, at the same time, developing a theoretical approach to these problems. This theoretical-practical approach was used in a number of Commission publications to grapple with key issues in criminal law.

### C. Accelerated Criminal Law Review

By the late 1970s, there was a growing impatience with the pace of criminal law reform. In 1979, at the annual meeting of the Canadian Bar Association, the then Minister of Justice, Senator Jacques Flynn, proclaimed "that the time has come to undertake a fundamental review of the Criminal Code. The Code has become unwieldy, very difficult to follow and outdated in many of its provisions".<sup>21</sup> He pointed out that both the Law Reform Commission of Canada in its reports and the Provincial Attorneys General had urged that a new Criminal Code be developed.

In the fall of 1979, Senator Flynn met in Ottawa with the provincial ministers responsible for the administration of justice. The ministers unanimously agreed that "a thorough review of the *Criminal Code* should be undertaken as a matter of priority".<sup>22</sup> A detailed proposal, which called for a three phase program, was drawn up. In the first phase, the Law Reform Commission was to be responsible for the basic research, analysis and formulation of recommendations on the substantive and procedural aspects of the law. In the second phase, the Departments of Justice and Solicitor General were to review the recommendations from the Commission and draft them into legislative form. Extensive consultation with judges, government officials, police, lawyers, professors and the public was incorporated as an integral part of the process.<sup>23</sup> The third phase was the legislative enactment of the proposals.

The review moved slowly at first. Senior government officials, members of the legal profession and academics, who would normally be called upon to participate in the Criminal Law Review, were deeply absorbed in the constitutional debate. Once the Charter was proclaimed in force, however, attention refocused on the Criminal Law Review. To expedite the process, the Commission decided, rather than publishing a multitude of reports to Parliament on individual topics, it would prepare working papers and then consolidate these into a new Draft Criminal Code.<sup>24</sup>

In preparation for the recodification task, the Commission held an international conference in Ottawa in April, 1984. A number of world

---

<sup>21</sup> [1979], Proc. Can. Bar Assn. 112, at p. 119.

<sup>22</sup> Canada, *The Criminal Law in Canadian Society* (1982), p. 10. See also Ministerial Statements, Agenda, Communiqué and other Related Documents (1979).

<sup>23</sup> For a list of participants in the Consultations, see Law Reform Commission of Canada, Report No. 30: *Recodifying Criminal Law*, Vol. I (1986), pp. 89-95.

<sup>24</sup> V.M. Del Buono, *Toward a New Criminal Code for Canada* (1986), 28 *Crim. L.Q.* 370, at pp. 375-377.

renowned experts on the codification of criminal law were invited to give their learned advice to the Commission and those involved in the process. Among those who attended were: Herbert Wechsler of the Model Penal Code; Dean Sanford Kadish, Berkeley, of the ill-fated California revision; Dean Richard Bartlett, Albany, of the successful New York revision; Professors Brian Hogan and Brian Simpson of the United Kingdom; and Professor Georges Levasseur of the French revision. The conference gave much encouragement to the Commission to proceed with the production of a draft Criminal Code.

In the fall of 1984 a team was formed under the leadership of Jacques Fortin,<sup>25</sup> Vice-President of the Commission, and one of the principal architects of the new Criminal Code. The team consisted of Patrick Fitzgerald,<sup>26</sup> Fortin's long-time collaborator at the Commission, Me François Handfield,<sup>27</sup> the newly appointed project coordinator and seven researchers.<sup>28</sup> Vincent Del Buono,<sup>29</sup> of the Department of Justice, was invited to join the team as liaison for the Department.

In November 1985 a draft of the first volume,<sup>30</sup> which included the General Part and Crimes Against the Person and Property from the Special Part, went to consultation in Calgary. A draft of Volume II, which included Crimes against the Natural Order, the Social and Economic Order, Political Order and the International Order, went to consultation in May 1986 in Ottawa and again on September 30 and October 1, 1986 in Toronto. Following the consultation, many changes were made on the basis of the advice received. Finally, on December 3, 1986, Volume I of the draft

---

<sup>25</sup> Vice-President of the Commission, 1983-85; former Professor of Law, Université de Montréal; Consultant to the Commission on Criminal Law 1971-1983. When tragically on January 28, 1985, Fortin died, Mr. Justice Allen Linden, President, became the Commissioner in charge of the project. Me Gilles Létourneau, who was appointed as Vice-President on June 24, 1985, also participated actively in the project.

<sup>26</sup> Member of the Ontario Bar, Professor of Law, Carleton University, Consultant and Special Advisor to the Commission on Criminal Law since 1971.

<sup>27</sup> Formerly Chief Crown Attorney for Hull, Province of Quebec, lecturer in criminal procedure and evidence, University of Ottawa; Member, Federal-Provincial Task Force on Uniform Rules of Evidence; appointed Secretary of the Commission 1986.

<sup>28</sup> John Barnes, formerly Professor of Law, Carleton University, Lita Cyr, Lynn Douglas, Oonagh Fitzgerald, Glen Gilmour, Donna White, all of the Ontario Bar, and Marie Tremblay of the Quebec Bar.

<sup>29</sup> Member of the Alberta Bar, Senior Counsel, Human Rights and Criminal Law, Department of Justice; Adjunct Professor in Law, School of Graduate Studies, University of Ottawa.

<sup>30</sup> The draft used for consultation can be found in P. Fitzgerald (ed.), *Crime, Justice and Codification* (1986), pp. 180-196.

Code was tabled in Parliament.<sup>31</sup> Volume II will be tabled in the fall of 1987.<sup>32</sup>

## II. *Recodifying Criminal Law: Strategies and Proposals*

The Commission decided at the outset to undertake "a deep philosophical probe" of criminal law and write a comprehensive code in tune with present values. Deciding to do this, though, is one thing and knowing how to do it quite another. For while everyone agrees that law, and criminal law especially, should be clear, fair and effective,<sup>33</sup> no one has ever produced a blueprint for achieving this. The Commission itself tried various strategies leading up to the preparation of Report 30.

### A. *Section by Section Approach*

One approach considered was the incremental, the "section by section", or the *ad hoc* method of reform. This process of inching forward, concentrating on anomalies and improving the law bit by bit has much in its favour.<sup>34</sup> Experience in judging, in practising or in teaching law highlights numerous particular problems—gaps in the law, inconsistencies, and obscurities giving rise to conflicts in the case law and controversies in the literature. One example is the definition of "negligence" in the current Criminal Code.<sup>35</sup> This section, through its use of the title "criminal negligence", points to objective liability but through use of the words "wanton and reckless disregard" implies subjective liability. Ridding the criminal law of such discrepancies has certainly been one of the Commission's preoccupations. To repair the deficiency the Commission has suggested that liability for criminal negligence is to be objective.<sup>36</sup>

Nevertheless, the section by section approach has obvious limitations. It focuses its lens too narrowly. Many of the defects in our Criminal Code are in fact systemic. They arise, not from an unfortunate word here and a contradiction there, but rather from the general style, arrangement and thrust of the whole statute. Getting to grips with these calls for a more global approach to the form of the legislation.

### B. *A Global Approach to Arrangement and Style*

Another reform strategy is the global approach to arrangement and style. This approach was first adopted in the Working Paper on Theft

<sup>31</sup> Law Reform Commission of Canada, *op. cit.*, footnote 23, was tabled in Parliament on December 3, 1986, by the Minister of Justice, The Honourable Mr. Ray Hnatyshyn: House of Commons Debates, December 3, 1986, p. 1752. Part I, The General Part, of the Draft Code is set out as an Appendix to this article, *infra*, p. 546.

<sup>32</sup> Volume III, dealing with procedure, will be tabled in 1988.

<sup>33</sup> See P.J. Fitzgerald, *Road Traffic: Law as the Lawyer Sees It*, in J.J. Leeming (ed.), *Road Accidents—Prevent or Punish* (1969), p. 157.

<sup>34</sup> Editorial, *Reforming the Law of Evidence* (1979-80), 22 *Crim. L.Q.*, p. 385; Editorial, *Criminal Law and Confederation* (1974-75), 17 *Crim. L.Q.* 125, at p. 126.

<sup>35</sup> R.S.C. 1970, c. C-34 (as am.), s. 202.

<sup>36</sup> *Op. cit.*, footnote 23, recommendation 2(4)(6), p. 21.

and Fraud.<sup>37</sup> The pattern there established was followed in most of the subsequent working papers on substantive criminal law.<sup>38</sup> This approach consisted of looking at an area of law across the board and examining it for defects of arrangement, style and substance. Arrangement was scrutinized for comprehensiveness, rationality and clarity.

### (1) *Arrangement*

To start with, the Code is far from comprehensive. Nowhere is this more obvious than in the General Part.<sup>39</sup> First, on the most central and fundamental matter in the criminal law, the matter of criminal liability—*actus reus* and *mens rea*—our Criminal Code says virtually nothing. What conduct can someone be criminally liable for, how far can one be liable for omissions, and what state of mind is necessary in general for responsibility? All these questions are answerable only by reference to the common law; the Code gives us no guidance to them. Second, on the almost equally fundamental matter of the general defences, the Code is incomplete. No mention is made, for instance, of necessity,<sup>40</sup> automatism<sup>41</sup> or (in so far as it is a defence) intoxication.<sup>42</sup>

To remedy this lack of comprehensiveness the Commission prepared a complete set of provisions on conduct, culpability and general defences.<sup>43</sup> Conduct and culpability are dealt with by providing that no one is liable for a crime without engaging in the conduct and having the level of culpability specified by its definition.<sup>44</sup> As regards conduct, the place of omissions in the criminal law is described.<sup>45</sup> As to culpability, three levels of culpability are proposed—purpose, recklessness and negligence—and definitions are supplied.<sup>46</sup> Finally, as concerns defences, a complete statement of all the general substantive defences is given. They are divided

<sup>37</sup> Law Reform Commission of Canada, Working Paper No. 19: Theft and Fraud (1977).

<sup>38</sup> It was followed, for example, in the Law Reform Commission of Canada's publications: Working Paper No. 29: The General Part: Liability and Defences (1982); Working Paper No. 31: Damage to Property: Vandalism (1984); Working Paper No. 33: Homicide (1984); Working Paper No. 35: Defamatory Libel (1984); Working Paper No. 36: Damage to Property: Arson (1984); Working Paper No. 38: Assault (1984); Working Paper No. 38: Secondary Liability (1985); Working Paper No. 45: Criminal Intrusion (1986); Working Paper No. 49: Crimes Against the State (1986).

<sup>39</sup> *Ibid.*, The General Part, pp. 4-5; Law Reform Commission of Canada, *op. cit.*, footnote 23, pp. 14-15.

<sup>40</sup> Law Reform Commission of Canada, *op. cit.*, footnote 23, p. 33.

<sup>41</sup> *Ibid.*, p. 26.

<sup>42</sup> *Ibid.*, p. 27.

<sup>43</sup> See Law Reform Commission of Canada, The General Part, *op. cit.*, footnote 38; Law Reform Commission of Canada, *op. cit.*, footnote 23.

<sup>44</sup> *Op. cit.*, footnote 23, Chapter 2, p. 13.

<sup>45</sup> *Ibid.*, Recommendation 2(3)(a), (b), (c), pp. 15-17.

<sup>46</sup> *Ibid.*, Recommendation 2(4), pp. 18-19.

into (1) absence of conduct or state of mind necessary for culpability, (2) exemptions and (3) justifications and excuses. For the future, then, the Commission's intention is that the Criminal Code will primarily cover these matters, not the common law.

Next, our present Criminal Code is open to objection for illogicality, incoherence and lack of system. Rules belonging to the General Part, for instance, may be found in three different places—in the General Part of the Code (as are many of the general defences),<sup>47</sup> in the Special Part (as are the provisions on duties relevant to crimes of commission by omission)<sup>48</sup> and in the common law (as are the matters discussed in the previous paragraphs).<sup>49</sup> Rules relating to one and the same topic are to be seen scattered in totally different places—the definition of attempt is given in section 24 under the general heading, Parties to Offences, but the sanction for it is found in section 421. Rules relating to offences are discovered inserted into rules on defences. For example, in the course of setting out rules about defence of property, crimes of assault are created.<sup>50</sup> Rules trying to distinguish different types of property fall between two stools; the Code adopts neither the movable/immovable classification of civil law nor the real/personal classification of common law but rather the totally illogical classification of movable and real!<sup>51</sup> Finally, rules creating offences sometimes create intolerable complexity by a process of “piggybacking”—manslaughter is defined as culpable homicide that is not murder or infanticide,<sup>52</sup> so that to discover what is manslaughter, the reader has to wade through eight lines on culpable homicide,<sup>53</sup> forty lines on murder,<sup>54</sup> twenty lines on murder reduced to manslaughter by provocation,<sup>55</sup> and finally five lines on infanticide.<sup>56</sup>

To repair those deficiencies the Commission adopted a more systematic approach. All General Part matters, including duties, are located in the General Part. Provisions relating to the same or to related topics, for example those on parties and inchoate offences, are placed together.<sup>57</sup> Offence-creating rules are kept strictly to the Special Part and not mingled with those on defences. Classifications, like that of property, are drawn

<sup>47</sup> *Supra*, footnote 35, ss. 12-19 and 25-45.

<sup>48</sup> *Ibid.*, ss. 197-199.

<sup>49</sup> *Supra*.

<sup>50</sup> *Supra*, footnote 35, ss. 38(2), 41(2).

<sup>51</sup> *Ibid.*, ss. 38 and 41.

<sup>52</sup> *Ibid.*, s. 217.

<sup>53</sup> *Ibid.*, s. 205(5).

<sup>54</sup> *Ibid.*, ss. 212-213.

<sup>55</sup> *Ibid.*, s. 215.

<sup>56</sup> *Ibid.*, s. 216.

<sup>57</sup> Law Reform Commission of Canada, *op. cit.*, footnote 23, Chapter 4, p. 40.

more logically—the movable/immovable distinction is adopted.<sup>58</sup> Finally the Special Part is set out in an orderly fashion which divides crimes into six categories, subdivides each category, where appropriate, according to the interest infringed, and mostly lists the crimes in each subcategory in order of ascending gravity to let less serious crimes precede those including them or building on them<sup>59</sup>—negligent homicide precedes manslaughter which precedes murder.<sup>60</sup>

Perhaps the most glaring fault, however, in our Criminal Code is lack of generality and resort to excess detail. All too often the Code, as well as, or worse still instead of, providing a unifying general rule, enumerates a lengthy *ad hoc* list of specific instances. In theft,<sup>61</sup> for example, not only is there a general rule provided<sup>62</sup> but, in addition, there are eight pages containing twenty-four other sections concerning theft of special kinds of property,<sup>63</sup> theft by or from special categories of persons,<sup>64</sup> and related offences.<sup>65</sup> The same is true of fraud,<sup>66</sup> of assault<sup>67</sup> and of damage to property.<sup>68</sup>

Such excess detail engenders a variety of unfortunate consequences. It wearies readers and imposes unnecessary burdens on them. It detracts from simplicity and coherence and blurs the general message of the law. Lastly it affords opportunity for overlap, inconsistency and general confusion.

To avoid this kind of excess detail the Commission has tried to pare down to the bone the crime-creating sections in the Special Part. Building on the preliminary working papers and reports, Recodifying Criminal Law reduced theft and fraud to three offences, criminal damage to two and assault to two. One consequence of this has been to substitute for 223 sections of the present Code 89 clauses in its proposed replacement, Volume I. More dramatically, about ninety pages in the pocket Criminal

<sup>58</sup> *Ibid.*, Recommendation 3(11) and (12).

<sup>59</sup> *Ibid.*, p. 51.

<sup>60</sup> *Ibid.*, Recommendation 6(1) and (3).

<sup>61</sup> Law Reform Commission of Canada, *op. cit.*, footnote 37, pp. 52-64.

<sup>62</sup> Criminal Code, *supra*, footnote 35, s. 283.

<sup>63</sup> For example, oysters, electricity, ore, motor vehicles, cattle, drift timber, documents of title, credit cards, mail, mines and the mint.

<sup>64</sup> For example, bailees, agents, persons with a special interest, husbands and wives, persons required to account, persons holding power of attorney, and public servants refusing to deliver property.

<sup>65</sup> For example, misappropriation of money held under a direction, criminal breach of trust, and fraudulent concealment.

<sup>66</sup> Law Reform Commission of Canada, *op. cit.*, footnote 37, p. 67.

<sup>67</sup> Law Reform Commission of Canada, Assault, *op. cit.*, footnote 38, pp. 8-16 and 21-22.

<sup>68</sup> Law Reform Commission of Canada, Vandalism, *op. cit.*, footnote 38, pp. 8-11 and 27-29.

Code have been replaced by ten pages in English and ten in French in the appended draft statute.

(2) *Style*

Important as the arrangement of the Code may be, its style is equally significant. Law, and above all criminal law, should speak to those it serves or governs in words they know, in provisions they can follow directly and in sentences they can easily understand. The words used in the present Code are mainly words in everyday currency, but there remain certain archaisms. For example, in defining parties to offences the Code uses the words "abets",<sup>69</sup> a word found nowhere nowadays outside the criminal law and characterized by the Shorter Oxford Dictionary as now obsolete. The definition of criminal negligence<sup>70</sup> employs the words "wanton or reckless disregard for the lives or safety of other persons", but "wanton" is a term rarely encountered now except in poetry or purple passages of rhetoric. Malicious damage to property is now labelled "mischief",<sup>71</sup> a word employed today in ordinary parlance to describe vexatious or annoying conduct.

The Commission has tried to cleanse the law of all such archaisms. It has recommended that "abets" be replaced by "encourages" and "urges".<sup>72</sup> "Reckless as to consequences or circumstances" is defined as "conscious that such consequences will probably result or that such circumstances probably obtain".<sup>73</sup> "Negligent" is to be "a marked departure from the ordinary standard of reasonable care". Property damage is labelled as "vandalism",<sup>74</sup> a word much used these days to describe ruthless damage or destruction.

Technical terms also militate against ready intelligibility. Accordingly, they need translating into ordinary language. This must either be done by definitions in the Code, which thereby add to its length and detail, or by explanations by judges to juries, which lengthen the time of trial. Our present theft law, for example, uses the terms "fraudulently" and "colour of right", which judges then explain (according to many of the judges we consulted) by telling juries that the basic question is whether the accused acted dishonestly. In order to be simpler and more straightforward, therefore, we defined theft using the term dishonesty.

---

<sup>69</sup> Criminal Code, *supra*, footnote 35, s. 21(1)(c).

<sup>70</sup> *Ibid.*, s. 202(1)(b).

<sup>71</sup> *Ibid.*, s. 387.

<sup>72</sup> Law Reform Commission of Canada, *op. cit.*, footnote 23, Recommendation 4(2)(1), p. 41.

<sup>73</sup> An alternative formulation defines "reckless" as "consciously taking 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"; *ibid.*, pp. 20-21.

<sup>74</sup> *Ibid.*, Recommendation 17(1), p. 84.

Much more objectionable, however, than mere archaisms and technical terms are the circumlocutions used by the present Code to formulate some of its provisions. One example relates to the defence of property. Clearly the legislators wanted to allow peaceable possessors of property to remove trespassers. This they should have done by stating so directly. Instead they did it by deeming a resisting trespasser (who may in fact be resisting passively) to commit an assault.<sup>75</sup>

Another example is found in the crime of break and enter. One form of this crime is defined as breaking and entering a place with intent to commit an indictable offence therein.<sup>76</sup> The Code then goes on to provide, however, that evidence that an accused broke and entered is, in the absence of evidence to the contrary, proof that he broke and entered with the required intent.<sup>77</sup> Then it is provided that a person shall be deemed to have broken and entered if he entered by a permanent or temporary opening without lawful justification or excuse, the proof of which lies upon him.<sup>78</sup> This is objectionable because it makes the law appear as one thing but really be another—it appears to require breaking and intent but, in reality, the crime may consist of mere entry. To avoid such objections, the draft defines the form of the crime of criminal intrusion straightforwardly as entering or remaining in another's premises without consent for the purpose of committing a crime, and abandons all reference to breaking, presumptions about breaking and presumptions about purpose.<sup>79</sup>

Another stylistic defect of the present Code is its complex sentence structure. Complex sentences impede comprehension through involved phraseology, excessive embedding of subordinate clauses and inverted style. An excellent example of all three deficiencies can be found in section 290(2) of the Criminal Code, a nine-line subsection which deals with theft by a person required to account. To rid the criminal law of such complexity, Recodifying Criminal Law aims at a maximum of simplicity. As far as possible, it avoids heavy, involved phrases, rejects embedded clauses and tries to make its sentences straightforward. In these ways it seeks to lighten the reader's load and make the law more easily intelligible.

A last observation. One enemy of simplicity is the marginal case. A case may be marginal because the draftsman failed to foresee it. As H.L.A. Hart<sup>80</sup> and others have shown, however, all such marginal cases can never be foreseen and dealt with in advance. So, rather than try to

---

<sup>75</sup> Law Reform Commission of Canada, *The General Part*, *op. cit.*, footnote 38, pp. 106-107.

<sup>76</sup> Criminal Code, *supra*, footnote 35, s. 306(1).

<sup>77</sup> *Ibid.*, s. 306(2).

<sup>78</sup> *Ibid.*, s. 308(b)(ii).

<sup>79</sup> Law Reform Commission of Canada, *op. cit.*, footnote 31, Recommendation 12(1), p. 14.

<sup>80</sup> H.L.A. Hart, *The Concept of Law* (1961), Ch. VII.

cope with the problem of drafting in even finer detail, legislators should articulate a general principle, draft in terms of that principle and leave such cases to be dealt with by the courts as they arise. Law should not be structured around the marginal case.

### C. A Principled Approach

Although an improvement on the section by section approach, the broader or more global attack on arrangement and style is not without its limitations. It focuses on form and ignores substance. It could be said merely to tinker with the *status quo*, to accept the basic premise of the law and simply to aim at marginal improvements.

In a justly celebrated paper<sup>81</sup> the late Robert Samek criticized this kind of approach as mere "legal reform". Such reform, he contends, assumes that basically all is well with the law and that all we need to do is give the *status quo* a "wash and brush up" or, worse still, "a face lift with a come-on smile".<sup>82</sup> It merely grafts something on to the existing system without changing the system itself.<sup>83</sup> To use a famous analogy, it changes the map but not the territory.<sup>84</sup>

What should be done then with the territory—with the substance of the law as opposed to its expression? Earlier it was suggested that the starting-point must be the present law and that the first question is whether it needs change. This question, though, cannot be answered without first determining what sort of criminal law we ought to have. But this preliminary question had not yet been answered.

For this reason in 1972 the Commission established an "aims and purposes" committee under the chairmanship of the then Vice-President, Mr. Justice Lamer. Originally a small committee, consisting of commissioners and project directors, it later came to include all the researchers and to constitute a "committee of the whole". Meeting once a month over the next two years, it explored the gap between myth and reality in the criminal justice system, examined the justifiable goals of the system and inquired what values should be enshrined in criminal law and what limitations should restrict pursuit of its goals. Out of these meetings eventually came the Working Papers, *The Meaning of Guilt*<sup>85</sup> and *Limits of Criminal Law*<sup>86</sup> and the Report, *Our Criminal Law*.<sup>87</sup>

---

<sup>81</sup> R. Samek, *A Case for Social Law Reform* (1977), 55 *Can. Bar Rev.* 405.

<sup>82</sup> *Ibid.*, pp. 409-418.

<sup>83</sup> *Ibid.*, p. 420.

<sup>84</sup> A. Korzybski, *Science and Sanity* (1958), pp. 58 and 750.

<sup>85</sup> Law Reform Commission of Canada, Working Paper No. 2: *The Meaning of Guilt: Strict Liability* (1974).

<sup>86</sup> Law Reform Commission of Canada, Working Paper No. 10: *Limits of Criminal Law: Obscenity: A Test Case* (1975).

<sup>87</sup> Law Reform Commission of Canada, Report No. 3: *Our Criminal Law* (1976).

These three papers set out the Commission's philosophy of criminal law in detail and provided the underpinning for all subsequent papers on substantive criminal law. The aims and purposes committee had come to the conclusion that the criminal law had primarily to do with values—to underline basic social values, uphold them when violated and stigmatize those who violate them. Accordingly, *The Meaning of Guilt* drew a clear distinction between “real” crimes (acts violating basic values) and regulatory offences (acts contravening various rules and regulations but not violating basic values) and recommended that criminal law be restricted to the former. *Limits of Criminal Law* examined factors limiting the use of criminal law, for example the cost in terms of suffering for those convicted, loss of liberty for ordinary citizens restricted by prohibitions of the law and expense for taxpayers paying for law enforcement. Building on this, *Our Criminal Law* saw criminal law as having a limited role—as something to be used with restraint, only in the last resort and only in the case of real crimes.<sup>88</sup> No act, it said, should qualify as a real crime unless it seriously harms other people or seriously contravenes values fundamental to our society, unless the use of criminal law against it will not itself contravene such values and unless criminal law can make a significant contribution to the solution of the problem posed by such an act.

To enshrine the underlying policy and principles of the new Code a minority of the commissioners would have prefaced the new Code with a preamble including a declaration of principles.<sup>89</sup> This preamble would have declared the basic policy of criminal law to be “to reinforce fundamental social values, to maintain social order and to protect individual freedoms”. It also would have incorporated the principle of restraint by stating that the criminal law should pursue this policy by prohibiting and punishing “conduct which causes or threatens serious harm”. And the declaration of principles would have proclaimed that criminal law should be used only as a last resort and “in a manner which interferes no more than necessary with individual rights and freedoms”. For various reasons<sup>90</sup> the majority of the commissioners preferred not to include a preamble, but many of the dictates of policy and principle, nevertheless, found articulation in the actual sections of the Code.

As for the “real” crime/regulatory offence distinction, the proposals define a crime as any federal offence carrying a possible sentence of imprisonment.<sup>91</sup> On the exclusion of absolute liability, the draft Code specifies that purpose, recklessness or negligence form the requisite culpability

---

<sup>88</sup> *Ibid.*, pp. 33-45.

<sup>89</sup> Law Reform Commission of Canada, *op. cit.*, footnote 23, pp. 7-8.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, Recommendation 1(4), p. 13.

for criminal liability.<sup>92</sup> Concerning constructive liability, the document abolishes constructive murder.<sup>93</sup> With regard to archaic offences, the new Code drops witchcraft, duelling and blasphemy and other similar anachronisms.

But justice operates in more than one direction. Not only must a decent Code avoid criminalizing acts not seen as criminal, it must also take cognizance of those that are seen as criminal. For this reason the new Code contains some crimes not presently included in the law, for example a general crime of endangering,<sup>94</sup> a crime of failure to rescue<sup>95</sup> and crimes against the environment.<sup>96</sup> In addition, it lessens the undue avoidance of liability resulting from certain defences. One recommendation narrows the defence of intoxication and provides that, absent fraud, duress, compulsion or reasonable mistake, someone performing the *actus reus* of a crime may be convicted of committing it "while intoxicated" even though intoxication deprived him of *mens rea*.<sup>97</sup> Another recommendation narrows the current law and excludes the use of force on school children by teachers.<sup>98</sup>

Ultimately of course the worth of any criminal code depends on its effectiveness. The distinction drawn by Ehrlich<sup>99</sup> between pure law and living law is as significant for criminal as for any other law. A law is what it does, and though in its work on substantive criminal law the Commission concentrated on policy, principle and expression, it also kept an eye on practice. To work out its proposals on mental disorder, it held consultations with psychiatrists. To develop an approach to palliative care, withdrawal of treatment and euthanasia, it held meetings with teams of doctors. To plan the definition of criminal intrusion, it took advice from the Ottawa Police.

The Commission also conducted its own empirical investigations. While most of these were in the field of procedure, evidence and sentencing,

<sup>92</sup> *Ibid.*, Recommendation 2(4), p. 18.

<sup>93</sup> *Ibid.*, Recommendation 6(3), p. 54.

<sup>94</sup> *Ibid.*, Recommendation 10(2), p. 64. See also, Law Reform Commission of Canada, Working Paper No. 36: Omissions, Negligence and Endangering (1985), pp. 30ff.

<sup>95</sup> *Ibid.*, Recommendation 10(2), p. 64. See also Omissions, Negligence and Endangering, *ibid.*, pp. 16-20.

<sup>96</sup> Law Reform Commission of Canada, Working Paper No. 44: Crimes Against the Environment (1985).

<sup>97</sup> A minority formulation would have imposed liability through negligence; *op. cit.*, footnote 23, p. 28.

<sup>98</sup> A minority would have removed it from the parents too; *ibid.*, p. 38; Law Reform Commission of Canada, *op. cit.*, footnote 38, pp. 38ff.

<sup>99</sup> E. Ehrlich, *Fundamental Principles of Sociology of Law* (trans. Walter L. Moll, 1936). See also G. Sawyer, *Law in Society* (1965).

some did concern substantive law. The Meaning of Guilt arose out of preliminary study papers which investigated the number of strict liability offences in Canada, inquired into the practice of those prosecuting strict liability offences in the regulatory sector and which found that charges were only laid where there is fault.<sup>100</sup> Investigation into the matter of palliative care shortening life revealed that no prosecutions ever result in such cases.<sup>101</sup> Research on blasphemy or criminal libel showed that very few prosecutions are brought for those offences.<sup>102</sup> In such instances, a clear gap exists between the written law and the living law, a gap which the Commission recommends closing by bringing the Code into line with actual practice.

These, then, were the different strategies used by the Commission—a section by section approach, a global approach to style and form and a principled approach. By using them, it tried to produce a Code that is simply written, coherently organized, based on clear policies and principles and in touch with reality.

### Conclusion

Everyone recognizes that Report 30 is only one step along the road to a new Canadian Criminal Code. It, along with the Report of the Canadian Sentencing Commission, is aimed at promoting a national debate about the future shape of our criminal justice system, which will take place over the next few years. Many of the questions that have been raised have not yet been discussed in the public arena, and they should be. The Commission knows that its work is not perfect and that it needs further study, consultation and revision. The Commission is delighted that the Federal and Provincial ministers responsible for criminal justice have decided to study and consult on Report 30, as well as on the Canadian Sentencing Commission Report. Parliamentarians, in the aftermath of the capital punishment vote, have undertaken to participate in this work. The Canadian Bar Association has also launched a study of Report 30. The Commission is eager to assist them in the noble endeavour of rejuvenating our criminal law.

In offering this proposed new Code, the Commission did not advocate change for its own sake: it believes the changes proposed are changes for the better and that they are needed to improve the criminal law. It is not urging that we fix something that is not broken; rather it believes that there are many aspects of our criminal law that *are* broken and in

---

<sup>100</sup> See, Law Reform Commission of Canada, *Studies on Strict Liability* (1974).

<sup>101</sup> Law Reform Commission of Canada, *op. cit.*, footnote 23, p. 57; Law Reform Commission of Canada, *Euthanasia: Working Paper No. 28: Aiding Suicide and Cessation of Treatment* (1982), p. 8.

<sup>102</sup> Law Reform Commission of Canada, *Defamatory Libel. op. cit.*, footnote 38.

urgent need of major reform. Report 30 is a contribution to the collective effort of Canadians in recodifying their criminal law. It should ultimately lead to a distinctive new Criminal Code that is just, clear, comprehensive, contemporary, coherent, effective, restrained where possible and strong where necessary, reflecting the fundamental values of modern Canadian society.

It is hoped that, when our new Code is enacted, Canada will once again be in the vanguard of criminal law reform; and that Canadian criminal law will serve future generations of Canadians as well as the work of Sir John A. MacDonald's generation has served us these last ninety-five years.

**APPENDIX\***  
**Draft Criminal Code**  
**Part I — The General Part**

**PART I**  
**THE GENERAL PART**  
**Division 1**  
**PRINCIPLES OF CRIMINAL**  
**LIABILITY**

3. 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.

4. A person is only criminally liable for conduct engaged in by that person unless otherwise provided in this code or another Act of Parliament.

5. 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.

**Physical Element**

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

(a) the omission is specified in the definition of the crime; or

(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.

(2) 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.

7. 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.

**Mental Element**

8. Where the definition of a crime specifies purpose as the relevant state of mind, or where the definition does not specify that 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. 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. 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. For the purposes of this Code and the provision 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 persons 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 includ-

\* The Appendix reproduces only those provisions which are of major substantive importance.

ing, 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.

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

(2) Proof of recklessness satisfies a requirement of negligence.

### Exemptions

13. A person is not criminally liable for conduct engaged in by him while he was under twelve years of age.

14. A person does not commit a crime if, at the time of the relevant conduct, the person, by reason of mental disorder, is incapable of appreciating the nature or consequences of the conduct or of appreciating that the conduct constitutes a crime.

### Absence of Physical Element

15. (1) No person who engages in conduct specified in the definition of a crime is guilty of the crime where that conduct was beyond that person's control

(a) by reason of physical compulsion by another person or, in the case of an omission, the physical impossibility of performing the relevant act; or

(b) for any other reason, other than loss of temper or mental disorder, that would cause an ordinary person to engage in the same conduct.

(2) Subsection (1) does not apply where the relevant state of mind is negligence and the conduct was beyond the person's control by reason of his negligence.

### Absence of Mental Element

16. (1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does not have the relevant state of mind by reason

of mistake or ignorance as to the relevant circumstances.

(2) Notwithstanding section 5, a person who is not guilty of a crime by reason of application of subsection (1) may be found guilty of an included crime or of attempting to commit a different crime if that person believed he was committing that included or different crime.

(3) Subsection (1) does not apply where the relevant state of mind is recklessness or negligence and the person's mistake or ignorance results from his recklessness or negligence.

17. (1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does not have the relevant state of mind by reason of intoxication resulting from fraud, duress, compulsion or reasonable mistake.

(2) Notwithstanding section 5, a person who engages in conduct specified in the definition of a crime but who does not have the relevant state of mind by reason of intoxication, other than intoxication resulting as described in subsection (1), is guilty of committing the crime while intoxicated.

## Division II

### JUSTIFICATIONS AND EXCUSES

20. (1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but does so in order to avoid immediate serious harm to himself or to another person or damage to property where such harm or damage

(a) substantially outweighs the harm or damage resulting from the conduct; and  
(b) could not have been avoided by other means that would have resulted in less harm or damage.

(2) Subsection (1) does not apply where the person purposely kills or purposely inflicts serious harm on another person.

23. (1) No person is guilty of a crime who

(a) uses such force as is reasonably necessary to prevent the commission of a crime that is likely to cause the death of or serious harm to another person or serious damage to property;

(b) uses such force as is reasonably nec-

essary to effect the arrest of a person as authorized by law; or

(c) performs any act that is required or authorized to be performed by or under an Act of Parliament or an Act of the legislature of a province and uses such force as is reasonably necessary to perform the act.

(2) Subsection (1) does not apply where the person purposely kills or purposely inflicts serious harm on another person, except where such an act is reasonably necessary to effect the arrest or recapture of, or prevent the escape of, a person whose being at large endangers human life.

24. No person bound by military law to obey the orders of a superior officer is guilty of a crime by reason of engaging in conduct pursuant to an order of the officer that is not manifestly unlawful.

25. (1) No person is guilty of a crime who engages in the conduct specified in the definition of the crime but mistakenly believes in the existence of a circumstance that, if it existed, would provide a defence under the law except a defence under section 13 or 14.

(2) Subsection (1) does not apply where the relevant state of mind is negligence and the mistaken belief is a result of that negligence.

### Division III

#### INVOLVEMENT IN CRIME

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.

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.

#### Inchoate Crimes

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.

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.

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.

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.

### PART II

#### CRIMES AGAINST THE PERSON

##### Division 1

#### CRIMES AGAINST LIFE

37. Every one commits the crime of negligent homicide who negligently kills another person.

38. Every one commits the crime of man-slaughter who recklessly kills another person.

39. Every one commits the crime of man-slaughter while intoxicated who kills another person but does not, by reason of intoxication, have the state of mind required for murder.

40. (1) Every one commits the crime of murder who purposely kills another person.

(2) Murder is first degree murder where it is premeditated or where it is

(a) accompanied by torture;

(b) committed pursuant to an agreement for valuable consideration;

(c) committed in preparation to commit a crime or to facilitate the commission of a crime, conceal the commission of a crime or aid in the escape of a criminal from detection, arrest or conviction;

(d) committed for terrorist or political motives;

(e) committed during the commission of a crime contrary to section 49 (confinement), 80 (robbery), × (hijacking), or × (sexual assault); or

(f) committed by means that the person who commits the crime knows will kill more than one person and in fact more than one death results.

(3) Murder is premeditated where the killing is the result of a calculated and carefully considered plan other than a plan to kill a person for a compassionate motive.

42. Sections 37 to 41 do not apply in respect of the administration of palliative care that is appropriate in the circumstances to control or eliminate the pain and suffering of a person regardless of whether or not the palliative care reduces the life expectancy of that person, unless that person refuses to consent to that care.

## Division II

### CRIMES AGAINST BODILY INTEGRITY

43. Every one commits a crime who touches or hurts another person without the consent of that person.

44. (1) Every one commits a crime who purposely, recklessly or negligently harms another person.

(2) Subsection (1) does not apply in respect of harm that is inflicted purposely or recklessly in the course of

(a) medical treatment that is administered with the consent of the patient for therapeutic purposes or for purposes of medical research, unless the risk of harm

is disproportionate to the benefits expected from the research; or

(b) a lawful sporting activity that is conducted in accordance with the rules governing the activity.

## Division IV

### CRIMES AGAINST PERSONAL LIBERTY

50. Every one commits a crime who confines a person for the purpose of inducing that person or another person to do or to refrain from doing anything

51. Every one commits a crime who takes unlawful custody of a child who is less than fourteen years of age for the purpose of depriving a person who has lawful custody of the child of the use of that right, regardless of whether the child consents or not.

## Division V

### CRIMES CAUSING DANGER

53. Every one commits a crime who negligently creates a risk of death or serious harm to another person.

54. (1) Every one commits a crime who, realizing that a person is in immediate danger of death or serious harm, omits to take reasonable steps to aid that person.

(2) Subsection (1) does not apply to a person who cannot render aid without incurring a risk of death or serious harm to himself or another person or for any other valid reason.

64. The crime defined by sections 43 (assault), 44 (infliction of harm), 45 (harassment), 46 (threatening), 47 (threats of immediate harm), 48 (extortion), 49 (confinement), 50 (kidnapping), 51 (child abduction), 53 (endangerment), 54 (failure to rescue), 55 (impeding rescue) are aggravated where, to the knowledge of the accused, the victim is his spouse, child, parent, grandparent or grandchild or where the crimes are

(a) accompanied by torture;

(b) committed pursuant to an agreement for valuable consideration;

(c) committed in preparation to commit a crime or to facilitate the commission

of a crime, conceal the commission of a crime or aid in the escape of a criminal from detection, arrest or conviction;

(d) committed for terrorist or political motives;

(e) committed by means of a weapon; or

(f) committed by means that, to the knowledge of the accused, could harm more than one person or by means with respect to which the accused was reckless as to whether more than one person could be harmed and in fact more than one person is harmed.

### Division VI

#### CRIMES AGAINST PERSONAL SECURITY AND PRIVACY

69. (1) Every one commits a crime who, for the purpose of committing a crime, enters or remains on premises of a person without the consent of the owner or a person in peaceable possession of the premises.

## PART II

### CRIMES AGAINST PROPERTY

#### Division I

##### THEFT AND FRAUD

70. Every one commits the crime of theft who dishonestly appropriates another's property without his consent.

71. Every one commits a crime who dishonestly obtains a service for himself or any other person and does not pay for it.

72. (1) Every one commits a crime who by a false representation of fact, whether past, present or future or by an omission to disclose a fact induces another person

(a) to part with his property; or

(b) to incur a financial loss or a risk thereof.

#### Division II

##### ROBBERY

80. (1) Every one commits a crime who, while or for the purpose of committing the crime of theft, uses violence or threatens to use violence against another person or against property.

(2) The crime defined by subsection (1) is aggravated if the accused uses a weapon at the time of the commission of the crime.

#### Division III

##### CRIMINAL DAMAGE

81. Every one commits a crime who recklessly destroys or damages another's property or renders it useless or inoperative without his consent.

82. Every one commits a crime who recklessly causes a fire or explosion that destroys or damages another's property without his consent.

#### Division IV

##### OTHER CRIMES AGAINST PROPERTY

83. Every one commits a crime who possesses any device or instrument under circumstances that give rise to a reasonable inference that the person used it or means to use it to commit theft, criminal intrusion or forgery.

87. Every one commits a crime who possesses anything obtained by the commission of a crime in Canada or by the performance of an act or omission that, if performed in Canada, would be a crime and that is a crime under the law of the place where the act or omission is performed.

88. Every one commits a crime who deals in things obtained by the commission of a crime in Canada or by the performance of an act or omission that, if performed in Canada, would be a crime and that is a crime under the law of the place where the act or omission is performed.