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CANADIAN BAR ASSOCIATION
NATIONAL CRIMINAL JUSTICE SECTION
COMMITTEE ON CRIMINAL CODE REFORM

PARTIES

Working Paper # 12

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February 23, 1992

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PARTIES

I. HISTORICAL PERSPECTIVE

The rationale behind the imposition of liability on a person for helping or encouraging another person to commit an offence can be found in the following Latin maxim:

*Quia vulnus, forcia et praeceptum generant unicum factum, nec esset vulnus forte nisi adfuisset forcia, nec vulnus, nec forcia nisi praeceptum praecessisset*¹

Legal historians agree that it is an ancient principle that a person who immediately and directly caused the *actus reus* of a crime should not necessarily be held exclusively liable for it. Persons who encouraged or helped bring about its commission should share the blame and punishment. However, legal historians are of differing opinions regarding the exact origins of the law of parties. Blackstone, in describing the punishment of accessories and principals referred to "the law of Athens" and spoke of the law as having been "borrowed from the Gothic Constitutions".² Another view holds that the law of parties is ultimately based on Roman Law³

A. English Approach

The law of parties (also termed the law of principals and accessories) was first codified in 1275 in Chapter 14 of the the Statute of Westminster, (3 Edw. 1), c. 14 and reflected a well established body of common law.⁴ The essential rules comprising the law of parties, as codified at that time, (which remain substantially unchanged today) were as follows: 1) Only the person who actually carried out the criminal act was considered to be a principal offender. 2) The other participants, whether or not they were present, were considered to be accessories.⁵ 3). They were guilty of the same crime as the principal offender and were subject to the same penalties.

Gradually, elaborate distinctions developed between principals and accessories which reflected various modes of participation in crime. The law distinguished between "principals in the first degree", "principals in the second degree", "accessories before the fact" and "accessories after the fact".⁶

1 For the wound, the assistant and the instigation together form a single deed: There would be no assistance and neither wound or assistance without the instigation. Bracton, *DeLegibus* 392 (Circa 1250 A.D).

2 Blackstone, *Commentaries*, @ 39.

3 Working Paper #45, *Secondary Liability: Participation in Crime and Inchoate Offences*, 1985 @ 9.

4 Gordon Rose, *Parties to an Offence*, 1982, Carswell @ 1.

5 *Ibid*, p.2

6 *Ibid*, p.2

By mid 16th Century, distinctions were being drawn between principals in the first and second degree. The actual perpetrator of a felony was considered to be the principal in the first degree, while persons actually constructively present at the scene of the crime who had aided or abetted in its in its perpetration were considered to be principals in the second degree.⁷ Sir Mathew Hale, in 1680, described "accessories before the fact" as those who aided or abetted or conspired⁸ with the principal in the first degree before hand, but who were not actually or constructively present at the commission of the crime. He further described those who intentionally aided a principal to escape punishment or to conceal a crime as "accessories after the fact".⁹ Note also that these distinctions applied only to felonies. In the case of misdemeanors, no attempt was made to classify the parties in this manner. Any party who would have been classified as a principal in the second degree, or as an accessories before the fact (had the offence been a felony) was simply treated as a principal offender.¹⁰

The English Aiders and Abettors Act 1861, s.8 as amended by the Criminal Law Act 1977, (U.K.), Ch. 45 provides that:

Whosoever shall aid abet, counsel, or procure the commission of any indictable offence whether the same be an offence of common law or by virtue of any act passed, shall be liable to be tried, indicted and punished as a principal offender.

The English Criminal Law Act 1967,(U.K.), Ch. 58 has the effect of extending this provision, so that the law of parties is presently applicable to all offences in the United Kingdom.¹¹

B. Canadian Approach

The common law distinctions between principals in the first degree, principals in the second degree and accessories before the fact were abolished in 1892, in the first Canadian *Criminal Code*.¹² Such persons became known simply as "parties to an offence". Only the distinction of "accessory after the fact" to an offence was retained. It should be noted, however, that while the formal labels were removed, the general principles remained intact so that the conduct that gave rise to criminal liability at common law remained the basis of liability upon codification.¹³

⁷ *Griffiths Case (1553)*, 1 Plowd, Plowden's Note @ 1 Plowden 99-100., Blackstone, Commentaries, 1772, vol.IV @ 33.

⁸ Ewaschuk, *Criminal Pleadings and Practice in Canada*, 2nd Ed. 1987 (Noted up to December 1991), Canada Law Book Inc., p.15-1. .

⁹ Sir Mathew Hale, *Pleas for the Crown*, 1680, p. 615.

¹⁰ Mewett and Manning, *Criminal Law*, 2nd. Ed., Butterworths 1985 @ 44, see also Interim Report, *Review of Commonwealth Criminal Law*, 1990, Australia @ 197.

¹¹ Smith and Hogan, *Criminal Law*, Fifth Edition, Butterworths, 1983 @ 118.

¹² Criminal Code, S.C. 1892, c.29.

¹³ Mewett and Manning, op. cit. n 10.

Section 61 of the 1892 *Criminal Code* was known as the general party section¹⁴, and provided that:

61. Everyone is a party to and guilty of an offence who:

- (a) actually commits it; or
- (b) does or omits an act for the purpose of aiding any person to commit the offence; or
- (c) abets any person in the commission of the offence; or
- (d) counsels or procures any person to commit the offence.

Section 61 did not distinguish between parties who were actually present and those who were absent at the commission of an offence. Liability could be imposed in either case. However, it did distinguish between aiders and abettors and counsellors and procurers. Subsection (d) was removed from the *Criminal Code* and incorporated in s.22 in 1955, for reasons which were not revealed.¹⁵ Section 61(2) provided that parties who had a "common intention" to carry out an unlawful purpose were liable for probable crimes committed (by any of them) as a result of their joint venture. Section 62 created the offence of counselling or procuring another person to be a party to an offence where further, consequent offences were committed. Section 63(1) retained the offence of "accessory after the fact".

Sections 61 to 63 of the 1892 *Criminal Code* are substantially retained in ss. 21 to 23 of the present *Criminal Code*¹⁶. Sections 21, 22, 23, 23.1 and 24 of the *Criminal Code* are now categorized under the heading "Parties to Offences". Section 24, "Attempts", is not generally discussed in the context of parties, but rather, is discussed in the context of inchoate offences. The Law Reform Commission of Canada¹⁷ has strongly recommended that "participation" offences and inchoate offences be unified under one scheme in the Draft Criminal Code. For this reason, s.24 will be discussed in that context in Part III of this paper. Note also that s.464 will be discussed in Part II of this paper, in addition to the above mentioned "party provisions", because it is built upon similar principles and supplements the law of secondary participation.

¹⁴ Stuart, *Canadian Criminal Law*, 1987, Carswell @ 502.

¹⁵ *Martins Criminal Code*, 1955, pp.63-64, Don Stuart, op. cit n. 14 @ 502.

¹⁶ R.S.C. 1985 c. C-46 - (hereafter referred to as the *Criminal Code*).

¹⁷ L.R.C. W.P. 45 op. cit. n. 3, and in Report #31, *Recodifying Criminal Law*, 1987.

II. THE NATURE OF PARTIES

A. Secondary Liability

1. Defining Secondary Liability

A "secondary party" is a person who, through encouragement, aid or inducement, has contributed to the occurrence of an offence which was committed by a principal party. Secondary parties are guilty of the same crime as the principal offender and are subject to the same penalties. Since the principal and secondary parties are both considered to be parties to the offence it is not ordinarily necessary to specify the level of involvement in a charge:

[S]omeone can simply be charged and convicted of the offence of murder, even though the case against her rests wholly on evidence of secondary participation. This gives the Crown flexibility to pursue alternative lines of argument. It also enables the jury to convict in the event that they are sure that the accused was a party in some way, but are unsure or disagree about which way.¹⁸

Secondary liability is found in ss.21 and 22. An accessory after the fact in s.23 is not technically considered to be a secondary party because he or she contributes to the escape of the offender, rather than to the occurrence of the offence committed by the principal.¹⁹ A person under s.464, who counsels another to commit an offence which is not actually committed is also not a secondary party, because there is no act to which the counsellor can be made a party. Nonetheless, ss. 23 and 464 have frequently been included in discussions of the law of parties²⁰ because they are built upon similar principles and because they supplement the law of secondary participation.

2. Relative Independence of Secondary Liability

Secondary liability is derivative liability in the sense that it must be grounded upon the *actus reus* of the principal. However, it has also been said that secondary liability is "relatively independent".²¹ This is because it is not necessary that the principal actually be convicted of the offence which the secondary party aided, encouraged or induced. "It is immaterial that the principal lacks the requisite culpability for the offence because secondary liability has its own standards of culpability".²² Thus, a secondary party may be convicted, even if the principal has died, escaped, been convicted of a lesser charge or been acquitted based on a defence which was unavailable to the secondary party.²³

¹⁸ Eric Colvin, *Principles of Criminal Law*, Second Edition, Carswell, 1991 @.366.

¹⁹ Colvin, *op. cit.* n.18 @ 362.

²⁰ i.e. Ewaschuk, *op. cit.* n.8 @ Chapter 15.

²¹ Colvin, *op. cit.* n.18 @ 367.

²² *Ibid*

²³ i.e., Duress: *R. v. Bourne*, (1952) 36 Cr.App. R.125 (C.A.), Mistake of Fact: *R. v. Cogan*; *R. v. Leak* [1975] 2 All E.R. 1959 (C.A.), Statutory Immunity: *R. v.*

The relative independence of secondary liability is also reflected in the fact that a secondary party with a more culpable state of mind than the principal may be convicted of a more serious offence²⁴. Wilson J. in *R. v. Kirkness* (1990) 60 C.C.C. (3d) 97 @ 102-103²⁵ noted with approval that:

[The common law] has been modified so that a party may be found guilty of either a more serious offence than the principal's or a less serious offence.

B. The Party Provisions

The following general overview of the "party provisions"²⁶ will serve to clarify their meaning and to highlight significant interpretations.

1. Section 21 of the Criminal Code

Section 21(1) of the *Criminal Code* provides that:

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

a. Principals to the Offence: Section 21(1)(a)

Section 21(1)(a) of the *Criminal Code* provides that everyone is a party to and guilty of an offence who actually commits it. Such a party is commonly referred to as the "the principal" or "principal party". If a person actually does or contributes to the doing of the *actus reus* of an offence with the requisite *mens rea*, he or she may be liable as a principal party. The principal "actually commits" the offence when he or she "does a physical act towards the commission of the offence", omits to do an act when under a legal duty²⁷ to act, or uses an innocent agent²⁸ to commit an offence²⁹. Note that "co-principals" may commit a crime together. If "several persons act together in pursuance of a common [criminal] intent, every act done in furtherance of such intent by each of them is, in law done by all".³⁰ Whether or not this common criminal objective is

Plourde (1985) 23 C.C.C. (3d) 463, see also s. 23.1 of the *Criminal Code* which codifies this common law rule.

²⁴ See for example *Remillard v. R.* (1921) 62 S.C.R. 21.

²⁵ In dissent with respect to another matter.

²⁶ ss.21, 22, 23, 23.1, and 464.

²⁷ i.e. when a person fails to provide medical assistance or the necessities of life to a person under her charge- see *R. v. Tutton* [1989] 1 S.C.R. 1392 -see *Criminal Code* s.215.

²⁸ Such as an under aged child or an insane person - *R. v. Berryman* (1990), 57 C.C.C. (3d) 375, *R. v. Clark* (1977) 35 C.C.C. (2d) 319, Stuart, *Canadian Criminal Law*, Carswell (1982).

²⁹ Ewaschuk, op. cit. n.8 @ 15-3.

³⁰ *R. v. Men* (1987) 34 C.C.C. (3d) 304 @ 313-19.

achieved jointly or severally, all who pursued a joint criminal enterprise and who were present at the commission of that crime are "co-principals".³¹ It should be noted that, where two or more accused act together in the commission of an offence, each accused may be liable as a principal or as an aider. Both theories are to be put to the jury.³² As well, a person must commit a positive act in order to be a principal to an offence. However, mere presence at the scene of an offence may be sufficient to constitute such a positive act in certain circumstances. For example, in *R. v. Mammolita et al* (1983) 9 C.C.C. (3d) 85 (Ont. C.A.) @ p.89, a person forming part of a human barricade was held to have obstructed or interfered with the lawful use of property. This was sufficient to constitute a positive act. A principal may "actually commit" an offence either through actual physical presence or through constructive presence. An example of constructive presence would be leaving poison for someone to drink at a later time.³³

b. Aiders and Abettors: Section 21(1)(b) and Section 21(1)(c)

(i) Distinguishing between aiding and Abetting

"Abetting" is most commonly defined in the caselaw as the encouragement of a person to commit a crime.³⁴ "Abetting" has also been defined as "instigating", "promoting"³⁵ or "inciting" the commission of a crime, and has been termed indistinguishable from "counselling".³⁶ "Aiding" has been defined as "assisting or helping without necessarily encouraging or instigating the actor."³⁷ Although the terms "aiding and abetting" are often used conjunctively in the cases, it is necessary to distinguish between them, as the *Criminal Code* separately provides for them and "either activity constitutes a sufficient basis for liability".³⁸ Aiding and abetting are "separate forms of liability, each with its own *actus reus* and *mens rea*"³⁹ and there may be defences open to a person charged with abetting which are not open to a person charged with aiding, and vice versa.⁴⁰ The terms "aiding and abetting" are often grouped together because the assistance of another person in the commission of an offence will *prima facie* encourage it.⁴¹ However, it is possible to aid a person in the commission of an offence without encouraging him or her in any way. Conversely, encouragement may not always amount to aiding.

31 See *Chow Bew v. R.* [1956] S.C.R. 124 @ 126-7, *Thatcher v. R.* [1987] 1 S.C.R. 652, @ 689-699.

32 *R. v. Isacc* [1984] 1 S.C.R. 74.

33 Mewett and Manning, 1985 op. cit n.10 @ 45, Ewaschuk, op. cit n. 8 @, p.15-3.

34 *R. v. Meston* (1975) 28 C.C.C. (2d) 497 (Ont. C.A.), *R. v. Rhyno* (1945), 83 C.C.C. 186 (N.S.S.C.App. Div.).

35 Mewett and Manning, op. cit. n.8 @ 46.

36 Smith and Hogan, op. cit. n. 11@ 21.

37 Mewett and Manning, op. cit n. 10 @ .46.

38 *R. v. Metson*, *supra*.

39 Colvin, op. cit n. 18 @ 369.

40 *R. v. Rhyno*, *supra*.

41 Colvin, op. cit n. 18 @, 370.

(ii) Actus Reus of Aiding and Abetting

Although liability for aiding or abetting under ss.21(1)(b) and (c) is derived from the *actus reus* of the principal⁴², the act requirements for both aiding and abetting relate to the secondary party's own conduct. Note that it is not required, under s.21(1)(b) that the conduct of a secondary party must have *actually* aided the principal. Legal commentators are divided on whether it is relevant if the act was ineffective and the purpose was not accomplished.⁴³

(a) Aiding or Abetting by Omission

A notable difference between the conduct description for aiding under s.21(1)(b) and the conduct description for abetting under section 21(1)(c) relates to omissions. Section 21(1)(b) states that a person becomes a party when he or she "does or *omits* to do anything for the purpose of aiding...", while there is no explicit reference to "omitting" under s.21(1)(c) in the context of abetting. It should be noted that "[n]one of our courts have attached significance to the fact that accessory responsibility for a mere act of omission is expressed in section 21(1)(b) but not in subsection (c)".⁴⁴

What the reference [to "omits"] means in the context of section 21(1)(b) is unclear. It is unlikely that it creates liability for non-interference in the commission of an offence. There has been extensive enquiry into the scope of liability for "passive presence" at the scene of an offence without it being suggested that the answer lies in the words of section 21(1)(b). Moreover, "aiding" suggests a positive contribution rather than non-interference. Perhaps the best interpretation is that "omits" merely refers to the situation where an omission is part of a wider criminal design involving action by other persons. Suppose for example that a chauffeur is directed to pick up a gangster outside of a restaurant, but fails to arrive, leaving the gangster exposed to an attack that would not otherwise have occurred. This would be a case where an omission makes a positive contribution to the offence.

The general rule is that something more than "passive presence" or mere acquiescence is required to constitute the *actus reus* of both aiding and abetting.⁴⁵ Exceptions to this general rule have been the subject of much controversy. It has been said that "the question of responsibility for aiding and abetting by an omission is undoubtedly the most substantive issue".⁴⁶ In the leading case of *Dunlop and Sylvester*, *supra*, Dickson J., for the majority held that:

Mere presence at a scene of a crime is not sufficient to ground culpability. Something more is needed: encouragement of the principal offenders; an act which facilitates the commission of the offence, such as keeping watch or

⁴² As discussed @ 4 of this paper.

⁴³ See L.R.C. W.P. 45 @ 21, footnote 54. See also D.A. MacIntosh, *Fundamentals of the Criminal Justice System*, Carswell 1989, @ 236.

⁴⁴ Stuart, *op. cit.* n. 14 @ 504

⁴⁵ *Dunlop and Sylvester v. R.* (1979) 47 C.C.C. (2d) 93.

⁴⁶ Stuart, *op. cit.* n. 14 @ 504.

enticing the victim away, or an act which tends to prevent or hinder interference with accomplishment of the criminal act, such as preventing the intended victim from escaping or being ready to assist the prime culprit...⁴⁷ I have great difficulty in finding any evidence of anything more than mere presence and passive acquiescence. Presence at the commission of an offence can be evidence of aiding and abetting if accompanied by other factors, such as prior knowledge of the principal offender's intention to commit the offence or attendance for the purpose of encouragement.⁴⁸

It may be observed that application of the general principle that something more than passive acquiescence is required has produced a series of "irreconcilable decisions"⁴⁹:

On the one hand there have been convictions of aiding and abetting the offence of dangerous driving, where a 20 year old owner of a motor vehicle had said or done nothing when a 16 year old female had driven him at 90 miles an hour,⁵⁰ of aiding and abetting assault where the accused had been present with a group of men in a small room laughing and shouting at the victim who was being sexually assaulted and tormented,⁵¹ and of aiding and abetting wilful obstruction by mere presence at a sit-in in a computer center in which other students had erected barricades.⁵² Each of these decisions is severe and difficult to reconcile with decisions to acquit of aiding and abetting rape, one who had been near the victim of a group rape with his pants down,⁵³ of aiding and abetting the causing of a disturbance of a political demonstrator who had not shouted because he was suffering from a bronchial condition but who had sold newspapers and handed out leaflets⁵⁴, and of aiding and abetting mischief one who had accompanied persons who had discharged shot guns and had done nothing to stop them from shooting⁵⁵

Exceptions to the general rule that more than passive acquiescence is required have been articulated in certain specific contexts. The range of these exceptions has been termed "contentious"⁵⁶ The following is an overview of case law relating to these exceptions. For example, in *National Coal Board v. Gamble*, [1959] 1 Q.B. 11, p. 25, approved in *Tuck v. Robson*, [1970] 1 W.L.R. 741, it was held that where the secondary party has the power to control the principal and is present during the commission of the offence, even mere acquiescence may suffice. This principle was extended even

47 *Dunlop and Sylvester, supra*, @ 106.

48 *Dunlop and Sylvester, supra*, @ 110.

49 Stuart, op. cit n. 14 @ 505.

50 *R. v. Kulbacki* [1966] 1 C.C.C. 167 (Man. C.A.).

51 *R. v. Black* (1970) 10 C.R.N.S. 17 (B.C.C.A.).

52 *Re A.C.S.* (1969) 7 C.R.N.S. 42 (Que. S.C.).

53 *R. v. Salajko* (1970) 9 C.R.N.S. 145 (Ont. C.A.). Note that in *R. v. Dunlop, supra*, Dickson J. expressed guarded disapproval: "one might be forgiven for thinking it was open to the jury to infer encouragement by conduct".

54 *R. v. Cruise* (1970) 9 C.R.N.S. 225 (Man. Prov. Ct.).

55 *R. v. Clow* (1975) 25 C.C.C. (2d) 97 (P.E.I.S.C.).

56 Colvin, op. cit n. 18 @ 371.

further in cases involving driving offences. The mere fact of ownership of a motor vehicle is now enough to suggest that the owner had the ability to control the perpetrator of the offence, and aided and abetted in its perpetration.⁵⁷ On this point, Colvin⁵⁸ has commented that:

[T]hese cases have often appeared anomalous. Moreover, concerns have sometimes been expressed about the potential implications for hosts who serve alcohol to guests knowing that they will afterwards drive vehicles. Presumably the failure to exercise control still has to amount to encouragement in fact. Nevertheless, relationships of legal control arising from the ownership of property are so pervasive that including them within the grounds for secondary liability could severely disrupt the ordinary course of social and economic transactions. Some commentators have therefore urged that the idea of general duty should be rejected and that any special problems with, for example, owner-passengers should be addressed through specific statutory provisions. There would be a range of policy based exceptions to the general rule that relationships of legal control do not ground liability as a secondary party. This is a sensible suggestion.

Note that Canadian Law Reform Commission proposals with respect to this issue are discussed in Part III. A. of this paper at pp.29-30.

Legal Duty to Act: Where a secondary party is under a legal duty to act, his or her failure to act (or passive acquiescence) may be viewed as aiding and abetting, in that he or she facilitated the commission of the offence. For example, in *R. v. Nixon*⁵⁹ a police officer breached his duty to prevent an assault on a prisoner and was held liable for aiding and abetting the assault. It may be inferred that the purpose of the failure to act was to aid in the commission of an offence.

Threat of Action: Liability has probably been imposed in some cases because a "threat of action" was "implied by a continuous presence in some obvious concert with the principal" which amounted to aiding and abetting.⁶⁰ For example, a presence, although itself passive, may contribute to a strength in numbers which dissuades others from attempting to intervene⁶¹, or scares the victim from self help.⁶²

(b) Presence of Aiders and Abettors at the Offence

In Canada (unlike the United Kingdom) aiders and abettors do not have to be physically or constructively present at the commission of an offence in order to be considered as parties to the offence. A person who provides another with burglar's tools for the purpose breaking and entering is "aiding", despite the fact that he or she is not present at the burglary.

57 *R. v. Halmo* (1941) 76 C.C.C. 116 (Ont. C.A.), *R. v. Kulbacki*, *supra*..

58 Colvin, *op. cit.* n. 18 @ 372.

59 (1990) 57 C.C.C. (3d) 97.

60 Colvin, *op. cit.* n. 18 @ 372.

61 See *Re A.C.S.* [1969] 4 C.C.C. 284 (Que. S.C.).

62 See *R. v. Black* (1970) 10 C.R.N.S. 17, @ 24-25 (B.C.C.A.).

Similarly, a person who encourages another to break and enter may be "abetting". [or counselling] the burglary despite his or her absence at the burglary.⁶³

(iii) Mens Rea of Aiding and Abetting

The few existing English authorities on the *mens rea* of aiding and abetting "appear to set the threshold of criminal culpability at *intention* for all forms of secondary liability. "[U]nder the *Criminal Code* the threshold of culpability for aiding is set even higher..." since s.21(1)(b) is an offence of "ulterior *mens rea*"⁶⁴, requiring that the act or omission must have been done "for the *purpose* of aiding".⁶⁵ Note the difference between "intention" and "purpose":

My purpose in doing something is my reason for it, in the sense of what I am trying to do or what I want to accomplish by doing it. Hence, to specify a purpose is to give an explanation, whereas to specify an intention is not necessarily to do so. We do things *with* an intention, but *for* a purpose, since the intention may only accompany the action, whereas the purpose must be a reason for it.⁶⁶

It may therefore be concluded, with respect to the *mens rea* of s.21(1)(b), that:

"Presumably, it is insufficient that [the act or omission] be done "with the intent of aiding" and it is therefore insufficient that the actor knew that the conduct would aid. Aiding must have been the *reason* why the actor did what she did."⁶⁷

Section 21(1)(c) has no such ulterior component, requiring only that the secondary party "abet":

Section 21(1)(c) does not prescribe any particular *Mens Rea* for abetting. Applying ordinary principles for the construction of statutory offences, it might seem that either intention to encourage or recklessness with respect to encouraging will suffice. There is, however, some authority for the proposition that intention is required⁶⁸ In effect, the traditional principles of secondary liability have here over ridden the ordinary principles of statutory construction.

Thus, the *mens rea* for aiding is the purpose to assist the offence and for abetting it is the intention to encourage the offence. This does not mean, however, that the precise detail of the offence must be known in advance. It is sufficient that there

63 *R. v. Campbell* (1899) 2 C.C.C. 357 (Que. Q.B.) *R v. Roy* (1900) 3 C.C.C. 472 (Que. Q.B.), *R. v. Yanover and Gerol* (1985) 20 C.C.C. (3d) 300 (Ont. C.A.).

64 Colvin op. cit. n. @ 370.

65 Colvin, op. cit n. 18 @ 372.

66 White, *Intention, Purpose, Foresight and Desire* (1976). 92 L.Q. Rev. 569 @574 as quoted by Colvin, op. cit n. 18 @122

67 Colvin, op. cit n. 18 @ 373.

68 *R. v. Curran* [1978] C.C.C. (2d) 151 @ 156-157 (C.A.) *Dunlop and Sylvester, supra*, @ 896, *R. v. Yanover and Gerol, supra*, - However, other courts have held that recklessness will suffice. See L.R.C. W.P 45, op. cit n.3 @ 21, see for example, *R.v. Halmo* (1941) 76 C.C.C. 116 (Ont. C.A.), *R.v. Kulbacki*, [1966] 1 C.C.C. 167 (Man. C.A.) *R. v. Farduto* (1912) 21 C.C.C. 144 (Que. C.A.).

is the purpose to assist or the intention to encourage what amounts to the *actus reus* of an offence...⁶⁹

Note that there is some inconsistency in the case law with respect to the *mens rea* required for aiding and abetting manslaughter:

There is a blatant anomaly in the law of aiding and abetting. Despite the court's general insistence on the importance of *mens rea* in aiding and abetting, it seems well established that the aiding or abetting of an assault which happens to kill will constitute aiding or abetting of the manslaughter. This is so even though the death has not been contemplated. The rule was affirmed, without discussion by the Supreme Court of Canada in *Clutte v. R.*⁷⁰ Manslaughter as a principle can, of course, be committed by means of an unlawful act which causes death.⁷¹ But the aiding or abetting of that unlawful act is not an aiding or abetting of an offence of which death is an essential ingredient. In effect, the rule turns aiding and abetting into offences of partial *mens rea* in relation to manslaughter. This is inconsistent with the notion that aiding and abetting carry their own *mens rea* requirements rather than take them from the principal offence. It is also inconsistent with the equally well established rule that *mens rea* must be proved for the aiding or abetting of an offence of strict or absolute liability.⁷²

Where the secondary participation can be held to have caused the death different considerations apply. The secondary participation can then operate as an "unlawful act" for the purposes of s. 222(5)(a). Causation of the principal offence is not, however, a requirement for a finding of secondary participation. The role respecting manslaughter is therefore a peculiar one⁷³.

c. Parties to Common Intention - Section 21(2)

Section 21(2) provides that:

Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or who ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

It was held in *R. v. Leblanc* (1948) 92 C.C.C. 47 (Man. C.A.) that five elements must be established for a person to be found to be a party to an offence under s. 21(2):

⁶⁹ Colvin, op. cit. n.18 @ 374.
See also *R. v. F.W. Woolworth Company* (1974) 18 C.C.C. (2d) 23 (Ont. C.A.), *R. v. Roy*, supra, @ 312- this applies equally to strict and absolute liability offences with respect to aiding.- see Ewaschuk, op. cit. n. 8 @ 15-5.

⁷⁰ [1985] S.C.R. 216 @ 229-30.-See also *R. v. Georgianna*, supra.

⁷¹ *Criminal Code* s.222(5)(a).

⁷² See *Callow v. Tillstone* (1900) 19 Cox C.C.C. 576 (Q.B.D.) *R. v. F.W. Woolworth* (1974) 18 C.C.C. (2d) 23 (C.A.).

⁷³ Colvin, op. cit. n. 18 @375.

- (1) two or more persons must have a *common intention* to carry out an *unlawful purpose*;⁷⁴
- (2) the person must have a common intention to *assist each other* in carrying out the unlawful purpose;⁷⁵
- (3) in doing so, one of the persons must *commit another offence*;
- (4) the commission of the offence must occur during the carrying out of the common purpose and be *in furtherance* of that purpose; and
- (5) the person who does not commit the offence must have known⁷⁶ that the offence was a *probable consequence* of carrying out common purpose.

Note that s. 21(2) is only applicable in cases where one of the parties has *exceeded* the common plan, so that a "collateral crime" was committed⁷⁷ :

Section 21(2) has a rationale only in cases where one of the parties has gone beyond what has been planned. Hence, the Supreme Court of Canada has ruled⁷⁸ that it is an error for a trial judge to direct a jury to consider s.21(2) unless an additional offence is in issue.⁷⁹

In cases where parties commit the very offence that was planned, there will most likely be liability for secondary parties based on counselling under s.22 or on aiding and abetting under s.21(1)(b) and (c).⁸⁰ The principal party will be liable under section 21(1)(a). Of course, each of the participants might be liable as co-principals (as discussed on pp.5-6) in the commission of the crime which they pursued as a joint enterprise.

(i) Actus Reus

The *Actus Reus* of s. 21(2) is, firstly, the formation of the unlawful common intention and secondly, the commission of a further offence as a consequence of carrying out the unlawful common intention. Where the secondary party has formed an intention in common to carry out an unlawful purpose and to assist another party, it is not necessary for that secondary party to be present during the carrying out of the common purpose. He or she may still attract liability under s. 21(2) for any additional offence committed during the commission of the completed offence.⁸¹ It is not necessary for the underlying offence to have been pre-planned. The common intention may have been formed just before or even during the commission of the resultant offence.⁸²

74 This may involve either an offence prohibited by Federal or Provincial Legislation - Ewaschuk, op. cit n. 8 @ 15-10;

75 Actual assistance need not be rendered - *R. v. Wong* (1978) 41 C.C.C. (2d) 196 @ 296, *R. v. Moore* (1984) 15 C.C.C. (3d) 541 (Ont. C.A.), leave to appeal to S.C.C. refused [1985] 1 S.C.R. x, C.C.C. loc. cit.

76 or "ought to have known" - s.21(2)

77 D. Watt, M. Fuest, *Tremears Criminal Code*, Carswell 1992.

78 *Simpson and Ochs v. R.* [1988] 1 S.C.R. 3 @ 15.

79 Colvin, op. cit n. 18 @ 378.

80 Ewaschuk, op. cit n. 8 @ 15-10.

81 *Beatty v. The King* [1944] S.C.R. 73 *R. v. Moore, supra.*

82 *R. v. Kirkness, supra.*

It is also not necessary that the principal be pursuing precisely the same plan as long as it is recognizable within the scope of the common purpose.⁸³

Note that "[c]ommon intention is rarely expressed or reduced to writing and must therefore, in general, be found from the conduct of the parties. Consequently, what takes place at the scene of the crime is material as is the prior and subsequent conduct of the parties".⁸⁴

(ii) Mens Rea

The initial *mens rea* requirement under s. 21(2) is specified in the provision itself. It is required that there be "an intention in common to carry out an unlawful purpose and to assist each other therein". It is not required that the secondary party under s. 21(2) have knowledge of the specific nature of the crime contemplated. General knowledge only is required.⁸⁵ In *Paquette v. R.* [1977] 2 S.C.R. 189 @ 197, the Supreme Court of Canada inferred that it is not sufficient that there be an intention to commit the offence which constitutes the unlawful purpose, in the sense that it is known that the offence will be committed as a result of the common plan. The accused's *purpose* in participating must have been to commit the offence constituting the "unlawful purpose".⁸⁶ E. Colvin has commented that:

Paquette is an odd decision because section 21(2), in contrast to section 21(1)(b), does use the word "intention". This is, of course, an intention "to carry out an unlawful purpose", but this does not alter the character of the mental element. All the phrase means is "to commit an offence". What the Supreme Court has said, in effect, is that common intent to commit an offence means common purpose to commit an offence. Why the court said this is a mystery.⁸⁷

The *mens rea* for the further consequent offence under s.21(2) requires that the secondary party "knew or ought to have known" that the offence was a "probable" or "likely" consequence. This objective component "does not mesh well with the general principles of criminal culpability".⁸⁸ The words "ought to have known" in s. 21(2) imply an objective test for liability which has been held to be unconstitutional under s. 7 of the Charter in *R. v. Logan* (1990) 58 C.C.C. (3d) 391:

The court was not prepared to hold that there is a general constitutional bar to prescribing a lower standard of *mens rea* for the secondary party than for the principal. It was held, however, that negligence could not suffice for secondary

⁸³ *R. v. Joyce* (1978) 72 C.C.C. (2d) 141.

⁸⁴ *Trameeers Criminal Code*, op. cit. n. @ 77, *R. v. Suchan* (1952) 104 C.C.C. 193 (S.C.C.).

⁸⁵ *R. v. Puffer, McFall and Kizwma* (1976) 31 C.C.C. (2d) 81 (C.A.) - affirmed on this point in [1980] 1 S.C.R. 321 @ 374.

⁸⁶ See commentary by Colvin, op. cit. n. 18 @ 379. who draws this conclusion based on the holding in *Paquette v. R.*, *supra*, that there is no common intention where a person participates in a crime out of fear of the other parties.

⁸⁷ *Ibid*

⁸⁸ *Ibid*

participation in offences such as murder and attempted murder because subjective *mens rea* is constitutionally mandated. The words "or ought to have known" were declared inoperative in relation to such offences.⁸⁹

Note that the Law Reform Commission⁹⁰ has proposed that the words "ought to know" be eliminated entirely in this context and be replaced with the word "knows".⁹¹

3. Counselling an Offence That is Committed: Section 22

1. Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
2. Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
3. For the purposes of this Act, "counsel" includes procure, solicit or incite.

As discussed on page 3, s. 61(d) of the 1892 *Criminal Code* provided that "every one is a party to and guilty of an offence who counsels or procures any person to commit an offence". Whether the offence was *in fact* committed was immaterial. This changed in 1955 with the introduction of s. 22, a separate counselling provision, which applied exclusively to counselling an offence which was in fact committed. Clearly then, there is some overlap between abetting in s.21(1)(c) and s. 22⁹² as both relate to encouragement.

It is generally understood in the cases that, while "aid" under s.21(1)(b) can be given *before* or *during* the commission of an offence, "abetting" under s.21(1)(c) occurs only *during* its commission. Encouragement given *before* the commission of an offence falls under s. 22(1) and is termed "counselling"⁹³. As a rule of thumb, aiding or abetting apply whether or not the secondary party is present at the crime, and counselling or procuring only if the secondary party was *not* present.⁹⁴ Note that s.464 now addresses situations where a person had counselled another person to commit an offence which was *not* committed (as will be discussed on page 16-17).

a. *Actus Reus*

The *actus reus* requirement under s. 22(2) is "counselling". "Counselling" under s.22 includes "procure", "solicit" or "incite"⁹⁵, and is generally thought to mean "encouraging".

⁸⁹ Colvin, op. cit n. 18 @ 380.

⁹⁰ L.R.C. Report 31 op. cit n. 17.

⁹¹ See p. 24 clause 4(6)(c).

⁹² Colvin, op. cit n. 18 @ 376, Stuart, op. cit n. 14 @ 503.

⁹³ Colvin, op. cit n. 18 @, pp.369-370, *R. v. Roy* 1900 (3 C.C.C.) 472 @.475.

⁹⁴ Ewaschuk, op. cit n. 8 @ 13-15.

⁹⁵ S. 21(3).

It is very doubtful that there are any differences between counselling, soliciting and inciting. All seem to mean encouraging. It has sometimes been said that procuring means the same thing too. In *R. v. Gonzague*⁹⁶, Martin J. A. of the Ontario Court of Appeal said: "The word 'procure' in the context in which it is used in section 422 [now section 464] means to instigate, persuade or solicit". He went on to say that "procure" is equivalent to "incite", and he quoted the statement from Glanville Williams: "Any persuasion or encouragement (including a threat) is sufficient; so probably is a mere suggestion."⁹⁷ The word 'procurer' is, however, mainly used in cases where there has been material inducement for the commission of an offence.⁹⁸

b. *Mens Rea*

The *mens rea* requirement under s. 22 (2) for the initial counselling is simply the intention to counsel the offence. However, the courts are divided on this issue and have sometimes concluded that recklessness is sufficient.⁹⁹ The *mens rea* requirement for further consequent offences under s. 22(2) can be satisfied by full intention, by recklessness or by objective negligence. It has been noted that:

The significant difference [between aiders and abettors in s.21, as compared to counsellors in s. 22] lies in s.22(2) which extends criminal responsibility to all offences "that the person who counselled knew or *ought to have known* was likely to be committed in consequence of counselling". Assuming that the actual perpetrator was committing a full *mens rea* offence, it is bizarre that the perpetrator and aiders and abettors are considered on a subjective approach, but counsellors or procurers at least partially on an objective approach ... There is virtually no Canadian case authority shedding light on the interpretation of our unique law relating to counselling and procuring.¹⁰⁰

It is clear that this objective component does not mesh well with general principals of criminal culpability.¹⁰¹

c. Further Distinctions Between Section 22 and Section 21(1)(c)

In addition to the distinction noted above relating to the objective requirement in s. 22(2), there are two further distinctions between ss. 22 and 21(1)(c).

One difference between ss. 22(1) and 21(1)(c) relates to the stipulation in section 22(1) that it is to operate "notwithstanding that the offence was committed in a

⁹⁶ (1983) 34 C.R. (3d) 169 @ 176.

⁹⁷ Glanville Williams, *Text Book of Criminal Law*, First Edition (1978) @ 384.

⁹⁸ Colvin, op. cit n. 18 @ 376 - Note also that "solicit" means to earnestly try to get or to request, to influence, to do wrong or to intice - Ewaschuk, op cit n 8 @ 15-13.

⁹⁹ See *R. v. Kyling* [1970] S.C.R. 953, *R. v. McLeod*, (1970) 1 C.C.C. (2d) 5 (B.C.C.A.); *David v. R.* (1979) 9 C.R. (3d) 189 (Que. C.A.); *R. v. Gonzague* (1983) 9 W.C.B. 344 (Ont. C.A.).

¹⁰⁰ Stuart, op. cit n. 14 @ 511, but see *R. v. Vallieres* (1970) 9 C.R.N.S. 24 (Que. Q.B.) which ignored the objective requirement).

¹⁰¹ Colvin, op. cit n. 18 @ 379.

way different from that which was counselled or procured".¹⁰² This stipulation is not found in the provisions related to aiding and abetting but case law achieves substantially the same effect."¹⁰³ E. Colvin has commented that:

This proviso is unnecessary. It does not add to the range of offences to which the counsellor may be a party. It only applies in situations in which a variance between what was encouraged and what was done does not alter the *actus reus* of the prospective offence. For example, it would apply to a case where killing by shooting is encouraged but killing by strangulation occurs. There would be secondary liability in such a case even without the proviso.¹⁰⁴

A further minor difference between ss. 22(1) and 21(1) has been noted:

The phraseology of s.22(1) also differs from that of s.21(1) by referring to counselling someone to be a "party to an offence" instead of "to commit an offence". It is again doubtful that this makes any difference. The phraseology of s.22(1) makes it clear that there can be counselling of someone to be a secondary party as well as a principal. Yet, since the secondary party does commit the offence, it would seem that there can also be an aiding or abetting of a secondary party.¹⁰⁵

4. Counselling an Offence Not Committed: Section 464

Section 464 provides that:

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

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

Since liability under s. 464 is not grounded in the criminal act of a principal offender, the "counsellor" under s. 464 is not considered to be a secondary party, and is not liable to the same punishment to which a person who committed that offence would be liable. Nonetheless, s. 464 is often discussed in the context of parties because it was built upon similar principles and because it supplements the law of secondary liability. Note that the Canadian Law Reform Commission has

¹⁰² However, the counsellor must know the general nature of the intended offence in order to be convicted of counselling its commission. *R. v. Bainbridge* [1960] 1 Q.B. 129.

¹⁰³ ie. There is no similar provision under section 21(1)(b) and (c), but it has been held that ignorance of the details of the offence is immaterial to liability as an aider and abettor.

¹⁰⁴ Colvin, op. cit. n. 18 @ 377.

¹⁰⁵ Ibid.

recommended incorporating a variation on s.464 in clause 4(4) of the Draft Code¹⁰⁶. Its classification in the Draft Code as "attempted furthering" recognizes its connection to the law of secondary liability while also acknowledging that it is actually an inchoate offence¹⁰⁷.

5. Accessories After the Fact: Section 23

As discussed on pp.2-3, the general rule relating to accessories after the fact was first codified in 1892¹⁰⁸ with inconsequential wording changes made in 1955. It presently appears in s. 23, which provides that:

1. An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists him for the purpose of enabling him to escape.
2. No married person whose spouse has been a party to an offence is an accessory after the fact to that offence by receiving, comforting, or assisting the spouse for the purpose of enabling the spouse to escape.

Punishments are set out in s. 463, so that an accessory after the fact is liable to the same penalty as that for attempting the offence. Section 592, which completes the statutory scheme, provides that:

Anyone who was charged with being an accessory after the fact to any offence may be indicted, whether or not the principal or any other party to the offence has been indicted or convicted or is not amenable to justice.¹⁰⁹

As mentioned, s.23 is often discussed in the context of parties¹¹⁰, is found under the heading Parties to Offences in the *Criminal Code*, and has been referred to as a "party provision"¹¹¹, but an accessory after the fact is nonetheless not technically a party to the original offence¹¹²:

The law of accessoryship after the fact can be viewed as a supplement of the law of secondary participation. The accessory after the fact is not a party to the original offence but is, by virtue of s. 463, guilty of a separate offence and is usually liable to the same punishment as someone who attempts to commit an offence. Nevertheless, there are many

¹⁰⁶ Ibid @ 365.

¹⁰⁷ This is discussed further in the commentary accompanying Chapter 4 of the Draft Code, which is reproduced on p.26 of this paper.

¹⁰⁸ S. 63(1) S.C. 1892, c.29.

¹⁰⁹ Thus, it has been held an accessory after the fact may be tried despite the absence of a trial for the principal party - *R. v. Anderson* (1980) 57 C.C.C. (2d) 255, *R. v. McEvoy* (1981) 60 C.C.C. (2d) 95 (Ont. C.A.).

¹¹⁰ See Colvin, op. cit. n.18, Stuart op. cit. n.14, Ewaschuk op. cit. n.8, . Smith and Hogan, op. cit. n.11.

¹¹¹ Ewaschuk, op. cit. n.8 @ 15-2, 15-16, 15-17.

¹¹² See *R. v. Fitzpatrick* (1926) 19 Cr. App. R. 91.

similarities between the law of post-offence accessoryship and the law of secondary participation.¹¹³

Note that the Canadian Law Reform Commission has not recommended including the offence of accessory after the fact within its proposed reforms of the law of parties.¹¹⁴ Note also the following reform considerations as suggested by D. Stuart¹¹⁵:

It would be dangerous to isolate the law relating to accessories after the fact for specific reform suggestions. The offence is better considered along with offences relating to obstruction of justice. There is an argument for not continuing the notion of derivative responsibility which attaches the responsibility of the accessory after the fact and certainly its penalty to the liability of the principal. The maximum penalty now available for being an accessory after the fact appears to be grossly excessive.

6. Section 23.1

The common law rule that immunity or lack of culpability of the principal will not automatically extend to the secondary party has recently been codified and extended to include accessories after the fact in s. 23.1. Section 23.1 provides that:

For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.

Note that s.23.1 does not apply to s.464.¹¹⁶

¹¹³ Colvin, op. cit n. 18 @ 381.,

¹¹⁴ L.R.C. Report 31, op. cit. p.17 @.

¹¹⁵ Stuart, op. cit n. 14 @ 522.

¹¹⁶ See Colvin, op. cit n. @ 368 on this point.

C. Defences

Where a *Criminal Code* defence replaces a common law defence, (i.e. duress) it is unclear from the *Criminal Code* itself which should apply to secondary parties.¹¹⁷ Note that there is express authority holding that the defence of duress is applicable in cases involving aiding and abetting under s. 21(1)(b) and (c) as well as in cases involving common intention under s. 21(2).¹¹⁸ Where the *Criminal Code* is silent, common law defences should generally apply equally to secondary parties, as they do to principals.¹¹⁹ For example, there is express authority regarding the applicability of intoxication as a defence for secondary parties.¹²⁰ Note, however, that the defences of abandonment and impossibility are problematic in this regard:

1. Abandonment

The defence of abandonment has generally been rejected in Canada, despite *Criminal Code* silence on the matter.¹²¹ However, it is available to secondary parties in some instances. In *R. v. Kirkness*, *supra*, Wilson J. in discussing the history of the defence of abandonment, noted that the defence is available to an accused charged under either s. 21(1) or 21(2) but is more often raised under s. 21(2).¹²² In the leading case of *R. v. Whitehouse* (1941), 15 C.C.C. 65 (B.C.C.A.)¹²³ it was held that a mere mental change of intention and physical change of place will be insufficient to raise the defence of abandonment and to relieve a person from liability from a further, consequent offence under s. 21(2):

[T]here must be timely communication of the intention to abandon the common purpose from those who wish to disassociate themselves from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case ...

Although Wilson J. has stated that the defence is equally available under s. 21(1) as under s. 21(2), and there is ample English authority on the question of whether an aider or abettor can raise the defence of abandonment, very few Canadian cases have actually addressed this issue.¹²⁴ Some theoretical difficulties which may be involved in this area have been addressed by Colvin.¹²⁵

¹¹⁷ L.R.C. W.P. 45, op. cit n. 3 @ 21.

¹¹⁸ *Pacquette v. The Queen*, [1976] 2 S.C.R. 189, *R. v. Curran* (1977) 38 C.C.C. (2d) 151, leave to appeal to S.C.C. refused 20 N.R. 180 n, *R. v. Hartford and Frigon* (1979), 51 C.C.C. (2d) 462 (B.C.C.A.).

¹¹⁹ L.R.C. W.P. 45, op. cit n. 3.

¹²⁰ *R. v. Cosgrove* (1975) 29 C.C.C. (2d) 169 (Ont. C.A.) leave to appeal to S.C.C. refused February 21, 1977, *R. v. Waterfield* (1974) 18 C.C.C. (2d) 14 (Ont. C.A.).

¹²¹ L.R.C. W.P. 45, op. cit n. 3 @ 34, see Colvin, op. cit n.18 @ 354, see *R. v. Goodman* (1873) 22 U.C.C.P. 338; *R. v. Rump* (1929) 51 C.C.C. 236 (B.C.C.A.); *R. v. Kosh* (1964) 44 C.R. 185 (Sask.)

¹²² @ 114.

¹²³ Cited by the Supreme Court of Canada in *R. v. Kirkness*, *supra*, and in *Miller and Cockriell v. R.* [1977] 2 S.C.R. 680.

¹²⁴ Stuart, op. cit n. 14 @ 508.

¹²⁵ Colvin, op. cit n. 18 @ 383-384.

Two different rationales can be suggested for a defence of abandonment. One rationale is that the act of abandonment removes the *actus reus* of secondary participation. In the case of counselling or abetting, the abandonment cancels out the encouragement; in the case of the common purpose rule, the principal is no longer carrying out a common purpose. A similar approach could be taken to aiding an offence, although here communication of the withdrawal would seem to be insufficient. It has sometimes been suggested that something must be done to rectify the danger which has been created, such as a warning being given to the victim or the police. Under section 21(1)(b) of the *Code*, however, there is an additional complication. Liability arises from doing something for the purpose of aiding an offence, not from actually aiding. It is difficult to see as subsequent acts could remove the significance of what has been done. Nevertheless, a defence of abandonment would still be available on the alternative rationale that abandonment is an independent, exculpatory defence at common law which is preserved by section 8(3) of the *Criminal Code*.

A defence of abandonment to secondary liability makes sense as an appropriate response to the culpability of the actor and as an inducement to desistance. It may seem anomalous that the defence should be accepted for secondary liability but rejected for inchoate liability. The anomaly should be rectified by extending the scope of the defence for inchoate liability and not by excluding it for secondary liability.

In 1985, the Law Reform Commission of Canada¹²⁶ offered the following analysis and recommendations:

[A defence of abandonment] can be supported on three grounds. A person who abandons a crime is less to blame than one who persists in it, and stands less in need of stigma. He is less dangerous to society and calls for less police intervention. Moreover, he may be induced by legal recognition of abandonment to withdraw from the enterprise - he will not feel he might as well be hanged for stealing a sheep as for only half-heartedly trying to steal it. To this there are three counter-arguments. Admittedly less culpable than a persister, an abandoner is still more to blame than a total nonstarter - he cannot rewrite history and erase his wrong behavior. Admittedly less too, if he really repented, he may still cause more concern than if he never started. An incentive to abandonment can also provide flexibility in the process of sentencing. In our view therefore, abandonment should go to mitigation of sentence. This approach would avoid the illogicality of acquittal where there is both the *actus reus* and *mens rea* of furthering. At the same time, it would allow abandonment to be taken into account.

Two years later the Law Reform Commission, in Report No. 31¹²⁷ recommended that there be no explicit provision regarding abandonment. In the commentary accompanying the recommendation, it was agreed that "abandonment is best left to be dealt with as a mitigating factor going to sentence". The rationale behind this choice was stated as follows:

...though a defence of abandonment could acknowledge reduced culpability on the part of the accused and could provide incentives to desist from further involvement, there are genuine counter arguments. First, abandonment may often result less from genuine change of heart than awareness that police are watching. Second, even where this is not so, reduced culpability is not the same as complete innocence.

¹²⁶ L.R.C. W.P. 45, @ 35.

¹²⁷ Report No. 31, op. cit. n. @ 48

Note that Alan Manson¹²⁸ has offered an alternative analysis:

...I was troubled by the observation that Canadian criminal law treated abandoned intention differently as between the context of parties and attempts...The response of the Law Reform Commission's *Re-codifying Criminal Law*, was surprising. Its proposals removed the pre-existing anomaly by advocating that abandoned intention should exonerate neither parties nor attempters...It is against this background that I have tried to offer a different analysis of attempts and parties premised on the notion of harm. Simply put, criminal responsibility ought to be grounded on the generation of harm. When a party neutralizes harm prior to the commission of an offence, no responsibility should attach. Similarly, the concept of abandoned intention as it relates to whether harm has been caused in the world can be incorporated into the definition of the act element of attempts to situate the threshold of responsibility.

2. Impossibility

In 1985, the Law Reform Commission¹²⁹ discussed whether impossibility should be available as a defence to secondary liability or for the defence of attempt. It was recommended at p. 50 that "impossibility of law and inherent impossibility of fact be a defence to attempt, helping, inciting and conspiring". In 1987, in Report 31¹³⁰ the Law Reform Commission of Canada did not provide for such a defence. While the issue of whether "attempting the impossible" should be a defence was discussed, the issue of encouraging or helping to commit a crime which turns out to be impossible was not explicitly addressed. However, it may be assumed that the Law Reform Commission's consideration of the issue in the context of attempts (as quoted below) is equally applicable in the context of secondary liability, given their comments made in 1985:¹³¹

Traditionally, impossibility is discussed under attempt, and for simplicity that will be done here too. However, the argument applies equally to any kind of furthering, for example, urging, encouraging or helping.

The conclusions in report no. 31 were as follows¹³²:

As for attempting the impossible, no special provision is necessary. Where the offence attempted is impossible because facts are other than imagined by the attempter, his error does not decrease his culpability or his dangerousness. If D tries to kill V, who is, unknown to him, already dead, he is surely as blame worthy 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

¹²⁸ Alan Manson, *Recodifying Attempts, Parties and Abandoned Intentions*, *Queens Law Journal*, November 21, 1989 85 @ 86.

¹²⁹ L.R.C. W.P. 45, op. cit. n.3 @ 50

¹³⁰ L.R.C. Report 31, op. cit. n. 17.

¹³¹ L.R.C. L.R.C. W.P. 45, op. cit. n. @ 50

¹³² Report No. 31, op. cit. n. @ 48-49

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.

D. Secondary Liability as Compared to Inchoate Liability

In 1985, the Canadian Law Reform Commission¹³³ strongly recommended that "participation" offences and inchoate (incomplete) offences (conspiracy, attempt, and counselling) be "treated for what in our view they really are - two aspects of one unified concept, the *furtherance* of crime."¹³⁴ The similarities and differences between these two concepts have been summarized as follows:¹³⁵

There are some analogies between secondary liability and inchoate liability. Both forms of liability are concerned with conduct which in itself may be innocuous. A rationale for legal intervention is that the conduct may further the commission of some harm. In inchoate liability, there is conduct furthering the eventual commission of the harm by the same actor; in secondary liability, there is conduct furthering the commission of the harm by another actor. Some of the features of the law of inchoate liability, therefore, find parallels in the law of secondary liability. For example, there are restrictive *mens rea* requirements for both forms of liability. On the other hand, a major difference between inchoate and secondary liability is that in the latter, the harm has usually occurred. Admittedly, there can be secondary participation in an inchoate offence such as an attempt. There is also liability for certain acts of preparatory encouragement whether or not the substantive offence is ever committed. More often, however, there will be a substantive offence to which the secondary party has made a contribution. Thus, if the measure of penal liability is to reflect the harm that has been caused, it is expected that the liability of the secondary party will be tied to that of the principal rather than that of the inchoate offender.

As will be discussed, in Part III of this paper, the Law Reform Commission adopted the general recommendation to unify secondary liability with inchoate offences, in its 1987 in Report No. 31¹³⁶, but followed only some of the specific recommendations in Working Paper 45.¹³⁷

¹³³ L.R.C. W.P. 45, op. cit n. 3

¹³⁴ Ibid - p.2.

¹³⁵ Colvin, op. cit n. 18 @ 361.

¹³⁶ L.R.C. Report 31, op. cit. n. 17.

¹³⁷ L.R.C. W.P. 45, op. cit n. 3

III. CODIFICATION

A. Canada - Draft Criminal Code (1987)

Chapter 4, as found in Report 31¹³⁸, sets out a new scheme which unifies the law of secondary liability with the law of inchoate offences. The following commentary from Report 31 briefly describes the rationale behind this unification and outlines this new format.

When a crime is committed, liability should attach not only to the person actually committing it, but also to secondary offenders who help or encourage its commission, or who try to commit it or get others to commit it. Present law, therefore, has rules imposing liability on: (1) Parties to offences; and (2) Those committing inchoate offences. Parties incur derivative liability, that is, liability deriving from that of an actual committer. Inchoate offenders essentially (for the rules of conspiracy provide an exception) incur original liability, that is, liability incurred solely on account of what they do themselves.

The new scheme in chapter 4 attempts to unify this area of law and imposes original liability on committers, other parties and inchoate offenders. It therefore makes secondary offenders basically liable for what they do themselves, subject to one exception concerning conspiracy (see clauses 4(5) and 4(6)). Thus, it provides a mini-code regarding secondary liability in criminal involvement.

The scheme is as follows. First, involvement is divided into involvement in complete crimes and involvement in incomplete crimes. Second, except in the case of conspiracy, under each heading a distinction is drawn between the prime mover and others: In complete crimes between committing and furthering, for example by helping; and in incomplete crimes between attempting to commit and attempted furthering, for example by trying to help. Third, there are supplementary rules about alternative convictions and related matters.

The provisions in chapter 4 are as follows:

Chapter 4: Involvement in Crime

Involvement in Complete Crimes

- 4(1) **Committing.** A crime may be committed:
 - (a) solely, where the committer is the only person doing the conduct defined as that crime; or
 - (b) jointly, where the committer and another person (or other persons) together do the conduct so defined.
- 4(2) **Furthering.** Everyone is liable for furthering a crime and is subject to the penalty for it if he helps, advises, encourages, urges, incites or uses another person to commit that crime and that person completely performs the conduct specified by its definition.

138 Ibid @

Involvement in Incomplete Crimes

- 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(5) **Conspiracy.** Everyone is liable for conspiracy who agrees with another person to commit a crime and is subject to half the penalty for it.
- 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.
 - (c) **Qualification.** A person who agrees with another person to commit a crime and who also otherwise furthers it, is liable not only for the crime he agrees to commit and intends to further, but also for any crime which he knows is a probable consequence of such agreement or furthering.
- 4(7) **Alternative Convictions.**
 - (a) **Committing.** Everyone charged with committing a crime may, on appropriate evidence, be convicted of furthering it, of attempting to commit it or of attempted furthering of it.
 - (b) **Furthering.** Everyone charged with furthering a crime may, on appropriate evidence, be convicted of committing it, of attempting to commit it or of attempted furthering of it.
 - (c) **Attempting.** Everyone charged with attempting to commit a crime may, on appropriate evidence, be convicted of attempted furthering of it, and, where the evidence shows that he committed or furthered it, may nevertheless be convicted of attempting to commit it.
 - (d) **Attempted Furthering.** Everyone charged with attempted furthering of a crime may, on appropriate evidence, be convicted of attempting to commit it, and, where the evidence shows that he committed or furthered it, may nevertheless be convicted of attempted furthering of it.
 - (e) **Unclear Cases.**
 - (i) Where two or more persons are involved in committing a crime but it is unclear which of them committed it and which of them furthered it, all may be convicted of furthering.
 - (ii) Where two or more persons are involved in attempting to commit a crime but it is unclear which of them attempted to commit it and which of them attempted to further it, all may be convicted of attempted furthering.

Selected commentary by the Law Reform Commission accompanying these provisions is as follows:

Present law is contained in sections 21 and 22 of the Criminal Code. Section 21 defines a party to an offence as a person who: (a) actually commits it, (b) aids another to commit it, or (c) abets another to commit it. Section 22 qualifies as a party to an offence a person who counsels another

to be a party to it. But curiously, in the Special Part of the *Criminal Code*, liability is explicitly imposed only on those committing offences. Under the new Code the position is clearer. Clauses 4(1) and 4(2) divide involvement in complete crimes into committing and furthering. Committers will of course be liable by virtue of the crime-creating provisions in the Special Part. Furtherers will be explicitly liable by virtue of the provision in clause 4(2).

Clause 4(1) articulates the different ways known to common law (not expressed in the *Criminal Code*) of actually committing a crime. A crime is committed by two (or more) people jointly when both do the *actus reus* together (for example D1 and D2 together beat up V) or where one does one part of it and the other another part (for example D1 and D2 rob V, D1 holding the gun on him while D2 takes the money from his pocket). Contrast the case of helping where the helper does no part of the act defined as a crime, but leaves this entirely to the committer. No special provision is made regarding crimes committed through an innocent agent (for example where D gets X, a person under twelve, to steal for him or D gets Y unknowingly to give V a poisoned drink). Under the new Code, such situations are covered by clause 4(2) which provides that a person who urges, incites or uses another to commit a crime is guilty of furthering, even though the doer of the wrongful act has no culpability and thus no liability.

As already mentioned, present law on parties is contained in sections 21 and 22 of the *Criminal Code*. In addition, certain other sections prohibit specific kinds of furthering (for example section 402, assisting cruelty to animals). But the *Criminal Code* is silent as to the *mens rea* required for aiding or abetting.

Clause 4(2) provides one rule to cover all types of furthering crimes that are completed, but spells out the different ways of furthering. Like section 21 of the *Criminal Code*, it makes furtherers all liable to the same penalty as the committer on the basis that a secondary party may often be as culpable as the actual committer and sometimes more so.

Furtherers, of course, like those who commit more specific crimes, will benefit from all the defences in the General Part. When D helps X to administer poison to Y, D will not be liable for furthering if he is unaware that the poison is in fact poison. Then D has a defence of mistake of fact applying to D himself.

In addition furtherers will also benefit from certain defences enjoyed by the actual committer. Where D helps X to reasonably resist an attack on him by Y, X has a defence of self-defence and commits no crime. This follows from clause 3(16). It follows that D cannot be liable for furthering a crime.

Sometimes, however, a furtherer will not benefit from a defence available to the committer. Where the committer labours under a mistake of fact such as to prevent him having the requisite culpability for the crime or such as to lead him to think his act is justified, the liability of the furtherer will depend, not on whether the committer was mistaken, but on whether he himself knew the true facts. D incites X to administer poison

to Y, X is unaware that the poison is poison but D is aware of this fact; X is not liable for murder or causing harm, as the case may be, but D is liable. X has a defence of mistake of fact and is to be judged on the facts as he imagined them to be. D has no such defence and is to be judged on the facts as he knew them to be. The same principle applies where X has a defence like that of immaturity. In all these cases, D can be said to be using X. At common law D would be said to commit the crime through X as an innocent agent. The use in clause 4(2) of the term "uses: "makes a special "innocent agent" rule unnecessary.

By virtue of clause 2(4)(d), the culpability required is purpose; the furtherer must act for the purpose of having the crime in question committed. As to the problem arising when the committer commits a different crime from the one intended to be furthered, clause 4(6) deals with the "common purpose" rule set out in subsection 21(2) of the *Criminal Code*.

Present law is contained in the *Criminal Code* provisions on the three inchoate offences: attempt, counselling and conspiracy. Clauses 4(3) and 4(4) replace these with a more unified approach relating to furthering. Just as involvement in complete crimes is divided into committing and furthering (for example by helping), so involvement in incomplete crimes is divided into attempting and attempted furthering (for example by helping a person to commit a crime which is not ultimately committed). Involvement in incomplete crimes, therefore, runs parallel to involvement in complete crimes instead of being treated quite separately...

Present law relates only to counselling. This is dealt with by section 422 [now s.464] of the *Criminal Code*. There are also various specific procuring provisions, for example paragraph 76(d) (procuring piratical acts). Clause 4(4) makes attempted furthering parallel to furthering (clause 4(2)). Again, clause 4(4) spells out the different ways of attempted furthering. The penalty for attempted furthering is the same as for attempt, just as the penalty for furthering is the same as for committing. Attempted furtherers, like furtherers, will benefit from all the defences in the General Part and also from certain defences enjoyed by the committer. (See comment on clause 4(2) above.)

Finally, the inclusion of "helps" is new. Under present law, liability arises for aiding and counselling another to commit a crime which he actually commits, for counselling another to commit a crime which he does not commit, but not for aiding a person to commit a crime which he does not commit. Clause 4(4) closes this gap in present law...

Present law is contained in subsections 21(2) and 22(2) of the *Criminal Code*. Subsection 21(2) makes parties having a common intention liable for any offence committed by one of them which they knew or ought to have known would be a probable consequence of carrying out that common purpose. Subsection 22(2) provides an analogous rule for counsellors.

Clause 4(6) changes the law to some extent. Clauses 4(6)(a) sets out the general rule that a furtherer is liable only for furthering the crime he intends to further. This is subject to two qualifications. First, clause 4(6)(b) itself provides that where the crime committed differs from that

intended only as regards the victim's identity or the degree of harm, the general rule does not apply. Second, clause 4(6)(c) incorporates a "common purpose" rule analogous to that in subsection 21(2) of the *Criminal Code*, but restricts liability to crimes which the furtherer actually knows to be probable consequences of the agreement or furthering. It does so on the basis that negligence has no place in this context.

A person charged with committing a crime may turn out only to have helped in its commission and vice versa. Clause 47 provides rules for these problems.

Present law needs no rules as to committers and helpers since all count equally as parties. It does provide rules in s.587 [now s.660] and s.588 [now s.661] about inchoate offences. Where a complete offence is charged but only an attempt is proved, there may be conviction for attempt as an included offence (s.587 [now 660]); where an attempt is charged but the complete offence is proved, there may be conviction for the full offence (s.588 [now s. 661]).

Clause 4(7) provides five rules. The first four deal with the four possibilities, namely, committing, furthering, attempting and attempted furthering. Whichever is charged, the evidence may show that one of the other three in fact obtained. In the case of committing and furthering, clauses 4(7)(a) and 4(7)(b) allow for the appropriate conviction. In the case of attempting and attempted furthering, it would be unfair to allow conviction for involvement in the complete offence carrying the full penalty of an accused charged only with involvement in an incomplete offence carrying a half penalty. Accordingly, where the evidence shows the offence to be complete, clauses 4(7)(c) and 4(7)(d) allow conviction. Nevertheless, for involvement in an incomplete offence clause 4(7)(e) provides for situations where it is clear that all of the accused were involved, but it is unclear who had primary involvement...

Observations

The following observations address issues which were not specifically discussed in the commentary accompanying Chapter 4 of Report 31.

1. The Draft Proposal "introduces some new language and a more straightforward format...".¹³⁹ The words "aid" "abet" "counsel", "procure" and "solicit", which are not terms of ordinary usage, are nowhere defined in the *Criminal Code*. The terminology proposed in the Draft Code, ("helps", "advises", "encourages", "urges", "incites" and the unifying concept of "furthering") are more clearly terms of common usage.
2. Nowhere in the *Criminal Code* is there discussion as to what constitutes "committing". Clause 4(1) explicitly defines it as "doing the conduct" of the crime.

¹³⁹ Alan Manson, op. cit. n. @ 128

3. There is no provision in the *Criminal Code* describing joint perpetration. Section 4(1)(b) clarifies this.
4. In the 1892 *Criminal Code*, it had been stated that "every one is a party to and guilty of an offence who...". When the words "and guilty of" were deleted in the 1953 - 1954 amendments, uncertainty was created so that nowhere in the *Criminal Code* is the liability of a secondary party explicitly addressed.¹⁴⁰ This uncertainty is clarified in clause 4(2).
5. The following drafting inconsistency has been noted¹⁴¹:

...section 22 on parties talks of counselling and procuring, while section 422 [now s.464] under inchoate offences, talks of counselling, procuring and inciting. Is it the law, as could be argued on the statutory interpretation principle *expressio unius est exclusio alterius*,¹⁴² that an incomplete offence may be instigated in a way in which a complete offence cannot?

This problem is solved by the terms in clause 4(2) ("furthering") and in clause 4(4) ("attempted furthering") which both talk of helping, advising, encouraging, urging, inciting and using another person".

6. It has been noted¹⁴³ that it is not clarified anywhere in the *Criminal Code* whether it is necessary that the recipient of the aid or counselling be actually aided¹⁴⁴ or counselled.¹⁴⁵ The following analysis was offered:¹⁴⁶

[The] question, "Must the inducement have effect?" is more difficult. In present law there are two types of counselling, one being an inchoate offence and the other being participation in the full offence. The former consists in trying to persuade another to commit a crime. The latter consists in actually persuading that other to commit it. Under the new scheme there is no such distinction. The only question is "Did the accused do a substantial act intended to induce another to commit a crime?" The effect of the inducement is irrelevant. Liability, therefore, of the inducer depends solely on his own acts - "the inducee" need neither hear nor read the words advanced by the inducer.

¹⁴⁰ L.R.C. W.P. 45, op. cit. n. 3 @ 20.

¹⁴¹ L.R.C. W.P. 45, op. cit. n. 3 @ 20.

¹⁴² The express mention of one thing implies the exclusion of another.

¹⁴³ L.R.C. W.P. 45, op. cit. n. 3 @ 21.

¹⁴⁴ Legal Commentators are divided on the issue. Some consider the fact that the aid is useless to be irrelevant. See J. Fortin and Lvobiau, *Traite de Droit Penal General* (Montreal: Themis, 1982) @ 354; D.R. Stuart, *Canadian Criminal Law: A Treatise* (Toronto: Carswell, 1982) @ 495. See on the other hand *v. Gordon Rose, Parties to an Offence* (Toronto: Carswell, 1982) @ 17; Smith and Hogan, op. cit. n. 11, @ 116.

¹⁴⁵ However the courts have held that a person cannot be convicted as a party under section 22 if his incitement was unsuccessful: *R. v. Deusch* 1983, 55 C.C.C. (3d) 41 (Ont. C.A.). It is unclear, however, if on a charge under section 22, it must be shown that an offence was committed in consequence of the incitement. See Rose, op. cit. n. @ note 54; *R. v. Soloway* (1975) 28 C.C.C. (2d) 212 (Alta. C.A.).

¹⁴⁶ L.R.C. W.P. 45, op. cit. n. 3 @ 39.

The Draft Code implicitly adopts this approach as "inchoate offenders essentially ... incur original liability, that is, liability incurred solely on account of what they do themselves".¹⁴⁷

7. It was noted in 1985 by the Law Reform Commission that:¹⁴⁸

Disorderly arrangement is manifested in two contexts. First, concerning attempt we find general provision in two different places: the definition is provided in section 24 under the general heading *Parties to Offences*, but the sanction is in a totally different part of the *Criminal Code* in section 421 [presently 463]. Second, with counselling we find the general provision, namely sections 422 [presently 464] and 423 [presently 465], admittedly in one place, but this location only partially links this inchoate offence with the inchoate offence of attempt, and manifests no connection whatsoever between counselling a complete, and counselling an incomplete, offence.

These problems have been overcome in the Draft Code.

8. There are two issues with respect to the *actus reus* of furthering which should be noted:
- a. In 1985 the Law Reform Commission had recommended that the *actus reus* of furthering should explicitly require "a *substantial* act in furtherance" of the specific crime in question.¹⁴⁹ This recommendation was based on the following analysis:

...criminal law must be used with restraint and only for serious wrong doing. The offence of furthering, then, should not extend to trivial acts innocent in nature and likely to be done in any event. For instance, a professional bank robber will start his criminal day by getting up and getting dressed, but this should surely not be taken as an act in furtherance of the morning's robbery. Likewise, an arsonist will have to provide himself with matches, but the mere purchase of a box of matches should hardly qualify as furthering arson. Getting up, getting dressed and buying matches are things we do in any event, regardless of our criminal intent or lack of it. To count them as acts of furtherance would be in effect, to penalize mere guilty intent.

Accordingly, the *actus reus* of furthering should comprise conduct in clear and substantial furtherance of a crime. This is not easily translated into legislation with precision because we cannot pinpoint clearness and substantiality simply by definition. Much will depend on the circumstances, calling for judgment by the trier of fact. All criminal law can do is flag that more is required than simply *any* act. There must be a *substantial* act intended to further the crime in question. The law can do no better than provide a general definition such as that of the present *Criminal Code*.

Could the law go further and lay down guide lines in the form of badges of substantial furtherance? This is the approach taken by the Model Penal Code as to attempt. Yet criminal offences are so many and so varied as to render illusory a

¹⁴⁷ L.R.C. Report 31, op. cit. n.17 @ 42.

¹⁴⁸ L.R.C. W.P.45, op. cit. n.3 @ 20.

¹⁴⁹ Ibid @ 27.

quest for badges to cover all the cases without resort to meaningless generality or undo complexity.

The Draft Code did not incorporate the term "substantial" and gave no explanation.

- b. In 1985 the Law Reform Commission addressed the issue of "omissions" (as discussed on pp.7,8,9) and offered the following analysis:¹⁵⁰

Suppose D intends to help or encourage (psychologically help) E to commit a crime. What must D do to incur liability? Is presence as a spectator enough? What if D's help is useless or is not received? What if D is merely a necessary party to a transaction of which one side only (for example, selling) is prohibited? Should buying count as aiding and abetting unlawful selling?...the starting point is that "not doing" is no offence. A bystander, witness or victim in fact does nothing; at most he omits to prevent, or leave the scene of the crime; but why should he be obliged, at his own risk, to prevent the crime or to leave where he has a perfect right to be simply because of another's wrong doing there? Clearly those who make no real positive contribution to the crime should not be liable for furtherance. Exceptionally, of course, bystanders may make a positive contribution. There applause may lend encouragement, their crowding around may hinder law enforcement, and their very presence as spectators may give point to a legal spectacle otherwise without *raison d'être*. In such case, given an intent to help or encourage, they could justifiably be liable for in fact doing a substantial act in furtherance of the crime committed.

The conclusion was that:

Principle cautions against liability for refraining from dissuading. Refraining, being an omission should not attract criminal liability as "furthering", unless the refrainer owes a legal duty to the potential victim. "It is, however," said Dickson J. in *Smith v. Leurs*,¹⁵¹ "exceptional to find in law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duty of controlling another to prevent his doing damage to a third."

No reference to "omissions" was recommended in the Draft Code (as found in s.21(1)(b) of the Criminal Code). As well, the Law Reform Commission has not recommended codifying any of the exceptions to the general rule that more than passive acquiescence is required to constitute the *actus reus* of aiding and abetting, although the term "encourages" in clause 4(2) may be broad enough to encompass situations where a person knows that his or her presence will encourage the commission or continuance of an offence.

9. The *mens rea* requirements for the various party provisions in the *Criminal Code* are inconsistent with each other. While s. 21(1)(b) of the *Criminal Code* restricts the *mens rea* requirement to "purpose", courts have extended it to include recklessness.¹⁵² With respect to abetting (in s.21(1)(c)) there is no explicit

¹⁵⁰ Ibid@ 40.

¹⁵¹ (1945) 70 C.L.R. 256 @ 261-262.

¹⁵² ie. *R. v. Halmo* (1941) 76 C.C.C. 116 (Ont. C.A.); *R. v. Kulbacki* [1966] 1 C.C.C. 167 (Man. C.A.); *R. v. Farduto* (1912) 21 C.C.C. 144 (Que. C.A.).

mention of a mental element. However, some courts have required intention, while others have determined that recklessness will suffice.¹⁵³ With respect to common intention (in s.21(2)) the initial *mens rea* requirement is intent, but some courts have extended it to "purpose"¹⁵⁴. With respect to counselling, courts are divided on whether intent is necessary or whether recklessness is sufficient.¹⁵⁵ Courts are divided on whether the initial *mens rea* requirement under s.22 is intent or recklessness.¹⁵⁶ As discussed on p.13 and 15, s.21(2) and s.22(2) provide that negligence is sufficient for consequent crimes which a party to common intention (s. 21(2)) or which a counsellor (s.22(2)) "ought to have known" would be a probable consequence. Clause 2(4)(d) of the Draft Code addresses these inconsistencies. It specifically provides that the culpability requirement is "purpose" for all of the new party provisions unless otherwise specified. Clause 2(4)(d) reads:

Residual Rule.

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

The comment is as follows:

Where nothing is said in the definition of a crime that definition is to be taken as creating a "purpose" crime. This rule avoids repetition of culpability requirements in "purpose" crimes, but of course necessitates it in "reckless" and "negligence" crimes".

Therefore, as per clause (4)(6), the *mens rea* required for furtherers is "purpose" unless a consequent crime, different from the one intended to be furthered results. In such a case, the furtherer would be liable even without intent or purpose if he or she *knew* the crime would be a probable consequence of the furthering. The objective requirement which existed in ss. 21(2) and 22(2) of the *Criminal Code* has therefore been specifically removed in clause 4(6)

Also, in clause 4(6), where a consequent crime, different from the one intended to be furthered results, no *mens rea*, is required with respect to a difference in the identity of the victim or degree of harm or damage.

10. Defences: As discussed on p.19, it is unclear from the *Criminal Code* whether common law defences which have been codified apply to secondary parties. This problem has been resolved in the Draft Code as "furtherers ... like those who commit more specific crimes, will benefit from all the defences from the general part".¹⁵⁷

¹⁵³ See footnote #68 and accompanying text on p.10.

¹⁵⁴ see p.13 and *R. v. Paquette*, *supra*.

¹⁵⁵ The courts have been left to grapple with the issue. See, for example, *R. v. Kyling* [1970] S.C.R. 953; *R. v. McLeod*, *supra*, *David v. R.* (1979) C.R. (3d) 189 (Que. C.A.); *R. v. Gonzague*, *supra*.

¹⁵⁶ See footnote 99 and accompanying text @ 15.

¹⁵⁷ Report No. 31, op. cit. n. @ 44.

As well, nothing is said, in the present *Criminal Code* about the applicability of the defences of abandonment and impossibility in cases where secondary liability is alleged. In the Draft Code the Law Reform Commission has recommended that there be no explicit provision as well because "abandonment is best left to be dealt with as a mitigating factor going to sentence".¹⁵⁸ The Law Reform Commission has also recommended that there be no provision with respect to impossibility for reasons discussed on pp.20-22 of this paper.

In 1985, the Law Reform Commission addressed the issue of whether a furtherer could avail him or herself of the defence of the primary offender¹⁵⁹:

On this our present law is less than wholly clear. *Criminal Code* section 21 provides that aiders and abettors are only parties to crimes committed by primary offenders. Whether an offence committed by a primary offender with a valid defence qualifies for this purpose as "committed" is uncertain.¹⁶⁰ Under the new scheme, the problem would be dealt with as follows ...

Liability for furthering should be affected by the primary offender's liability as follows:

- (a) Where the primary offender commits no offence because he has a justification, there should be no secondary liability;
- (b) Where he commits an offence but has an excuse, there should be full secondary liability for furthering a complete offence;
- (c) Where he commits no offence by reason of an exemption or lack of the requisite mental or physical element, there should be secondary liability for furthering and incomplete offence.

These recommendations were not adopted in the Draft Code. The Law Reform Commission did discuss the characterization of defences as either a justification or an excuse but elected not to categorize the defences as such because:

As has pointed out, justifications and excuses overlap and one and the same defence, for example, necessity, may operate now as an excuse, now as a justification. For this reason, no attempt has been made to categorize each defence as either one or the other.

However, the Law Reform Commission did note in its commentary¹⁶¹ that "furtherers will also benefit from certain defences enjoyed by the actual committer ... this follows from clause 3(16)." Clause 3(16) provides:

Lawful Assistance.

No one is liable who helps, advises, encourages, urges or incites another person, or acts under the authority or on behalf of another person, if that other person has a defence under clauses 3(1) or 3(8) to 3(15).

Clause 3(1) provides defences in the case of physical compulsion, physical impossibility, and automatism. Clauses 3(8) to 3(15) provide defences in cases of duress, necessity, defence of the person, protection of movable property,

¹⁵⁸ Ibid @ 48-see also pp.20-21 of this paper.

¹⁵⁹ L.R.C. W.P. 45, op. cit. n. 3 @ 35.

¹⁶⁰ See *R. v. Cogan*; *R. v. Leak* [1976] Q.B. 217 but see *R. v. Else*, *R. v. Kemp*, [1964] 2 Q.B. 341; G. Williams, op. cit. n. @ 321.

¹⁶¹ Report No. 31, op. cit. n. @ 44.

protection of immovable property, protection of persons acting under legal authority, authority over children, and obedience to superior orders in military law.

11. Penalties: In 1985, the Law Reform Commission articulated the following issues:

This brings us to the basic question of punishment. Should those involved in crime as secondary offenders receive the same punishment as actual committers? Given that a crime is committed, do all involved have equal moral responsibility? Should the effect of each person's actual contribution affect the penalty? Given that no crime is committed, do those who attempt, counsel, incite or procure its commission, have as much responsibility as if it had actually been committed? Do considerations of deterrence justify a lesser, or indeed a greater penalty? Do common sense reactions justify a lesser punishment because no concrete harm resulted?¹⁶²

It was then recommended that:

The new scheme should rationalize the penalties. First, ... penalties for incomplete crimes should be less than for complete crimes. We would suggest a half-penalty, as under present law. Second, penalties for all types of involvement in incomplete crimes should be the same. Thirdly, penalties for all types of involvement in complete crimes should be the same; the helper and inciter should liable to the same sanction as the perpetrator, for sometimes they may be equally or even more culpable.

These recommendations have been adopted in the Draft Code.

12. The offence of accessory after the fact has not been incorporated into chapter 4 of the Draft Code. Presumably, this is because s. 23 of the *Criminal Code* is not technically an offence of secondary liability (as discussed on pp.17-18) nor is it an inchoate offence. Note that under clause 25(10) of the Draft Code, every one who escapes from lawful arrest or imprisonment or is at large before the expiration of a term of imprisonment, commits a crime. It appears, then, anyone who helps such an escape would be liable for furthering that crime.
13. In 1985, the Law Reform Commission noted that¹⁶³:

The principle of double jeopardy clearly indicates that no one should be liable to conviction for committing and for helping, inciting or attempting. Accordingly, on the same lines as present law provides (*Criminal Code* section 587 [now 660] to 589 [now 662]), the Code should provide that where one type of involvement is charged but another is proved, there should be a conviction for that other offence only. ... To avoid double jeopardy, furthering would be an included offence.

This approach has been followed in the Draft Code.

¹⁶² L.R.C. W.P.45, op. cit. n. @ 8.

¹⁶³ L.R.C. W.P.45, op. cit. n. @ 41-42.

B. Other Anglo American Jurisdictions

1. United Kingdom

Clauses 25 to 28 of the English Draft Code¹⁶⁴ provides that:

25. Unless otherwise provided-
 - (a) a person may be guilty of an offence as a principal or as an accessory;
 - (b) defences apply to both principals and accessories.
- 26.(1) A person is guilty of an offence as a principal if, with the fault required for the offence-
 - (a) he does the act or acts specified for the offence; or
 - (b) he does at least one such act and procures, assists or encourages any other such acts done by another; or
 - (c) he procures, assists or encourages such act or acts done by another who is not himself guilty of the offence because-
 - (i) he is under ten years of age; or
 - (ii) he does the act or acts without the fault required for the offence; or
 - (iii) he has a defence.
- (2) A person guilty of an offence by virtue of the attribution to him of an element of the offence under section 29 (vicarious liability) is so guilty as a principal.
- (3) Subsection (1)(c) applies notwithstanding that the definition of the offence-
 - (a) implies that the specified act or acts must be done by the offender personally; or
 - (b) indicates that the offender must comply with a description which applies only to the other person referred to in subsection (1)(c).
- 27.(1) A person is guilty of an offence as an accessory if-
 - (a) he intentionally procures, assists or encourages the act which constitutes or results in the commission of the offence by the principal; and
 - (b) he knows of, or (where recklessness suffices in the case of the principal) is reckless with respect to, any circumstance that is an element of the offence; and
 - (c) he intends that the principal shall act, or is aware that he is or may be acting, or that he may act, with the fault (if any) required for the offence.
- (2) In determining whether a person is guilty of an offence as an accessory it is immaterial that the principal is unaware of that person's act of procurement or assistance.
- (3) Assistance or encouragement includes assistance or encouragement arising from a failure by a person to take reasonable steps to exercise any authority or to discharge any duty he has to control the relevant acts of the principal in order to prevent the commission of the offence.

¹⁶⁴ The Law Commission, No. 177, *A Criminal Code for England and Wales; Report and Draft Criminal Code, Bill 1989*.

- (4) Subject to subsection (5), a person may be guilty of an offence as an accessory although he does not foresee, or is not aware of, a circumstance of the offence which is not an element of it (for example, the identity of the victim or the time or place of its commission, where this is not an element of the offence).
 - (5) Notwithstanding section 24(1) (transferred fault), where a person's act of procurement, assistance or encouragement is done with a view to the commission of an offence only in respect of a specified person or thing, he is not guilty as an accessory to an offence intentionally committed by the principal in respect of some other person or thing.
 - (6) A person is not guilty of an offence as an accessory by reason of anything he does-
 - (a) with the purpose of preventing the commission of the offence; or
 - (b) with the purpose of avoiding or limiting any harmful consequences of the offence and without the purpose of furthering its commission; or
 - (c) because he believes that he is under an obligation to do it and without the purpose of furthering the commission of the offence.
 - (7) Where the purpose of an enactment creating an offence is the protection of a class of persons no member of that class who is a victim of such an offence can be guilty of that offence as an accessory.
 - (8) A person who has encouraged the commission of an offence is not guilty as an accessory if before its commission-
 - (a) he countermanded his encouragement with a view to preventing its commission; or
 - (b) he took all reasonable steps to prevent its commission.
- 28.(1) A person may be convicted of an offence whether he is charged as a principal or as an accessory if the evidence shows that-
- (a) he was a principal; or
 - (b) he was an accessory; or
 - (c) he was either a principal or an accessory.
- (2) A person may be convicted of an offence as an accessory although-
- (a) the principal has not been convicted of or charged with the offence or his identity is unknown; or
 - (b) the evidence shows that he did acts rendering him guilty of the offence other than the acts alleged in the indictment or information.

Comparison

Notable differences between the United Kingdom Draft Proposal and the Canadian Draft Code are as follows:

1. The traditional distinction between principals and accessories is maintained.
2. Clause 26(1)(c) is a variation of the doctrine of innocent agency. "The use in clause 4(2) [in the Canadian Draft Code] of the term "uses" makes a special "innocent agency" rule unnecessary."¹⁶⁵

¹⁶⁵ See commentary accompanying Chapter 4 of the Draft Code as reproduced @ 25.

3. The *mens rea* requirement for accessories in clause 27 differs from that required of furtherers in the Canadian Draft Code.¹⁶⁶
4. There is no parallel in the Canadian Draft Code with respect to clause 27(5) (which qualifies clause 27(4)).
5. There is no parallel in the Canadian Draft Code with respect to clause 27(6)
6. The exemption for victims in clause 27(7) of the U.K. Draft Code does not exist in the Canadian Draft Code.
7. Clause 27(8)(a) provides a defence for abandoned intention, while the Canadian Draft Code recommends that abandonment go to mitigation of sentencing.
8. Clause 28(2)(8) provides a rule whereby an accessory may be convicted even where the principal has not been convicted or charged or is unknown. Section 23.1 of the Criminal Code contains a similar provision. The Canadian Draft proposal does not explicitly provide for this, although it is implied, in that it imposes "original liability" (as opposed to derivative liability) on secondary offenders¹⁶⁷.
9. Note that related issues are found in clauses 29 to 32 (which are not reproduced here). Clause 29 relates to vicarious liability. In the *Criminal Code*, vicarious liability is not mentioned among the party provisions and is generally inapplicable in criminal law, subject to some statutory exceptions.¹⁶⁸ In *Canadian Dredge and Dock Co. Ltd. v. R.* [1985] 1 S.C.R. 662 "there was an outright repudiation of vicarious liability for natural persons [as opposed to corporations] in criminal law".¹⁶⁹
10. Clause 30 relates to the liability of corporations. Among numerous other provisions relating to corporate liability, it is provided in Clause 30(2) that:
 - (2). A corporation may be guilty;
 - a. as a principal, of an offence involving a fault element; or
 - b. as an accessory of any offence;
 - c. only if one of its controlling officers, acting within the scope of his office and with the fault required, is concerned in the offence.

Similar issues have been addressed in Canadian case law. In *R. v. Fell* (1981) 64 C.C.C. (2d) 456, it was held that:

¹⁶⁶ See p.208, *U.K. Draft Code*.

¹⁶⁷ Thus, the Canadian Draft Proposal has the effect of extending s.23.1 to those who counsel an offence not committed under s.464 of the Criminal Code (ie to "attempted furtherers"). Colvin approves of this extension - op cit n. 18 @ 368.

¹⁶⁸ See Colvin, op. cit n. 18 @ 362.

¹⁶⁹ Ibid

A corporate director who is the company's directing mind may be convicted as a principal or a secondary party to a crime even where the company is also convicted of the same crime based on the director's criminal conduct.¹⁷⁰

In the Canadian *Criminal Code*, corporate liability is not mentioned among the party provisions. In the Draft code, corporate liability is addressed under clauses 2(5)(a) and (b), which do not expressly state that a corporation may be liable as either a committer or a furtherer.

2. United States

Section 2.06 of the Model Penal Code¹⁷¹ provides that:

Section 2.06. Liability for Conduct of Another; Complicity.

- (1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both.
- (2) A person is legally accountable for the conduct of another person when:
 - (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or
 - (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or
 - (c) he is an accomplice of another person in the commission of the offense.
- (3) A person is an accomplice of another person in the commission of an offense if:
 - (a) with the purpose of promoting or facilitating the commission of the offense, he
 - (i) solicits such other person to commit it, or
 - (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
 - (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort to do; or
 - (b) his conduct is expressly declared by law to establish his complicity.
- (4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.
- (5) A person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity.
- (6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:

¹⁷⁰ Ewaschuk, op. cit. n. 8 @ 15-4.

¹⁷¹ Model Penal Code, *Official Draft and Explanatory Notes* (1962), American Law Institute 1985.

- (a) he is a victim of that offense; or
 - (b) the offense is so defined that his conduct is inevitably incident to its commission; or
 - (c) he terminates his complicity prior to the commission of the offense and
 - (i) wholly deprives it of effectiveness in the commission of the offense; or
 - (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.
- (7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

Comparisons

Notable differences between the Model Penal Code and the Canadian Draft Code are:

1. Subsection (3)(a)(iii) explicitly articulates a rule respecting omissions by persons under a legal duty to act. While this rule does reflect Canadian caselaw¹⁷², the Canadian Draft code has not included such a provision. (Although the term "encourages" in clause 4(2) of the Draft Code may be broad enough to encompass situations where a person knows that his or her presence will encourage the commission or continuance of an offence).
2. There is no parallel clause in the Canadian Draft Code comparable to subsection (3)(b) of the Model Penal Code, which "preserves all special legislation declaring that particular behavior suffices for complicity".¹⁷³
3. Similar to subsection (3), in subsection (4), the mental element required of the accomplice may be something less than purpose or intent¹⁷⁴. Subsection (4) has been explained as follows:¹⁷⁵

[When] a wholly different crime has been committed, thus involving conduct not within the conscious objectives of the accomplice, he is not liable for it unless the case falls within the specific terms of subsection (4) ...

The most common situation in which subsection (4) will become relevant is where unanticipated results occur from conduct for which the actor is responsible under subsection (3). His liability for unanticipated occurrence rests upon two factors: his complicity in the conduct that causes the result, and his culpability towards the result to the degree required by the law, that makes the result criminal. Accomplice liability in this event is thus assimilated to the liability of the principal actor; the principal actor's liability for unanticipated results, of course, would turn on the extent to which he was reckless or negligent, as required by the law defining the offence, toward the result in question.

¹⁷² see p.9.

¹⁷³ Model Penal Code.@ 320.

¹⁷⁴ See commentary in Mode Penal Code @ 311.

¹⁷⁵ See Model Penal Code, op. cit. n. @ 311 and @ 321.

As discussed on p.30-31, in the Canadian Draft Code, the *mens rea* requirement for furtherers where consequent crimes occur, is knowledge that the consequent crime was a probable consequence of the furthering.

4. There is no parallel in chapter 4 of the Canadian Draft Code for subsection (5) of the Model Penal Code.
5. Subsection (6), an exemption for accomplices who are also victims, does not exist in the Canadian Draft Code.
6. While subsection (6)(c) appears to provide a defence of abandonment, subsection (6)(c)(i) and (ii) add requirements which go beyond the defence of abandonment. These requirements address some of the concerns which lead the Law Reform Commission of Canada to conclude that abandonment should not be a defence, but should go towards mitigation of sentence.

3. Australia

Clauses 5 to 7 of the Australian Crimes Act (1990) provides as follows:

Knowingly being involved in offence

- 5(1) A person who is knowingly involved in the commission of an offence against a law of the Commonwealth is taken to have committed that offence and is punishable accordingly.
- (2) A person may be regarded as being knowingly involved in the commission of an offence against a law of the Commonwealth even though:
 - (a) the person is not aware of, or does not foresee, a circumstance of the offence that is not an element of the offence; or
 - (b) no other person is charged with or convicted of the offence or the identity of the person who committed the offence is unknown.
- (3) A person may be convicted of an offence against a law of the Commonwealth whether the person is charged as having committed the offence or as a person who was knowingly involved in the commission of the offence if the evidence establishes that the person:
 - (a) committed the offence; or
 - (b) was knowingly involved in the commission of the offence; or
 - (c) either committed the offence or was knowingly involved in the commission of the offence.
- (4) A person may be charged with being knowingly involved in the commission of an offence against a law of the Commonwealth by words to that effect or by alleging that the person assisted, encouraged or procured the commission of the offence, or did one or more of those acts, and any such charge is to be taken to be the charge of a single offence.

Procuring

- 6(1) Without limiting subsection 5(1), where:
- (a) a person (in this section called the 'procurer') procures another person to do or omit to do an act; and
 - (b) if the procurer had done or omitted to do the act, the procurer would be guilty of an offence against a law of the Commonwealth;
- the procurer is to be taken, for the purposes of section 5, to be knowingly involved in the commission of the offence (whether or not the other person can be held criminally responsible for the offence).
- (2) Where, apart from this subsection, paragraph (1)(b) would not be satisfied only because the procurer does not satisfy a description that applies only to the other person, that paragraph is to be taken to be satisfied.

Common purpose

- 7 Where:
- (a) 2 or more persons form a common intention to bring about the doing of an act or an omission to do an act; and
 - (b) the doing of that act or the omission of that act constitutes an offence against a law of the Commonwealth; and
 - (c) in implementing that common intention, an act is done or an omission is made that constitutes another offence against a law of the Commonwealth; and
 - (d) each of those persons contemplated the doing of the act or the making of the omission referred to in paragraph (c) as a possible incident of the implementation of that common intention;
- each of those persons is to be taken to have committed the offence referred to in paragraph (c).

Comparison

Notable differences between the Australian reform proposals and the Canadian Draft Code are:

1. In clause 5(2)(a) it is provided that a person may be a secondary party even when he or she is not aware of, or does not foresee, a circumstance of the offence that is not an element of the offence. The position in Canadian caselaw is that aiders¹⁷⁶, abettors¹⁷⁷, parties to common intention¹⁷⁸ and counsellors¹⁷⁹ must at least have general knowledge of the circumstances constituting the offence, although knowledge of all the details is not required. This requirement has not been articulated in the Canadian Draft Code, except in cases where a consequent crime different from the one intended to be furthered results. In such a case, clause 4(6) specifies which kinds of details are not required to be known (i.e. victim's identity or degree of harm).

¹⁷⁶ *R. v. Stevenson* (1984) 11 C.C.C. (3D) 443 @ 450.

¹⁷⁷ *R. v. Roy* (1900) 3 C.C.C. (3d) 472

¹⁷⁸ *R.v. Puffer, McFall and Kizyma* (1976) 31 C.C.C. (2d) 81, aff'd on this point [1980] 1 S.C.R. 321 @ 374.

¹⁷⁹ *R. v. Bainbridge* [1960] 1 Q.B. 129

2. Clause 5(2)(b) provides a rule whereby an accessory may be convicted even where the principal has not been convicted or charged or is unknown. Section 23.1 of the *Criminal Code* contains a similar provision. The Canadian Draft proposal does not explicitly provide for this, although it is implied in that it imposes "original liability" (as opposed to derivative liability) on secondary offenders.
3. There is no parallel clause in the Canadian draft code comparable to clause 5(4).
4. "Procuring" under clause 6 has no *mens rea* requirement when the requirement in clause 6(b) is satisfied. Note that in Australian law, "procuring" is said to differ from other forms of secondary liability in that procuring must actually bring about the acts of the principal.¹⁸⁰ There is no such parallel provision in the Canadian Draft Code. In Canada, procuring has been defined simply as to "instigate", "persuade" or "solicit".¹⁸¹
6. Under clauses 6 and 7, omissions as well as acts are sufficient to constitute the *actus reus* of procuring and being a party to common purpose. The Canadian Draft Code has no such provisions.

4. New Zealand

Clauses 54 to 60 of the New Zealand Draft Crimes Bill¹⁸² provide:

54. Party is guilty of offence and liable to punishment---Every person who is, in accordance with any of the succeeding provisions of the Part of this Act, a party to an offence is guilty of that offence and liable to the penalty prescribed by law for that offence.
55. Person who personally commits offence---Every person is a party to an offence who personally commits the offence.
56. Person who commits offence through innocent agent---
 - (1) Every person is a party to an offence who intentionally causes an innocent agent to commit the act that constitutes the offence.
 - (2) In subsection (1) of this section, the term "innocent agent" means a person who at law cannot be held criminally responsible for the offence.
57. Person who helps or brings about commission of offence---
 - (1) Every person is a party to an offence who, knowing the circumstances constituting the offence or intending the consequences of the offence---
 - (a) Helps any person to commit the offence; or
 - (b) Does or says anything to bring about the commission or continuance of the offence.
 - (2) A person may be a party to an offence by virtue of subsection (1) of this section merely by being present at the scene of the offence if---

180 Interim Report, p.199.

181 see p.14-15, para.3.a.

182 Crimes Bill, 1989.

- (a) That person knows that his or her presence will encourage any other person to commit or to continue the offence; or
 - (b) That person fails to exercise any authority that he or she has in the circumstances to prevent the commission or continuance of the offence.
- (3) A person may be a party to an offence by virtue of subsection (1) of this section even though the offence is committed in a way that person does not expect.
- (4) A person who does or says anything to bring about the commission by another person of an offence may, by virtue of subsection (1) of this section, be a party to every offence that the other person commits in consequence of what is said or done and that is known by the first-mentioned person to be a likely consequence of what is said or done.
58. **Persons who carry out common intention**---Where 2 or more persons form a common intention to help each other to commit an offence, each of them is a party to every offence committed by any of them in carrying out that common intention if he or she knows that the commission of that offence is a probable consequence of the carrying out of that common intention.
59. **Person who helps or brings about offence outside New Zealand**---A person may, in respect of anything done or omitted to be done by that person in New Zealand, be convicted as a party to an offence by virtue of section 57(1) or section 58 of this Act, even though the act or omission that would have constituted the offence if it occurred in New Zealand occurred outside New Zealand, unless that act or omission did not constitute an offence in the place where it occurred.
60. **Party may be convicted despite certain matters**--- A person may be convicted as a party to an offence even though---
- (a) No other person has been charged with or convicted of the offence; or
 - (b) Some other person is not liable to be convicted of the offence because of age or insanity; or
 - (c) The evidence shows that any act or omission that made the person a party to the offence differs from the act or omission alleged in the information or indictment.

Comparisons

Notable comparisons between the New Zealand Draft Crimes Bill and the Canadian Draft Code are:

1. Part IV of the New Zealand Crimes Bill is comprised of three sub-categories; Parties, Conspiracy and Attempt. While no explanation has been provided, it seems likely that this grouping is based on similar reasoning as was put forward by the Canadian Law Reform Commission. That is, that secondary liability and inchoate liability are "... two aspects of one unified concept, the furtherance of crime."¹⁸³

¹⁸³ L.R.C. W.P. 45 op. cit. n. @ 2.

2. Clause 56 codifies a rule respecting innocent agency. "The use in clause 4(2) [in the Canadian Draft Code] of the term "uses" makes a special "innocent agency" rule unnecessary.¹⁸⁴
3. The *mens rea* requirement for helping or bringing about the commission of an offence in clause 57(1) differs from that required of "furtherers" in the Canadian Draft Code.
4. The *actus reus* of the offence in clause 57(1) includes "helping" to commit the offence as well as *doing or saying anything* to bring about the commission or continuance of the offence. This is broader than the terminology used to describe the *actus reus* of furthering, which includes helping, advising, encouraging, urging, inciting or using another person.
5. Clause 57(2)(a) and (b) provide explicitly for passive acquiescence (as discussed on pp.7,8,9). The Canadian Draft Code does not have such a provision, although the term "encourages" in clause 4(2) may be broad enough to encompass situations where a person knows that his or her presence will encourage the commission or continuance of an offence.
6. Clause 57(3), which provides that a person may be a party even where the offence is committed in an unexpected way, has no parallel in the Canadian Draft Code. As discussed, the Canadian Draft Code does provide that a "furtherer" will be liable where the crime differs only as to the identity of the victim or the degree of damage, in cases where a consequent crime different from the one intended to be furthered results.
7. Clause 59 has no parallel in chapter 4 of the Canadian Draft Code. Chapter 5 of the Canadian Draft Code deals with territorial jurisdiction. The general rule in Clause 5(2) is that "no person shall be convicted in Canada for a crime committed wholly outside Canada".
8. Clause 60 has no explicit parallel in the Canadian Draft Code. Clause 60 is similar to clause 28(2)(a) of the United Kingdom Draft Proposal and to clause 5(2)(b) of the Australian Reform Proposal.

¹⁸⁴ See commentary on Chapter 4 @ 25

IV. ISSUES FOR CONSIDERATION

- A. Should the recommendations proposed by the Law Reform Commission be adopted? If so:
1. Should the recommendation that participation offences and inchoate offences be unified under the concept of "furtherance of crime be adopted? [p.22]
 2. Is the organizational framework effective in accomplishing this purpose? [pp.23-24]

derivative

16. Should there be a provision regarding the issue of "double jeopardy"?[p.33-para.-13]
17. Should there be an exemption for victims?[pp. 36, para.#6, .39-para.#5]?
18. Should there be a provision relating to corporate liability among the party provision [p. 36-para.#10]?
19. As discussed,"[u]nder present law, liability arises for aiding and counselling another to commit a crime which he actually commits, for counselling another to commit a crime which he does not commit, but not for aiding a person to commit a crime which he does not commit." [p.26] Should there be a provision, such as clause 4(4) of the Draft Code to "close this gap in present law"?