

**"Source: Department of Justice Canada,  
*Papers Prepared for the Department of Justice in Response to the White Paper  
"Proposals to Amend the Criminal Code (General Principles)"*, March 1994.  
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# PARTIES TO AN OFFENCE

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This draft paper has been prepared for the Department of Justice's Consultation Meeting with criminal law teachers on the White Paper on the General Part of the Criminal Code, held in Ottawa, March 25-26, 1994.

## Table of Contents

I.	Introduction	1
II.	Policy Underlying the Policy Provisions	2
III.	Do the Proposed Party Provisions Convey Effectively the Policy?	3
IV.	Comparing White Paper Proposals with Existing Code Sections	4
	1. Every One Becomes Every Person	5
	2. Abets Becomes Encourages	5
	3. Aiding Remains the Same	5
	4. Re-uniting Counselling with Aiding and Encouraging	5
	5. Committed in a Way Different Than That Counselling	5
	6. The Common Unlawful Purpose Doctrine	6
	7. "Ought to have known" Eliminated from Counselling Provision	7
	8. Counsel Includes Advise	7
V.	Other Modifications To The Party Provisions	7
	1. LRCC Proposals	8
	2. Creating Consistency in the Language Used	9
	3. Who Is A Principal Offender?	10
	(a) Perpetrators and Co-Perpetrators	10
	(b) The Doctrine of Innocent Agency	11
	4. Application to Omissions	11
	5. Mens Rea Requirement	12
	6. Parties to Complete and Inchoate Crimes	14
	7. Aid, Encourage or Counsel An Offence, But Only Attempt or Lesser Included Offence Committed	15
	8. Aid, Encourage or Counsel One Offence, But An Entirely Different Offence is Committed	16
VI.	Section 23.1: Where One Party Cannot Be Convicted	16
	a. Section 23.1 and Accessories after the Fact	17
	b. The Meaning of Section 23.1	18
	(i) "Can not be Convicted of the offence"	18
	(ii) "Or is Otherwise Relieved of Criminal Responsibility"	19
	(iii) "Has been Acquitted"	20
	c. The Policy Question	20

## I. Introduction

This paper covers "parties to an offence" as dealt with in sections 21 and 23.1 of the White Paper and sections 21, 22 and 23.1 of the Criminal Code. Persons who are accessories after the fact (s. 23) or who counsel an offence that is not committed (s. 24.1) are guilty of separate offences (ss. 463 and 464). They are not "parties" to the primary offence. Because this "brief" paper is designed to discuss "parties to an offence", these latter two offences will only be mentioned tangentially.<sup>1</sup>

The proposed amendments in the White Paper to the existing party sections (21, 22 and 23.1) are, with one exception, rather modest, although they are generally sound. Further modifications are warranted if the new General Part is to achieve the stated goals of being clear, rational and reasonably comprehensive.

In recommending modifications to the party provisions, I am operating on the following assumptions:

- (1) the party provisions should be clear, logical and consistent with general principles of criminal liability;
- (2) they should be "reasonably" comprehensive; and
- (3) they should be based on existing statutory language if that language has a well settled meaning and is neither archaic nor ambiguous.

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1. For a fuller discussion of parties and related areas in Canada, see V. Gordon Rose, Parties to An Offence; LRCC, Working Paper 45, Secondary Liability (1985); LRCC, Report 31 Recodifying Criminal Law (1986); D. Stuart, Canadian Criminal Law ch. 10 (2nd ed. 1987); E. Colvin, Principles of Criminal Law, ch. 10 (2nd ed., 1991); A. Mewett and M. Manning, Criminal Law, pp. 42-62 (2nd ed. 1985); and G. Ferguson and J. Bouck, Canadian Criminal Jury Instructions, Chs. 5.00, 5.01, 5.02 and 6.00 (1993) [hereinafter cited as CRIMJI].

## II. Policy Underlying the Party Provisions

For centuries, both common law and civil law countries have imposed criminal liability on persons who have "actually" committed the offence, as well as on persons who have otherwise participated in the commission of an offence.<sup>2</sup> The underlying premise is that persons who aid, encourage, counsel, procure or incite an offence have contributed to the commission of the offence and should share in the blame and responsibility for the offence, rather than holding the person who actually commits the offence exclusively liable for it. (This underlying premise is relevant when examining the causal requirement, if any, for "secondary" parties.)

The policy reflected in the current party provisions was codified as early as 1275.<sup>3</sup> That early codification recognized the person who actually committed the criminal conduct as the principal offender and classified other participants as accessories. Under that statute, both principals and accessories were guilty of the same offence and subject to the same penalties. That same policy exists today in our party provisions.

Neither the White Paper nor the Parliamentary Subcommittee Report recommend a change in the current policy of holding the principal offender and other "secondary" parties liable to the same offence and the same range of penalties. I think that policy is justifiable and sensible. I am not aware of any substantial movement to change that policy. It is true that the principal offender may often be more culpable than the secondary parties, but this is not always so. In some offences (e.g. organized crime, large scale drug trafficking, etc.) the aider, abettor or counsellor may be the kingpin. The degree of culpability between the

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2. LRCC, Working Paper 45, at 9-14.

3. Statute of Westminster, 3 Edw. I, c. 14.

principal offender and the other parties is best left to judicial discretion at the sentencing stage.

**III. Do the Proposed Party Provisions Convey Effectively the Policy?**

Although the existing and proposed party provisions list the various methods by which a person can become a "party" to an offence, those provisions do not expressly state the consequences of being found to be a party to an offence. They do not say that a person who is a party to an offence has committed or is guilty of that offence and therefore subject to the range of penalties available for that offence. Those consequences are implied, but I would think it better that they be expressed.

Prior to the 1954 revision of the Code, s. 69(1) of the Code (R.S.C., 1927, c. 36) provided:

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

In the 1954 revision, s. 69 was renumbered as s. 21. By deleting the words "and guilty of" from s. 21, section 21 was transformed into a definition section, rather than offence creating section.

**Recommendation**

*Rather than reinsert the words "and guilty of" in s. 21(1), a separate provision should be enacted which would also include within its scope parties in sections 21(2) and 21(3). The following provision should be included as part of the party provisions:*

*Every person who is a party to an offence commits (or is guilty of) that offence and liable to the punishment prescribed for that offence.*

**IV. Comparing White Paper Proposals with Existing Code Sections**

**Current Provisions**

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

....

22.(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

....

21(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence, R.S., c. C-34, s. 21.

....

22(2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed on consequence of the counselling.

....

**White Paper**

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

(d) counsels any person to be a party to it, where the person counselled is afterwards a party to it,  
*notwithstanding, in the cases of paragraphs (b) to (d), that the offence was committed in a way different from that which was aided, encouraged or counselled.*

(2) Where two or more persons form a common intention to be parties to an offence and to assist each other therein and any one of them, in carrying out the common intention, commits another offence, each of them who was aware of a substantial risk that the commission of that other offence would be a consequence of carrying out the common intention is a party to that other offence.

(3) Every person who counsels another person to be a party to an offence is a party to every offence that the other person commits in consequence of the counselling, if the person who counselled was aware of a substantial risk that the commission of that offence would be a consequence of the counselling.

22(3) For the purposes of this Act, "counsel" includes procure, solicit or incite.

(4) *In this Act, "counsel" includes advise, procure, solicit or incite.*

**1. Every One Becomes Every Person**

The White Paper proposal changes the words "Every one" to "Every person" in s. 21(1) of the Code. This does not appear to me to effect a change in the law since "everyone" and "every person" seem to have the same meaning according to s. 2 of the Code.

**2. Abets Becomes Encourages**

The word "abets" is changed to "encourages". Since the word "abets" is archaic and it has been consistently interpreted by the courts to mean "encourages", the White Paper's proposed word change ought to be supported.<sup>4</sup>

**3. Aiding Remains the Same**

The word "aiding" is retained in the White Paper. It has been consistently given its ordinary meaning: "to help or assist".<sup>5</sup> The LRCC proposal uses the word "helps", rather than "aids". In my opinion, either word is appropriate.

**4. Re-uniting Counselling with Aiding and Encouraging**

Paragraph (d) and the closing lines of s. 21 of the White Paper proposal place within s. 21 the concept of counselling as currently defined in s. 22(1). Until the 1954 Code revision, counselling was included as paragraph (d) in section 21 (then s. 69). Placing counselling back into s. 21 as proposed by the White Paper is sensible.

**5. Committed in a Way Different Than That Counselled**

The closing lines in section 21(1) of the White Paper proposal extend to aiders and encouragers a concept of party liability which the Code currently

4. See the cases cited in Ferguson and Bouck, CRIMJI 5.00, n. 8.

5. See the cases cited in Ferguson and Bouck, CRIMJI 5.00 n. 5.



reserves only for counsellors [s. 22(1)]. Under the White Paper proposal a person is a party to an offence notwithstanding the fact that the offence was committed in a way different from that which was "aided, encouraged" or counselled. This extension is sound in principle and effects consistency between the counselling, and the aiding and encouraging provisions.

**6. The Common Unlawful Purpose Doctrine**

Section 21(2) of the White Paper is an important improvement over the existing provision. It should be strongly supported. The main improvement is the elimination of the objective, constructive liability provision found in the words "or ought to have known" in the current s. 21(2). It is not defensible to hold a secondary party liable on an objective standard for offences where the principal offender can only be convicted on the basis of subjective liability. The proposed test requires a person to be "aware of a substantial risk" that another offence would be a consequence of carrying out the common intention. The insertion of the words "substantial" before risk is a sensible policy decision. Of course, what exactly constitutes a "substantial" risk will, like all such standards, have to be worked out to a certain extent on a case by case basis.

The proposed section eliminates the phrase "to carry out an unlawful purpose" and substitutes the phrase "to be parties to an offence". That change clarifies the law and creates greater consistency in the legislative language used in other parts of s. 21. Likewise, substituting the words "commits another offence" for the words "commits an offence", makes it clearer that s. 21(2) only applies where the "other offence" committed is a different offence than the "common intention" offence.<sup>6</sup>

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6. Currently the law as a result of the decision in R. v. Simpson and Ochs, [1988] 1 S.C.R. 3, at 15.

7. **"Ought to have known" Eliminated from Counselling Provision**

For the same reasons as mentioned above, section 21(3) of the White Paper, which eliminates the objective, constructive liability provision in s. 22(2) of the current Code, is to be applauded and should be strongly supported.

8. **Counsel Includes Advise**

Section 21(4) of the White Paper adds the word "advise" to the existing description of "counsels" which currently includes "procure, solicit or incite". Since the primary meaning of counsel is to advise or recommend, it is wise to include the word "advise" in the definition of counsel. The words "procure, solicit or incite" overlap. They are not further defined in the code. They are normally defined by judges for the jury as including "to advise, to recommend, to instigate, to encourage, to persuade, to urge, to stir up or to stimulate."<sup>7</sup> Since the Crown need only establish one of these to constitute counselling, the overlap in the above words does no real mischief.

V. **Other Modifications To The Party Provisions**

Although the party provisions in the Code have remained substantially the same since 1892, those provisions are neither as comprehensive nor as clear as they could be. There is ambiguity and uncertainty about the actus reus and the mens rea of the various party provisions. There is also uncertainty on the extent to which other general provisions apply (e.g. attempts and some defences). In short, the sections do not actually say what the courts have generally assumed or presumed they mean.

Some of the confusion relates to the fact that liability for secondary parties is partly derivative (grounded on the actus reus of the principal) and partly

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7. See Ferguson and Bouck, CRIMJI 502, paras. 7, 12 and 13 and the cases referred to therein.

independent (i.e. the principal and secondary parties may be convicted of different offences due to different states of mind or the availability of defences to one party but not to other parties).<sup>8</sup>

In my opinion the most consistent way out of the doctrinal confusion is to act upon the policy which underlies the party provisions. The party provisions state that there are various ways (or modes) to commit a crime. The general principles of criminal liability (concerning actus reus, mens rea and defences) which apply to one mode (principal offenders) should be consistently applied to the other modes of participation (except to the extent that logic or policy dictates otherwise).

#### 1. LRCC Proposals

The LRCC (Working Paper 45 as modified in Report 31) would abolish the scheme of placing principal offenders and secondary offenders under the same rubric of "parties". Instead, the Commission recommends two separate offence categories for participation in crime. The two categories are "committing" a crime and "furthering" a crime:

- (1) committers - persons who solely or jointly do the conduct defined as the crime.
- (2) furtherers - persons who help, advise, encourage, urge, incite or use another person to commit the crime and that person completely performs the conduct specified by its definition.

Like our existing Code provisions, committers and furtherers would be liable for the same offence and the same penalties. However a distinction would be clearly drawn between completed crimes of committing and furthering and uncompleted crimes of attempted committing and attempted furthering. That distinction is

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8. See, e.g. R. v. Kirkness, [1990] 3 S.C.R. 74; R. v. Davy, S.C.C. D. 5545-03 as yet unreported; and R. v. Nurse (1993), 83 C.C.C. (3d) 546 (Ont. C.A.).

somewhat unclear in our current Code in regard to aiders and abettors, but not in regard to counsellors.

The Parliamentary Subcommittee offered the "tentative view" that the LRCC's proposal for "furthering" crime is attractive, but the Subcommittee did not subject the LRCC's proposal to any detailed scrutiny. The LRCC's attempt to design a clear yet logical scheme for participation in crime is laudable. However, neither the CBA Task Force Report nor the White Paper pursued the LRCC's scheme. In my opinion, the principal objectives of the LRCC scheme -- clarity, logic and simplicity -- can be achieved by modifying the existing provisions, without creating an entirely new structure and vocabulary of committers and furtherers. In addition the LRCC proposal as drafted contains some ambiguities and uncertainties which need not be pursued at this time.<sup>9</sup>

## **2. Creating Consistency in the Language Used**

The language used in section 21(2)(b) and (c) should be amended to make it consistent with the language used in s. 21(1)(d) of the White Paper. Sections 21(1)(b) and 21(1)(c) make it an offence to aid or encourage any person "to commit an offence", whereas section 21(1)(d) makes it an offence to counsel any person "to be a party to an offence". The latter expression is preferable and should be used in sections 21(1)(b) and (c). The words "aid a person to commit it" are potentially ambiguous. They may be taken to refer only to aiding a person who "actually" commits it, and therefore be held not applicable to other secondary parties. There is no reason in principle why the counselling provision should apply

9. For example, the LRCC's proposal on attempted furthering deals with situations where assistance, advice etc. is given, but nonetheless the principal does not complete the crime. But the LRCC proposal does not deal with situations where the furtherer attempts to (tries to) give assistance or advice to the principal, but the principal does not receive the advice or assistance, and, in any event, does not complete the offence. See, e.g., Ransford (1874), 13 Cox C.C. 9. This situation could be dealt with under the current Code as an attempt (s. 24) to commit the offence of s. 464 (i.e. counselling an offence that is not committed).

to counselling all parties, but the aiding and abetting provision should apply only to aiding or abetting the principal offender.

**3. Who Is A Principal Offender?**

Section 21(1)(a) of the White Paper uses the same language as the existing law in declaring that a person is a party to an offence who "actually commits it." Such persons are sometimes referred to as principal offenders or perpetrators.

**(a) Perpetrators and Co-Perpetrators**

Existing law clearly recognizes that a person can "actually" commit an offence as a sole perpetrator or as a co-perpetrator. The difference between a co-perpetrator and an aider and abettor is sometimes hard to define.<sup>10</sup> Unfortunately the distinction must be drawn in cases involving the defence of duress or compulsion since the principal offender must rely on s. 17, whereas secondary parties may rely on the common law defence of duress.<sup>11</sup>

The LRCC (Report 31) expressly indicates that a person may commit an offence solely or jointly with another person. A similar provision could be inserted in s. 21(1)(a) along the following lines:

21.(1) Every person is a party to an offence who, solely or jointly with one or more persons,  
(a) actually commits it  
(b) . . . .

By inserting the words "solely or jointly" in the opening line of s. 21(1), it is made clear that a person can actually commit an offence, or can aid, abet or counsel an offence, either solely or jointly with others.

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10. See, for example, the cases cited in Ferguson and Bouck, CRIMJI 8.20 n. 2.

11. See Paquette v. The Queen, [1977], 2 S.C.R. 189; but see also R. v. Langlois (1993), 80 C.C.C. (3d) 28 (Que.C.A.) holding that s. 17 of the Code, which applies to principal offenders, is unconstitutional.

(b) The Doctrine of Innocent Agency

In R. v. Berryman<sup>12</sup> the B.C. Court of Appeal held, through Wood J.A., that at common law a person who committed an offence by means of an innocent agent was deemed to be the actual perpetrator, that this doctrine was not abolished by codification of the "parties provisions" in 1892 and that section 21(1)(a) can and should be construed so as to give effect to the doctrine of innocent agency. Wood J.A. cites with approval the following passage from Glanville Williams, Criminal Law: The General Part:

The principal in the first degree need not commit the crime with his own hands; he may commit it by a mechanical device, or through an innocent agent, or in any other manner, otherwise than through a guilty agent. An innocent agent is one who is clear of responsibility because of infancy, insanity, lack of *mens rea* and the like. *In law he is a mere machine whose movements are regulated by the offender.* [emphasis added]

The doctrine of innocent agency should be expressly included in the party provisions along the following lines:

A person who, with the state of mind specified for that offence, uses an innocent agent to commit an offence shall be deemed under s. 21(1)(a) to have actually committed it. An innocent agent is a person who is not criminally responsible because of infancy, mental disorder, lack of mens rea or other lawful excuse.

The express recognition and inclusion of the doctrine of innocent agency as an aspect of "principal" liability must be taken into account in evaluating the need for s. 23.1.

4. Application to Omissions

Section 21(1)(b) in both the existing Code and the White Paper creates liability for aiding by omission. The general rule, at least as it has been applied to principal offenders, is that there is no criminal liability for omissions in general, but rather only for the omission of duties imposed by law. The same general principle

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12. (1990), 48 B.C.L.R. 105 (B.C.C.A.).

should apply to parties. This can be accomplished by deleting any reference to acts or omissions and simply using the word "assists". Then relying on general principles of criminal liability, a person could be held to have "assisted" either by acts or omission of a legal duty. Alternatively, if the current reference to "omission" is retained, section 21(1)(b) should be amended to include expressly a reference to "omission of a legal duty".

5. **Mens Rea Requirement**

Section 21 does not consistently or adequately address the mens rea requirement for parties. Paragraphs (a), (c) and (d) are silent; paragraph (b) uses the expression "for the purpose of aiding" and sections 21(2) and 21(3) use the expression "aware of a substantial risk" that the other offence would be a consequence of the common intention or counselling.

In regard to subsection 21(1)(b), most courts have not interpreted the expression "for the purpose of" as meaning motive or purpose, but rather as if it meant "with knowledge (or awareness) that" one's acts or omissions would assist another person to commit it.<sup>13</sup> However there have been a few cases where the courts seem to have required proof of "purpose".<sup>14</sup> The Parliamentary Subcommittee (pp. 66-67) seemed to think that the CBA Task Force was expanding the existing law by substituting "knowledge" for "purpose" as the requisite mens rea requirement for s. 21(1)(b). However, the Subcommittee's comments do not seem to take into account the interpretation which most courts have given to the word "purpose" in s. 21(1)(b).

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13. See case law cited in Ferguson and Bouck, CRIMJI 5.00 n. 10.

14 Ibid.

If the word "purpose" is retained in section 21(1)(b), it should also be noted that that word is not one of the mens rea words defined in clause 6 of the White Paper.

As a matter of general principle, I see no reason why liability for aiding should be restricted to specific intent, motive or purpose. I agree with Professor Stuart<sup>15</sup> that the mens rea requirement for secondary parties should not be limited to specific intent but should also include recklessness or wilful blindness measured subjectively. I am inclined however to go one step further for the sake of consistency and logic.

There will be some criminal offences (few I hope) where the principal offender may be convicted on the basis of penal negligence (a substantial departure from the conduct expected of a reasonable person in similar circumstances). If the principal offender of such offences may be convicted on the basis of penal negligence, is it inconsistent or contrary to policy to apply the same fault standard to secondary parties involved in such offences? Although such situations may arise infrequently in practice, they are not inconceivable. For example,

- A owns a car and allows B to drive it.
- A is a passenger in the front seat.
- B drives the car in a dangerous manner.
- A is under a legal duty to take some steps to prevent his car (or property) from being used in a criminal manner.<sup>16</sup>

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15. See Canadian Criminal Law, 2nd ed., 1987, at p. 519.

16. See, e.g., R. v. Kulbacki (1966), 47 C.R. 233 (Man. C.A.); and R. v. Roy (1900), 3 C.C.C. 472 (Que. S.C.).



- A does nothing because A is honestly unaware of the fact that B's driving is dangerous, although a reasonable person would clearly and easily recognize that B's driving was dangerous.
- The principal offender B is guilty of dangerous driving on the basis of penal negligence (whether or not he/she was subjectively aware of the danger).
- Assuming A's conduct (in this case an omission of A's legal duty) is a substantial departure from the conduct expected of a reasonable person in similar circumstances, A will be
  - (1) a party to B's dangerous driving if the fault level for A's act or omission of assistance, encouragement or counselling is penal negligence, and
  - (2) not guilty if the fault level for A's conduct is subjective awareness or wilful blindness.

At the moment, the mens rea requirement for section 21 is not adequately set out in section 21 since it is silent in regard to encouraging and counselling, and uses "purpose", but probably means "knowledge" in regard to aiding. Section 21 should be amended so that it clearly expresses the mens rea requirements for secondary parties. The policy choices for amending section 21(1)(b) to (d) are:

- (1) to require specific intent or purpose;
- (2) to require general mens rea (i.e. intent, recklessness or wilful blindness measured subjectively; or
- (3) to require the same level of fault as that which is specified for the offence being aided, encouraged or counselled.

#### **6. Parties to Complete and Inchoate Crimes**

Section 21(d) of the White Paper makes it clear (as does s. 22(1) of the current Code) that it only applies where the person counselled is afterwards a

party to the offence. If the person counselled does not become a party to the offence, then the counsellor commits a separate offence under s. 464 (via s. 24.1) as set out in the White Paper (clauses 9 and 13).

Generally speaking, sections 21(1)(b) and 21(1)(c) are only used when the person who is aided or encouraged to commit a crime, afterwards becomes a party to that crime. But sections 21(1)(b) and 21(1)(c) are not expressly limited to that situation as is section 21(1)(d). Such a limitation should be made express. That can be accomplished by having the words in s. 21(1)(d) "where the person counselled is afterwards a party to it" expanded to modify paragraphs (b) to (d) and to read "where the person aided, encouraged or counselled is afterwards a party to it."

Likewise, sections 21(b) and (c), in both the White Paper and the current Code, do not indicate what is to happen if A aids or encourages B to commit an offence, which B does not afterwards commit. If counselling an offence which is not committed is a crime, then logic and principle dictate that aiding or encouraging a crime which is not committed should also be a crime. This policy can be accomplished by expanding s. 24.1 and s. 464 to include within those sections aiding and encouraging, as well as counselling, an offence where the person aided, encouraged or counselled is not afterwards a party to that offence.

**7. Aid, Encourage or Counsel An Offence, But Only An Attempt or Lesser Included Offence Committed**

Section 21 should be amended to make it clear that if A aids, encourages or counsels B to commit an offence (e.g., robbery) and B afterwards is only a party to an attempt (e.g. attempted robbery) or an included offence (e.g. theft or assault), then A should be deemed a party to the attempted or included offence which B actually committed.

8. Aid, Encourage or Counsel One Offence, But An Entirely Different Offence is Committed

If A knowingly lends his/her car to B to commit robbery, but B uses A's car to traffick in narcotics, then A has actually assisted trafficking, but lacks the mens rea for assisting in trafficking and will therefore be acquitted of that charge. However A did assist, encourage or counsel B to commit robbery, which offence B did not commit, and thus A can be charged and convicted of a s. 464 offence [assuming s. 464 is amended to include "aiding and encouraging" as recommended in item 6, p. 14-15].

VI. Section 23.1: Where One Party Cannot Be Convicted

Current Provision

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

White Paper Proposal

*23.1 For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids, encourages or counsels or receives, comforts or assists cannot be convicted of the offence, has been acquitted of the offence, or is otherwise relieved of criminal responsibility for the offence.*

Section 23.1 is of recent vintage. After the enactment of the Young Offenders Act in 1984, in which the minimum age for criminal responsibility of a young offender was raised to 12 years of age, police began to complain that adult offenders, with impunity, were using children under 12 to commit offences. No doubt the case of R. v. Richard,<sup>17</sup> which I believe was wrongly decided, added some weight to that police belief. Apparently the belief was that since children under 12 could not, "legally speaking", commit an offence, then the adults who counselled them could not be convicted either, since they had counselled or procured a "non-offence". This analysis apparently overlooked the common law

17. (1985), 41 Man. R. (2d) 238, aff'd (1986), 43 Man. R. (2d) 160 (C.A.).

doctrine of innocent agency which clearly applied to the use of children below the age of responsibility. In any event, in response to the above concern,<sup>18</sup> Parliament enacted s. 23.1,<sup>19</sup> which came into effect on September 1, 1986.

Regardless of its original purpose, section 23.1 in the Code, and s. 23.1 as expanded in the White Paper, apply to situations beyond the procuring of minors to commit offences.

a. **Section 23.1 and Accessories after the Fact**

I have not considered s. 23.1 as it applies to accessories after the fact (an offence which is not altered by the White Paper, but which, in my opinion, is in need of alteration). However, it should be noted that in Alan Mewett's paper on Conspiracy at p. 6-7 he argues that "s. 23.1 is quite wrong insofar as it deals with accessories after the fact. It is true that an accessory may be prosecuted and convicted even though the principal has not been or cannot be charged, but it is not the law that an accessory can be prosecuted even though the principal has been acquitted, since there is then no offence to which he can be an accessory. Perhaps the change was deliberate, but it is difficult to see the reason for it."

When assessing the implications of s. 23.1 in regard to accessories after the fact, one must also consider s. 592 of the Code, and the case law interpreting that provision. Section 592 applies only to accessories after the fact, not to aiders, abettors or counsellors. Section 592 states:

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

First, one should ask where s. 23.1 adds anything additional to s. 592. On that point, I would have to give some more thought to that question. Second, I think

18. see House of Commons Debates, May 22, 1986, at p. 13534.

19. S.C. 1986, c. 32, s. 46.

that Alan Mewett's statement of the law that an accessory can not be prosecuted if the principal has been acquitted, is deserving of further analysis. For example, Don Stuart argues that "an accessory after the fact should surely be convicted, even where the principal was acquitted, if there was independent proof of the fact that the principal did commit the offence."<sup>20</sup>

b. The Meaning of Section 23.1

Whether s. 23.1 is considered in regard to accessories after the fact, or aiders, abettors or counsellors, I am not at all sure what the words "cannot be convicted of the offence" in s. 23.1 mean. It is even more perplexing to try to figure out what the new, and additional words in s. 23.1 of the White Paper mean:

cannot be convicted of the offence, has been acquitted of the offence, or is otherwise relieved of criminal responsibility for the offence.

I was only able to find three cases which briefly discuss or apply s. 23.1, but they were not particularly illuminating.

(i) "Can not be Convicted of the offence"

These words seem broad enough to encompass all situations which are a bar to conviction. For example persons can not be convicted of an offence

- (1) if they can not be brought before the court and tried because, for example,
  - (a) they are unfit to stand trial,
  - (b) they have not been caught,
  - (c) they are outside the country and not extraditable,
  - (d) they have died before trial.
- (2) if they can be brought before the court and tried, but the trial will not result in a conviction because

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20. D. Stuart, Canadian Criminal Law, at 522.

- (a) convincing evidence of P's guilt is not admissible against P because it was obtained in violation of P's Charter rights,
- (b) the available evidence (whether admissible or inadmissible) is insufficient to establish proof beyond a reasonable doubt,
- (c) P has a defence, whether it be in the nature of an exemption (age, mental disorder, diplomatic immunity etc.), a justification (lawful use of force in self-defence, defence of property or administration of the law), an excuse (mistake of fact, intoxication, necessity, duress etc.) or a partial excuse (provocation reducing murder to manslaughter or intoxication reducing a specific intent offence to a lesser included general intent offence).

**(ii) "Or is Otherwise Relieved of Criminal Responsibility"**

It is hard to imagine at first glance what the above residual clause refers to. Perhaps it was intended to deal with the special verdict "not criminally responsible due to mental disorder" (s. 672.34). But s. 672.35 makes it clear that a person who is subject to this special verdict "shall not be found guilty or convicted of the offence". So a s. 16 mentally disordered person is covered under the original words in s. 23.1 -- "cannot be convicted of an offence".

There is another category of cases where a person "can" be convicted of an offence but "is not". For example, P. is available for trial and there is sufficient admissible evidence to convict P, but the police/prosecution decide not to charge, or not to proceed with a charge. The reasons for not proceeding will vary, including the following:

- (a) diversion is recommended,
- (b) humanitarian reasons prevail,

- (c) a bargain is struck with P not to proceed if P gives evidence against X,
- (d) P is an undercover police officer who has trafficked in drugs in order to infiltrate a drug trafficking ring.

In the above circumstances, it is not correct to say that P "can not be convicted". It can be said that P "is not convicted", or perhaps that P is "relieved of criminal responsibility" not as a legal matter but as a matter of prosecutorial discretion. [But cases such as those described in paragraph (a) to (d) do not require a special rule such as that provided in s. 23.1. The ordinary rule applies to these cases, i.e. A may be convicted of counselling aiding or abetting an offence even though P has not been charged or tried. The Australian Attorneys-General Model Criminal Code (Dec., 1992), s. 402.3 uses the following words: "even though the principal offender has not been prosecuted or found guilty provided that the commission of the principal offence is proved."]

**(iii) "Has been Acquitted"**

These words are unambiguous in regard to their meaning.

**c. The Policy Question**

What ought the policy of the law be in regard to the above situations? Are there any situations where we ought to impose some form of criminal liability on A who aids, encourages or counsels P "to commit an offence", which P "does commit", but for which P "can not be convicted", has already been acquitted, or otherwise is relieved of criminal responsibility. I think the answer is yes. Indeed the answer should be yes to most, but not all the situations listed above. For example, A should not be liable where P's conduct was justified.

There is neither time nor space in this Paper to properly analyze all of the above situations. A large part of the confusion and uncertainty in this area relates

to the loose and ambivalent use of the words "to commit an offence". When the expression "commit an offence" is used in the Code or elsewhere, exactly what do we mean? Does a person "commit an offence" when they engage in wrongful conduct (i.e. the actus reus of the offence without a legal justification), or is it also necessary to establish the attribution of blame/responsibility/guilt to the actor (based on actus reus, mens rea and the absence of any lawful defence). For example, we commonly say that an insane person "committed" the offence of murder, although we do not attribute criminal responsibility to him/her. For the victim and family, a wrongful act - a murder - occurred whether or not someone is blamed or punished. It is necessary to sort out what we mean by "committed an offence", before trying to resolve the difficult questions in s. 23.1, s. 24.1 and s. 24.2.