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Recodifying Criminal Law

I. INTRODUCTION

Canada was once in the vanguard of criminal law reform. When Parliament enacted our first *Criminal Code* in 1892, we were in the forefront of the codification movement.[1] Our first Prime Minister, Sir John A. MacDonald, and his Minister of Justice, Sir John Thompson, who later became our fourth Prime Minister, had the vision and courage to assemble into one document the criminal laws of a fledgling nation. They were determined to reflect and to defend the values of Canadians through the instrumentality of a *Criminal Code*. Their handiwork has served us well these last ninety-seven years.

The ravages of time, however, have taken their toll. The present code 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. It is poorly organized. It contains archaic language. It is difficult to understand. There are many gaps, some of which have had to be filled by the judiciary. It contains obsolete and unconstitutional provisions. It overextends the proper scope of the criminal law; and it fails to address some serious current problems. Canadians are no longer in the vanguard of criminal law reform.

It is time for renewal. A major rethinking and recodification has been under way for several years already, led by the Law Reform Commission of Canada which has produced many publications, culminating with our *Report 30: Recodifying Criminal Law*,[2] which was tabled in Parliament on December 3, 1986.[3] The Supreme Court of Canada has been an active participant in the process, issuing numerous outstanding decisions which have inspired the enterprise. Canadian legal scholars have contributed greatly, publishing excellent books and articles that have energized the effort. Over the next few years, our proposal for a new Criminal Code will be studied and debated by Canadians. Eventually, we hope, it will lead to a new Criminal Code made entirely in Canada, by Canadians for Canadians.

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II. HISTORY

In order to understand where we are going, it is useful to consider where we have been. Prior to the codifications of 1892, the groundwork had already been laid by Sir John A. MacDonald's first government. Before confederation, each province had its own criminal law, although all were founded on the British Common Law and statutory law. Having been given exclusive jurisdiction under Section 91(27) of the *British North America Act*[4] over criminal law, the government sought, as one of its priorities, to create a uniform system of criminal law to help unify the fledgling country.[5] The first stage was the 1869 *Consolidation Act*[6] which included a group of nine statutes, the first six of which were modelled on Greaves' consolidation of 1861 in England.[7] The statutes that were consolidated in this Act included: coinage offences,[8] forgery,[9] offences against the person,[10] larceny,[11] malicious injuries to property,[12] perjury,[13] procedure in criminal cases,[14] justices of the peace and indictable offences[15] and justices of the peace and summary convictions.[16] Historically, the 1869 consolidation was an important event, for it laid the foundation which eventually led to the 1892 codification breakthrough.[17]

A. *CODIFICATION: THE ENGLISH EXPERIENCE*

Our 1892 *Criminal Code*[18] has its roots in the codification movement of 19th century England. Briefly, at the turn of that century, English criminal law was in a state of chaos – a bottomless pit of complex case law, petty, anachronistic offences and harsh punishments.[19] Out of that chaos there grew a strong reformist reaction. One of the outstanding leaders of the reformist movement was the utilitarian philosopher, Jeremy Bentham.

Bentham, who is considered to be the "intellectual father of codification"[20] argued extensively in favour of a comprehensive codification and reform of English law based on utilitarian principles.[21] His ideal code was not only concerned with rationalizing law into an orderly system of principles and rules, but was also very much concerned with style. One of his chief goals for codification of penal law was "to set forth the whole penal law with such simplicity and clarity that the average citizen would be able to understand it and the average judge would be unable not to."[22] On the substantive side he argued that crime should be suppressed with the "smallest possible infliction of suffering," and that truth should be ascertained at the "smallest possible cost of time and money."[23]

Although Bentham never produced a criminal code himself, he had a strong influence on the codes written by a number of 19th and 20th century jurists. These included Thomas Babington Macaulay's Indian Penal Code,[24] Edward Livingston's draft penal code for Louisiana,[25] James Fitzjames Stephen's Criminal Code (Indictable Offences) Bill[26] and the 1962 American Law Institute's Model Penal Code, drafted under the direction of Professor Herbert Weschler.[27]

A start toward codification in the United Kingdom occurred in the 1830's when the Lord Chancellor, Brougham, convinced King William IV to appoint a Royal Commission to consolidate the criminal law of England into one statute.[28] In 1837 the Commission presented a report which was critical of an unwritten system.[29] In 1848 Brougham, using the work of the Commission, introduced into Parliament the first of several Bills which attempted to replace the common law with a code. These Bills were strongly opposed by English judges and any attempt to codify the law was lost by 1853.[30]

The movement for codification surged again in the 1870's when, in 1871, R.S. Wright was asked to draft a penal code for Jamaica.[31] Soon thereafter, in 1878, James Fitzjames Stephen was asked to draft a penal code for the United Kingdom.[32] Stephen's draft Code, which was never enacted in the United Kingdom, is important to us because it is this document which became the foundation of the *Canadian Criminal Code*. In style, Stephen was a Benthamite. In substance, however, he took a markedly different approach. 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..."[33] For Stephen, on the other hand, codification of English common law did not involve the enumeration of major principles;[34] in his mind, codification meant "the reduction of the existing law to an orderly written system."[35] Stephen regarded the desire for revenge against criminals as "deserving of legitimate satisfaction," and capital punishment as an important expression of that desire.[36] For Stephen, criminal justice was to vengeance what marriage was to sexual passion.[37]

Stephen's first attempt at codification was to draft the Homicide Law Amendment Bill of 1874. The Bill was criticized, however, because it codified only one part of the criminal law.[38] Stephen, spurred on by this criticism, set out to develop a complete code. In preparation for this task, Stephen published *A Digest of the Criminal Law of England*.[39] This major work, along with strong personal lobbying, played an important role in Stephen receiving the commission to prepare the Criminal Code (Indictable Offences) Bill of 1878.[40]

Stephen's Criminal Code Bill of 1878 was never enacted. After receiving a second reading in the House of Commons, it was referred to a Royal Commission composed of Stephen and three High Court judges.[41] One year later the Commission produced the English Draft Code of 1879.[42] The draft code consisted essentially of Stephen's 1878 Bill along with supporting commentary. One important difference between Stephen's Bill and the English Draft Code was that, where Stephen's Bill would make room for the "elasticity" of the common law[43] by allowing for common law offences not defined in the *Code*, the English Draft Code operated as a complete code defining all of the common law offences.[44]

The English Draft Code, of 1879, like Stephen's Bill of 1878 was never

enacted in Britain. One reason for this was that the Draft Code received harsh criticism from the Lord Chief Justice, Sir Alexander Cockburn, in a widely publicized open letter to the Attorney General, Sir John Holker.[45] Also, in 1880 the Conservative government of Sir Benjamin Disraeli, which had begun the codification effort, was defeated by Sir William Gladstone, a Liberal. Early in that year the English Draft Code Bill of 1880, which was substantially the same as the draft code, was presented to the House of Commons.[46] Caught in the change of government and in the "raging Irish storm,"[47] the Bill disappeared into "the general vortex which swallows up such things."[48] With the demise of this Bill, official activity aimed at codifying criminal law in the United Kingdom faded away not to surface again until the 1980's.[49]

B. *CODIFICATION: THE CANADIAN EXPERIENCE*

1. *The 1892 Criminal Code*

Although the 19th century codification movement was aborted in England, it ripened to fruition in Canada. By the 1880's, the *Consolidation Act* of 1869 began to develop faults. Amendments to the Act had proliferated so that the original 369 pages of the Act had been expanded into an unwieldy document of over 650 pages.[50] The need for major reform became obvious.[51]

Judge James Gowan, a champion of the English Draft Code and an old friend of Prime Minister MacDonald, strongly urged the government to codify Canadian criminal law. As early as 1871 Gowan had appealed to MacDonald to start such a codification project, offering to do the work himself. MacDonald's response at that time was most amenable: "Well Judex ... have we not been laying the foundations and if I live and prosper I mean to build on them."[52] However, it was not until the early 1890's, under the leadership of Sir John Thompson, who had a "genius for systematic law" and the courage to assume "the intimidating responsibility in shouldering such a measure through the House of Commons," that Gowan saw his dream come true.[53]

Sir John Thompson, a former Judge of the Supreme Court of Nova Scotia, was an energetic man of great legal talent.[54] Although he did not personally take part in the writing of the *Criminal Code* (the actual work was done by two maritimers and successive deputy ministers of Justice — George Burbridge and Robert Sedgewick),[55] Thompson with great political skill gently piloted the *Code* through Parliament with scarcely a ripple.[56] The *Code*, which was completed in the space of a year, was said by Thompson at the time of its second reading on April 12, 1892[57] to be drawn primarily from the English Draft Code Bill of 1880, Stephen's Digest, Burbridge's Digest and Canadian statutory law as consolidated in 1869. He 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."[58] Although there were some differences in procedure, in substance the 1892 Code was almost identical to the English Draft Code.[59]

The Bill passed through Parliament with very little debate.[60] The Bill (No. 32) was first introduced into Parliament on May 12, 1891 by Thompson in a rather succinct manner.[61] It did not receive a second reading,[62] but was reintroduced in the next session on March 8th, 1892 in a similarly precise manner.[63] Second reading on April 12th was unusual in that the Bill (No. 7) was introduced into the House of Commons without copies having been distributed in advance to its members.[64] Thompson's speech was very short. His intention was to lull the opposition into believing that there were no fundamental changes to the existing law. He introduced a diversionary issue — abolishing the grand jury — which acted as a smoke screen to obscure the more controversial changes.[65]

The debate ended amicably,[66] with only three opposition members speaking at any length: Wilfred Laurier and two of his future cabinet ministers David Mills and Louis H. Davies.[67] In order to facilitate its passage the Bill was sent for consideration to a special Joint Committee of the House and Senate.[68] By June 28th, the Bill received third reading.

On July 4th the Bill was introduced into the Senate by Prime Minister Abbott[69] where it almost foundered. Introduced six days before prorogation, the Liberal leader, Senator R.W. Scott, was incensed over the short time given to debate this massive Bill and strongly opposed it.[70] But since in principle the Senate-Commons Committee had approved the Bill, and also since other Senators felt that the insult to the Senate was not sufficient "to kill such an important measure," opposition fell away and the Bill was passed on July 8th.[71] The Code received Royal assent on July 9, 1892 and was proclaimed in force on July 1, 1893.[72]

The enactment of the *Criminal Code* was a major event in Canadian legal history.[73] It earned much praise abroad and was widely accepted at home.[74] Gowan, who actively pressed for codification was jubilant. He wrote to Thompson: "just think of it, *Canada in the van* — The first to enact a complete codification ... It is far and away the best measure of the kind ever submitted to any legislature."[75]

The only sour note was sounded by Mr. Justice H.E. Taschereau, a judge of the Supreme Court of Canada. Emulating Chief Justice Cockburn's action of 1879, on January 20, 1893, after the *Code* was enacted but before it came into force, Taschereau wrote an open letter to Justice Minister Thompson severely criticising the new code.[76] He condemned the *Code* for being: "...replete of contradictory clauses, of redundant enactments, of clumsy, needlessly minute and irrational or repugnant provisions, obviously leading ... to incongruities and anomalies ... ." His most telling criticism was directed at the General Part. He expressed great indignation at the gap which had been left by the drafters in not defining the necessary mental elements of a crime (the *mens rea*) and in not defining defences such as intoxication.[77]

Mr. Justice Taschereau did not receive much support. The Canada Law Journal, for example, criticized him[78] for failing in his position as a judge who, "enjoying the confidence of the public, and receiving public money"

and whose specialty was criminal law, did not come forward sooner "to aid in making any legislation ... as complete as possible."[79]

2. The 1955 revision

Over the past 97 years there have been many amendments and revisions to the *Code*. The most significant of these was the 1955 revision prepared by a Royal Commission appointed in 1949 by Justice Minister Ilsley (another Maritimer). The Commission which consisted of three Commissioners (expanded to five in 1950) and a Chairman, The Chief Justice of Saskatchewan, The Honourable W.M. Martin, was assisted by a Committee of eminent jurists which included Joseph Sedgewick, Q.C., and J.J. Robinette, Q.C.[80]

The mandate of the Commission contemplated a simplified restatement of the current law, rather than a fundamental re-evaluation of criminal law according to first principles.[81] Its terms of reference directed the Committee to revise ambiguous and unclear provisions, adopt uniform language throughout, eliminate inconsistencies, legal anomalies or defects, rearrange provisions and parts, seek to simplify by omitting and combining provisions, and endeavour to make the *Code* exhaustive of criminal law.[82]

On January 22, 1952, the Commission presented to the government its final report, together with a draft Criminal Code.[83] The draft Code, after some study by the government, first went to the Senate as Bill No. H-8 on May 2, 1952, where it was referred to the Banking and Commerce Committee. Before a final report could be made, Parliament adjourned. In the Fall it was reintroduced as Bill No. 0. On December 17, 1952 after 116 Amendments were made, the Bill was passed by the Senate; in January 1953 it was introduced into the House of Commons as Bill 93.[84] The Bill was then sent to a special committee for study in May 1953, but Parliament was prorogued that Spring and the Bill died on the order paper.[85]

It was reintroduced that year on November 16, 1953 bearing the same number as the 1892 *Code*, No. 7.[86] The atmosphere of the debate on the new revised *Code* can be best summarized in the words of the then Minister of Justice, the Hon. Stuart S. Garson just before it was passed by the House on third reading April 8, 1954:

> I must say that I never sat on any legislative committee, either in provincial politics or in federal politics, in which there was less partisanship, a more objective consideration of the merits of each section and a willingness to listen to ideas no matter whence they came.[87]

The revised Code received Royal assent on June 26, 1954 and was proclaimed into force on April 1, 1955.[88]

The newly revised *Criminal Code* was a significant milestone in Canadian Criminal Law. A historical break was made with British tradition by virtually abolishing all "common law offences" except contempt of Court.[89] "The 1955 *Code* thus made our law independent of English law and committed us to a written law with a distinct Canadian flavour."[90]

In style, within its limited mandate, the Commission when drafting the revised *Code* succeeded in producing a slimmer and tighter document. By

dropping many obsolete and superfluous provisions and redrafting offences into more concise statements, it reduced the number of sections of the old *Code* from 1,100 to 753. Although the Commission had succeeded in abbreviating and rationalizing the existing law, and according to MacLeod even introduced some new law,[91] essentially there was little difference in substance, language or basic design between the 1955 and 1892 Codes. The 1955 reform had merely dusted off the old law without calling into question the underlying philosophy, style or forms of expression.[92]

III. THE CURRENT RECODIFICATION EFFORT

After the 1955 revision, the pattern of *ad hoc* amendments continued, as during the previous six decades.[93] Controversial issues, which were put off during the revision of the *Code* so that its passage would not be impeded, were subsequently dealt with in a piecemeal fashion.[94] Committees or Commissions of inquiry were appointed to investigate substantial matters such as insanity,[95] capital and corporal punishment,[96] and parole.[97] By the 1960's 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.[98]

A. *THE OUIMET COMMITTEE*

One response to this perceived need was the appointment in 1965 of the Canadian Committee on Corrections[99] (generally known as the Ouimet 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... ."[100] When the Ouimet 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.[101] One of the first recommendations that the Committee made was for the establishment of a Committee or Royal Commission to examine the substantive law.[102] The recommendation represented one of many such calls not only for 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."[103]

B. *THE LAW REFORM COMMISSION OF CANADA*

In 1971 the Law Reform Commission of Canada was created[104] as a permanent body and endowed with broad objects and powers. Briefly, the Commission was mandated to review on a continuing basis all of 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.[105] 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.[106]

In beginning this enormous task, the first problem for the early Commission was one of strategy and of methodology. On 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 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 1970's, 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." 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.[107]

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."[108] 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.[109] The third phase was the legislative enactment of the proposals.

The Commission's work on the review of the Canadian criminal justice system began long before the Federal and Provincial governments' commit-

ment to the "three-phase review." In fact when the three-phase program was announced, the Commission was fully prepared with a well thought-out criminal justice policy that it had developed in its early years.

In 1976 this criminal justice policy was presented to Parliament in the Commission's report on *Our Criminal Law*.[110] Succinctly, the policy can be summed up in one word – restraint. Criminal law, the Report recommended, should be used only in the last resort and only in the case of real crimes.[111] The test as to whether an act qualifies as a real crime requires that the act seriously harms other people or seriously contravenes the fundamental values of our society; that the use of the criminal law will not itself contravene such values; and that the criminal law can make a significant contribution to the solution of the problem created by the act.[112] In 1982, the Federal government adopted the substance of *Our Criminal Law* as the justice policy for Canada in its document *The Criminal Law in Canadian Society*.[113]

With the philosophical underpinnings of a federal criminal justice policy in place the commission's work on its phase of the Criminal Law Review became a matter of analyzing the substantive law in light of this policy. The results were numerous working papers and reports on topics such as: Homicide,[114] Assault,[115] Contempt of Court,[116] Defamatory Libel,[117] Vandalism,[118] Arson,[119] Bigamy,[120] Crimes Against the Environment,[121] Crimes Against the State,[122] Medical Treatment and Criminal Law,[123] Euthanasia, Aiding Suicide and Cessation of Treatment,[124] Criminal Intrusion,[125] and Hate Propaganda.[126]

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 refocussed on the Criminal Law Review. To expedite the process the Commission decided that, rather than publish a multitude of Reports to Parliament on individual topics, it would consolidate its working papers into a new *Draft Criminal Code*.[127]

The Working Papers were not written in a vacuum. Consultations were held with those involved in the criminal justice process – judges, government officials, lawyers, police chiefs, scholars – and with the general public. Following the advice we received, adjustments were made and recommendations were modified.

In preparation for the recodification task, the Commission held an international conference in Ottawa in April, 1984. A number of world 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: Professor 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 advice and 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,[128] Vice-President of the Commission, and one of the principal architects of the new *Criminal Code*. The team consisted of Patrick Fitzgerald,[129] Fortin's long-time collaborator at the Commission, Me. François Handfield,[130] the newly-appointed project co-ordinator, and seven researchers.[131] Vincent Del Buono,[132] of the Department of Justice, was invited to join the team as liaison for the Department.

In the fall of 1985,[133] a draft of the first volume,[134] 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 two, which included "Crimes Against the Natural Order, the Social and Economic Order, Political Order and the International Order" went to consultation in the spring of 1986[135] in Ottawa and again in the fall of that year[136] in Toronto. Following the consultation, many changes were made on the basis of the advice received. Finally, on December 3, 1986, Volume one of the draft Code was tabled in Parliament.[137] Volume two was tabled on May 19, 1988.[138] Volume three dealing with procedure will be tabled in the near future.

IV. THE PROPOSED NEW CRIMINAL CODE – THE HIGHLIGHTS

The proposed new Criminal Code not only reflects our Canadian values, but in style and arrangement incorporates the objectives of comprehensiveness, simplicity and systematization. It expresses the essential principles of criminal law and rules of general application. It defines most of the crimes of concern to our society. It drops archaic provisions, and it addresses modern day social problems.

In style the new Code aims to be intelligible to all Canadians. It is drafted in a straightforward manner, minimizing the use of technical terms and avoiding complex sentence structure and excessive detail. It speaks, as much as possible, in terms of general principles instead of needless specifics and *ad hoc* enumerations. Finally, it avoids deeming provisions, piggybacking and other indirect forms of expression on the basis that the direct way of saying anything is the simplest, the clearest and most readily understandable.

In structure the new Code is like the present *Code*. It contains a General Part (Title I) and a Special Part (Titles II to VI). The General Part includes rules of general application: definitions, liability, defences, criminal involvement and jurisdiction. The Special Part defines the particular crimes and includes crimes against the person, crimes against property, crimes against the natural order, crimes against the social order and crimes against the governmental order.

One noteworthy thing about the new Code is that the number of substantive provisions have been reduced from over 400 to under 200. Gone are the archaic and obsolete offences of witchcraft,[139] duelling,[140] three-card monte,[141] advertising means for restoring sexual virility[142] and towing water-skiers at night.[143] These offences are not only obsolete but trivialize the seriousness of the criminal law.

Along with modernizing and simplifying the criminal law, the new *Code* restrains it where necessary, strengthens it where needed and creates some new offences to reflect our modern values. These include not only our social values but the values enshrined in the *Canadian Charter of Rights and Freedoms*.[144]

A. *THE GENERAL PART*

The new General Part is more comprehensive and systematic than the present one. For example, on the most central and fundamental matter in the criminal law – the question of criminal liability – the present *Code* says virtually nothing. What conduct can someone be criminally liable for? How far can one be liable for omissions? What state of mind is necessary in general for responsibility? The *Code* is silent on these critical questions.

The draft Code on the other hand sets out in five sections[145] the general rules on conduct, omissions and the requirement of culpability. These sections provide the general rules of interpretation for the definition of a specific crime in the Special Part. For example, in the case of the requisite mental element[146] the new Code defines three levels of culpability – acts which are done purposely, acts which are done recklessly, or acts which are done negligently. The level of culpability which will apply depends upon what the definition of the specific crime requires as the relevant state of mind. Once that is determined the applicable rule in the General Part will apply. Thus the required mental element of a crime will no longer be something gleaned from the common law by judges, but will be articulated in the *Code* in a principled and systematic manner.

On the almost equally fundamental matter of the general defences, our present *Code* is incomplete. No mention is made, for instance, of necessity, automatism or, insofar as it is a defence, intoxication. The new draft Code on the other hand articulates, in as complete a manner as possible, the general defences including those that have been governed by the common law.

The sections on defences are divided into three categories. The first category deals with the defence of absence of conduct or state of mind necessary for culpability.[147] This would include the case where a person commits an act outside of his or her control either due to automatism or compulsion. Where the behaviour is involuntary a person would not be held liable for his or her actions. However, where the lack of control resulted from a person's own negligence, for example, failing to take the required medication, then that person can be found guilty of a negligence offence.

Similarly in the case of involuntary intoxication, for example, a drug is slip-

ped into a person's drink which causes a violent involuntary action on the part of the person against another, the drinker will not be held liable for his or her act. However, where the intoxication is voluntary, the new Code does away with the present obscure distinction of "specific" and "general" intent with its resulting legal fictions. Under the new Code a voluntarily intoxicated person will, with one exception, be liable for "committing that crime while intoxicated" and be subject to a penalty that is equal to that crime. The exception relates to killing while intoxicated. In that case everyone killing while intoxicated will be liable for manslaughter.

The second category of defences exempts special categories of people.[148] They include the very young, those unfit to plead, and those suffering from a mental disorder which prevents them from understanding the act which they committed or realizing its legal wrongfulness. (A minority of the Commissioners would add to this last defence that the mental disorder made the person sincerely believe that the act was morally right.)

The third category deals with justifications and excuses.[149] These include the defences of ignorance of the law, duress, necessity, defence of the person, protection of property and acting under legal authority.

Another Chapter in the General Part which is of major significance is "Involvement in Crime." Essentially this Chapter unifies the present law on parties to a crime so that liability accrues not only to those fulfilling the general liability conditions but also in some circumstances to others involved in a secondary way in the crime charged.

This Chapter sets out all of the rules concerning the different ways in which a person may be involved in crime. It divides these into two groups: (a) rules about involvement in *completed* crimes; and (b) rules about involvement in *incomplete crimes*. The rules in each group run parallel. In group (a) there is a rule concerning *committing* a crime and a rule concerning *furthering* such a crime, for example, by inciting, helping, etc. The penalty for furthering is the same as for committing. In group (b) there is a rule concerning *attempting* a crime and a rule about *attempted furthering* of such a crime, for example, by inciting, helping, a person who doesn't in fact complete the crime. The penalty for involvement in incomplete crimes is half the penalty for the full crime.

The last Chapter of the General Part deals with the extra-territorial jurisdiction of Canadian courts. The provisions of this Chapter serve two purposes: (1) to regulate where and under what conditions criminal conduct, particularly outside Canada, should be governed by Canadian criminal law; and (2) to give Canadian courts the power to exercise jurisdiction over such conduct. To a large extent, it creates exceptions to the general principle (enunciated in Section 35(1)) that no one should be convicted in Canada for a crime committed wholly outside Canada. The provisions are based upon generally accepted principles of international law and subject to the various diplomatic and other legal immunities.

B. *THE SPECIAL PART*

The Special Part of the new Code divides crimes into five categories. As noted earlier these consist of crimes against the person, property, the natural order, the social order and the governmental order.

Each category is subdivided, where appropriate, by reference to the interests infringed. So, crimes against the person are divided into: crimes against personal safety and liberty; and crimes against personal security and privacy.

Each subcategory is, where necessary, further subdivided. So, crimes against personal safety and liberty are divided into crimes against life, crimes against bodily integrity, threats and harassment, crimes against personal liberty, and crimes causing danger.

In each of these further subcategories crimes are, for the most part, listed in ascending order of gravity. Thus, less serious crimes usually precede more serious ones which include them or build upon them. The basic crimes against life, for instance, are listed in order as negligent homicide, manslaughter (reckless killing) and murder (intentional killing).

1. *Crimes Against the Person*

a) Crimes Against Life

In the new Code, the law of homicide has been set out in six clear sections. The Chapter on Crimes against Life defines four basic crimes of killing persons already born: negligent homicide, manslaughter, murder and first degree murder. It adds a special crime of furthering suicide, and ends with an exception relating to palliative care.

These six sections replace the 35 sections and 4,000 words used in the present *Code* to elaborate unnecessarily on the clear and simple prohibition "Thou shalt not kill." An example of the complexity of the present *Code*'s homicide provisions can be seen in the definition of manslaughter. Section 217 defines manslaughter as "culpable homicide that is not murder or infanticide." Therefore, to discover what manslaughter is, the reader has to wade through eight lines on culpable homicide,[150] forty lines on murder,[151] twenty lines on murder reduced to manslaughter by provocation,[152] and finally five lines on infanticide.[153] The result is that the present law of manslaughter not only becomes a crime of broad and unclear dimensions, but is almost impossible to explain to a jury that must apply it.

In contrast the new draft Code defines manslaughter in section 38 in a straightforward way: "Everyone commits a crime who recklessly kills another person." "Recklessly" is defined in Section 9 of the General Part as something worse than negligence but less heinous than wrongful purpose. Manslaughter, then, is singled out as falling between negligent homicide and murder and as meriting an intermediate penalty.

b) Crimes Against Bodily Integrity

The present law on assault (not including sexual assault) is found in seven sections in Part VI of the Code. As well there are a number of sections found outside of Part VI (for example: sections 38 to 42, assaults by trespassers; 69, assaulting person reading riot proclamation; 172, assaulting clergyman celebrating divine service).

In contrast, the new Code rationalizes and simplifies the law on assault into two sections. One section creates the offence of "Assault by Touching or Hurting." The other section creates the offence of "Assaulting by Harming." Two exceptions are created, one for "Medical Treatment" where there is informed consent and one for "Sport Activities" where the injury is inflicted "during the course of, and in accordance with, the rules of a lawful sporting activity."

In the area of domestic violence the new Code strengthens the assault provisions by making it an aggravated offence if the assault is committed against family members.[154] As well, with regard to the use of physical force for disciplinary purposes, it will no longer be a defence for school teachers and masters of ships to use physical force by way of "correcting" a pupil or maintaining good order and discipline on a vessel.

c) Crimes Against Danger

The proposed Code creates some new offences to bring the law into line with present day values. One newly created crime is the general offence of "endangering." Unlike the traditional focus of major crimes against a person which requires an "injured" victim, the new offence focuses on risk or harm. Everyone commits an offence of endangering who purposely, recklessly or with criminal negligence causes risk of death or serious harm to another person.[155] The key to this offence is that it allows the law to step in and prevent harm *before* it can occur.

Another new offence is the proposed crime of "failure to rescue."[156] This offence would apply where a person perceives another to be in danger of death or serious harm, but fails to take reasonable steps to help. It would *not*, however, be a crime to refuse to assist someone if that would place the rescuer at risk. The new recommended crime builds on the principle recognized in section 2 of the Québec *Charter of Human Rights and Freedoms*[157] and brings our law into line not only with ordinary notions of morality but also with the laws of many other states, for example Belgium, France, Germany, Greece, Italy, Poland, and at least one state of the United States (Vermont).

2. *Crimes Against Property*

a) Theft and Fraud

The law of theft and fraud is another example where the new Code simplifies and rationalizes the law to make it "coherent." The present *Code* is burdened with excessive details. Not only is a general rule of theft provided in section 283 but, in addition, there are eight pages which contain 24 other sections

concerning theft of special kinds of property (for example, oysters, electricity, cattle, drift timber, mail, credit cards and motor vehicles); theft by or from special categories of persons (for example, bailees, agents, husbands and wives, persons with a special interest and persons holding power of attorney); and related offences (for example, misappropriation of money held under a direction, criminal breach of trust, and fraudulent concealment). What the present *Code* provides in these sections is not only complexity and excessive details but the opportunity for overlap, inconsistency and general confusion. In contrast, the new Code reduces the theft and fraud provisions to three offences: (1) dishonestly appropriating another persons' property; (2) dishonestly obtaining another person's services; and (3) dishonestly, by false representation, inducing another person to suffer an economic loss.

b) Criminal Damage

The law of arson is an area where the law has been strengthened, by treating it as a more serious offence, by expanding the offence to include the destruction caused by explosives and by making the arson laws easier to enforce and apply. The intent of the redefined offence of arson is to provide police and fire enforcement officials with the means to counter the threats posed by the sophisticated modern arsonist without in any way jeopardizing the rights of the accused person.

The archaic and needlessly complicated present *Code* offence of mischief can be committed in four ways: (1) by damaging or destroying property; (2) by rendering it dangerous, useless, inoperative or ineffective; (3) by obstructing its lawful use; and (4) by obstructing a person lawfully using it. The new *Code* creates one simple crime: "Everyone commits a crime who recklessly destroys or damages another's property or renders it useless or inoperative without his consent." Since the term mischief is both inappropriate and carries too trivial a connotation, the new replacement renames the crime "Vandalism" to better reflect the nature and seriousness of the crime.

3. *Crimes Against The Natural Order*

The proposed Code creates a new title — "Crimes Against the Natural Order." Criminal law to a large extent has focused its concerns on conduct harming persons and property. Harm to the environment, no matter how drastic, has not been of direct concern to the criminal law. As well, maltreatment of animals has been poorly dealt with in our *Code* where it is subsumed under the general rubric of "Wilful and Forbidden Acts in Respect of Certain Property" (*Criminal Code*, Part IX).

In recent years there has been a growing awareness of the catastrophic damage that humankind is inflicting on our environment. The need to protect our planet from man-made environmental catastrophes reflects the emerging social value of respect for the environment. There is also emerging a social value which emphasizes respect for other sentient creatures who share our planet with us in their own right.

The new Title IV, which is quite short, contains two Chapters, one on en-

vironment, the other on animals. The provision on the environment supplements provisions that are found in environmental protection statutes. The provisions on animals are a logical development from those already in the present *Criminal Code*.

a) Crimes Against the Environment

The provision on environment represents the majority view of the Commissioners. The offence is defined in Section 90 as "Everyone commits a crime who recklessly causes disastrous damage to the environment." The purpose of the offence is to underline the value or respect for the environment itself and stigmatize behaviour causing disastrous damage with long-term loss of natural resources. A minority of the Commissioners also recommends that the *Code* include the following provision: "Everyone commits a crime who persistently refuses or fails to comply with federal regulations for environmental protection."

b) Crimes Against Animals

Cruelty to animals, unlike environment, is already dealt with both by criminal law and by regulatory legislation. The present law is contained in Section 400 to 403 in Part IX of the *Criminal Code* — "Wilful and Forbidden Acts in Respect of Certain Property." Under the new Code animals are protected in their own right and not as chattels. For this reason the offence of cruelty to animals is taken out of the property offences and included in the new Title of "Crimes against the Natural Order." The emphasis of the new section is to ensure humane treatment of animals. Section 92(1) reads "Everyone commits a crime who unnecessarily causes injury or serious pain to an animal." While the section is meant to deter the infliction of serious pain on animals it does not criminalize minor hurting. Section 92(3) creates an exemption for various customary and accepted practices such as medical treatment and provision of food and other animal products, provided that the means used are "reasonably necessary" for such practices.

4. *Crimes Against Social Order*

a) Crimes Against Social Harmony

One area in which the *Code* has been restrained is in the decriminalization of the offences of "Defamatory Libel," "Blasphemous Libel" and "Seditious Libel." Taking into consideration the provisions on "freedom of expression" in the *Canadian Charter of Rights and Freedoms*,[158] the Commission, in its Working Paper,[159] which informs this decision, concluded that the strong arm of the criminal law was not only inappropriate but an ineffective way to remedy an injury to a person's reputation. Civil remedies such as monetary compensation and injunctions are far more effective and are less intrusive on freedom of expression.

Again upholding *Charter* values the new Code restrictively defines the

present "Hate Propaganda" crimes to avoid unreasonable infringement upon the fundamental values of freedom of expression, truth and privacy. Under the new Code the crime is renamed "Stirring up Hatred" and is restricted to the most serious kinds of hatred aimed at particular, vulnerable groups. It singles out for protection those groups which are specifically protected by the equality guarantee in section 15(1) of the *Charter*. It therefore replaces the present *ad hoc* definition of "identifiable group" with a principled definition in line with the *Charter*. "Identifiable" is defined in Section 1(2) as meaning identifiable by race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

b) Crimes Against Public Order

The crimes contained in this chapter are a simplified and logical arrangement of crimes found in the present *Criminal Code* that relate to disturbing the peace. The present law on these matters is found in Part II, "Offences against Public Order," which includes offences against state security, international crimes, treason and piracy; and Part IV, "Sexual Offences, Public Morals and Disorderly Conduct" which includes sexual offences, various kinds of nuisance offences, indecency and other disorderly conduct. The new proposed Code logically arranges, in a principled manner, the specific crimes of disturbing the public peace in a separate chapter as opposed to the present intermingling with crimes threatening the State itself or the community's morality.

Chapter 22 lists eight different crimes against public order. The first, "Disturbing Public Order," is the basic crime against public order. It has no corresponding section in the present *Code* and is based partly on the notion of breach of the peace and partly on the concept of unlawful assembly. The offence is defined in clause 22(1) at 103 (section 96 at 198 of the legislative draft) as follows: "Everyone commits a crime who so behaves in public as to make others in the vicinity reasonably fear harm to the person or serious damage to property." The next four offences: Disturbing public order by hatred, unlawful assembly, riot and failure to disperse, are aggravated forms of this crime listed in ascending order of gravity. The remaining three, raising false alarm, public nuisance and loitering, are a miscellaneous group of offences commonly comprised under the Public Order heading.

5. *Crimes Against the Governmental Order*

The last Title, "Crimes Against the Governmental Order" is composed of crimes against public administration and crimes against state security. "Crimes Against Public Administration" is divided into three Chapters: *corrupting* public administration, *misleading* public administration, and *obstructing* public administration.

The major change in these Chapters from the present law is not in the substance but in the structure. The Title reorganizes the present law into a

coherent classification and simplifies the law by ridding it of numerous unnecessary details. It also makes minor changes in substance, omits certain crimes like disobeying a statute (section 115), and includes some new crimes. For example, five forms of common law contempt of court identified in *Report 17, Contempt of Court*, have been codified. These include: obstruction of justice, disruption of judicial proceedings, defiance of judicial authority, affront to judicial authority and interference with judicial proceedings.

Chapter 26, "Crimes Against State Security," as recommended in *Working Paper 49*, substantially retains the present law. Basically, the new Code incorporates offences in the *Criminal Code* and offences contained in the *Official Secrets Act*[160] in one Chapter. It simplifies the arrangement and streamlines the substance by omitting unnecessary offences.

In substance, Chapter 26 deals both with treason and espionage offences. It defines a primary crime of treason and ancillary offences of failing to prevent treason, espionage, unlawful disclosure and sabotage. In keeping with the policy of restraining and simplifying the law, eight *Criminal Code* and five *Official Secrets Act* offences are specifically omitted because they can be dealt with elsewhere in the new Code. (For example, "conspiracies to commit treason" is omitted in view of the general provisions in "Involvement in Crime" in Chapter 4; "intimidating Parliament" is covered by Chapter 8, "Threats and Harassment," together with the aggravating factor of political motive (Section 64(d)).

Under the *Official Secrets Act*, espionage and unlawful communication relate to various kinds of information but leave a good deal of uncertainty. It is not clear whether *only* secret and official information is involved. It is not clear whether an individual of the State must him/herself know his/her purpose is prejudicial. And it is not clear whether that prejudicial nature must be determined as a matter of fact by the jury or as a matter of policy by the Crown prerogative.

Clauses 26(3) and 26(4) restrict the crimes of espionage and unlawful disclosure to classified information. On the other hand, they remove the need for prejudicial purpose and simply criminalize gathering or disclosing which will injure the national interest. Deciding which information is classified and not to be revealed is left, subject to an exception discussed in clause 26(5), to be determined by the executive. The new crimes of espionage and unlawful disclosure, then, are predicated on a clear and uniform system of classification.

The brief description of the contents of the new Criminal Code demonstrates only a few highlights of its principled and practical approach. It reflects not only a modern, logical, comprehensive, understandable and restrained basis for our criminal justice system, but also the realities we will have to meet as our society enters the 21st century.

V. REACTIONS AND PROSPECTS

The immediate response to the tabling of the first volume of the draft Criminal Code was overwhelmingly positive. The Minister of Justice, The Hon. Ray Hnatyshyn, in his press release of December 3rd, commented: "This report is a valuable contribution to criminal law reform and should be recognized as an important first step in the process of renewal." John V. Nunziata, M.P., member of the Standing Committee on Justice and the Solicitor General, commented:

> I do not believe this document should gather any dust at all and we should move with dispatch towards adopting this. I would hope that we can proceed through this discussion in a non-partisan fashion because the time to adopt changes is now. I do not think it would be in the best interest of the criminal justice system in Canada for us to embark upon a process which will further delay it.[161]

A number of judges who were involved in the consultation process wrote to the Commission congratulating it on the quality of its recodification effort. The Hon. P. J. LeSage, Associate Chief Judge, District Court of Ontario, commented:

> ...I can say without hesitation that I believe the recodification of the criminal law is not only necessary but overdue. The draft code prepared by the Commission is in my view a remarkable work of logic, order and simplification of what has become a somewhat cumbersome and disorganized area of the law. I know that as a trial judge my task both when sitting alone and more particularly, when charging a jury, will be greatly aided by the more comprehensible Code.

The Hon. Mr. Justice Kaufman of the Québec Court of Appeal commented:

> ... It is of the utmost importance in a free and democratic society that the criminal law not only be clearly defined, but also that it be understood. Archaic rules – ghosts of the past – must be discarded; modern developments must be recognized. The first volume of the Law Reform Commission of Canada's proposed new Criminal Code achieves these goals; it is clear and orderly; it is current; and, above all, it can be understood. There can be no greater compliment.

Other Court of Appeal judges, The Honourable Mr. Justices: Angus L. MacDonald (Nova Scotia); William A. Stevenson (Alberta); Melvin L. Rothman (Quebec); and Calvin F. Tallis (Saskatchewan) wrote to us saying:

> ..We applaud the Commission for its initiative in undertaking this difficult and important task by rationalizing and modernizing the criminal law of Canada. This should produce the first thorough and comprehensive review of the Criminal Code since it was first enacted in 1892.

Prominent criminal lawyers also endorsed the new Code. Me. Serge Ménard, a respected criminal lawyer and Bâtonnier of Québec commented in the December *National* that the new Criminal Code "...est un document remarquable qui couronne une entreprise nécessaire de révision d'un document de base pour la vie en société." Another prominent criminal lawyer, Edward Greenspan, Q.C., in an article in the Ottawa Citizen[162] stated:

> With very few reservations...I commend the Commission for the excellent work of its first

> volume of *Recodifying Criminal Law*. This may well be the finest work of its kind in the English-speaking world but it is of only passing interest if Parliament does not act on it. From this point on there should be the widest possible debate and consultation.

G. Greg Brodsky, Q.C., a former National Chairman of the Criminal Justice Section of the C.B.A. wrote in the December, *National*: "it is a document worth the study and steadfast attention of this country, for its noble purposes demonstrate the need and the beginning of welcome reform and perfecting of legal concepts."

Several legal scholars from across Canada wrote to the Commission with their comments. Professor Gisèle Côté-Harper of Université Laval wrote: "Accessibilité, clarité, cohérence, contemporanéité et rationalité tels sont les caractères spécifiques du volume I du nouveau code pénal canadien proposé par la C.R.D." Professor Don Stuart wrote:

> It is high time that the vision of Sir James Stephen in 1892 England did not govern so absolutely the principles whereby guilt is determined in the criminal courts of Canada of today. The Commission provides a much clearer and more coherent set of principles by which justice can be achieved. The Commission's major initiative deserves wide support.

The Commission also received comments on its efforts from the Canadian Association of Chiefs of Police. Me. Guy Lafrance, a lawyer with the Communauté urbaine de Montréal and a member of the Canadian Association of Chiefs of Police Law Reform Committee commented: "Même si je ne peux partager l'ensemble des recommendations, je dois affirmer qu'il s'agit là d'un travail monumental qui démontre une grande conscience professionnelle." A study of the *Code* was prepared by the police. It raised several issues that are being studied by Commission personnel.

Across Canada the media — radio, television and newsprint — gave the tabling of *Report 30* full and complete coverage. Over 200 articles (including 44 editorials) appeared in newspapers and magazines across the country; over 55 radio and 15 television broadcasts were made. Although disagreement was expressed on some particular sections, virtually everyone seemed to agree that our country was in need of a modern Criminal Code that reflected our own Canadian values and identity. Typical editorial comments made included *The Toronto Star*:[163]

> After fifteen years of effort involving hundreds of persons representing various disciplines and interests across the country, the Commission has provided Parliament with an excellent basis for a modern, usable and understandable Criminal Code. A special parliamentary subcommittee should be struck to continue the public debate and bring the new code to fruition;

The Ottawa Citizen:[164]

> Its first virtue is simplicity. Gone are the obstructions of post-Victorian legal jargon, replaced by plain and simple words and grammar...

Its second virtue is consistency. The present *Code*'s lack of unifying principles not only makes it hard to understand — it makes for unpredictable judgments in the courts;

La Presse:[165]

> On peut espérer que bientôt, petit à petit, le vieux *Code* sera remplacé par un autre qui émergera du project qu'a commencé à déposer la Commission de réforme du droit du Canada. Et tout le monde s'en réjouira. [...] Et il sera révélateur;

The Edmonton Journal:[166]

> If the first report is any indication, the second will be even more thought-provoking. It invites Canadians to help draft an enlightened and compassionate Criminal Code;

The Globe and Mail:[167]

> The attic of Canadian criminal law is crammed with anachronisms and hasty adjustments – a disorganized jumble that cries out for spring cleaning.... The Law Reform Commission of Canada, which has been bustling around with a broom for some years, has presented Justice Minister Ramon Hnatyshyn with an impressive list of fossils that might safely be discarded and measures that should be brought up to date by revision.

In his Law Day address on April 15, 1987, the Prime Minister of Canada, the Rt. Hon. Brian Mulroney added his voice to those calling for reform of the criminal law. He referred to the present *Code* as being a "vestige of the Victorian Age" and praised *Report 30* as "remarkable for its brevity and clarity of language." In this context he pointed out that: "It is widely acknowledged that Canada is on the leading edge of law reform – many other nations watch to see what we shall do." Former Prime Minister Pierre Elliott Trudeau has observed that the proposed Code has the "promise of a law that is coherent, modern and human." Former Prime Minister and Leader of the Opposition John Turner has also praised the new Code as "an outstanding attempt to bring the *Criminal Code* into line with contemporary Canadian values of humanity, justice and freedom." Bryan Williams, the President of the Canadian Bar Association, has written in the *National*:

> The gigantic project to reform the criminal law in Canada is a monumental achievement. The publication of the Commission's draft Criminal Code stands as a prime example of the wisdom and expertise of the Law Reform Commission of Canada in action.

When the new Code was submitted for discussion at the International Conference on Reform of the Criminal Law in London, in July 1987 it was very well received by the scholars, lawyers and officials who participated. One participant, the Vice-Dean of the Hebrew University of Jerusalem, wrote to us saying:

> ...I had studied with great interest the proposal for a Criminal Code prepared by your Commission. ... In my view this is a major step in the process of reforming the Criminal Law in the Anglo-American world. The proposed Code is a most inspiring document and any country who seeks to codify or reform its criminal law will have to face this challenge.

Report 30 was also the object of study by the federal and provincial ministers responsible for criminal justice. On March 17, 1988 they met in Saskatoon to consider the Commission's proposals as well as the Report of the Canadian Sentencing Commission. At that meeting they reaffirmed their commitment to review the *Criminal Code*. They agreed that the Commis-

sion's draft Code was a good starting point, indicating that more work needs to be done and that priority needs ought to be identified. On May 26 and 27, 1988 they met again in Quebec City and set out a list of 12 priorities. Ten of these priorities specifically relate to subjects on which the Commission has made recommendations. These include: homicide, criminal procedures, defences and parties to crime, contempt of court, hate propaganda, abortion, search warrants, publicity, mental disorder, firearms and sentencing. The Department of Justice is engaged in detailed study of these matters, a process in which we participate.

Along with governmental institutions, other organizations have shown an interest in studying the proposed Code. The Canadian Association of Law Teachers, which has been most supportive of our efforts, organized a conference devoted exclusively to an analysis of the proposed new Code, the product of which is published in this issue. The Canadian Bar Association has established a special committee to study *Report 30*. As well, meetings to discuss the new Code have been held with the Canadian Criminal Justice Association, the National Associations Active in Criminal Justice, and various legal and other organizations. In over 500 high schools in every province of Canada, students are studying our proposals and offering their suggestions for improvement.

Everyone recognizes that the Commission's proposed Code 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 we have raised have not yet been discussed in the public arena, and they should be. We know that our work is not perfect and that it needs further study, consultation and revision.

We are delighted with the initial positive response to the new Code as well as the interest shown by so many organizations. We are hopeful that Parliament will soon undertake a detailed examination of these proposals as well. The Government of Canada, in the most recent Speech from the Throne on April 3, 1989, committed itself to "introduce further legislation to reform Canada's legal system and sentencing practices" which indicates that things are moving forward.

In offering this proposed new Code, we are not advocating change for its own sake: we believe the changes we propose are changes for the better and that they are needed to improve the criminal law. We are not seeking to fix something that is not broken; we believe that there are many aspects of our criminal law that *are* broken and in urgent need of major reform. *Recodifying Criminal Law* is our contribution to the collective effort of Canadians in rewriting our criminal law, which will 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 our hope that, when our new Code is enacted, Canada will once again be in the vanguard of criminal law reform. It is also our hope that the work of our generation in recodifying 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 97 years.

[1] G.H. Crouse, "*A Critique of Canadian Criminal Legislation*" (1934) Can. Bar Rev. 545 at 546.

[2] Law Reform Commission of Canada (Ottawa: LRC of Canada, 1986).

[3] Canada, House of Commons, *Debates* at 1752 (3 December 1986). Volume II, *Report 31*, was tabled in 1988.

[4] Now the *Constitution Act, 1867* (U.K.) 30 & 31 Vict.

[5] Crouse, *supra*, note 1 at 552-553. See also, D.H. Brown, *The Canadian Criminal Code 1892: A Comparative Study in Codification*, Ph.D. thesis, University of Alberta, 1986 at 272.

[6] (U.K) 32 and 33 Vict. (Dom.) cc. 18-36.

[7] (U.K) 24 and 25 Vict. (Imp.) cc. 94-100. See Crouse, *supra*, note 1 at 559; H.E. Taschereau, *The Criminal Law Consolidation and Amendment Acts of 1869*, 1st ed. vol. I, iv (Montreal: Montreal Pub. Co., 1974) where he notes that the statutes were taken almost "textually" from the 1861 Act. In introducing the Bill into the House of Commons, MacDonald explained the reliance on the English legislation by saying that the Dominion "would thereby enjoy the unestimable advantage of having English decisions as authority in our courts." Canada, House of Commons, *Debates* at 89 (27 April 1869).

[8] *Supra*, note 6, c. 18.

[9] *Ibid.*, c. 19.

[10] *Ibid.*, c. 20.

[11] *Ibid.*, c. 21.

[12] *Ibid.*, c. 22.

[13] *Ibid.*, c. 23.

[14] *Ibid.*, c. 29.

[15] *Ibid.*, c. 30.

[16] *Ibid.*, c. 31.

[17] (1892) 28 Can. L.J. at 540.

[18] 55 and 56 Vict. (Dom.) c. 29.

[19] See L. Radzinowicz, *A History of English Criminal Law*, vol. I (London: Stevens and Sons, 1948).

[20] S.H. Kadish, "Codifiers of the Criminal Law: Weschler's Predecessors" (1978) 78 Columbia L.R. 1098 at 1099.

[21] P. Healy, "The Cause of Legislative Reform in Canadian Criminal Law," LLM thesis, University of Toronto, 1984 at 6-7.

[22] Kadish, *supra*, note 20 at 1113.

[23] G. Parker, "The Origins of the Canadian Criminal Code" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: University of Toronto Press, 1981) at 251.

[24] Macaulay drafted this code in 1837 and it was enacted in 1860 one year after his death. It has survived the passage of time and is still in force in most of the Asiatic Commonwealth countries that are or were members of the Commonwealth as well as parts of Africa. Sir Rupert Cross, "The Making of English Criminal Law (5) Macaulay" [1978] Crim. L.R. 519.

[25] Completed in 1826, it was never enacted but remained as a model and influence on American penal codification. Kadish, *supra*, note 20 at 1099-1106.

[26] *Ibid.* at 1098.

[27] *Ibid.*

[28] *Reports from the Royal Commission on the Criminal Law with Appendicies and Index*, (Shannon, Ireland: Irish University Press, 1971) at 11.

[29] *Ibid.* first Report at 14-48.

[30] See Sir Rupert Cross, "The Reports of the Criminal Law Commissioners (1834-1849)" and the "Abortive Bills of 1853" in P.R. Glazebrook, ed., *Reshaping the Criminal Law* (London: Stephens and Sons, 1978) at 5-20.

[31] M. Friedland, "Old and New Criminal Codes" (1892) 16 Gazette 220 at 223. *Wright's Code*, which passed the Jamaica Legislative Council in 1879, never came into force because the Colonial Secretary, Lord Kimberly, refused to approve the Code unless it added the procedural rule that an accused be allowed to testify at his own trial. Later, however, British Honduras, Tobago and St. Lucia adopted Wright's Code. See 229.

[32] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* vol. I (London: 1883) at vi. Reprinted (New York: Burt Franklin, 1964).

[33] Kadish, *supra*, note 20 at 1099.

[34] Parker, *supra*, note 23 at 251.

[35] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* vol. III (London: 1883) at 350. Reprinted (New York: Burt Franklin, 1964).

[36] Stephen, *supra*, note 32 at 227.

[37] Sir James Fitzjames Stephen, *A History of the Criminal Law of England* vol. II (London: 1883) at 82. Reprinted (New York: Burt Franklin, 1964).

[38] Kadish, *supra*, note 20 at 1122. See also Sir Rupert Cross, "The Making of English Criminal Law (6) Sir James Fitzjames Stephen" [1978] Crim. L.R. 652 at 656.

[39] Sir James Fitzjames Stephen, *A Digest of the Criminal Law* (London: Sweet and Maxwell Ltd., 1950).

[40] Kadish, *supra*, note 20 at 1122.

[41] The other members of the Commission were Lord Blackburn, Mr. Justice Barry, and Lord Justice Lush.

[42] Attached as an appendix to U.K., *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, 1879.

[43] Stephen, *supra*, note 35 at 227.

[44] See *supra*, note 42 at 9 where the Commissioners expressly state that, unlike Stephen's Bill, their proposal of a complete code would prevent indictments at common law.

[45] Cockburn was highly critical of both the style and substance of the draft Code. In his letter he states:

> Not only is there much room for improvement as regards arrangement and classification, but the language used is not always perspicuous, or happily chosen, while the use of provisos, an objectionable mode of legislation, is carried to an unusual excess, nor is the intention always clear; and, what is still more important, the law is, in many instances, left in doubt, and I am bound to say, in my opinion, not always correctly stated.

Cited in A.J. MacLeod and J.C. Martin, "The Revision of the Criminal Code" (1955) 33 Can. Bar Rev. 2 at 5. See also 15 Canada Law Journal (1879) at 197.

[46] Crouse, *supra*, note 1 at 547. See also Cross, *supra*, note 38 at 657.

[47] M.A. Chalmers, "An Experiment in Codification" (1886) 2 Law Quarterly Rev. 125 at 126.

[48] MacLeod and Martin, *supra*, note 45.

[49] Although codification of the criminal law had been part of the English Law Reform Commission's program since 1968, it was only in 1981 that the systematic drafting of a criminal code was begun. See J.C. Smith, "Codifying the Criminal Law" [1984] Statute Law Rev. 17.

[50] See, Canada, Statutes, Acts to the Parliament of Canada Relating to the Criminal Law (Ottawa: Queen's Printer).

[51] Brown, *supra*, note 5 at 291.

[52] P.B. Waite, *The Man From Halifax* (Toronto: University of Toronto Press, 1985) at 336.

[53] *Ibid.* at 335-340.

[54] Parker, *supra*, note 23 at 259. See generally Waite, *supra*, note 52.

[55] The draftsman of the Code was C.H. Masters who worked under the supervision of Burbridge and Sedgewick. Parker, *supra*, note 23 at 259.

[56] *Supra*, note 52 at 235-340. See also MacLeod, *supra*, note 45 at 65-68; and Parker *supra*, note 23 at 259-264.

[57] Canada, House of Commons, *Debates*, vol. I at col. 1312.

[58] *Ibid.* Here Thompson is quoting directly from the *Report of the Royal Commission on the English Draft Code*.

[59] Crouse, *supra*, note 1 at 564; Parker, *supra*, note 23 at 264; A.W. Mewett, "The Criminal Law, 1867-1967" (1967) 45 Can. Bar Rev. 726 at 727-728.

[60] Parker, *supra*, note 23 at 271; *supra*, note 52 at 332.

[61] Thompson's introduction was only two sentences:

> The object of this Bill is fully expressed by its title [*Criminal Law Act of 1891*]. It is intended to be a codifiction of the Criminal law as well as of the Statutes relating to the Criminal Law of Canada, and it has been prepared principally on the model of the Imperial Codification.

House of Commons, *Debates* at col. 156 (12 May 1891).

[62] One of the reasons given for the Bill dying was that Thompson had become preoccupied with assuming the Priministerial duties of the ailing MacDonald. After MacDonald's death on June 6, Thompson added to his duties as Justice Minister that of Government Leader in the House of Commons. *Supra*, note 51 at 336-337.

[63] This time Thompson introduced the Bill in one sentence:

> This Bill is substantially the same as that introduced last session, but it contains some improvements which have been suggested in consequence of the circulation of the Bill, and which I will explain to the House more fully in the second reading.

House of Commons, *Debates* at col. 106 (8 March 1892).

[64] House of Commons, *Debates* at col. 312 (12 April 1892). See also *supra*, note 51 at 337-340.

[65] *Ibid.* at 342. See also A.J. MacLeod, "The Shaping of Canadian Criminal Law, 1892-1902" *Hist. Papers* [1978] 64 at 66.

[66] *Supra*, note 5 at 343.

[67] MacLeod, *supra*, note 65 at 66.

[68] *Supra*, note 5 at 340.

[69] Senate, *Debates* at 384 (4 July 1892).

[70] *Ibid.* at 386; *supra*, note 5 at 354.

[71] Senate, *Debates* at 495 (8 July 1892). MacLeod, *supra*, note 65 at 66.

[72] S.C. 1892, c. 29, s. 3.

[73] MacLeod, *supra*, note 65 at 64.

[74] *Supra*, note 52 at 339. See also Crouse, *supra*, note 1 at 546.

[75] *Supra*, note 5 at 336.

[76] *The Legal News* (20 January 1893) vol. 14 at 36-45.

[77] *Ibid.* See also, Parker, *supra*, note 23 at 274.

[78] 29 Canada Law Journal (1893) at 94-95.

[79] *Ibid.* at 95.

[80] The first Commission appointed on February 3, 1949 included Mr. Justice Fauteux, Mr. F.P. Varcoe, Q.C., Deputy Minister of Justice and Mr. Arthur Slaght, Q.C., as counsel. The Commission was reorganized on May 10, 1950 and included: Hon. Mr. Justice Fernand Choquette, Quebec; His Honour Judge Robert Forsyth, Toronto; Mr. H.J. Wilson, Q.C., Edmonton; Mr. Joseph Sedgwick, Q.C., Toronto and Mr. A.A. Moffat, Q.C., Ottawa. Canada, *Report of the Royal Commission on the Revision of the Criminal Code* (Ottawa: Queen's Printer, 1954) at 3.

[81] *Supra*, note 21 at 31.

[82] *Supra*, note 79 at 3-4.

[83] Speech by the Hon. Stuart S. Garson, Minister of Justice on the occasion of the Bill's second

reading. House of Commons, *Debates*, No. 7, vol. I(15 December 1953) at 944.

[84] *Ibid.* at 944-945.

[85] *Ibid.* at 945-946.

[86] *Ibid.* (16 November 1953) at 32.

[87] *Ibid.* vol. IV (8 April 1954) at 3925.

[88] SOR/54-431, Part II, at 1345.

[89] *Criminal Code of Canada*, R.S.C. 1970, c. C-34, s. 8.

[90] Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* (Ottawa: LRC of Canada, 1976) at 26-27.

[91] MacLeod and Martin, *supra*, note 45 at 3.

[92] *Supra*, note 90.

[93] P. Healy, "The Process of Reform in Canadian Criminal Law" (1984) 42 U.T. Fac. L. Rev. 1 at 5.

[94] House of Commons, *Debates*, vol. I at 940-94 (14 December 1953).

[95] 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 MacLeod and Martin, *supra*, footnote 45 at 17-18.

[96] See Hansard, House of Commons (15 December 1953) at 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.

[97] 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, *supra*, note 45 at 18.

[98] Healy, *supra*, note 93 at 56.

[99] 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 *Canadian Committee on Corrections*: *Toward United Criminal Justice and Corrections* at 1-2.

[100] *Ibid.* at 1.

[101] *Ibid.* at 11-19.

[102] *Ibid.* at 15.

[103] Healy, *supra*, note 93 at 8. See also, J. Edwards, "Penal Reform and the Machinery of Criminal Justice in Canada" (1965) 8 Crim. L.Q. 408 at 415-417; Henry (Chairman), National Law Reform Commission (Panel Discussion) [1966] Can. Bar Papers 1; A. Linden, "The Challenge of Law Reform" (1966) 9 Can. Bar. J. 268; A. Linden, "The Laggard Law: Machinery of Law Reform" in Fotheringham, ed., *Transition: Policies for Social Action* (Toronto: McClelland-Stewart, 1966) at 141; A. W. Mewett, "The Criminal Law 1867-1967" (1967) 45 Can. Bar Rev. 726.

[104] *Law Reform Commission Act*, R.S.C. 1970, c. 23 (1st Supp.).

[105] *Ibid.* at s. 11.

[106] Law Reform Commission of Canada *Research Program* (Ottawa: LRC of Canada, 1972) at 12-15.

[107] (1979) 62 Proc. Can. Bar Assn. 112 at 119.

[108] Canada, *The Criminal Law in Canadian Society* at 10. See also Ministerial Statements, Agenda, Communiqué and other related documents (1979).

[109] For a list of participants in the Consultations see Law Reform Commission of Canada, *Report 30*: *Recodifying Criminal Law*, vol. I (Ottawa: LRC of Canada, 1986) at 89-95.

[110] Law Reform Commission of Canada, *Our Criminal Law: Report 3* (Ottawa: LRC of Canada, 1976).

[111] *Ibid.* at 33.
[112] *Ibid.* at 33-34.
[113] *Supra*, note 108 at 58-66.
[114] LRC, *Working Paper 33*: *Homicide* (1984).
[115] LRC, *Working Paper 38*: *Assault* (1984).
[116] LRC, *Working Paper 20*: *Contempt of Court* (1977); and Report 17: *Contempt of Court* (1982).
[117] LRC, *Working Paper 35*: *Defamatory Libel* (1984).
[118] LRC, *Working Paper 31*: *Damage to Property*: *Vandalism* (1984).
[119] LRC, *Working Paper 36*: *Damage to Property: Arson* (1984).
[120] LRC, *Working Paper 42*: *Bigamy* (1985).
[121] LRC, *Working Paper 44*: *Crimes Against the Environment* (1985).
[122] LRC, *Working Paper 49*: *Crimes Against the State* (1986).
[123] LRC, *Report 28*: *Some Aspects of Medical Treatment and Criminal Law* (1986).
[124] LRC, *Working Paper 28*: *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982); and *Report 20*: *Euthanasia, Aiding Suicide and Cessation of Treatment* (1983).
[125] LRC, *Working Paper 48*: *Criminal Intrusion* (1985).
[126] LRC, *Working Paper 50*: *Hate Propaganda* (1986).
[127] V.M. Del Buono, "Toward a New Criminal Code for Canada" (1986) 28 Crim. L.Q. 370 at 375-377.
[128] 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.
[129] Member of the Ontario Bar, Professor of Law, Carleton University, Consultant and special advisor to the Commission on criminal law since 1971.
[130] 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.
[131] 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.
[132] 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.
[133] November 14, 15, and 16.
[134] The draft used for consultation can be found in P. Fitzgerald, ed., *Crime, Justice and Codification* (Leeds Univ. Press, 1962) at 180-196.
[135] May 22, 1986.
[136] September 30, and October 1, 1986.
[137] Law Reform Commission of Canada, *Report 30: Recodifying Criminal Law* (Ottawa: LRC of Canada, 1986). It was tabled in Parliament on December 3, 1986, by the Minister of Justice, The Honourable Mr. Ray Hnatyshyn. House of Commons, *Debates* at 1752 (3 December 1986).
[138] Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1988). It was tabled in Parliament on May 19, 1988, by the Minister of Justice, The Honourable Mr. Ray Hnatyshyn, House of Commons, *Debates* at 15609 (19 May 1988).
[139] R.S.C. 1970, c. C-34 (as am.), s. 323.
[140] *Ibid.*, s. 72.
[141] *Ibid.*, s. 185.
[142] *Ibid.*, s. 159(a).

[143] *Ibid.*, s. 234(2).
[144] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.
[145] Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law*. An expanded and Revised edition of *Report 30* (LRC of Can.: Ottawa, 1988) Draft Legislation, ss. 6-10.
[146] *Ibid.*, ss. 8-10.
[147] *Ibid.*, ss. 15-17.
[148] *Ibid.*, ss. 13-14.
[149] *Ibid.*, ss. 18-25.
[150] *Supra*, note 139, s. 205(5).
[151] *Ibid.*, ss. 212-213.
[152] *Ibid.*, s. 215.
[153] *Ibid.*, s. 216.
[154] *Supra*, note 145, s. 64.
[155] *Ibid.*, s. 53.
[156] *Ibid.*, s. 54.
[157] See *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12.
[158] *Supra*, note 144, s.2.
[159] *Supra*, note 117.
[160] See *Official Secrets Act*, R.S.C. 1985, c. 0-5.
[161] Minutes of Proceedings and Evidence of the Standing Committee on Justice and the Solicitor General, Issue 3, (4 December 1986) (Ottawa: Queen's Printer, 1986) at 3:38.
[162] (6 December 1986) B-5. "Slight Blemishes Fail to Take Away from Brilliant Piece of Legal Work".
[163] (4 December 1986) A-20. "A New Criminal Law".
[164] (5 December 1986) A-8. "Drafting a Criminal Code to Live By."
[165] (5 December) 1986 B-2. "Les nouveaux crimes d'un prochain Code."
[166] (6 December 1986) A-3. "All Should Share in Drafting Laws."
[167] (5 December 1986) A-6. "Criminal Code Reform."

* The orginal of this article was published in Cambridge Lectures, ed. Frank E. McArdle LL.B., Cambridge, England, 1985. It was also published later in *Crime, Justice and Codification*, ed. Patrick Fitzgerald (Ottawa: Carswell, 1986). The book is a collection of essays in memory of Jacques Fortin.