



Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

REPORT

recodifying criminal law

Revised and Enlarged Edition

31

Canada

REPORT 31

RECODIFYING
CRIMINAL
LAW

(Revised and Enlarged Edition of Report 30)

Available by mail free of charge from:

Law Reform Commission of Canada
130 Albert St., 7th Floor
Ottawa, Canada
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Suite 310
Place du Canada
Montréal, Québec
H3B 2N2

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Catalogue No. J31-51/1987
ISBN 0-662-54757-8

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June, 1987

The Honourable Ray Hnatyshyn, P.C., M.P.,
Minister of Justice
and Attorney General of Canada,
Ottawa, Canada

Dear Mr. Minister:

In accordance with the provisions of section 16 of the *Law Reform Commission Act*, we have the honour to submit herewith this Report, with our recommendations on the studies undertaken by the Commission on recodifying criminal law.

Yours respectfully,

A stylized, cursive signature in black ink, consisting of several loops and a long horizontal stroke at the end.

Allen M. Linden
President

A cursive signature in black ink, with the first name 'Gilles' clearly legible and the last name 'Létourneau' written in a flowing script.

Gilles Létourneau
Vice-President

A signature in black ink that starts with a large 'J', followed by a horizontal line with an arrow pointing to the right, and ends with a stylized 'G'.

Joseph Maingot, Q.C.
Commissioner

A cursive signature in black ink, with the first name 'John' clearly legible and the last name 'Frecker' written in a flowing script.

John Frecker
Commissioner

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Introduction

This is a revised and enlarged edition of Report 30 proposing a new Code of Substantive Criminal Law for Canada. Report 30, also entitled *Recodifying Criminal Law*,¹ was tabled in Parliament on December 3, 1986, by the Minister of Justice, the Honourable Ray Hnatyshyn, who commented: "This report is a valuable contribution to criminal law reform and should be recognized as an important first step in the process of renewal."²

Preliminary reactions to Report 30 by bench, bar, police, media and public were highly encouraging. The Commission has, therefore, decided to propose a revised and enlarged edition of the new Code. We recognize that this is only a first step in a long process leading ultimately, we hope, to the enactment of a new Criminal Code made in Canada by Canadians for Canadians and more accurately reflecting our national identity and our common values.

Our present *Criminal Code*³ was originally enacted in 1892⁴ — the fulfilment of Sir John A. MacDonald's dream of giving our fledgling nation a uniform set of criminal laws. Its enactment put Canada in the vanguard of criminal law reform. The ravages of time, however, took their toll, and Canada is no longer in that happy position.

The present *Criminal Code* has served us well over the past ninety-five years but is no longer adequate to our needs. Even though amended many times, with a major revision in 1955,⁵ it remains much the same in structure, style and content as it was in 1892. It is poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled by the judiciary. It includes obsolete provisions. It over-extends the proper scope of the criminal law. And it fails to address some serious current problems. Moreover, it has sections which may well violate the *Canadian Charter of Rights and Freedoms*.⁶

As we mentioned in Report 30, the new Criminal Code proposed by the Commission results from fifteen years of philosophical probing, researching, thinking, debating, writing, consulting and publishing on numerous criminal law subjects. It also represents the full co-operation of federal and provincial governments in the Accelerated

1. Law Reform Commission of Canada, *Recodifying Criminal Law*, vol. 1 (Report 30) (Ottawa: LRCC, 1986) [hereinafter Report 30]. **The present revised and enlarged edition supersedes Report 30.**

2. "Justice Minister Tables Report of Law Reform Commission Recodifying Criminal Law, Vol. 1," *News Release* (Ottawa: Department of Justice, 3 Dec. 1986).

3. *Criminal Code*, R.S.C. 1970, c. C-34 [hereinafter *Criminal Code*].

4. *Criminal Code*, S.C. 1892, c. 29 [hereinafter 1892 *Code*].

5. *Criminal Code*, S.C. 1953-54, c. 51.

6. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

Criminal Law Review. The work of these fifteen years was presented prior to publication of Report 30 in various Reports and Working Papers which should be consulted for a fuller understanding of the present Report. Attention is drawn in particular to the following:

- Report 3, *Our Criminal Law* (1976)
- Report 12, *Theft and Fraud* (1979)
- Report 17, *Contempt of Court* (1982)
- Report 20, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1983)
- Working Paper 2, *The Meaning of Guilt: Strict Liability* (1974)
- Working Paper 10, *Limits of Criminal Law: Obscenity: A Test Case* (1975)
- Working Paper 16, *Criminal Responsibility for Group Action* (1976)
- Working Paper 19, *Theft and Fraud: Offences* (1977)
- Working Paper 20, *Contempt of Court: Offences against the Administration of Justice* (1977)
- Working Paper 26, *Medical Treatment and Criminal Law* (1980)
- Working Paper 28, *Euthanasia, Aiding Suicide and Cessation of Treatment* (1982)
- Working Paper 29, *The General Part: Liability and Defences* (1982)
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- Working Paper 33, *Homicide* (1984)
- Working Paper 35, *Defamatory Libel* (1984)
- Working Paper 36, *Damage to Property: Arson* (1984)
- Working Paper 37, *Extraterritorial Jurisdiction* (1984)
- Working Paper 38, *Assault* (1984)
- Working Paper 44, *Crimes against the Environment* (1985)
- Working Paper 45, *Secondary Liability — Participation in Crime and Inchoate Offences* (1985)
- Working Paper 46, *Omissions, Negligence and Endangering* (1985)
- Working Paper 47, *Electronic Surveillance* (1986)
- Working Paper 48, *Criminal Intrusion* (1986)
- Working Paper 49, *Crimes against the State* (1986)
- Working Paper 50, *Hate Propaganda* (1986)

In producing all this work we have profited enormously from the practical advice of our consultants. These were drawn from across Canada and include eminent judges, criminal lawyers, law teachers, representatives of provincial and federal governments, police chiefs and the general public (Appendix C). We have also benefitted from the flowering of criminal law scholarship in Canada and the burst of judicial creativity on criminal law.

The proposed Criminal Code expresses the essential principles of criminal law and rules of general application. It defines most of the crimes of concern to a modern industrialized society. At the same time it drops archaic provisions but addresses modern day social problems like pollution and terrorism.

In style the new Code aims to be intelligible to all Canadians. It is drafted in a straightforward manner, minimizing the use of technical terms and avoiding complex sentence structure and excessive detail. It speaks, as much as possible, in terms of general principles instead of needless specifics and *ad hoc* enumerations. Finally, it

avoids deeming provisions, piggybacking and other indirect forms of expression, on the basis that the direct way of saying anything is the simplest, the clearest and most readily understandable.

In structure the new Code is like the present *Criminal Code* but begins with crimes against the person instead of crimes against the State. Substantive criminal law is divided into a General Part containing rules of general application and a Special Part defining the particular crimes. Title I is the General Part; Title II contains most of the crimes against the person; Title III enumerates most of the crimes against property; Title IV lists crimes against the natural order; Title V deals with crimes against the social order; and Title VI encompasses crimes against the governmental order.

Each title is subdivided where appropriate by reference to the interests infringed. Crimes against the social order, for example, are divided into crimes against social harmony and crimes against public order.

Each subcategory is further subdivided where appropriate. Crimes against social harmony, for example, are divided into: stirring up hatred and inciting genocide.

Finally, the crimes in these subcategories are mostly listed in ascending order of gravity. Less serious crimes precede more serious ones which include or build upon them. In crimes against public order, disturbing public order precedes unlawful assembly (disturbing by three or more) which in turn precedes riot (unlawful assembly resulting in risk of injury or property damage). Naturally, the provisions in all these titles affect and are affected by the principles set out in the General Part.

Our proposed new Code whose recommendations are summarized in Appendix A is not yet in the form of a Bill to be presented to Parliament; rather it is a proposal for a new statute. What that statute might look like can be seen in the illustrative draft legislation in Appendix B. **All references to the proposed Code, however, are to the recommendations and not to the legislative draft.** Moreover, though the recommendations and draft Bill are written in the traditional style, the final draft, it is envisaged, will ensure that as far as possible its provisions are gender neutral.

A few topics, because of their specialized nature or because others have dealt with them, are left to be considered later. They include trade and securities frauds, abortion, sex offences, prostitution and pornography. Sentences have not been ascribed to the crimes, as that task has been performed by the Canadian Sentencing Commission.⁷ Our work on criminal law procedure, which continues apace, will be put into the form of a proposed new Code of Criminal Procedure in the near future.⁸

Absent from our proposed Criminal Code are provisions dealing with burden of proof and presumptions. Although the present *Criminal Code* contains many such provisions, the Commission has eliminated them entirely from its recommendations to reflect its views on inculcation. Substantive criminal law provisions define conditions

7. Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (Ottawa: Supply and Services Canada, 1987).

8. Our forthcoming **Code of Criminal Procedure** (to be published in 1989) will contain our recommendations on the general principles of criminal procedure already described in LRCC, *Our Criminal Procedure* (Report 32) (Ottawa: LRCC, 1988) [to be released soon]. **All references to the Code of Criminal Procedure are to the former publication.**