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NATIONAL CRIMINAL JUSTICE SECTION

COMMITTEE ON CRIMINAL CODE REFORM

CRIMINAL ATTEMPTS

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CRIMINAL ATTEMPTS

> . . . whereas in most crimes it is the *actus reus* which the law endeavours to prevent, and the *mens rea* is only a necessary element of the offence, in a criminal attempt the *mens rea* is of primary importance and the *actus reus* is the necessary element.
>
> *R. v. Cline* (1956) 115 CCC 18, @ 27 (Ont CA, per Laidlaw, JA)

1. HISTORY

The statutory definition of attempt first appeared in the 1892 *Criminal Code*, S.C. 1892, c. 29, s. 64:

> 64.(1) Everyone who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.
>
> (2) The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law.

The only amendment to this provision occurred in the 1955 revision (S.C. 1953-54, c. 51, s. 24), when the present wording was adopted. It states:

> 24.(1) Everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.
>
> (2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.

There are several statutory provisions establishing the penalty for attempting to commit an offence:

- attempted murder: life imprisonment (s. 239);
- attempt to commit an indictable offence for which an accused is liable to be sentenced to death or to imprisonment for life: 14 years (s. 463(a));
- attempt to commit an indictable offence for which an accused is liable to be sentenced to imprisonment for 14 years or less: one-half of the longest term to which a person who is guilty of that offence is liable (s. 463(b));
- attempt to commit an offence punishable on summary conviction: guilty of an offence punishable on summary conviction (s. 463(c)); and

- attempt to commit an offence for which the offender may be prosecuted by indictment or for which he is punishable on summary conviction:
    - guilty of an indictable offence and liable to imprisonment for a term not exceeding a term that is one-half of the longest term to which a person who is guilty of that offence is liable, and
    - guilty of an offence punishable on summary conviction (s. 463(d)).

2. RATIONALE FOR CRIMINALIZING ATTEMPTS

There are 2 public policy arguments why an attempt to commit a crime constitutes a crime. The first is preventive; it allows the State to intervene and terminate dangerous or otherwise serious misconduct at any early stage, thereby avoiding the commission of a more serious criminal offence.

Second, the offender ought to be subjected to criminal law sanctions for having the intent to commit an offence, and for taking steps beyond mere preparation to fulfil that intention.

As will be seen, all jurisdictions support the notion of criminalizing attempts, but they differ to some considerable extent on whether the Crown must prove an *intent* to commit the offence, on the dividing line between preparation and attempt and whether that is a question of law or fact, and on abandonment and impossibility as defences.

3. THE PRESENT LAW IN CANADA

a. The mental element

Since 1892 the *Criminal Code* has used the phrase "an intent to commit an offence". Before 1955 the section referred to the accused doing something "for the purpose of accomplishing his object", whereas the present wording uses the expression "for the purpose of carrying out his intention."

Both formulations make it clear that the accused must intend to commit the substantive offence, to be liable for attempting to commit it.

However, in *Lajoie v. The Queen* (1973) 10 CCC (2d) 313 the Supreme Court of Canada gave section 24 a broader interpretation. The accused was charged with attempted murder; he had fired 2 shots at a taxi driver during a robbery attempt; one missed the driver and the other hit his shoulder, 3 inches from his heart. The trial judge charged the jury that, in order to convict of attempted murder, they must be satisfied that the accused intended to kill the victim. The jury found the accused guilty of the lesser included offence of discharging a firearm with intent to endanger life.

The B.C. Court of Appeal [(1971) 4 CCC (2d) 402] (2:1) reversed, holding that the Crown need only prove that the accused meant to cause bodily harm that he knew was likely to cause death and was reckless whether death ensued or not.

The Supreme Court of Canada dismissed the appeal. The Court observed that murder may be committed if the accused means to cause death, but it may also be committed if the accused means to cause bodily harm knowing that it is likely to cause death and is reckless whether death ensues or not. Section 24 uses the language "an intent to commit an offence", and the Court ruled that any intent that would suffice for the offence of murder would suffice also for an attempt:

> If it can be established that the accused tried to cause bodily harm to another of a kind which he knew was likely to cause death, and that he was reckless as to whether or not death would ensue, then, under the wording of s. 210, if death did not ensue an attempt to commit murder has been proved. (p. 317)

A decade later, the Supreme Court of Canada reversed itself, in *Regina v. Ancio* (1984) 10 CCC (3d) 385. The accused, armed with a sawed-off shotgun, broke into the home where his wife was living with another man. The other man threw a chair at the accused and the gun discharged, missing the other man by several feet. The accused was charged with attempted murder.

The trial judge made a finding of fact that the accused broke and entered the home with the intent of forcibly confining his wife, and convicted him on the basis that the definition of murder at that time included "causing the death of a human being while committing . . . breaking and entering . . . whether or not he knows that death is likely to be caused to any human being, if . . . he uses a weapon or has it upon his person during or at the time he commits the offence . . . and the death ensues as a consequence." If an accused was liable for murder even though he had no intent to kill and was not reckless as to whether death would ensue, then he was equally liable for attempted murder in such circumstances, if death did not ensue, applying (and extending to constructive murder situations) the principle in *Lajoie*.

The Ontario Court of Appeal reversed, holding that attempted murder required proof either of an intent to kill or recklessness as to whether death would ensue, and that the principle in *Lajoie* should not be extended to cases of constructive murder.

In the Supreme Court of Canada the Crown maintained that the intention for attempted murder extends to an intention to do that which constitutes the commission of the offence of murder as defined in *Criminal Code*. Thus, section 24 and the constructive murder provision, in combination, can form the basis for a conviction for attempted murder.

The Court, Ritchie J dissenting, rejected that view. Not satisfied simply to distinguish *Lajoie*, and hold that the principle enunciated there should not be extended to cases of constructive murder, the Court went one step further and repudiated its earlier reasoning in *Lajoie*. Noting that section 24 defines the offence of attempt as "having an intent to commit an offence", McIntyre J added:

> The completed offence of murder involves a killing. The intention to commit the complete offence of murder must therefore include an intention to kill. I find it impossible to conclude that a person may intend to commit the unintentional killings described in ss. 212 and 213 of the *Code*. I am then of the view that the *mens rea* for an attempted murder cannot be less than the specific intent to kill. (p. 402)

McIntyre J recognized that this position would lead to the somewhat illogical result that attempted murder would require a higher level of *mens rea* (ie. intent) than is necessary for murder itself (ie. recklessness as to whether death ensues). He found no merit in this argument:

> The intent to kill is the highest intent in murder and there is no reason in logic why an attempt to murder, aimed at the completion of the full crime of murder, should have any lesser intent. If there is any illogic in this matter, it is in the statutory characterization of unintentional killing as murder. The *mens rea* for attempted murder is, in my view, the specific intent to kill. A mental state falling short of that level may

> well lead to conviction for other offences, for example, one or other of the various aggravated assaults, but not a conviction for attempt at murder. (p. 404)

In a sequel to *Ancio*, the Supreme Court of Canada recently ruled that a party to a common venture could not be convicted of attempted murder by application of section 21(2) of the *Criminal Code* unless he or she *knew* that it was probable that the accomplice would do something with the intent to kill in carrying out the common purpose: *Regina v. Logan* (1990) 79 CR (3d) 169. Lamer, J stated:

> I would therefore . . . declare inoperative the words "or ought to have known" when considering under s. 21(2) whether a person is a party to any offence where it is a constitutional requirement for a conviction that foresight of the consequences be subjective, which is the case for attempted murder. (p. 181)

While use of the word "intent" in section 24 may well have justified the decision in *Ancio*, the important policy issue to be decided is whether the new *Criminal Code* ought to extend the scope of attempts, so that the mental element required for an attempt merely mirror that required for the completed offence.

b. The actus reus

The thorniest issue to resolve in the law of attempts is where to draw the line between mere preparation and an attempt. In *Secondary Liability* (Working Paper 45, 1985), the Law Reform Commission of Canada identified 14 tests which the Courts, legislatures and academics have developed in this futile quest to create one all-purpose articulation of the dividing line:

1. The last step or final stage test

This test arose from the dicta of Baron Parke in *R. v. Eagleton* (1855), Dears. C.C. 515. The test holds that an accused is guilty of attempt when he has done all that it was necessary for him to do towards the completion of a crime. The test was applied in Canada in *R. v. Courtemanche and Bazinet* (1970) 9 CRNS 165, but was subsequently disapproved of by the Ontario Court of Appeal in *R. v. James*, [1971] 1 O.R. 661, p. 663.

2. The *Cheeseman* test

This test originated in *R. v. Cheeseman*, (1862), Le & Ca 140, and was espoused by Sir James Fitzjames Stephen in *A Digest of the Criminal Law*, Article 47 (now 9th ed. (1950), Article 29). According to Stephens, the test requires "an act . . . forming part of a series of acts, which would constitute [the] actual commission [of a crime] if it were not interrupted." The test has been widely used in Canada. See *R. v. Snyder* (1915), 24 C.C.C. 101, 34 O.L.R. 318; *R. v. Lepage* (1941), 78 C.C.C. 227, [1941] 4 D.L.R. 484; *R. v. Brown* (1947), 88 C.C.C. 242, 3 C.R. 412; *R. v. Quinton*, [1947] S.C.R. 234, *per* Estey J. and Rinfret J.; *R. v. Young* (1949), 94 C.C.C. 117.

3. The proximity test

This test assesses how close the accused's act came to the actual commission of the offence. It has been applied in Canada in *Kelley v. Hart* (1934), 61 C.C.C. 364 (Alta. C.A.); *Case of Duels*, (1615) 2 St. Tr. 1033; *R. v. Sorrell and Bondett* (1978), 41 C.C.C. (2d) 9 (Ont. C.A.); *R. v. Cline*, (1956) 115 C.C.C. 18.

4. The first step test

This test holds that an attempt occurs when the accused engages in his first overt act toward the commission of an offence. This test appears in the criminal codes of several countries including those of Denmark and Australia. One of the earliest cases which refers to this test is *Commonwealth v. Eagan* (1889), 190 P.A. 10, p. 22.

5. The unequivocality test

This test was developed by Sir John W. Salmond in *Jurisprudence*, 12th ed. (London: Sweet and Maxwell, 1966), p. 404, and later adopted by New Zealand in its *Crimes Act 1908*. According to this test, an attempt is made when the act itself, apart from any statement of intention, unequivocally demonstrates that the accused's intention was to commit an offence. This test was rejected in Canada in *R. v. Cline*, *supra*.

6. The dangerous proximity doctrine

O.W. Holmes, in *The Common Law* (Boston: Little, Brown and Co., 1963), p. 56, proposed that to determine whether an act constitutes an *actus reus* one must consider "the nearness of the danger, the greatness of the harm, and the degree of apprehension felt."

7. The stages of commission

This test is based on the premise that every criminal act consists of a discernible number of discrete acts which begin with the accused forming the idea to commit the crime and end with the execution of the crime. It then follows that proximity can be determined by counting back from the last act necessary for execution (see Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Co., 1978), p. 187-8).

8. The Turner test

This test is a variation on the unequivocality test. It is taken from J.W.C. Turner, "Attempts to Commit Crimes" (1933-35), 5 *Cambridge L.J.* 230, p. 236. He sets the following test:

> The *actus reus* of attempt is constituted when accused does an act which is a step towards the commission of that specific crime, and the doing of that act has no other purpose than the commission of that specific crime.

This test was applied in *Davey v. Lee*, [1967] 2 All E.R. 423.

9. The *R. v. Taylor* test

This case (1 F. & F. 512; (1859), 175 Eng. R. 831) proposed the test that the *actus reus* must be an act, immediately and directly tending to the execution of the principal crime.

10. The aptness test

In this test, an accused's act will constitute an *actus reus* if it was an effort which was aptly related to his objective. This test has been used in cases where the completion of the offence was impossible. For example, using this test, employing voodoo to kill would not constitute an *actus reus* for attempted murder, since voodoo is ineffective in bringing about the accused's objective (see Fletcher, pp. 150-1).

11. The "on the job" test

This test, developed in *R. v. Osborn*, (1920) 84 J.P. 63, is a variation of the aptness test. It states that, to be guilty of attempt, the accused must have been "on the job" or "on the thing itself." For example, an accused who tries to poison using an innocuous substance cannot be said to be "on the job." However, if the attempt fails owing to insufficient dosage, the accused is nevertheless "on the job" and may be found guilty.

12. The *Hope v. Brown* test

[1954] 1 All E.R. 330. This test resembles the *Cheeseman* test. It is really a proximity test plus a peculiar qualification. Judge Byrne stated, at page 332:

> [T]he respondent's acts were not interrupted because the time had not arrived for their completion. His acts . . . were for that reason too remote. They certainly indicated an attempt but were not sufficiently connected with the offence . . . to constitute an attempt.

13. The probable desistance test

Probable desistance has been used in the United States. An accused's conduct will amount to an attempt when it would, if uninterrupted by any outside cause, have resulted "in the ordinary and natural course of events" in the completion of a crime. See Donald Stuart, "The *Actus Reus* in Attempt," [1970] *Crim. L.R.* 505, p. 509.

14. The rational motivation test

This test was developed by Fletcher. Fletcher seeks the true nature of attempt by looking at what effect a mistake of fact as to the circumstances surrounding an attempt has on attempt. Fletcher holds that an accused can be said to be attempting an offence, even if he is operating under a mistake when knowing the true facts would affect his incentive in acting, if it would give him a good reason to change his course of conduct. Under this theory, if a man tries to receive goods and he does not know they are stolen, he would be guilty of attempted possession of stolen goods only if the knowledge that the goods were stolen would have caused him not to receive the goods. In the ordinary case, such knowledge would not affect the offender taking possession of the goods, and therefore he would not be guilty of the offence of attempting to possess stolen goods.

In *Regina v. Cline* (1956) 115 CCC 18 (Ont CA) Laidlaw JA discussed several of these tests, and then went on:

> It is my respectful opinion that there is no theory or test applicable in all cases, and I doubt whether a satisfactory one can be formulated. Each case must be determined on its own facts, having due regard to the nature of the offence and the particular acts in question. (p. 26)

He then went on to identify 6 propositions which he had gleaned from the common law, the last 3 of which are:

> (4) It is not essential that the *actus reus* be a crime or a tort or even a moral wrong or social mischief;
>
> (5) The *actus reus* must be more than mere preparation to commit a crime;
>
> (6) When the preparation to commit a crime is in fact fully complete and ended, the next step done by the accused for the purpose and with the intention of committing a specific crime constitutes an *actus reus* sufficient in law to establish a criminal attempt to commit that crime. (p. 29)

The most recent pronouncement of the Supreme Court of Canada on this issue is in *Deutsch v. The Queen* (1986) 52 CR (3d) 305. The accused, who was in the business of selling franchises, advertised in several newspapers for a secretary/sales assistant. He interviewed 4 applicants, the fourth being an undercover police officer who taped the conversation. The accused told the applicants that the successful candidate would be expected to have sexual intercourse with clients or potential clients of the company, if that appeared necessary to conclude a contract. He indicated that the secretary/sales assistant could earn as much as $100,000 annually. He did not make an offer to any of the first 3 applicants, who lost interest after hearing the requirements of the position. The officer, when she expressed an interest in the job, was told to think it over and let the accused know. The accused was charged with attempting to procure female persons to become common prostitutes and attempting to procure female persons to have illicit intercourse with another person.

The accused was acquitted of both charges at trial. The Ontario Court of Appeal ordered a new trial on the second count, ruling that the trial judge erred in concluding that the acts or statements of the accused could not, in the absence of an offer of employment, constitute an attempt to procure, rather than mere preparation.

The Supreme Court of Canada dismissed the appeal. For the majority (4:1), LeDain J canvassed the various tests referred to above, and observed that all of them have been pronounced by academic commentators to be unsatisfactory to some degree. He agreed with those who have concluded that no satisfactory general criteria has been, or can be, formulated for drawing the line between preparation and attempt, and that the application of this distinction to the facts of a particular case must be left to common sense judgment (p. 322). He added:

> In my opinion the distinction between preparation and attempt is essentially a qualitative one, involving the relationship between the nature and quality of the act in question and the nature of the complete offence, although consideration must necessarily be given, in making that qualitative distinction, to the relative proximity of the act in question to what would have been the completed offence, in terms of time, location and acts under the control of the accused remaining to be accomplished. I find that view to be compatible with what has been said about the actus reus of attempt in this court and in other Canadian decisions that should be treated as authoritative on this question. (p. 323)

Le Dain J held that relative proximity may give an act which might otherwise appear to be mere preparation the quality of attempt, whereas an act which on its face is an act of commission does not lose its quality as the *actus reus* of attempt because further acts were required or because a significant period of time may have elapsed before the completion of the offence.

c. Abandonment

Section 24 of the *Criminal Code* makes no reference to voluntary desistance or abandonment. What Canadian law there is offers little support for such a defence.

In *Regina v. Kosh* (1964) 44 CR 185 (Sask CA) the 2 accuseds were observed trespassing onto a business property, crouching at a door, shining a flashlight on the door and making upward fist motions. After 2 minutes they left the scene. They were arrested nearby, charged with attempted break and enter, and convicted.

On appeal, the Saskatchewan Court of Appeal agreed with the trial judge's finding that the accused's acts went beyond mere preparation, and constituted an attempt to break and enter. On the issue of abandonment, the Court accepted that the accuseds desisted voluntarily, but stated:

> In my view, once the essential element of intent is established, together with overt acts towards the commission of the intended crime, the reason why the offence was not committed becomes immaterial. Once these elements are established, it makes no difference whether non-commission was due to interruption, frustration or a change of mind. (p. 189)

In *Regina v. Frankland* (1985) 23 CCC (3d) 385 (Ont CA) the accused picked up a female hitch-hiker. He later turned off the road, they both exited the vehicle and, according to the complainant, he threatened her. As he was about to have sexual intercourse with her, she cried out and the accused immediately stopped and assisted her in getting up and dressing. He was charged and convicted of attempted rape.

The Ontario Court of Appeal ordered a new trial. It held that the crucial issue in the case was not whether the complainant consented to have intercourse (she clearly did not), but that although he intended to have intercourse and attempted to do so, he did not intend to do so without her consent. Thus, evidence of the accused's desistance was relevant to the issue of his intent.

d. Impossibility

Section 24(1) of the *Criminal Code* appears to rule out any defence of impossibility, by stating that:

> Everyone who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out his intention is guilty of an attempt to commit the offence *whether or not it was possible under the circumstances to commit the offence.*

Several Canadian cases discuss impossibility, but none articulate clearly the important distinction between factual and legal impossibility.

In *Regina v. Scott* [1964] 2 CCC 257 (Alta CA) the accused was caught with his hand in the victim's back pocket. The wallet in that pocket contained valuable papers and a credit card, but no cash. The accused was charged with attempted theft of cash, and was convicted.

The Alberta Court of Appeal upheld the conviction, finding that the accused had the intent to commit the completed offence and did some act toward the accomplishment of that objective. Based on the wording of section 24(1), "the fact that the Crown failed to prove that there was money in [the victim's] pocket cannot, in my view, make the charge bad in law." (p. 261)

A similar conclusion was reached in *Regina v. Gagnon* (1975) 24 CCC (2d) 339 (Que CA). The accused was observed to open the cash register in a store and then, without putting his hand into the cash drawers, leave the store. In entering a conviction on appeal, the Quebec Court of Appeal cited *Scott* with approval.

Finally, in *Detering v. Regina* (1982) 31 CR (3d) 354 (SCC), the accused was charged with fraud, for fraudulently misrepresenting that a customer's car needed a rebuilt transmission, and later fraudulently misrepresenting that he had rebuilt it. The car owner paid for the work, but was not deceived because she was investigating the garage repair business on behalf of the government.

The Ontario Court of Appeal substituted a conviction for attempted fraud, on the basis that, since the victim was not deceived, the full offence had not been proved.

The Supreme Court of Canada dismissed the appeal. The defence argued that, because the victim was not deceived, the accused could not be convicted of the offence of fraud, and neither could

he be convicted of attempting the impossible. Laskin CJC appears to have rejected that argument in the following terms:

> Nor do I find cogency in the appellant's submission that if there is impossibility this does not bring any act of the accused closer to realization so as to establish proximity. I read s. 24(1) as making a different distinction, one merely requiring proof of intent and of the accused going beyond mere preparation by making, as in this case, a false representation even though not resulting in full realization of his objective. (p. 356)

4. PROPOSALS FOR REFORM

a. Law Reform Commission of Canada

In *Secondary Liability* (Working Paper No. 45, 1985) the Law Reform Commission of Canada recommended a new approach to the law respecting participation in crimes and inchoate crimes. With respect to attempts, it recommended:

1. That the law on . . . inchoate offences be based on the general concept of doing an act in furtherance of a crime.

3. That the present law on inchoate offences be replaced by a provision to the effect that where a crime is not completed a person may be charged with, liable for, and subject to half the penalty for the complete offence for:

   (a) attempting to commit it, . . .

4.(3)(b) That in all other cases except that of a committer, liability should require a substantial act in furtherance of a specific *Criminal Code* offence intended to further that offence.

4.(4) That impossibility of law and inherent impossibility of fact be a defence to attempting, . . . but that abandonment and ordinary impossibility of fact be no defence.

By 1987 it had modified its view significantly. In *Recodifying Criminal Law* (Report 31), the Law Reform Commission recommended the following provisions:

4(3) Attempt. Everyone is liable for attempt who, going beyond mere preparation, attempts to commit a crime, and is subject to half the penalty for it.

4(4) Attempted furthering. Everyone is liable for attempted furthering of a crime and is subject to half the penalty for that crime if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that other person does not completely perform the conduct specified by its definition.

4(6) Different Crime Committed from That Furthered

   (a) General Rule. No one is liable for furthering or attempting to further any crime which is different from the crime he meant to further.

   (b) Exception. Clause 4(6)(a) does not apply where the crime differs only as to the victim's identity or the degree of harm or damage involved. . . .

4(7) Alternative Convictions. . .

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

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

(e) Unclear Cases. . . .

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

b. English Law Commission's Draft Criminal Code

The draft Bill provides:

49.-(1) A person who, intending to commit an indictable offence, does an act that is more than merely preparatory to the commission of the offence is guilty of attempt to commit the offence.

(2) For the purposes of subsection (1), an intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself.

(3) "Act" in this section includes an omission only where the offence intended is capable of being committed by an omission.

(4) Where there is evidence to support a finding that an act was more than merely preparatory to the commission of the offence intended, the question whether that act was more than merely preparatory is a question of fact. . . .

(6) It is not an offence under this section . . . to attempt to procure, assist or encourage as an accessory the commission of an offence by another; but

(a) a person may be guilty as an accessory to an attempt by another to commit an offence; and

(b) this subsection does not preclude a charge of attempt to incite . . . or of attempt to conspire . . . to commit an offence.

50.-(1) A person may be guilty of . . . attempt to commit an offence although the commission of the offence is impossible, if it would be possible in the circumstances which he believes or hopes exist or will exist at the relevant time. . . .

(3) Subsection (1) does not render a person guilty of . . . attempt to commit an offence of which he is not guilty because circumstances exist which . . . justify or excuse the act he does.

c. New Zealand Crimes Bill

65. Attempt-(1) A person attempts to commit an offence who, with intent to commit the offence, does or omits to do any act for the purpose of carrying out that intention, being an act or omission that is immediately or proximately connected with the offence, and not so remote as to be mere preparation.

(2) The question whether an act or omission constitutes an attempt or mere preparation is a question of fact.

(3) Subject to subsection (4) of this section, a person may be convicted of an attempt to commit an offence, even though the commission of the offence was impossible.

(4) A person may not be convicted of an attempt to commit an offence in respect of any act or omission that, through a mistake of law, he or she wrongly believed to constitute an offence.

(5) Notwithstanding anything in subsection (1) of this section, where recklessness as to the circumstances of an act or omission would be sufficient to constitute an element of the offence, it is also sufficient to constitute an element of an attempt to commit the offence.

66. Punishment for attempt-(1) Every person who attempts to commit an offence is liable,-

(a) In the case of an offence punishable by imprisonment for life, to imprisonment for a term of 10 years; or

(b) In any other case, to imprisonment for half the maximum term for the offence.

(2) This section does not apply to any offence in respect of which this Act or any other Act makes express provision for the punishment of those who attempt to commit the offence.

67. Attempt to help or bring about commission of offence-(1) Every person who would have been a party to an offence by virtue of section 57(1) of this Act had the offence been committed is liable to the same penalty to which that person would have been liable if he or she were guilty of an attempt to commit the offence.

(2) This section does not apply to any case in respect of which this Act or any other Act makes express provision for the punishment of those involved.

d. Australian Draft Bill

The Committee for the Review of Commonwealth Criminal Law, in its July 1990 interim report, recommended as follows:

(a) The *actus reus* of attempt should be defined in the future law as any act which goes so far towards the commission of the offence attempted as to be more than an act of mere preparation; the mental element should be intent to commit the offence attempted and the general definition of "intention" proposed in Part II should apply.

(b) The future law should further provide to the following effect:

(i) A person may be convicted of an attempt, even though the facts (not limited to facts known to the defendant) are such that commission of the offence is impossible;

(ii) The offence should be capable of being committed by omission;

(iii) Whether an act amounted to attempt would be a question of fact to be determined by the jury on a trial on indictment; and

(iv) Any laws applicable to the principal offence as to by whom proceedings may be instituted, consent to prosecution, time limits and like matters should apply to an attempt to commit that offence.

(c) No provision should be made for a defence of withdrawal.

e. U.S. Model Penal Code

The American Law Institute's 1962 Model Penal Code states:

Section 5.01. Criminal Attempt.

(1) Definition of Attempt. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

(a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(2) Conduct That May Be Held Substantial Step Under Subsection (1)(c). Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section unless it is strongly corroborative of the actor's criminal purpose. Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:

(a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;

(c) reconnoitering the place contemplated for the commission of the crime;

(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;

(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;

(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

(3) Conduct Designed to Aid Another in Commission of a Crime. A person who engages in conduct designed to aid another to commit a crime that would establish his complicity under Section 2.06 if the crime were committed by such other person, is guilty of an attempt to commit the crime, although the crime is not committed or attempted by such other person.

(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.

Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

5. DISCUSSION

a. The mental element

Since *Ancio*, an accused can be convicted of an attempt only if he or she means to commit the completed offence. Thus, even though murder may be committed if the accused means to cause death, or means to cause bodily harm knowing that it is likely to cause death and is reckless whether death ensues, the same accused could be convicted of attempted murder (where the victim does not die) only in the former instance, where he or she means to cause death.

The Law Reform Commission of Canada's 1987 proposal is silent on this issue; it is not specifically dealt with in the clause making an attempt culpable (4(3)), nor is it discussed in the Comment. It appears that the Commission is in favour of retaining the present position, as clause 4(6) states that "No one is liable for furthering or attempting to further any crime which is different from the crime he *meant to* further."

The Australian Committee for the Review of Commonwealth Criminal Law adopted a similar position, by stipulating that the mental element should be "intent to commit the offence attempted".

However, the English Law Commission, the New Zealand *Crimes Bill* and the U.S. *Model Penal Code* all support an extension of *mens rea* liability:

United Kingdom: "an intention to commit an offence is an intention with respect to all the elements of the offence other than fault elements, except that recklessness with respect to a circumstance suffices where it suffices for the offence itself;"

New Zealand: "where recklessness as to the circumstances of an act or omission would be sufficient to constitute an element of the offence, it is also sufficient to constitute an element of an attempt to commit the offence;" and

U.S. Model Penal Code: "a person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime . . . ."

The issue for consideration is clear; whether the Crown ought to be required, on a charge of attempt, to prove an intent to commit the completed offence, or whether it need only prove the degree of culpability required for the completed offence. In practical terms, this means whether an accused should be convicted of recklessly attempting to commit an offence if he or she could be convicted of recklessly committing the completed offence.

While the wording of s. 24 of the *Criminal Code* presently requires proof of intent, there seems no reason in principle why the law of attempts should be so narrowly defined.

b. The actus reus

Every jurisdiction has wrestled with this issue; most have been content to distinguish in a general way between mere preparation and attempts, and leave it to the Courts to apply that general principle to their own peculiar facts.

Indeed, the Law Reform Commission of Canada concedes the futility of drafting a more precise provision:

> Clause 4(3) . . . gives no definition of the physical element except to state that the attempt must go beyond mere preparation. This is because nothing more can be done than give synonyms such as "try" and "endeavour" which are likewise unanalysable. As for the question: When does the accused get beyond mere preparation? (the real problem about the *actus reus* of attempt), there is no way of formulating any satisfactory answer, as is clear from the inadequacy of each of the tests known to the law. Ultimately the trier of fact faces a judgment call in each particular case (p. 45)

The Australian Committee would define the *actus reus* as "any act which goes so far towards the commission of the offence attempted as to be more than an act of mere preparation", while the New Zealand *Crimes Bill* refers to an act or omission that is "immediately or proximately connected with the offence, and not so remote as to be mere preparation."

The U.S. *Model Penal Code* is unique in several respects. First, it creates liability when an accused does anything:

- with the purpose of causing or with the belief that it will cause the result without further conduct on his part, or
- that is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Second, the *Code* enumerates 7 specific acts which, if strongly corroborative of the actor's criminal purpose, may constitute a "substantial step":

1. lying in wait, searching for or following the contemplated victim,
2. seeking to entice the contemplated victim to go to the place of the contemplated crime,
3. reconnoitering the place of the contemplated crime,
4. unlawfully entering a structure, vehicle or enclosure,
5. possessing materials to be employed in the commission of the crime,

6. possession, collection or fabrication of materials at or near the place of the contemplated crime, and

7. soliciting an innocent agent to engage in conduct constituting an element of the crime.

The issue for consideration is the extent to which the new *Criminal Code* ought to articulate a statutory definition of the *actus reus*. The three options appear to be:

1. distinguishing only between mere preparation and attempt,

2. devising a new formulation, such as the proximity test referred to above, or

3. setting out a general test (as per (1) or (2) above), and then listing any number of specific acts which may constitute an attempt.

The advantage of option (1) or (2) is that it offers the greatest flexibility, allowing Courts to adapt a broadly-worded test to unique fact situations. The disadvantages are that it gives no guidance to the Courts, and forces the Courts to decide where to draw the preparation/attempt line, an approach which seems contradictory to the development of a true *Criminal Code*.

The U.S. *Model Penal Code* approach has several advantages. First, it recognizes that no single test can hope to capture the enormously wide range of human conduct which constitutes criminal attempt; judges will always need some flexibility to apply general principles of culpability to unique fact patterns. Second, it recognizes that there are certain patterns of conduct, often associated with specific crimes such as sexual assault or break and enter, which routinely lead toward the commission of the contemplated offence, where the Legislature can give some guidance in drawing the preparation/attempt line. Spelling these acts out, in the *Model Penal Code* way, clarifies for all interested parties where the line is drawn in such situations, without depriving the Courts of the power to apply the overriding general definition in other cases.

c. Omissions

Section 24 of the present *Criminal Code* and all other jurisdictions surveyed include omissions in their "attempt" provisions. While the Law Reform Commission of Canada's "attempt" provision is silent, it appears to be addressed in Clause 2(3):

> 2(3) Conduct
>
> (a) General Rule. Unless otherwise provided in the definition of a crime, a person is only liable for an act or omission performed by that person.
>
> (b) Omissions. No one is liable for an omission unless:
>
> (i) it is defined as a crime by this code or by some other Act of the Parliament of Canada; or
>
> (ii) it consists of a failure to perform a duty specified in this clause.

The effect of this provision would appear to be that if a completed offence can be committed by omission (*eg.* failure to rescue, clause 10(2)), then an attempt, by omission, to commit that offence would stand as well. If that is the legislative intent, it might be preferable to adopt a provision similar to that recommended by the English Committee:

> 49.(3) "Act" in this section includes an omission only where the offence intended is capable of being committed by an omission.

d. Question of law or fact

Section 24(2) of the present *Criminal Code* provides that "The question whether an act . . . is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law". In *Canadian Criminal Jury Instructions*, (Second Edition, 1990) pp. 6.09-8-9, Ferguson and Bouck recommend the following explanation to the jury on this issue:

> 16. What this means is that it is up to me, as the judge of the law, to decide whether or not the conduct of the accused, if proved, is an attempt. I direct you as a matter of law that if you find that the Crown has proven beyond a reasonable doubt the following conduct [list conduct] then that conduct amounts in law to an attempt, and is not mere preparation.
>
> 17. You are the judges of the facts. You, and you alone, must decide whether the accused actually did these things. If he/she did, I have directed you as a matter of law that these acts go beyond mere preparation and would constitute an attempt.

In Report 31, the Law Reform Commission of Canada's draft is silent on this issue, although the Comment suggests that it should be a question of fact: "As for the question: When does the accused get beyond mere preparation? . . . there is no way of formulating any satisfactory answer, as is clear from the inadequacy of each of the tests known to the law. Ultimately the trier of fact faces a judgment call in each particular case." (p. 45)

The proposals in both Australia and New Zealand recommend that whether an act amounts to an attempt be a question of fact, for the jury to decide. The English Commission and the U.S. *Model Penal Code* favour a 2-stage process:

English Committee:

> 49.(2) Where there is evidence to support a finding that an act was more than merely preparatory to the commission of the offence intended, the question whether that act was more than merely preparatory is a question of fact.

U.S. Model Penal Code:

> Without negativing the sufficiency of other conduct, the following [7 fact situations], if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law.

In practice, it may make little difference if the issue is characterized as one of law or fact. In either case, the judge will have to charge the jury on the law of attempts, and explain to them the dividing line between mere preparation and attempt. Since the jury must decide what the facts were, before anyone can decide whether the accused's conduct could amount to an attempt, it will be up to the jury in every case (unless we resort to a 2-stage verdict system) to make the decision whether the accused went beyond mere preparation. Thus, the practice would not change, if the preparation/attempt issue were treated as a question of law.

e. Abandonment

Only the U.S. *Model Penal Code* recognizes a defence of abandonment:

> 5.01(4) Renunciation of Criminal Purpose. When the actor's conduct would otherwise constitute an attempt under Subsection (1)(b) or (1)(c) of this Section, it is an affirmative defense that he abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose. The establishment of such defense does not, however, affect the liability of an accomplice who did not join in such abandonment or prevention.
>
> Within the meaning of this Article, renunciation of criminal purpose is not voluntary if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose. Renunciation is not complete if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim.

Several arguments have been made in support of such a defence. A person who abandons a crime is less to blame than one who persists in it, and is less dangerous to the public. Indeed, having a legally-recognized defence of abandonment might induce some offenders to withdraw from the criminal enterprise.

On the other hand, an abandoner is more to blame than one who does not even attempt a crime, and may well have caused public concern, even though the full crime was not committed. Some argue that it would be difficult to tell whether an accused abandoned a crime because of genuine remorse, or because of fear of detection. Those who argue against a defence of abandonment believe that justice is best served by treating desistance as a mitigating factor in sentencing.

It is clear that abandonment should only arise once it has been established that the accused has progressed beyond mere preparation, and has actually attempted the crime; otherwise, he or she should be acquitted on the merits. However, once the *actus reus* and the *mens rea* of the offence of attempt have been proved, it is a fundamental policy decision whether the accused should be exonerated (as in an "excuse" or as with *de minimus*), or whether evidence of abandonment should serve to mitigate the sentence.

f. Impossibility

Section 24 of the present *Criminal Code* imposes liability, "whether or not it was possible under the circumstances to commit the offence."

In *Secondary Liability* (1985) the Law Reform Commission of Canada proposed:

> (4) That impossibility of law and inherent impossibility of fact be a defence to attempting . . . but that . . . ordinary impossibility of fact be no defence.

The Commission reasoned that there are really 2 kinds of factual impossibility and 2 kinds of legal impossibility:

1. factual impossibility arising out of unknown circumstances - an accused fires a gun at another person but, unknown to the accused, the gun is defective and no bullet is discharged. The accused should be convicted of attempted murder because had the circumstances been as the accused imagined them (*ie.* that the gun was operational),

murder would have occurred. Attempting to steal money from an empty pocket is another example.

2. inherent factual impossibility - attempting to kill another by voodoo is relatively harmless so, although the attempt is no less reprehensible than an attempt using more appropriate methods, it ought not to constitute a crime because it is "inherently impossible" to complete such an offence.

3. legal impossibility in the circumstances - a person who attempts to steal his own umbrella, thinking it belongs to another, ought not to be convicted of a crime. Unlike the case of the pickpocketer picking an empty pocket, the completed act of "stealing" one's own umbrella cannot be a crime.

4. inherent legal impossibility - a person attempts to commit adultery, thinking it to be a crime. Attempting to do that which, at law, is not a crime, cannot itself be a crime.

In *Recodifying Criminal Law* (1987) the Law Reform Commission modified its view, arguing that no special provision is necessary:

> Where the offence attempted is impossible because the facts are other than imagined by the attempter, his error does not decrease his culpability or dangerousness. If D tries to kill V, who is, unknown to him, already dead, he is surely as blameworthy and as much a social menace as one who tries to kill a living victim and should accordingly be liable for attempted murder; D should be judged (analogously with the defence of mistake of fact) not on the facts as they are, but as he wrongly thinks them to be. Where the offence attempted is impossible because the law is other than imagined, then no crime has been attempted. If D tries to buy contraceptives, wrongly believing that this is (as it once was) an offence against the *Criminal Code*, he is attempting to do something which in law is not a crime and which, therefore, should incur no liability; D should be judged (analogously with the defence of mistake of law) on the law as it is, not as he erroneously thinks it to be. Attempting the impossible, then, can be adequately dealt with by the proposed Code provisions.

The other jurisdictions surveyed specifically exclude impossibility of fact as a defence, although each uses a different formulation:

England: a person may be guilty of . . . attempt to commit an offence although the commission of the offence is impossible, if it would be possible in the circumstances which he believes or hopes exist or will exist at the relevant time;

Australia: a person may be convicted of an attempt, even though the facts (not limited to facts known to the defendant) are such that commission of the offence is impossible;

New Zealand: a person may not be convicted of an attempt to commit an offence in respect of any act or omission that, through a mistake of law, he or she wrongly believed to constitute an offence; and

U.S. Model Penal Code: a person is guilty of an attempt if . . . he purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be.

There is likely to be general consensus that criminal liability should attach in the Law Reform Commission's first category ("factual impossibility arising out of unknown circumstances"), and that criminal liability should not attach in the fourth category ("inherent legal impossibility").

A good argument could be advanced that criminal liability ought not to attach in the second category ("inherent factual impossibility"), both on theoretical grounds and because the likelihood of such situations arising is extremely remote.

Most of the debate centres around the third category (stealing your own umbrella). It is best characterized as a form of mistake of law, in the sense that the accused is mistaken as to legal ownership, but the accused has moral culpability in the sense of intending to steal and doing everything possible to steal. It may be that this hypothetical example is one of intellectual interest only; a person who "steals" their own umbrella would rarely be caught, and an accused who commits other offences while attempting to commit this type of impossible crime could be prosecuted for those other offences.

If that analysis is sound, then distinguishing between cases of impossibility of fact and impossibility of law may be adequate.

The issues for consideration are:

1. does the impossibility of fact/impossibility of law distinction adequately cover all attempt situations which may arise?

2. if it does, should liability arise in cases of impossibility of fact, and not in cases of impossibility of law?

3. if so, should the new *Criminal Code* specifically say so?

g. Penalty

The Law Reform Commission of Canada recommends that a person convicted of an attempt to commit a crime be "subject to half the penalty for it," for two reasons:

> First, the main deterrence and stigma for a crime are contained in the penalty for its actual commission, and not in the penalty for attempt. Second, an attempter creates less actual harm than a successful committer. Finally, clause 4(3) makes unnecessary any specific attempt provisions in the new Code. In the cases where a crime would be punishable by life imprisonment, the length of sentence would have to be established by a specific rule. (p. 45)

The only other jurisdiction surveyed which addresses penalty is New Zealand, which proposes 10 years' imprisonment for attempting to commit an offence which carries a penalty of life imprisonment, and half the maximum penalty in all other cases.

h. Attempted furthering

Under clause 4(4) the Law Reform Commission of Canada recommends that where a person helps, encourages, urges, incites or uses another person to commit a crime, and that other person does not completely perform the conduct specified by its definition, the person is liable for attempted furthering of that crime.

The English Committee recommends that there be liability in the case of:

1. an accessory to an attempt by another to commit an offence,

2. an attempt to incite to commit an offence, and

3. an attempt to conspire to commit an offence.

In New Zealand, it is proposed that a person who would have been a party had the offence been committed is liable to the same penalty to which that person would have been liable if he were guilty of an attempt to commit that offence.

Similarly, the *Model Penal Code* creates liability for attempt, where the accused acts as an accomplice, but the principal actor does not commit the offence.

6. ISSUES FOR CONSIDERATION

a. The mental element - should the Crown be required to prove, on a charge of attempt, an intent to commit the completed crime, or need it only prove the degree of culpability required for the completed offence?

b. The *actus reus* - in articulating a statutory definition of the *actus reus*, should the new *Criminal Code*:

   i) distinguish only between mere preparation and attempt,

   ii) devise a new formulation, such as the proximity test, or

   iii) set out a general test (as per (i) or (ii) above), and then list any number of specific acts which may constitute an attempt?

c. Omissions - would it be preferable to include a provision to the effect that "an act includes an omission only where the offence intended is capable of being committed by an omission"?

d. Question of law or fact - is it necessary to specify whether the issue of preparation versus attempt is a question of law or fact?

e. Abandonment - should evidence of abandonment lead to an acquittal, or only be a mitigating factor in sentencing?

f. Impossibility -

   i) does the impossibility of fact/impossibility of law distinction adequately cover all attempt situations which may arise?

   ii) if so, should liability arise in cases of impossibility of fact, and not in cases of impossibility of law?

   iii) if so, should the new *Criminal Code* specifically say so?

g. Penalty - what should be the penalty or penalties for attempting to commit a crime?

h. Attempted furthering - should the Law Reform Commission's recommendation of a new offence of attempted furthering be endorsed?