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**TOWARD A NEW GENERAL PART OF  
THE CRIMINAL CODE OF CANADA**

**- DETAILS ON REFORM OPTIONS -**

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**I. Introduction**

The White Paper on Proposals to Amend the Criminal Code (General Principles) was issued on June 28, 1993. The White Paper represented the response of the former government to recommendations made in 1993 by the Parliamentary Sub-Committee on Recodification of the General Part of the *Criminal Code*.<sup>1</sup> Previous reports urging reform of the General Part have also been issued by the Law Reform Commission of Canada<sup>2</sup> and a Task Force of the Canadian Bar Association.<sup>3</sup> All of these reports recommended recodification of the General Part of the *Criminal Code*.

The General Part of the *Criminal Code* is that part of the Code that sets out the most basic principles of liability. It prescribes the essential elements of all criminal offences - namely, the physical and fault elements, and the available defences. These general rules apply to the "Special Part" of the *Criminal Code*, the part defining specific offences, and to offences created by other federal statutes. However, particular offences may have special rules of liability or defences attached to them. The General Part of the current *Criminal Code* is found in sections 4 to 45, although some general rules can be found elsewhere in the Code. In addition, many of the basic rules of liability can be found only in case law.

The White Paper attempts to address many, but not all, of the matters that should form part of a recodified General Part. As such, the White Paper does not look like and cannot really be read as if it were a new General Part. Rather, it presents proposals on many of the key issues that will form part of a new, comprehensive and coherent General Part. It presents proposals for adding new sections to the General Part of the Code and for amending existing sections. The White Paper is drafted in a statutory form in order to permit those with whom the Department consults to focus on specific words and phrases rather than general concepts.

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<sup>1</sup> See *First Principles: Recodifying the General Part of the Criminal Code of Canada*, Report of the Sub-Committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General (Blaine Thacker, M.P., Q.C., Chairperson) February 1993. The Sub-Committee requested that the Government provide a comprehensive response to its Report in accordance with Standing Order 109.

<sup>2</sup> See Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31, Revised and Enlarged Edition (Ottawa: Law Reform Commission of Canada, 1987).

<sup>3</sup> See *Principles of Criminal Liability, Proposals for a New General Part of the Criminal Code of Canada*, Report of the Canadian Bar Association Criminal Recodification Task Force (Ottawa: Canadian Bar Association, 1992).

Some issues arising from the General Part of the current Code were left to be addressed separately because they require special attention. Examples include consent to death (s. 14),<sup>4</sup> correctional authority over children (s. 43) and police use of deadly force (s. 25). Some of these matters have already received separate Parliamentary attention.

This paper contains a description of the White Paper's provisions. It also contains options for departing from the White Paper's approach in some areas. These options have been developed based on comments the Department of Justice has received on the White Paper to date.

The options presented in this paper are not government policy. Rather, they are intended to provide a basis for further discussion.

The options are also not necessarily mutually exclusive. In some areas, options could be combined.

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<sup>4</sup> The issue of consent to death arises in the context of euthanasia and assisted suicide.

## II. Administrative Provisions

The opening sections of the White Paper are mainly of a "housekeeping" nature and are uncontroversial.

Enacting Clause	Intended Effect
Clause 1	Amend s. 2 of the <i>Criminal Code</i>
<b>Commentary</b>	
The purpose of this section is to cross-reference, in the section 2 definitions, the new definition of "know" in section 12.3. This is simply to make the s. 12.3 definition easy to locate.	

Enacting Clause	Intended Effect
Clause 2	Repeal heading preceding s. 4 of the <i>Criminal Code</i>
<b>Commentary</b>	
This has the effect of moving the existing section 4 ("postcard a chattel, value") out of the General Part, and under the earlier heading, "Interpretation". Section 4, like sections 2 and 3, is a definition and interpretation section, and more appropriately located with them.	

Enacting Clause	Intended Effect
Clause 3	Create new s. 5.1 (former s. 20)
<b>Commentary</b>	
This moves the existing section 20 ("certain acts on holidays valid") out of the General Part and under the heading "Interpretation". Section 20 was located between the sections dealing with ignorance of the law and participation in offences, but is of a wholly different nature from those substantive provisions.	



Enacting Clause	Intended Effect
Clauses 4 and 5	Create new s. 6.1 (former s. 6(2))
<b>Commentary</b>	
<p>These provisions relocate the existing subsection 6(2), which relates to the principle of territoriality. It was situated between two subsections dealing with the presumption of innocence. The move will situate it more logically, immediately before the exceptions to the principle of territoriality set out in section 7. This will also leave uninterrupted the provisions dealing with the presumption of innocence. The French version of this provision has been revised for stylistic reasons.</p>	

### III. The Physical Element

#### 1. White Paper Provisions

Enacting Clause	Intended Effect
Clause 6	Enact new ss. 12.1, and 12.2 of the <i>Criminal Code</i>
<b>Commentary</b>	
<i>Subsection 12.1(1) - Elements of an offence</i> This subsection defines the physical element or <i>actus reus</i> of the offence: an act or omission committed in the specified circumstances, if any, and having the specified consequences, if any. The physical element must be committed "with the state of mind specified in the description of the offence or otherwise provided by law". This will permit the required state of mind to be defined either by Parliament, or through the interpretation of the courts.	
<i>Subsection 12.1(2) - Voluntariness</i> This subsection codifies the principle that the <i>actus reus</i> of an offence must be voluntary, i.e. the product of a mind that is capable of making choices. This principle was recognized by the Supreme Court in <i>Perka v. The Queen</i> <sup>5</sup> and <i>R. v. Parks</i> <sup>6</sup> and operates regardless of the state of mind required for the commission of the offence.	
<i>Section 12.2 - Causation</i> The purpose of this section is to codify the definition of causation from <i>Smithers v. The Queen</i> <sup>7</sup> . The reservation set out at the beginning of the definition preserves the effect of specific provisions relating to causation in particular contexts (e.g. s. 224 and following of the <i>Criminal Code</i> ).	

#### 2. Discussion and Options

The White Paper starts with the most basic rules about criminal liability. The first rule is contained in s. 12.1(1). It expresses the idea, fundamental to criminal law, that a person can only be convicted of an offence if the person has done something that the law specifically prohibits and is blameworthy in the sense that the person has the degree of fault, or *mens*

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<sup>5</sup> [1984] 2 S.C.R. 232.

<sup>6</sup> [1992] 2 S.C.R. 871.

<sup>7</sup> [1978] 1 S.C.R. 506.

*rea*, required for conviction of the offence. In fact, to be more accurate, s. 12.1(1) should refer to "fault" rather than "state of mind", since fault includes both positive mental states and objective liability, such as criminal negligence. The definition of particular offences will set out the conduct that is prohibited and may also define the circumstances in which the conduct is unlawful or specify particular unlawful consequences of the conduct. Subsection 12.1(1) makes clear that a person will be liable only where all of the elements of an offence are proved.

The next basic rule of criminal law is that people are responsible only for voluntary behaviour. Thus, s. 12.1(2) provides that no person commits an offence unless the person's conduct was voluntary. There are two improvements on this provision that could be reflected in a new General Part. The first would be to set it out in a separate section of the General Part so as to keep it apart from the rules on elements of offences in s. 12.1(1). The second improvement would be to refer in this section to an act or omission, rather than commission of an "offence". This would make it clearer that the voluntariness requirement applies to the conduct element of offences. Thus, the voluntariness rule could be recast as follows:

No person commits the act or makes the omission [specified in the description of the offence] unless that person [commits the act or makes the omission] does so voluntarily.

Because some offences include consequences in their definition (e.g. murder involves causing death), the White Paper includes a test for determining when a person's conduct can be said to cause the consequences prohibited by an offence. Section 12.2 sets out the rule that has been accepted in Canadian case law. It states that a person's conduct causes a consequence if it makes a "more than negligible" contribution to it. The Canadian Bar Association Task Force and the Law Reform Commission recommended that an accused person should be considered to have caused a consequence only when his or her conduct contributes "significantly" to it.

Both the Law Reform Commission<sup>8</sup> and the CBA Task Force<sup>9</sup> included in their formations of a rule of causation an additional requirement that there be no independent intervening cause. This requirement is intended to address situations where, in the circumstances surrounding an offence (such as homicide, which amounts to causing a person's death), the actions of the accused fall into the background because of other intervening events. For example, where a victim's death is attributable to harmful medical treatment received after an assault by the accused, the medical treatment may be said to be an intervening cause of death. In such a case, it is perhaps unfair to say that the conduct of the accused caused the

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<sup>8</sup> *Report 31*, s. 2(6), at 27.

<sup>9</sup> S. 5(1), at 18.

victim's death. As such, while the accused may be liable for the assault, he or she should not be held responsible for causing the victim's death. This rule may be implicit in the White Paper proposal since, in the presence of such an intervening cause, the accused's actions could no longer be said to be a cause of the particular consequence.

The *Criminal Code* already contains special rules of causation in relation to homicide.<sup>10</sup> The White Paper would not affect those provisions, although they might be addressed in a review of the law of homicide in the future.

### **Options in Relation to Causation**

- Option 1: The General Part could provide that a person's conduct causes a consequence if it makes a more than negligible contribution to it. (**White Paper s. 12.2**)
- Option 2: The rule on causation could state that an accused person will be considered to have caused a consequence only when his or her conduct contributes significantly [or substantially] to it.
- Option 3: The rule on causation could make clear that a person does not cause a consequence where there is an independent intervening cause of such significance that the person's conduct merely forms the background to the actions that actually caused the consequence.

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<sup>10</sup> See, e.g., ss. 226 to 228.

#### IV. The Fault Element

##### 1. Defining the Fault Element

###### (a) *White Paper Provisions*

Enacting Clause	Intended Effect
Clause 6	Enact new sections 12.4 and 12.5 of the <i>Criminal Code</i>
<b>Commentary</b>	
<i>Section 12.4 - Intention</i> This section defines the concept of intent. Subsection (1) applies where every element of the offence must be committed intentionally. Subsection (2) contemplates the situation where one or some, but not all, elements of an offence must be committed intentionally.	
<i>Section 12.5 - Recklessness</i> This section defines the concept of recklessness. It is defined in a manner intended to differentiate recklessness from intent. Key to the definition of recklessness is awareness of a "serious risk" that a circumstance exists. "Serious risk" is defined in s. 12.5(3) to include both a substantial risk (in quantitative terms) and a risk which, whether substantial or not, is unreasonable to take.	

###### (b) *Discussion and Options*

The White Paper contains a series of provisions defining various forms of fault (see sections 12.4 to 12.7). The Paper sets out two different approaches to establishing the most prevalent forms of criminal fault - intention and recklessness (ss. 12.4 and 12.5). The Paper also defines criminal negligence (s. 12.6) and simple negligence (s. 12.7).

The first approach to defining the fault element of offences, which one might call the "labelling" approach, is expressed in subsections 12.4(1) and 12.5(1). The second approach to prescribing fault requirements might be called the "element" approach.

The labelling approach is based on the assumption that it is possible to classify whole offences as offences of intention or recklessness. The element approach is based on the idea that it is necessary to isolate the various elements of offences and particularize the fault requirements attached to them.

The element approach can be seen in subsections 12.4(2) and 12.5(2) of the White Paper. These provisions set out what intention and recklessness mean as they apply to conduct, circumstances and consequences. Subsections 12.4(2) and 12.5(2) leave Parliament and the

courts the necessary scope for requiring different states of mind for various elements of the offence (e.g. sexual assault requires intent with respect to the application of force (s. 265(1)(a) of the *Criminal Code*) but recklessness with respect to consent (s. 273(2)(a)(ii) of the Code).

Either approach raises the question of whether there is a need to attach a fault element to conduct, or just to circumstances and consequences. The White Paper provides a fault requirement in relation to conduct that is the same whether the fault is intention or recklessness. It states in subsections 12.4(1)(a) and 12.5(1)(a) that no one commits an offence unless the person "means to commit the act or make the omission specified in the description of the offence". The question is whether this requirement adds anything more than saying that the conduct must be voluntary in the sense that it is the product of conscious will. If not, a fault requirement beyond voluntariness may be unnecessary. If that were so, it would be possible simply to delete all of the paragraphs in the White Paper's provisions on fault that relate to the fault aspect of conduct.<sup>11</sup> The only requirement in relation to conduct would then be voluntariness.

It could be left to the courts and Parliament (in the Special Part of the *Criminal Code*) to specify what the fault requirement for a particular offence or element of an offence would be (subject to the possibility of a residual fault rule, which is discussed below). The General Part would simply define what the particular fault requirement meant.

While it is possible for the "labelling" and "element" approaches to stand together, it is not necessary to adopt both. While somewhat more complex, the element approach has the advantage that it is more precise and therefore avoids confusion. Providing a single approach to prescribing fault in relation to intention and recklessness would simplify the rather complicated structure of this part of the White Paper. In addition, the structure of these provisions could be simplified to make them easier to understand. For example, the meaning of intention and recklessness could be set out in provisions that stated simply what these terms mean in relation to the various elements of offences.

In the definition of "recklessness" in the White Paper (s. 12.5(2), (3)), there is ambiguity in the concept of "serious risk." The accused person must be aware of a serious risk that a circumstance exists or that a consequence will occur in order for an act to fall within the definition of recklessness. A serious risk is a substantial risk or a risk that is highly unreasonable to take. The question is whether the accused must be aware of the unreasonableness of the risk or whether unreasonableness is a purely objective standard.

The possibilities under this branch of the White Paper's definition of recklessness are the following:

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<sup>11</sup> Paragraphs 12.4(1)(a), 12.4(2)(a), 12.5(1)(a) and 12.5(2)(a).

- the person is aware that the risk is highly unreasonable to take;
- the person is aware that a reasonable person would consider that the risk is highly unreasonable to take; or
- the person is aware of the risk and (objectively speaking) the risk is highly unreasonable to take.

The definition of recklessness could be amended to make clear which of these possibilities best captures the concept of recklessness.

### **Options in Relation to Defining the Fault Element**

- Option 1: The General Part could define fault requirements according to the classification of offences as offences of intention or offences of recklessness (the "labelling" approach). **(White Paper ss. 12.4(1), 12.5(1))**
- Option 2: The General Part could define the fault requirements (intention or recklessness) for the various elements of offences: conduct, circumstances and consequences (the "element" approach). **(White Paper ss. 12.4(2), 12.5(2))**
- Option 3: The fault requirement in relation to conduct could be subsumed within the General Part's requirement of voluntariness.
- Option 4: Accepting Option 3, a simplified version of the "element" approach could be included in the General Part along the following lines:
- (1) Intention means:
- (a) in relation to a circumstance, that the person knows the circumstance; and
  - (b) in relation to a consequence, that the person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- (2) Recklessness means:
- (a) in relation to a circumstance, that the person is aware of a serious risk that the circumstance exists; and

(b) in relation to a consequence, that the person is aware of a serious risk that the consequence will occur.<sup>12</sup>

Option 5: The definition of "recklessness" in the White Paper could be amended to make clear the relationship between the person's awareness and the reasonableness of the risk. The possibilities are the following:

- the person is aware that the risk is highly unreasonable to take;
- the person is aware that a reasonable person would consider that the risk is highly unreasonable to take; or
- the person is aware of the risk and (objectively speaking) the risk is highly unreasonable to take.

## 2. Fault in Relation to Consequences

With respect to consequences, a particular fault requirement is not set out under the labelling approach set out above.<sup>13</sup> The White Paper leaves it open to Parliament and the courts to establish the fault requirement in relation to consequences (see s. 12.4(1)(c) and s. 12.5(1)(c)) for offences classified as offences of intention or recklessness.

However, it would be possible to set out in the General Part a general rule on the fault requirements for consequences. Such a rule could state, for example, that for offences of intention the fault requirement for consequences specified in the definition of the offence should also be intention.<sup>14</sup> This would be possible under the labelling approach discussed above, since that approach is based on the recognition of various classes of offence with different fault rules. To illustrate, for an offence of intention like assault causing bodily harm, the prosecution would have to prove that the accused committed the assault intentionally and meant to cause the victim bodily harm. Fault requirements could still be set out expressly for particular offences, but, where none was provided, the rule in the General Part would apply. Option 1 below reflects this approach.

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<sup>12</sup>"Serious risk" is defined in the White paper as a "substantial risk or a risk, whether or not substantial, that is highly unreasonable to take" (s. 12.5(3)).

<sup>13</sup> This is because the White Paper was released prior to the Supreme Court of Canada's decision in *R. v. Creighton* (1993), 23 C.R. (4th) 189 (S.C.C.).

<sup>14</sup> This was the proposal of the Law Reform Commission of Canada. See *Report 31*, at 25.



Another possibility under the labelling approach would be to make a distinction between offences where the underlying conduct was itself an offence (i.e. what the Supreme Court in *R. v. DeSousa*<sup>15</sup> called a "predicate offence") and offences where the underlying conduct is not an offence. For the former, it might be justifiable for the fault requirement in relation to consequences to be relaxed somewhat (e.g. from intention to recklessness), since society has determined that engaging in that conduct (e.g. an assault, as in *DeSousa*) is punishable as an offence, regardless of the consequences. For the latter, perhaps the fault requirement in relation to the consequences should be the same as for the conduct itself. An example of this kind of offence would be fraud, where the underlying conduct is some form of deceit and the consequence is depriving someone of something. The deceit alone is not an offence. The General Part could provide that, for such offences, the general rule should be that the fault requirement for the consequence is intention. An alternative would be to provide that the fault requirement for consequences should, where there is no predicate offence, correspond to the fault requirement for circumstances. This would mean that where the offence required knowledge in relation to circumstances, it should require that the accused mean to cause the consequences (both being aspects of intention). Similarly, if the offence required awareness of a serious risk of the existence of the circumstances, it should also require awareness of the serious risk that the consequences will occur (both being aspects of recklessness). This approach is set out in Option 2 below.

By definition, the element approach would provide a rule of fault in relation to consequences, just as it would in relation to both conduct and circumstances. However, this approach would not actually specify when a particular fault requirement should apply. That could be left to a general residual rule for fault (discussed below), or to Parliament (in the Special Part) and the courts. Option 3 applies this approach.

It should be noted that Options 1 and 2 would, in effect, create a residual rule of fault in relation to consequences, in that they would specify what the fault requirement would be for offences that did not include an express fault requirement in their description.

If a general rule on fault in relation to consequences were to be included in the General Part, such a rule would set the minimum fault requirement for consequences, subject to whatever Parliament provided in relation to particular offences in the Special Part. Thus, if the default rule provided that the fault requirement for consequences should be intention or recklessness, then only Parliament could recognize objective foresight of consequences as a sufficient fault requirement for consequences.

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<sup>15</sup> [1992] 2 S.C.R. 944.

### Options in Relation to the Fault Aspect of Consequences

- Option 1: The General Part could contain a general rule setting out the fault requirement in relation to consequences. Such a rule could state what the fault requirement should be for particular classes of offence. For example, for offences of intention, the General Part could state that the corresponding fault requirement for consequences would be intention or recklessness.
- Option 2: The General Part could provide a general rule on fault in relation to consequences that would distinguish between offences where there was a predicate offence and where there was no predicate offence. Such a rule could provide that where there was a predicate offence, the fault requirement for consequences would be recklessness and where there was no predicate offence, the fault requirement would be intention. Alternatively, the General Part could provide that where there was no predicate offence, the fault requirement for consequences should be the same as for circumstances.
- Option 3: The General Part could define various fault requirements in relation to consequences while leaving it to the courts and to Parliament (in the Special Part of the *Criminal Code*) to determine what the fault requirement should be for particular offences or classes of offence (**White Paper ss. 12.4(1)(c), 12.5(1)(c)**). The General Part could include provisions along the following lines:
- (1) A person causes consequences intentionally when the person
    - (a) means to cause them, or
    - (b) is aware that they will follow in the ordinary course of events.
  - (2) A person causes consequences recklessly when the person is aware of a serious risk that the consequence will occur.

### 3. Wilful Blindness

#### (a) White Paper Provisions

Enacting Clause	Intended Effect
Clauses 4 and 5	Enact a new s. 12.3 of the <i>Criminal Code</i>
<b>Commentary</b>	
<i>Section 12.3 - Definition of "know"</i> This section defines knowledge to include actual knowledge and wilful blindness. The concept of knowledge applies to all circumstances, whether elements of the offence or aspects of a defence. The effect of this provision would be to codify the distinction between recklessness and wilful blindness drawn by the Supreme Court in <i>Sansregret v. The Queen</i> . <sup>16</sup>	

#### (b) Discussion and Options

The definition of intention under both of the approaches to fault described above uses the word "know" in relation to circumstances (ss. 12.4(1)(b), 12.4(2)(b)). "Know" is defined in s. 12.3. Paragraph 12.3(b) sets out a definition of knowledge that is the same as the concept of wilful blindness. Wilful blindness refers to a situation where the accused deliberately took steps to avoid coming to know something. An alternative to this approach would be to define knowledge in such a way as to equate it with a recklessness standard - awareness of a serious risk that a circumstance exists. The effect of this approach would be to introduce recklessness as a sufficient fault requirement for awareness of circumstances as a general rule, except for offences of negligence or criminal negligence.

A further clarification could be made in relation to the requirement of wilfulness. The requirement that the accused must have *deliberately* avoided determining whether the circumstance existed could be made clearer by inserting the word "deliberately" into this branch of the definition of "know".

The result of this approach would be to equate intention and recklessness as they apply to circumstances. Intention and recklessness are already defined in the White Paper identically in relation to conduct. Thus, if this approach were taken, the only difference between intention and recklessness would be in relation to consequences.

A final alternative would be to leave the definition and application of the concept of wilful blindness to the courts, as is currently the case.

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<sup>16</sup> [1985] 1 S.C.R. 570.

### **Options in Relation to Wilful Blindness**

- Option 1: Knowledge could be defined as awareness of, or wilful blindness in relation to, circumstances. **(White Paper s. 12.3)**
- Option 2: The definition of "wilful blindness" in the White Paper could be modified
- (a) by replacing the words "it is probable" with "there is a serious risk". The effect of the change would be to equate the first branch of the concept of wilful blindness with recklessness as to a circumstance; and/or
  - (b) by inserting the word "deliberately" before the words "to avoid", in order to make the wilful aspect of wilful blindness more clear.

If both of these changes were made, the resulting provision would read as follows:

"12.3(b) to be aware that there is a serious risk that the circumstance exists and deliberately to avoid taking steps to confirm whether that circumstance exists."

- Option 3: The definition and application of the concept of "wilful blindness" could be left to the common law.

#### 4. Criminal Negligence

##### (a) White Paper Provisions

Enacting Clause	Intended Effect
Clause 6	Enact a new s. 12.6 of the <i>Criminal Code</i>
<b>Commentary</b>  <p><i>Section 12.6 - What constitutes criminal negligence</i></p> <p>This section defines the concept of criminal negligence. Criminal negligence is the fault requirement for offences currently set out in sections 220 and 221 of the <i>Criminal Code</i>, and the existing s. 219 provides a definition. In addition, courts have read this fault requirement into offences such as careless handling of firearms.<sup>17</sup> However, Parliament may in future also wish to require this for other types of conduct. For this reason, the General Part, rather than s. 219, is considered to be the appropriate location for the definition.</p> <p>The test set out in s. 12.6(1), read in conjunction with s. 12.6(3), provides that criminal negligence involves a concept of objective fault (marked and substantial departure from the standard of reasonable care), but requires that such a departure be assessed on the basis of the person's perception, if any, of the situation (s. 12.6(3)).</p>	

##### (b) Discussion and Options

Concerning criminal negligence, the White Paper makes it clear that the accused's appreciation of the circumstances is a relevant factor in determining whether his or her conduct represented a marked and substantial departure from the standard of reasonable care (s. 12.6(3)). The proposed definition would resolve the debate growing from the decisions in *R. v. Tutton*<sup>18</sup> and *R. v. Waite*.<sup>19</sup> However, as a result of the Supreme Court of Canada's decision in *R. v. Creighton*,<sup>20</sup> issued after the release of the White Paper, the question has arisen whether an accused's personal characteristics, such as age, background or level of education, that affect his or her capacity to achieve the requisite standard of care should be taken into consideration in criminal negligence cases. The White Paper could recognize the

<sup>17</sup> *R. v. Gosset* (1993), 23 C.R.(4th) 280 (S.C.C.).

<sup>18</sup> [1989] 1 S.C.R. 1392.

<sup>19</sup> [1989] 1 S.C.R. 1436.

<sup>20</sup> (1993), 23 C.R. (4th) 189 (S.C.C.).

relevance of an accused's personal characteristics, for example, by adding at the end of the definition of criminal negligence in s. 12.6(1) the words "which the person is capable of achieving".

It is not stated expressly in s. 12.6(3) that the court should consider *all of the circumstances of the case* as well as the accused's awareness of those circumstances. These words could be added in order to make this clear.

The drafting of s. 12.6 is somewhat awkward because it combines a description of the conduct required for an offence of criminal negligence with a definition of criminal negligence. Some people might interpret the section as creating an offence of criminal negligence rather than prescribing the elements of such an offence.

### Options in Relation to Criminal Negligence

- Option 1: The General Part could state that the person's awareness of circumstances should be considered in determining whether the person's conduct represented a marked departure from the standard of reasonable care. **(White Paper s. 12.6(3))**
- Option 2: Subsection 12.6(3) could be amended to make clear that the court should take into account all of the circumstances of the case, including the accused's awareness of those circumstances.
- Option 3: Subsections 12.6(1) and (2) of the White Paper could be redrafted to separate the conduct forming the basis of an offence of criminal negligence from the definition of the standard that such offences would employ. The result would be a provision along the following lines:

12.6(1) Except as otherwise provided by this Act or any other Act of Parliament, where the description of an offence specifies or the law otherwise provides, in substance, [that the offence be committed by criminal negligence or]<sup>21</sup> that there be criminal negligence in respect of an element of the offence, no person commits that offence unless the person's conduct

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<sup>21</sup> The bracketed words reflect the possibility that offences may be classified as offences of negligence under the labelling approach. These words would not be necessary under the element approach.

shows a marked and substantial departure from the standard of reasonable care.

- (2) For purposes of subsection (1), conduct means
- (a) doing anything or
  - (b) omitting to do anything that it is the person's duty to do.

Option 4: It could be made clear in the General Part that personal characteristics of the accused relating to the capacity to meet the standard of reasonable care should be considered by courts in deciding whether the accused acted with criminal negligence. This could be done in one of two ways:

- (a) by stating that criminal negligence exists where a person's conduct shows a marked and substantial departure from the standard of reasonable care *that the person is capable of achieving*; or
- (b) by stating that a person is not criminally negligent where he or she was unable to achieve the standard of reasonable care because of personal characteristics outside the person's control (i.e. those that habitually affect a person's ability to perceive a risk or achieve the standard of care, and excluding such factors as self-induced intoxication, drug dependency, *etc.*).

## 5. Simple Negligence

### (a) *White Paper Provisions*

Enacting Clause	Intended Effect
Clause 6	Enact a new s. 12.7 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 12.7 - What constitutes negligence</i></p> <p>Section 12.7 proposes a definition of simple negligence, the negligence applicable to most regulatory offences (strict liability offences). The departure from the standard of reasonable care is less substantial than that required for criminal negligence, and is assessed purely objectively.</p>	

(b) *Discussion and Options*

The final form of fault provided in the White Paper is simple negligence (s. 12.7). Section 12.7 would apply to non-criminal, regulatory offences in statutes other than the *Criminal Code*. Even though it would not apply to the *Criminal Code* itself, it is included here because, according to the *Interpretation Act*, provisions of the *Criminal Code* apply to offences outside the Code. Thus, s. 12.7 would specify the fault requirement for offences in statutes other than the *Criminal Code*. Some argue that a definition of negligence should not, in fact, be included in the *Criminal Code*, since negligence is not a form of criminal fault. The reasoning is that there is a risk that courts would apply it to criminal offences if it is found in the *Criminal Code*. If a definition of negligence is placed in the *Criminal Code*, it could be made clear that the definition actually applied outside the Code. The alternative would be to include the definition of negligence in the *Interpretation Act* itself or in specific regulatory statutes.

**Options in Relation to Simple Negligence**

- Option 1: Negligence could be defined in the *Criminal Code*. (**White Paper s. 12.7**)
- Option 2: Negligence could be defined in the *Criminal Code* but the Code could also make clear where the definition applied.
- Option 3: Negligence could be defined in the *Interpretation Act*.
- Option 4: The definition of negligence could be included in regulatory statutes.

**6. Residual Fault Provision**

The White Paper does not prescribe what the fault requirement should be for particular offences. This is left to the actual definition of offences in the Special Part. Nor does the White Paper set out what the fault requirement should be in situations where the definition of the offence does not include an express fault standard. The General Part could include a residual or default provision. It could state that, in the absence of an express fault requirement in the definition of an offence, a fault requirement, such as intention or recklessness, should be read into it. The Law Reform Commission of Canada and the Canadian Bar Association Task Force both recommended inclusion of a default rule in the General Part. The Law Reform Commission proposed that where the definition of a crime did not specify a fault requirement it should be interpreted as requiring "purpose". "Purpose" was defined by the Commission similarly to the White Paper's definition of



intention as to conduct and consequences.<sup>22</sup> The CBA Task Force proposed a residual rule that offences without a specific fault element provided should be interpreted as requiring intention.<sup>23</sup>

As noted above in relation to the fault requirement for consequences, it would be possible to have a special default rule just in relation to consequences. The question here is whether it is appropriate to provide a general default rule for all elements of offences.

It should be noted that the default rule would only apply to crimes. It would not set the minimum level of fault at simple negligence, which would continue to be the fault requirement for regulatory offences. Crimes would be defined as offences enacted pursuant to Parliament's jurisdiction under s. 91(27) of the *Constitution Act, 1867*.

### **Options in Relation to a Residual Fault Rule**

Option 1: The appropriate fault provisions for particular offences could be left entirely to the Special Part and the courts. **(White Paper approach)**

Option 2: The General Part could include a residual rule that sets out the fault requirement for offences or elements of offences in situations where none was provided in the definition of the offence. If such a rule were to be enacted, it could state that:

in the absence of an express fault requirement, the fault requirement for an offence or an element should be intention.

Alternatively, it could state that:

in the absence of an express fault requirement, the fault requirement for an offence or an element should be recklessness.

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<sup>22</sup> *Report 31*, s. 2(4)(b), (d), at 23-25.

<sup>23</sup> *CBA Task Force Report*, s. 8(7), at 32.

Option 3: The General Part could provide a default rule that states that where the definition of an offence did not contain an express fault requirement it should be interpreted as requiring knowledge in relation to circumstances and recklessness in relation to consequences.<sup>24</sup>

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<sup>24</sup> The residual rule in relation to consequences could distinguish between offences according to whether they included predicate offences. This issue is discussed above under "2. Fault in Relation to Consequences" and reflected in Option 2 under that heading.

## V. Ways of Participating in Offences

### 1. Parties

#### (a) White Paper Provisions

Enacting Clause	Intended Effect
Clause 8	Enact a revised s. 21 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 21 - Parties to an offence</i></p> <p>The new s. 21 would bring together the various modes of participating in offences currently found in sections 21 and 22. Thus, s. 21(1) contains a new paragraph (d) (counselling an offence that is committed), which essentially brings the existing s. 22(1) into the new s. 21. The other changes to s. 21 are as follows:</p> <p>s. 21(1) - The verb "abet", in the English version of s. 21(1)(c), is replaced by the more modern "encourage". The closing words of s. 21(1) are designed to codify existing law, to the effect that it does not matter whether the offence is committed by the person who actually commits it in a different manner from the manner contemplated by the other party.</p> <p>s. 21(2) - The proposed basis for the liability of a party under s. 21(2) would amend the existing rule. The "knew or ought to have known" basis of liability in the existing subsection 21(2) is replaced by a requirement of awareness of a substantial risk that the offence will be committed.</p> <p>s. 21(3) - Subsection 21(3) replaces the existing subsection 22(2) (collateral crimes counselled) by providing a test for responsibility similar to the test in the new subsection 21(2).</p> <p>The s. 21(4) definition of "counsel" is the same as the present subsection 22(3) with the addition, in the English version, of the verb "advise". The French version stays the same, except for some stylistic improvement and the deletion of the definition of "conseil", which is made redundant by the new formulation of subsections 21(1) and 21(3).</p>	

Enacting Clause	Intended Effect
Clause 8	Replace s. 23.1 of the <i>Criminal Code</i>
<b>Commentary</b>	
<i>Section 23.1 - Where one party cannot be convicted, etc.</i> The scope of the present section 23.1 is made more explicit, to make it clear that a party to an offence may be found guilty notwithstanding the fact that the other party has been acquitted of the offence or otherwise relieved of criminal responsibility for the offence.	

(b) *Discussion*

By and large, the provisions on parties reproduce existing law. The exception is in relation to s. 21(2). The proposed basis for the liability of a party under s. 21(2) would amend the existing rule by replacing the "knew or ought to have known" basis of liability in the existing subsection 21(2) by a requirement of awareness of a substantial risk that the offence will be committed. This introduces a recklessness standard in place of a negligence standard. However, in order to incorporate the full definition of recklessness, it would probably be better to refer in s. 21(2) to persons who were "reckless", rather than "aware of a substantial risk", that the commission of the other offence would be a consequence of the common intention. (See also the discussion, above, of clause 6, section 12.5 of White Paper, definition of recklessness.)

Another minor change would be to remove from the French version of s. 21(2) the word "probablement", which adds a requirement of probability of commission of the offence that is not contained in the English version.

## 2. Corporate Liability

### (a) White Paper Provisions

Enacting Clause	Intended Effect
Clause 8	Enact a revised s. 22 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p>The revised s. 22 would set out the conditions for corporate liability. These conditions vary according to whether the offence charged requires intent or recklessness, on the one hand, or criminal or simple negligence, on the other hand. For offences of intent or recklessness, s. 22(1) sets out the conditions for corporate liability; for offences of criminal negligence or negligence, s. 22(2) applies. Other features of the provision are as follows:</p> <p>The range of individuals for whose acts the corporation may be liable is very broad in both subsections. However, the range is more circumscribed as regards the mental element. Where the offence requires intent or recklessness, the state of mind must be found on the part of a person in authority in the corporation. For offences requiring criminal negligence or negligence, there need be no individual attribution of the failure to exercise reasonable care: the corporation may be liable for the collective failure of its managerial people to exercise reasonable care.</p> <p>"Corporation" and "bodies corporate" are defined to include partnerships, limited partnerships, and trade unions. This takes into account the recent decision of the Supreme Court in <i>United Nurses of Alberta v. Alberta (A.G.)</i>.<sup>25</sup></p> <p>Subsection 22(3) codifies the existing law to the effect that a corporation may be found guilty of an offence not only as the one who actually commits it, but also as a party.</p> <p>Subsection 22(6) makes applicable to any entity that falls within the extended definition of "corporation", the provisions of the <i>Criminal Code</i> applying on their face to corporations proper. Thus, for example, the provisions allowing for an <i>ex parte</i> trial of a corporation would apply, with the necessary changes, to a partnership charged as a "corporation".</p>	

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<sup>25</sup> (1992), 13 C.R. (4th) 1 (S.C.C.).

(b) *Discussion and Options*

The White Paper proposes that express rules of corporate liability be added to the *Criminal Code*. Currently, these rules derive from common law. Section 22 of the White Paper would expand the liability of corporations. At present, corporations are liable when an offence is committed by a senior executive in the firm in the course of his or her duties. This is referred to as the "identification theory" of liability. The liability of the corporation is identified with the liability of an individual within it.

Under the approach proposed, a corporation could be liable even where no one individual is identified as having committed an offence. The corporation could be liable if responsibility for the offence were spread among two or more persons within the corporation.

The drafting of s. 22 is complex, given that it contains both the fault and physical elements of corporate liability. Subsection (1) applies to offences of intention and recklessness. Subsection (2) applies to offences of negligence. This drafting could be simplified if the fault and physical elements were separated.

Another possible basis for corporate liability is where a "corporate culture" within the firm leads to commission of an offence. A corporation could be made liable for offences where senior individuals within the firm created a climate that fostered non-compliance with legal requirements or did not encourage compliance. A proposal along these lines has been discussed in Australia.<sup>26</sup>

The definition of "corporation" in s. 22(4) is quite broad. It would include a public body, body corporate, society, company, partnership, limited partnership and trade union. The question arises whether there is, or whether there should be, any limit on the scope of the principles of corporate liability. Should the same principles apply to the liability of any organization, such as a church, a school, or an Indian band? Alternatively, should the rules be limited in application to organizations formed for the purposes of generating profit, on the grounds that it is in relation to these kinds of groups that there are the most serious problems with compliance with the law? There is little jurisprudence on this issue in Canadian law. The White Paper gives some indication of where the rules of liability would apply, but would leave it to the courts to expand on them where appropriate, as they now do.

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<sup>26</sup> See the *Discussion Draft of the Australian Model Criminal Code*, Ch. 2, *General Principles of Criminal Responsibility*, Part 5, at 94-96.

### **Options in Relation to Corporate Liability**

- Option 1: The definition of corporate liability could provide the fault and physical aspects of corporate liability in a single provision.  
**(White Paper s. 22)**
- Option 2: The definition of corporate liability could separate the fault and physical aspects along the following lines:
- (1) For purposes of paragraph 21(1)(a), a corporation commits an offence when one or more of its representatives, acting under its express, implied or apparent authority, do or make, individually or collectively, the act or omission specified in the description of the offence, and the fault requirements of subsection (2) are satisfied.
  - (2) No corporation commits an offence unless
    - (a) in the case of offences of intention or recklessness, one or more of its representatives
      - (i) knows that the conduct referred to in subsection (1) is taking place, has taken place or will take place,
      - (ii) has its express or implied authority to direct, manage or control its activities in the area concerned, and
      - (iii) has, while executing that authority, the state of mind required for the commission of the offence; or
    - (b) in the case of offences of criminal negligence or negligence, one or more of its representatives, having its express or implied authority to direct manage or control its activities in the area concerned, and in the execution of that authority, fail, individually or collectively, to the degree applicable to that offence, to exercise reasonable care to prevent the conduct referred to in subsection (1).
  - (3) A corporation may be found liable whether or not the representatives referred to in subsections (1) and (2) are the same person or persons, whether or not any of them

is identified, and whether or not any of them has been prosecuted for or convicted of the offence.

Option 3: The concept of corporate culture leading to commission of offences could be introduced into the *Criminal Code*, in addition or as an alternative to the identity theory of liability. Corporate culture, as a basis of liability, could be confined to offences of [recklessness], negligence and criminal negligence. Such a provision could state as follows:

A corporation commits an offence when one or more of its representatives do or make, individually or collectively, the act or omission specified in the description of the offence, and there exists within the corporation an attitude, policy, or practice that directed, encouraged, tolerated or led to the offence, or that failed to require its representatives to comply with the law.

Option 4: The application of the General Part's provisions on corporate liability could

- (a) be limited to profit-oriented organizations,
- (b) be expanded to a wide range of organizations, such as a church, a school, or an Indian band, or
- (c) be left to the common law.



## VI. Inchoate Offences

### 1. White Paper Provisions

Enacting Clause	Intended Effect
Clause 9	Amend s. 24 and enact ss. 24.1, 24.2 and 24.3 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 24 - Attempts</i> This section does not alter the interpretation of the definition of attempt proposed by the Supreme Court in <i>Deutsch v. The Queen</i>.<sup>27</sup> See also s. 24.3 (Impossibility) discussed below.</p> <p><i>Section 24.1 - Counselling offence that is not committed</i> Section 24.1 brings the substantive aspect of s. 464 into the General Part, so as to complete the General Part's catalogue of inchoate offences. The sentencing aspect of s. 464 would remain in its present position. Correspondingly, s. 13 of the White Paper would modify s. 464 of the <i>Criminal Code</i> to take account of the fact that the definition of counselling an offence that is not committed has been moved to the General Part.</p> <p><i>Section 24.2 - Conspiracy</i> For the same reason, conspiracy is defined in the General Part, while its sentencing regime remains in s. 465. The definition of conspiracy is intended to codify the existing law, except with respect to conspiracies between spouses. The purpose of s. 24.2(2) is to abolish an exemption which existed at common law for spouses, which no longer has any place in modern society.</p> <p><i>Section 24.3 - Impossibility</i> This section amplifies the concept of an impossible attempt, conspiracy, or counselling. It modifies the common law, by allowing conviction for an attempt etc. which is impossible in law, so long as the offence attempted is an offence known to the law.</p>	

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<sup>27</sup> [1986] 2 S.C.R. 2.

## 2. Discussion and Options

The White Paper sets out rules of liability for attempts, counselling offences not committed, and conspiracy. Section 24 codifies the existing case law on attempts. Section 24.1 brings into the General Part the substantive rules on counselling incomplete offences currently contained in s. 464 of the *Criminal Code*.

The White Paper also codifies the current law on conspiracy, except that it abolishes the rule that spouses cannot conspire (s. 24.2). The rule in s. 24.2(1)(b) is intended to make clear that two people could be convicted of conspiracy if they agreed, for example, to hire a third person to actually commit the offence. This situation is not caught by s. 24.2(1)(a) since it speaks of an intention "to commit" the offence. However, it is possible to interpret s. 24.2(1)(b) in its current form as including in the definition of conspiracy agreements to do something lawful that involve some unlawful conduct on the part of some third party. This may be an overly broad definition of conspiracy. It may be possible to incorporate the intention of this provision in more limited terms by amending s. 24.2(1)(a) of the White Paper to refer to "a common intention that the offence shall be committed".<sup>28</sup>

Alternatively, paragraphs 24.2(1)(b) and 24.2(1)(b) could be combined and drafted so as to make clear that the conspirators must actually agree to be parties to some offence (i.e. to commit, aid, encourage or counsel commission of it) before they would be considered to fall within the definition of criminal conspiracy.

The scope of section 24.3 (impossibility) is best seen in examples. There will be an attempted theft where the article sought to be stolen is not in the place where the person believes it to be (attempt impossible in fact). There will also be an attempted theft where, for a reason unknown to the person, the article already belongs to him or her (attempt impossible in law). Under the existing law, this would not amount to an offence. However, it is clear under s. 24.3 (and under the current law) that there could never be an attempt to engage in conduct that is not unlawful. For example, it would not be an offence to attempt to commit adultery, as adultery is not an offence known to the law.

### Options in Relation to Conspiracy

- Option 1: Paragraphs 24.2(1)(a) and (b) of the White Paper could be combined to make clear that a conspiracy exists where a person agrees with one more persons to carry out a common intention either to commit an offence or that the offence be committed.

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<sup>28</sup> See The Law Commission, *A Criminal Code for England and Wales, Vol. 1, Report and Draft Criminal Code Bill* (1989), s. 48, p. 63.

Option 2: Paragraphs 24.2(1)(a) and (b) of the White Paper could be combined and drafted so as to make clear that a conspiracy exists where a person agrees with one or more persons to carry out a common intention to be parties<sup>29</sup> to the offence.

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<sup>29</sup> Under s. 21 of the White Paper, a person is a party to an offence if the person commits it, aids or encourages commission of it, or counsels another person to be a party to it, and that person subsequently becomes a party to it.

## VII. Defences

### 1. The Subjective Element of Defences

#### (a) *White Paper Provisions*

Enacting Clause	Intended Effect
Clause 10	Enact ss. 36, 37 and 38 <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 36 - Duress</i> Section 36 creates a new two-fold defence of duress: the new "duress by threats" would replace the existing s. 17 defence of compulsion; the new "duress of circumstances" would cover generally the excuse of necessity recognized by the Supreme Court in <i>Perka v. The Queen</i>.<sup>30</sup></p> <p><i>Section 37 - Defence of the person</i> Section 37 proposes a greatly simplified defence in place of the existing sections 34-37 of the <i>Criminal Code</i>. Essentially, a person may act in self-defence or defence of another against unlawful force, if his or her own force is necessary, reasonable, and proportionate.</p> <p><i>Section 38 - Defence of Property</i> Section 38 attempts to express in a more straightforward fashion the policies underlying the existing sections 38-42 of the <i>Criminal Code</i>. The concepts of "peaceable possession" and "claim of right" are brought forward from the existing provisions into the new proposals. Thus, s. 38(1) allows a person in peaceable possession of property <i>under a claim of right</i> to reasonably and proportionately protect the property against interference, even if the interference is lawful. The sole exception arises in relation to interference protected by s. 25 of the <i>Criminal Code</i> ("protection of persons acting under authority"). Subsection 38(2) deals with the person in peaceable possession of property but <i>without</i> a claim of right. Such a person may defend the property only against <i>unlawful</i> interference.</p>	

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<sup>30</sup> [1984] 2 S.C.R. 232.

*b) Discussion and Options*

The definitions of defences<sup>31</sup> proposed in the White Paper generally take into account the accused's perception of the circumstances in determining whether the accused's conduct gives rise to a defence. This approach is in keeping with the proposals of the Law Reform Commission, the CBA Task Force and the Parliamentary Sub-Committee. For example, for the defence of self-defence (s. 37), the White Paper states that a person acts in self-defence if, "in the circumstances as the person believes them to be", the person's acts are necessary to repel unlawful force and are reasonable and proportionate to the perceived harm. A similar approach can be seen in relation to the defence of defence of property (s. 38(1)) and the defences of duress of circumstances (s. 36(2)) and duress by threats (s. 36(3)). To counterbalance this purely subjective aspect, limitations of reasonableness and proportionality have been incorporated into the White Paper's definitions of defences.

This approach gives greater emphasis to the accused's point of view than is the case under the existing law. For example, in relation to self-defence under s. 34(2) of the current *Criminal Code*, the issue is whether the accused's apprehension of death or bodily harm was reasonable. As the Supreme Court of Canada decided in *R. v. Lavallée*,<sup>32</sup> personal characteristics of the accused are relevant to this question. Still, the accused is entitled to the defence only if his or her perceptions are found to be reasonable.

**Options in Relation to the Subjective Element of Defences**

- Option 1: Defences set out in the General Part could be founded on the accused's appreciation of the circumstances, subject to the requirement of reasonableness. (**White Paper ss. 36-38**)
- Option 2: In place of the accused's subjective awareness of circumstances, defences could be based on the reasonableness of the accused's assessment of circumstances, and reasonableness could be determined in light of the accused's individual characteristics (i.e. the approach in *Lavallée*).

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<sup>31</sup> The term "defences" is used here in a broad sense to include exemptions and partial defences, such as automatism, entrapment and intoxication.

<sup>32</sup> [1990] 1 S.C.R. 852.

## 2. Duress

The White Paper provisions on duress are summarized in the previous section. The White Paper addresses the traditional concept of duress and the common law defence of necessity in a single provision (s. 36) that recognizes both duress of circumstances (necessity) and duress by threats.

Section 36 limits these defences to offences other than murder. An alternative could be to recognize duress as a partial defence to murder. In circumstances where the accused killed another to save himself or herself, the person could be liable for manslaughter, rather than murder.

The CBA Task Force recommended that the requirement that the threat of death or serious bodily harm be imminent be removed from the definition of duress under the current law, since the threat of some future harm could be equally potent. The White Paper includes a requirement of imminence but, in view of the requirement that the threat of death or serious bodily harm be otherwise unavoidable, it could perhaps be deleted.

### Options in Relation to Duress

- Option 1: The General Part could provide that duress is not a defence to murder. (**White Paper s. 36(1)**)
- Option 2: Duress could operate as a partial defence to murder, serving to reduce murder to manslaughter in appropriate circumstances.
- Option 3: The requirement in the White Paper that the threat of death or harm be "imminent" could be deleted, given that the danger must be "otherwise unavoidable".

### 3. Automatism

#### (a) *White Paper Provisions*

Enacting Clause	Intended Effect
Clause 7	Enact a new s. 16.1 of the <i>Criminal Code</i>
<b>Commentary</b>	
<i>Section 16.1 - Automatism</i> Section 16.1 creates a new defence of incapacity which is closer to the medical definition of automatism than the traditional legal formulation of the defence. The new defence results in an exemption from criminal responsibility that is similar to the exemption for the defence of mental disorder.  A person putting forward a defence of automatism would rely on s. 16.1 and provide proof of that defence on a balance of probabilities. If the person is successful, the verdict will be "not criminally responsible on account of automatism," and the court or review board would determine whether a "disposition" should be made that would impose some form of control on the person.	

#### (b) *Discussion and Options*

The White Paper proposes that the defence of automatism be expressly recognized in the General Part as a defence of incapacity which results in an exemption from criminal responsibility, and be treated similarly to the defence of mental disorder. The *Criminal Code* defines mental disorder as "a disease of the mind". Under the current law, automatism that is the product of mental disorder is dealt with under the mental disorder provisions of the *Criminal Code*. Accused persons who act in an automatistic state caused by mental disorder are subject to the kinds of dispositions that apply to those found not criminally responsible on account of mental disorder. On the other hand, automatism that derives from an external source, such as a blow to the head that causes unconsciousness, results in a complete acquittal.

Thus, the White Paper departs from the current law by recognizing automatism as fundamentally an issue of capacity for criminal responsibility rather than an issue of guilt or innocence. As in the case of mental disorder, once the accused is found incapable, the issue of guilt or innocence does not arise. In the case of automatism caused by an external source,

the result would be a finding of not criminally responsible on account of automatism and an exemption from criminal responsibility.

The White Paper in s. 7 proposes enactment of a new s. 16.1 that would create the defence of automatism and define it as "a state of unconsciousness or partial consciousness that renders a person incapable of consciously controlling their behaviour". This definition is based on the view that forms of automatistic behaviour such as sleepwalking, which may involve a complex series of acts, are not involuntary, but are directed by the unconscious or partly conscious mind. The requirement that the state of unconsciousness or partial consciousness must be the cause of the incapacity would distinguish automatism from those situations where a person suffers from muscle spasms or reflex actions, of which the person is conscious, but which the person cannot control. As such, uncontrollable muscle spasms and reflex actions would continue to be dealt with on the basis of an absence of voluntariness. An accused who suffered from one of these rare disorders would be acquitted under the White Paper's approach.

As with the defence of mental disorder, the burden would be on the accused to prove automatism on the balance of probabilities. An alternative to the White Paper's approach would be to recognize and codify the defence of automatism as a defence of incapacity, which results in an exemption from criminal responsibility, but not place the burden of proof on the accused.

In addition, the White Paper provides for the enactment of procedures for dealing with those found to have committed acts that formed the bases of offences while in a state of automatism. Section 14 of the White Paper would establish a set of procedures analagous to those that now apply to the defence of mental disorder, which would permit the court or review board to make a variety of dispositions in relation to the accused. These dispositions are set out in the proposed s. 672.98 and include absolute discharge, conditional discharge or detention in hospital.

The effect of the White Paper's approach would be to treat cases of automatism similarly to mental disorder. However, the distinction between automatism deriving from mental disorder and other causes of automatism would be preserved. In the former case, the result would be a finding of not criminally responsible on account of mental disorder (see White Paper s. 672.97(2)). Where the automatic state was *not* the product of mental disorder, the result would be a finding of not criminally responsible on account of automatism (see White Paper s. 672.97(1)).

Alternatively, mental disorder could be defined to include automatism, which was the proposal that the Canadian Psychiatric Association presented to the Parliamentary Sub-Committee. The latter approach would mean that *all* persons who acted in an automatistic



state would be labelled as mentally disordered, which could stigmatize persons whose automatism was not due to mental disorder.

The reason for creating procedures similar to those for mental disorder, in order to permit different dispositions of the accused, is that even in cases where the source of the automatism is not due to mental disorder, the person may be a danger to the public and should not necessarily be released without conditions into the community. Under the White Paper's approach, there would be an opportunity to consider the risk the accused presents to the community and make an order for release, discharge under conditions, or detention in hospital.

An alternative to the White Paper's approach would be, in cases of automatism not due to mental disorder, to empower judges to acquit the accused and notify the appropriate provincial authorities, who would consider whether the accused should receive treatment.

A final alternative would be simply to preserve the current law under which an accused is acquitted where there is evidence of automatism not resulting from mental disorder.

#### **Options in Relation to Automatism**

- Option 1:     The General Part could provide a regime for automatism not due to mental disorder that paralleled the treatment of mentally disordered persons by placing the burden of proof on the accused and, where the defence was made out, empowering courts and review boards to make dispositions in relation to the person. **(White Paper approach)**
- Option 2:     The definition of mental disorder in the *Criminal Code* could be amended to include automatism.
- Option 3:     The General Part could provide that, in the case of automatism not resulting from mental disorder, courts could acquit the accused and, where there was a concern about the recurrence of automatism, would be empowered to notify appropriate provincial authorities of the case.
- Option 4:     The General Part could provide that accused persons who suffered from automatism not due to mental disorder receive an acquittal.

- Option 5: The General Part could recognize and define the defence of automatism without placing the burden of proof on the accused to establish the defence.

#### 4. Intoxication

##### (a) White Paper Provisions

Enacting Clause	Intended Effect
Clause 10	Enact s. 35 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 35 - Self-induced intoxication</i></p> <p>Section 35 codifies the law concerning the defence of self-induced intoxication, as it stood prior to <i>Daviault</i>,<sup>33</sup> and reflects the distinction drawn by the courts between offences of general intent and those of specific intent.</p> <p>Subsection 35(1) attempts to articulate the distinction between general intent and specific intent offences, and provides that self-induced intoxication is not a defence to a general intent offence, either in itself or as the basis for a defence of mistake of fact.</p> <p>Subsection 35(2) adds other circumstances where self-induced intoxication is not a defence, including where intoxication is expressly excluded as a defence, or is an element of the offence, (e.g. impaired driving).</p>	

##### (b) Discussion and Options

The White Paper (s. 35) proposed codification of the law of intoxication as it stood prior to *Daviault*.<sup>34</sup> By that approach, self-induced intoxication would exist as a defence only in relation to offences of specific intent and not in relation to offences of general intent. It would also be available to support a claim of mistaken belief as to a circumstance in relation to specific intent offences. It would not be available as a defence where the definition of the

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<sup>33</sup> *Daviault v. The Queen*, unreported, S.C.C., September 30, 1994.

<sup>34</sup> *Ibid.*

offence expressly excluded it or where intoxication was itself part of the definition of the offence (e.g. impaired driving).

In *Daviault*, the Supreme Court of Canada, by a majority, affirmed the distinction between offences of specific and general intent but held that intoxication may be raised in relation to general intent offences if the accused offers proof on the balance of probabilities that the intoxication was so severe that he or she was in a state akin to automatism or insanity and therefore lacked the basic intent to commit the offence or committed the prohibited act involuntarily. The majority held that the prior common law, which limited the availability of the defence of intoxication (for offences of general intent), violated s. 7 of the Charter and was not a reasonable limit under s. 1.

The following discussion and options should be read in conjunction with the earlier discussion of Automatism and, in particular, the proposal (White Paper s. 16.1) of a new special verdict of "not criminally responsible by reason of automatism." It should be noted that the White Paper's proposed special verdict is based on incapacity, rather than involuntariness, whereas the following discussion and options are based on the assumption in *Daviault* that intoxication may negate intention or voluntariness.

#### (i) Codifying the Current Law

Given the judgment in *Daviault*, it is no longer an option to codify the prior common law, as s. 35 of the White Paper would have done. Still, it remains an option to codify the distinction between offences of specific and general intent, taking into account that proof that the accused was in a state of extreme intoxication akin to automatism or insanity might negate the basic intention or the voluntariness requirement of basic intent offences. It would be problematic (and might implicate s. 7 of the Charter) to impose a burden of proof on accused persons in relation to the defence of voluntary intoxication for specific intent offences, as the result in some cases would be to convict persons against whom the mental element of the offence had not been proved beyond a reasonable doubt. It might be unfair, for example, to label a person a thief (theft being a specific intent offence) if the Crown could not prove that the person had an intention to steal. Thus, Option 1 imposes a burden of proof only in relation to basic intent offences and, as such, reflects the post-*Daviault* common law.

#### (ii) Intoxication in Relation to Fault Elements

Another way of providing a limited defence of self-induced intoxication would be to state expressly that evidence of intoxication may negate certain mental states, such as intention or knowledge, where it raises a doubt about the presence of those states. In relation to other

fault elements, taking *Daviault* into account, the defence of intoxication would succeed only where there was proof on the balance of probabilities that the accused lacked the required mental element or committed the prohibited act involuntarily. As such, evidence of intoxication could negate intention or knowledge, but, in relation to the fault elements of recklessness, criminal negligence or simple negligence, intoxication would be available as a defence only where the accused proved on a balance of probabilities that because of extreme intoxication he or she was in a state akin to automatism or insanity. For the reasons given above in relation to Option 1, the burden of proof would rest on the accused only for offences with lesser fault elements.

This option does not represent a radically different approach from that set out in Option 1. However, it has the advantage of tying the defence of intoxication to fault elements that are recognized and defined in the General Part. Thus, it may be a simpler approach to apply and may be more readily understood than the distinction between specific and general intent offences. This approach is set out in Option 2.

### (iii) An Offence of Criminal Intoxication

The Law Reform Commission, the Canadian Bar Association and the Parliamentary Sub-Committee on the General Part all recommended doing away with the distinction between specific and general intent offences and recognizing self-induced intoxication as a more general defence, as long as some form of offence of criminal intoxication was created at the same time. Mr. Justice Cory, writing for the majority in *Daviault*, also referred to the possibility of creating an offence of criminal intoxication, stating: "[I]t is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk."<sup>35</sup>

The motivation for creating an offence of criminal intoxication arises from two propositions. The first is that intoxication can impair a person's perception to the extent that the mental, or even the physical, element of the substantive offence charged may not be present. If that is the case, then, according to basic rules of criminal liability, the person should be acquitted of that offence. The second proposition is that a person who is acquitted of an offence because of voluntary intoxication cannot be said to be morally innocent. Such persons are blameworthy for having put themselves into such a state as to be disposed to commit unlawful conduct. For that, they should be subject to prosecution and punishment. Thus, an offence of criminal intoxication is aimed at the conduct for which the accused *can* be blamed, even if he or she cannot be held responsible for the substantive offence charged.

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<sup>35</sup> *Ibid.*, at 32.

All four varieties of liability for criminal intoxication described below would operate in law as included offences. This would mean that an accused could be convicted where there was evidence of voluntary intoxication even if the offence of criminal intoxication was not expressly charged.

One possible approach would be to impose liability for criminal intoxication in any circumstance where voluntary intoxication was raised successfully as a defence. The result of this approach would be to create an offence (or special verdict) of criminal intoxication which would apply in any case where the accused, had it not been for the voluntary intoxication, would have been liable for the substantive offence charged. It would not impose any burden on the Crown to prove voluntary intoxication or a fault element. This was the approach of the CBA Task Force. In procedural terms, it is the simplest form of liability for criminal intoxication.

However, this approach also raises potential constitutional issues of fundamental justice and the presumption of innocence, the very issues underlying *Daviault*. If voluntary intoxication operated as a general defence applicable to all offences, it would be successful wherever it raised a doubt about the existence of the elements of the offence. Even if the distinction between specific and general intent offences were preserved and, in relation to the latter, the burden of proof rested with the accused, voluntary intoxication would result in an acquittal on proof that the accused lacked the basic intent to commit the offence or committed the act involuntarily. In either case, if liability for criminal intoxication flowed automatically from an acquittal on the principal offence, the accused would be convicted on the basis of evidence short of proof beyond a reasonable doubt that he or she was legally responsible for the conduct involved. In effect, evidence sufficient for an acquittal on one charge would be equated with evidence sufficient for a conviction on another. This scenario could have constitutional implications. This approach is reflected in Option 3(a).

A slightly different approach was proposed by the Law Reform Commission of Canada.<sup>36</sup> The Commission's approach was to impose liability on an accused who had successfully raised a defence of voluntary intoxication if the elements of the offence charged were otherwise present. The accused would then be convicted of committing the crime charged "while intoxicated". This approach would amount to recognizing that evidence of voluntary intoxication could be substituted for whatever element of the original offence had, because of intoxication, been found to be absent. The problem with this approach is that it would not be strictly correct to say that the accused had committed the offence while intoxicated, since he or she would already have been found *not* to have committed the offence at all. In effect, a person would be convicted of the crime for which he or she had already been acquitted

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<sup>36</sup> *Report 31*, s. 3(3), at 30-2.

without proof of the simultaneous presence of the mental and physical elements of that offence. The thrust of the Commission's approach is set out as Option 3(b).

Other formulations of liability for criminal intoxication would impose a burden on the Crown to adduce evidence in relation to either fault or causation. In fact, recognizing the shortcomings of its earlier approach, the Law Reform Commission of Canada proposed a modified offence of criminal intoxication in its submissions before the Parliamentary Sub-Committee on the General Part. The Commission proposed an offence of self-induced intoxication *leading to commission* of unlawful conduct.<sup>37</sup> Such an offence would require the Crown to prove that the intoxication was the cause of the unlawful conduct. The offence would vary in its elements depending on the conduct in which the accused engaged. For example, the accused would be liable for "criminal intoxication leading to sexual assault" or "criminal intoxication leading to robbery".

Depending on the definition of "causation", an offence of criminal intoxication along the lines proposed by the Law Reform Commission could be difficult to prove. The Law Reform Commission itself had recommended a fairly stringent test of causation which would impose liability for a consequence where the accused's conduct "contributes significantly to its occurrence and no other unforeseen and unforeseeable cause supersedes it."<sup>38</sup> This test of causation would require the Crown to prove that the accused's voluntary intoxication contributed significantly to the resulting unlawful conduct. On the other hand, the White Paper proposed that a person's conduct be said to cause a consequence if it makes a more than negligible contribution to it (White Paper s. 12.2). This definition would impose a relatively light burden on the Crown to show that the unlawful conduct carried out by the accused was the product of voluntary intoxication. Presumably, if the accused were successful in raising a doubt about his or her blameworthiness in relation to the substantive offence through evidence of voluntary intoxication, it would follow that the accused's prior action (becoming intoxicated) made a more than negligible contribution to the consequences (the unlawful conduct). This would be even clearer in the case of general intent offences (assuming that the distinction between specific and general intent offences were preserved), since the accused would bear the burden of proving on the balance of probabilities that he or she lacked the basic intent of the offence or committed the conduct involuntarily because of voluntary intoxication. The approach of creating an offence of criminal intoxication leading to commission of unlawful conduct is set out as Option 3(c).

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<sup>37</sup> As proposed by the Law Reform Commission of Canada before the Parliamentary Sub-Committee on the General Part. See *Proceedings of the Sub-Committee*, Issue 1A:15.

<sup>38</sup> *Report 31*, s. 2(6), at 27.

Another formulation of an offence of criminal intoxication would be to recognize a general included offence of criminal negligence that would apply in circumstances where there was evidence of voluntary intoxication on the part of the accused. Such an offence would impose a burden on the Crown to prove that the intoxicated accused engaged in conduct that represented a marked departure from the standard of a non-intoxicated reasonable person. This kind of offence would therefore not be tied to particular forms of unlawful conduct, such as robbery or assault. In fact, it could apply even where the conduct involved was not specifically defined as a crime. This approach is set out as Option 3(d).

A variation on Option 3(d) would be to create an offence with a fault element of recklessness rather than criminal negligence. This would require the Crown to prove that the accused was aware of a risk of the consequences of his or her intoxication (the resulting harmful conduct) and decided to assume that risk. This would impose a burden on the Crown to prove subjective fault on the part of the accused. While this burden may be difficult to discharge in some cases, this approach is consistent with principles of criminal liability.

The relationship between self-induced intoxication and other defences could be complex if an offence of criminal intoxication were created. For example, take a case where an accused is acquitted of a charge of assault in circumstances where there was evidence that the accused was intoxicated and the accused presented evidence of self-defence. The accused may have been acquitted on any one of the following bases: (1) because the accused's intoxication led him or her to perceive a physical threat justifying the accused's actions, (2) because the actions of the accused were reasonable in any case (i.e. even if he or she had not been intoxicated) or (3) because the accused was so intoxicated that he or she was incapable of forming the intent to commit the assault. The question that would have to be decided if an offence of criminal intoxication were to be created is the following: In which of these circumstances, if any, would a conviction for criminal intoxication be justified? It would have to be made clear that an accused could be convicted of criminal intoxication only where, had it not been for the voluntary intoxication, the accused would have been convicted of the substantive offence. In other words, if there exists any other basis for an acquittal, the accused should not face liability for criminal intoxication.

There are procedural issues that must be addressed if an offence of criminal intoxication is created. As mentioned, Option 3(a) is the simplest in this respect, since it would create liability automatically where the defence of voluntary intoxication was successful, although it carries with it constitutional concerns. Option 3(b) would also be relatively simple in procedural terms. However, it has other shortcomings which have already been mentioned. The other options would be more complex since they would involve the production of some evidence by the Crown. The question is when the Crown would be required to advance evidence to prove the elements of the offence of criminal intoxication. If the Crown was proceeding on a case of assault, for example, it would attempt to place before the court

evidence that the accused had committed the assault and had done so intentionally. If there was some evidence that the accused was intoxicated, the Crown would have the burden of tendering evidence to prove criminal intoxication. Depending on how the offence was defined, the Crown might have to prove that, if the accused did not intend to commit the assault, (1) his or her voluntary intoxication led to commission of the assault; (2) the accused's conduct represented a marked departure from the standard of a reasonable, non-intoxicated person; or (3) the accused was aware of the risk that intoxication could lead to the unlawful conduct and decided to accept that risk. In effect, the Crown would have to put before the court evidence in relation to two different offences at once and argue alternative positions - that the accused should be convicted of the offence charged and, if acquitted of that offence on grounds of voluntary intoxication, convicted of the offence of criminal intoxication. In fact, the Crown might have to assert factually contradictory positions in some cases. On the one hand, the Crown would contend that the accused intended to commit the offence and, on the other hand, the Crown would argue that the accused, because of voluntary intoxication, did not intend to commit the offence and should be convicted instead of criminal intoxication.

Finally, the issue of the appropriate sentence would have to be addressed if an offence of criminal intoxication were created. One of the motivations for creating such an offence is to recognize that the culpability of a person who committed offensive behaviour while intoxicated may be different from that of a person who committed that conduct intentionally. The CBA Task Force recommended that persons convicted of criminal intoxication be punished as if they had attempted to commit the full offence. The maximum punishment for attempts under the current law is generally one-half of the maximum for the full offence.<sup>39</sup>

Another approach on sentencing would be to provide that the maximum punishment for criminal intoxication should be equivalent to the maximum punishment for the full offence charged and leave intoxication to be taken into account in sentencing. This would give judges a maximum amount of flexibility to adjust the punishment to the circumstances of the offence, including aggravating and mitigating factors, and the characteristics of the offender.

If a completely separate offence of criminal intoxication were created along the lines of Option 3(d), the penalty for that offence would not necessarily be tied to that provided for the particular offence charged. Thus, it would be possible to set the maximum penalty at a level appropriate for an offence of criminal negligence, perhaps corresponding to the punishment for criminal negligence causing death (life imprisonment) or bodily harm (10 years), as the case may be. Of course, all of the circumstances of the case, including the consequences of the accused's intoxication, would be relevant in the sentencing process.

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<sup>39</sup> S. 463.



(iv) Intoxication and Automatism

According to *Daviault*, an accused who tendered proof on the balance of probabilities that he or she was in a state akin to automatism or mental disorder as a result of voluntary intoxication may be acquitted of the offence charged. Under the White Paper's approach, a person who was in an automatistic state brought on by self-induced intoxication would be entitled to raise the defence of automatism and be found not criminally responsible on account of automatism. The person could then be made subject to a disposition order which could include treatment (on consent) for any alcohol or drug problem.

This approach would mean that a person who successfully raised the defence of voluntary intoxication resulting in a state akin to automatism would be treated in the same manner as a person found to be mentally disordered. This is obviously a recognition that intoxication to this degree should be treated extremely seriously by the legal system. In addition, the accused could be made subject to a disposition order that could include treatment (on consent) for alcohol or other substance abuse. The rationale for this approach lies in a concern for public safety. If a person is capable of such extreme self-induced intoxication, there is a strong likelihood that the person is in need of supervision and presents a danger to the public. Option 4 represents the White Paper's approach on this issue.

(v) Combining Options in Relation to Self-induced Intoxication

Some of the foregoing options in relation to voluntary intoxication might be combined. In particular, Option 4 could be readily combined with the first two options. For example, if Option 4 were combined with Option 1, the result would be a regime that operated as follows: Voluntary intoxication could be raised to negate the mental element of specific intent offences. In relation to general intent offences, voluntary intoxication would be an answer to a charge only if the accused proved on the balance of probabilities that the intoxication was to the point of automatism or insanity, in which case the accused could be made subject to a disposition order of a court or review board. Combining Option 4 with Option 2 would yield a similar result. Option 5 below sets out this combined approach.

Another possibility would be to combine Option 3 with the first two options. The result would be that a person who raised the defence of voluntary intoxication successfully in relation to an offence of basic intention (or, under Option 2, an offence with a fault element other than intention or knowledge) would be exposed to liability for criminal intoxication. A person who successfully raised voluntary intoxication in answer to a specific intent offence (or, under Option 2, an offence of intention or knowledge) would not be liable for criminal intoxication. The rationale for an approach along these lines would be that the kind of residual liability afforded by an offence of criminal negligence is only needed for the

*Daviault*-type case, since in relation to specific intent offences there is often an included offence for which the accused will be liable even if the defence is successful on the principal charge. Thus, the availability and scope of the defence of voluntary intoxication are issues primarily in relation to offences of so-called general intent. In addition, the most troubling concerns about intoxicated offenders exist in relation to offences like assault and sexual assault, for which the mental element is limited. Finally, it is in relation to persons who achieve the level of intoxication which is akin to automatism or insanity that the public requires the additional protection of an offence of criminal intoxication.

### **Options in Relation to the Defence of Self-Induced Intoxication**

- Option 1: The existing distinction between specific and general intent offences could be preserved and codified in a new General Part. Accordingly, evidence of intoxication may result in the negation of a motive, purpose or intention, other than a basic intention. (The same distinction would determine whether or not a mistaken belief as to a circumstance would provide a defence.) (White Paper s. 35.)<sup>40</sup> In relation to offences of basic intention, proof on the balance of probabilities of extreme intoxication rendering the accused in a state akin to automatism or insanity would result in an acquittal.
- Option 2: The General Part could provide that evidence of intoxication may result in the negation of particular mental states, such as knowledge and intention, but not recklessness, criminal negligence or simple negligence. (The same distinction would determine whether or not a mistaken belief as to a circumstance would provide a defence.) In relation to offences of recklessness, criminal negligence, or simple negligence, proof on the balance of probabilities of extreme intoxication rendering the accused in a state akin to automatism or insanity would result in an acquittal.
- Option 3: The General Part could recognize a general defence of self-induced intoxication which would apply to all offences. At the

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<sup>40</sup> Under Options 1 and 2, it is not all mistakes in relation to circumstances that would provide a defence. It is only where the mistaken belief relates to a defence or would negate responsibility for the offence that it might provide a defence (see White Paper s. 35(1)(b)(ii)).

same time, an offence of criminal intoxication causing harm could be created. There are four possible forms of such an offence:

(a) An accused who successfully raised a defence of voluntary intoxication in relation to an offence involving death or harm to persons or property could be made liable automatically for an offence of criminal intoxication.

(b) An accused who successfully raised a defence of voluntary intoxication could be made liable for committing the original offence charged while intoxicated.

(c) A person who caused death or harm to persons or property while in a state of voluntary intoxication could be liable for the offence of criminal intoxication leading to commission of the particular unlawful conduct involved.

(d) An offence of intoxicated criminal negligence could be structured along the following lines:

Every person who causes death or harm to persons or property, in circumstances where the person, in whole or in part because of intoxication, shows a marked departure from the standard of reasonable conduct of a person who is not intoxicated is guilty of an offence.

Alternatively, the fault element of this form of the offence could be recklessness, rather than criminal negligence:

Every person who recklessly causes death or harm to persons or property while in a state of voluntary intoxication is guilty of an offence.

Option 4: The General Part could provide that a person who entered an automatistic state because of self-induced intoxication would be dealt with under the provisions relating to automatism. In particular, the burden of proof could rest on the accused and, where the defence was made out, courts and review boards could be empowered to make dispositions in relation to the person.

Option 5: Option 4 could be combined with either Option 1 or Option 2 as follows:

Voluntary intoxication could negate the mental element of specific intent offences (Option 1) or offences of intention and knowledge (Option 2). However, in relation to general intent offences (Option 1) or offences of recklessness, criminal negligence and simple negligence (Option 2), voluntary intoxication could succeed only if the accused proved on the balance of probabilities that the intoxication put the accused in a state akin to automatism or insanity. In the latter case, the accused could be made subject to a disposition order from a court or review board (Option 4).

Option 6: Option 3 could be combined with either Option 1 or Option 2 as follows:

Voluntary intoxication could negate the mental element of specific intent offences (Option 1) or offences of intention and knowledge (Option 2). However, in relation to general intent offences (Option 1) or offences of recklessness, criminal negligence and simple negligence (Option 2), voluntary intoxication could succeed only if the accused proved on the balance of probabilities that the intoxication rendered the accused in a state akin to automatism or insanity. In the latter case, the accused could be made liable for criminal intoxication (Option 3).

## 5. Other Defences

Enacting Clause	Intended Effect
Clause 10	Enact ss. 34 and 39 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 34 - Ignorance of the law, mistake of law</i></p> <p>The new s. 34 would replace the provision concerning ignorance of the law which is currently found in section 19. Despite the stringency of the principle laid down by section 19, existing law recognizes a number of situations in which a person may rely on mistake or ignorance of law as a defence. Subsection 34(1) expressly sets these out. Thus, paragraph (a) allows the defence where, essentially, such a defence is contemplated by the section creating the offence. Paragraph (b) allows the defence in relation to a matter of "private rights". Note however that s. 34(2) makes clear that ignorance or mistake relating to any provision of an act or of regulations of general application, whether federal or provincial, is <i>not</i> a matter of private rights. Paragraph (c) allows the defence in the case of an "officially induced" error. Subsection 34(3) sets out in some detail the boundaries of the defence of "officially induced mistake of law".</p> <p><i>Section 39 - Entrapment</i></p> <p>Section 39 codifies <i>R. v. Mack</i><sup>41</sup> with two modifications. It provides that the defence is not available if the offence for which the accused is being tried involves the intentional or reckless causing of death or of serious bodily harm (s. 39(9)). It also gives the trial judge a discretion to hold an entrapment hearing prior to a finding of guilt, if the interests of justice so require (s. 39(5)).</p>	

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<sup>41</sup> [1988] 2 S.C.R. 903.

Enacting Clause	Intended Effect
Clause 11	Enact ss. 45 and 45.1 of the <i>Criminal Code</i>
<b>Commentary</b>	
<p><i>Section 45 - Emergency surgical or medical treatment</i> Section 45 is revised to accord more expressly with judicial interpretation and application of the present defence.</p> <p><i>Section 45.1 - Where act includes omission</i> This provision indicates that, in the provisions concerning defences, a reference to an act also refers to an omission. This simplifies the drafting of the proposed defences.</p>	

### **VIII. Miscellaneous Provisions**

Clause 12 would repeal the existing s. 219 since the new section 12.6 defines criminal negligence.

Clause 15 would allow for the coming into force of portions of the new General Part on different dates.