A Review of Selected Trends and Topics Regarding Criminal Law Reform in Canada

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Introduction

While crime is not new to any region of the world, some argue that today crime is unprecedented both in magnitude and in manifestation.[1] Crime is seen to be evolving as cause and consequences of change in the way modern societies function and interact. Weak and collapsed governments, mass poverty, income inequality, corrupt behaviour and armed conflict have become weapons and shields for criminals, traffickers and terrorists.[2] Technology, international trade and the unprecedented movement of people and businesses around the world are perceived to have resulted in increasingly porous borders that create new opportunities for exploitation by criminals. Over the past 10 years, at the international level, there has been constant and widespread calls for toughening the criminal law, especially as it relates to issues of organised crime, corruption, violence against women and children, crime by youth, and now more recently terrorism. The Canadian criminal justice system is not immune to these perceptions and has undergone different reforms in recent years to respond to pressures, both internal and external.

Along with these calls for toughening the criminal law, concern has been raised that the reform of criminal law in Canada has become more reactive and ad hoc, responding to media sensationalization of crime and the public's fear of crime. As a result, the Canadian Criminal Code, the substantive, procedural and evidentiary law, has become complex and cumbersome. Over the years there has been a whole range of new offences that have been "grafted" onto the existing Criminal Code, different procedures, different investigative powers and new defences.[3] It has been described by many as a "patchwork quilt"[4] and "a hodgepodge of language and provisions"[5]. There have been many voices calling for law reform in criminal law in Canada, for a "principled approach to a new and modern criminal law statute".[6]

This paper will explore some of the broad trends taking place in criminal law reform in Canada and some selected topics that have been surveyed by various academics. Part one of this paper examines the recent trends by the two main actors in law reform: the legislature and the courts. Recent criminal justice legislation over the last ten years and the current Bills before Parliament are reviewed. The jurisprudence of the Supreme Court of Canada is also explored to determine any trends. The first section also provides a backdrop of broad trends taking place at the international level as this can add to pressure to respond at the domestic level but can also be seen to reflect the situations happening in domestic systems. It also includes a summary of some of the perceptions by the public of the criminal justice system in Canada and compares this to criminal justice statistics to put the recent reforms into context.

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[1] Antonio Marie Costa *"Global Threats to Global Governance: crime and Terrorism Undermine Development, Security and Justice"* (2004) Paper delivered at the Confronting Globalization: Global Governance and the Politics of Development Conference, Vatican, April 2004 found at www.unodc.org/unodc/en/speech_2004-04-30.1.html.

[2] A.M. Costa, *supra* note 1.

[3] Morris Manning *"Rethinking Criminal Law in the Age of the Charter of Rights and Freedoms: The Necessity for a 21st Century Criminal Code"* (2002) 21 Windsor Y.B. Access Just. 455.

[4] Morris Manning, *ibid* and Don Stuart *"Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution"* (2000) 28 Man L.J. 89.

[5] Morris Manning, *supra* note 3.

[6] Manning, *supra* note 3 and Don Stuart, *supra* note 4.

The second part of the paper highlights some selected topics. First the role of the media is examined in an attempt to understand the continuing "battle" between what the public purportedly 'thinks" of crime and the reality as reflected by criminal justice statistics.[7] The next topic that is considered is one of the proposed responses to this "battle", the call for a principled review and recodification of the Criminal Code. The third topic explored is another suggested response to a principle approach to reform and that is the need for independent law reform commissions.

Part I: Recent Trends in Criminal Law Reform in Canada

1. The Overall Context

1.1 Reflecting Trends at the International Level

Criminal justice reform was highlighted during one of the official workshops at the most recent United Nations Crime Congress held in Bangkok in 2005.[8] This Workshop discussed how many States have been experiencing a number of pressures to reform their criminal justice systems and to increase access to justice.[9] These demands are being made by offenders, victims, local communities and specific nations as well as the international community. In many countries, there is a sense that criminal justice systems are not providing equal access to justice for all parties which has led to both rising public expectations about criminal justice and a confidence crisis that the criminal justice is not satisfying those expectations.[10] This has resulted in increased public demands for reform.

There is increasing concern that many criminal justice systems are becoming over-burdened, with more lengthy and costly trials as well as overcrowding in prisons. Even relatively well-resourced criminal justice systems are under pressure to cut costs. Efforts have focused on diversion and reducing the size of prison populations. Furthermore the rise of victim advocacy has contributed to not only an increased interest in restorative and informal justice but also to some extent calls for more punitive measures.

All countries are experiencing demands from the international community to respond to priority crimes including: crimes involving terrorism; organised crime; money laundering; corruption; trafficking in women and children; trafficking in drugs, firearms and explosives; and cyber crime. The recent elaboration of various international

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[7] Anthony Doob describes this as a battle, see Anthony Doob and Carla Cesaroni *"The Political Attractiveness of Mandatory Minimum Sentences"* (2001) 39 Osgoode Hall L.J. 287.

[8] Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice, adopted at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005 (A/CONF.203/L.5) and the Background Paper: Workshop 2: Enhancing Criminal Justice Reform including Restorative Justice, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, 18-25 April 2005 (A/CONF.203/10).

[9] Background Paper: Workshop 2, *ibid*.

[10] See Hough, M. and Roberts, J.V. (2004) Confidence in Justice: an International Review. Findings, No 234. London: Home Office, Research, Development and Statistics Directorate and also see a survey conducted in the US found that more than four out of five respondents favored the idea of "totally revamping the way that the [criminal justice] system works" (see L. Sherman (2002) *"Trust and Confidence in Criminal Justice"* National Institute of Justice Journal, 248, 22-31). This desire for radical change reflects a lack of confidence in the way that the system currently functions or is perceived to function.

conventions in the field of criminal justice requires States to implement obligations of criminalization, prevention, training and international cooperation.[11]

With attention on these priority crimes, there are more calls to reform criminal procedure in such a way as to provide more power to the police and less power for the accused.[12] The UN Crime Congress Workshop recognized that one of the biggest current challenges facing the administration of justice is the careful balancing of the right of the accused with the newly acknowledged rights of the victims while still achieving the critical objective of doing justice.[13] The fundamental values of fair trial as reflected in the international human rights instruments and the rule of law are continually being challenged when using criminal justice to address new and old fears of security, personal as well as national.

1.2 Perceptions of the Criminal Justice System

When faced with these increased demands for criminal justice reform, a fundamental question is "How do we envision our criminal justice system and what values do we want to instill in the system through reform?". A criminal justice system is seen as one way to ensure that everyone has the right to live in a just, peaceful and safe society. Criminal law protects members of society from harmful and socially unacceptable behaviour and is used as a powerful tool by the government to control crime and protect society.[14] As such, criminal law is seen as a deterrent and as punitive. However, in addition, our criminal justice system has a number of principles that are seen as cornerstones, one being the presumption of innocence and the need for the state to have the burden of proof beyond a reasonable doubt. Individual rights of the accused person are to be safeguarded against the power of the state as this provides protection to all individuals from the arbitrary use of the state's power of arrest, detention and punishment.[15] The coming into force of the Canadian Charter of Rights and Freedoms in 1982 clarified these principles.

A general statement of what is expected from our criminal justice system was reflected in a broad criminal policy document in 1982 entitled "The Criminal Law in Canadian Society".[16] This report identified two main purposes of the criminal justice system which

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[11] These instruments include the *Convention Against Transnational Organised Crime* (UNTOC) and its Protocols, the *Protocol to Prevent, Suppress and Punish Trafficking in Person, Especially Women and Children* (the Trafficking Protocol in force 2003); the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* (the Smuggling Protocol in force 2004); the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunitions* (in force July 2005). and the *Convention Against Corruption* (the UNCAC). The Convention can be found at UNODC website: www.unodc.org/unodc/en/crime_cicp_signatures.html.

[12] Klaus Volk, *"The Principles of Criminal Procedure and Most Modern Society: Contradictions and Perspectives"* Paper delivered at the International Society for the Reform of Criminal Law in The Hague, Netherlands 2003, found at www.isrcl.org/volk.pdf.

[13] Background Paper: Workshop 2, *ibid*. Also this challenge is articulated in Kader Asmal, *"Human Rights and the Administration of Criminal Justice: Law Reform in the Age of Globalism"*, Paper delivered at the International Society for the Reform of Criminal Law in Johannesburg, 2000 found at www.isrcl.org/paper/asmal.pdf.

[14] Vicki Schmolka *"Principles to Guide Criminal Law Reform"* Appendix B – Background Material to Minister's Roundtable on Criminal Law (Toronto November 2002) found at http://www.justice.gc.ca/en/cons/roundtable/nov102/appendixb.html.

[15] Don Stuart summarizes five main values he sees in criminal justice in Canada: (1) The criminal justice system is all about presumption of innocence, fair labeling and just state punishment; (2) Individual rights of accused against the power of the state must be carefully safeguarded before, during and after trial, and must take precedence over rights of victims; (3) The rule of law and a just adversarial system require the law to be as clear and comprehensive as possible; (4) There are no magic answers about what causes criminal behaviour, how to treat and stop it, and how to predict dangerousness; and (5) The criminal sanctions are a blunderbuss power which must be used with restraint, with prison as a last resort. Don Stuart, *supra* note 4.

[16] Department of Justice Canada, The Criminal Law in Canadian Society, (1982: Department of Justice Canada).

follows the traditional models of crime control (security goals) and due process (justice goals). There is tension between the due process model, which emphasizes individual rights protections, and the crime control model, which emphasizes efficiency and the truth-seeking process in the administration of justice.[17] In Canada, there is a constant dynamic to balance the goals of controlling crime and protecting individual rights.

However, as Kent Roach has argued, the criminal justice system's values can no longer be simply explained by the traditional models of crime control and due process.[18] In looking at the development of law reform and recent criminal justice policies, the rise of the victim's rights discourse and the development of restorative justice practices have altered the traditional view. Not all are happy with this development. For instance, David Paciocco believes that the function of a criminal trial "to test whether there is sufficient evidence of a condemnable wrong to provide society with moral authority to collectively label, stigmatize, ostracize and punish one of its citizens" is being re-configured to have a negative impact on individual rights.[19] He argues this is because everyone is being given a voice in the criminal law, which has resulted in the muffling of the accused's rights. As such, the community views are asserting a significant influence on the development of criminal law.[20]

So what are the views of the community toward crime and the criminal justice system? Some of the main perceptions that the public has are that we are living in a more violent society, crime is escalating and new forms of crime are emerging.[21] One Member of Parliament noted recently that current justice bills before Parliament are:

> "[B]eing driven in part by a degree of political pretence. There is a pretence out there that Canadian society is beset with crime, that crime is escalating, and that violent crime is taking over our communities".[22]

The nature of crime is also believed to be changing, with more focus on organised crime, with increasing links to terrorism, the transnational nature of crime, computer-based crimes, knowledge and information crimes, and identity thefts.[23]

There seems to be a belief that criminal law can control crime and provide security. This can be seen in pleas for zero tolerance and calls for government policy to include enhanced control and excessive punishment. Along with this have been expressed views that "criminals have too many rights at the expense of the victims".[24] There is a belief that criminal justice systems have traditionally acted with the desire to protect, at all

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[17] Herbert Packer's legal theory which incorporates both the due process model and the crime control model is described in Julianne Parfett *"A Triumph of Liberalism: the Supreme Court of Canada and the Exclusion of Evidence"* (2002) 40 Alberta Law Review 299.
[18] Rosanna Langer *"Book Review of Kent Roach's Due Process and Victims' Rights: The New Law and Politics of Criminal Justice"* (2001) 39 Osgoode Hall L.J. 713.
[19] D.M. Paciocco, *"Book Review of the Charter's Impact on the Criminal Justice System by J. Cameron*" (1996-1997) 28 Ottawa L. Rev. 249 as cited in Manning, *supra* note 3.
[20] *ibid*.
[21] This belief is also one which is held in the United Kingdom as reflected in the prime minister's speech on 'rebalancing of criminal justice systems" 18 June 2002, where he says "criminal justice systems across the developed world are under strain. Most face rising crime. All are grappling with new forms of crime". Found at www.number-10.gov.uk/output/Page1717.asp.
[22] Mr. Derek Lee (Scarborough-Rouge River, Lib) 39:1 Hansard – 143 (2007/4/30).
[23] Research and Statistic Division, Justice Department, presentation at the round table discussion in 2002 see http://www.justice.gc.ca/en/cons/roundtable/nov102/toc.html.
[24] Don Stuart, *supra* note 4.

costs, the civil liberties of the innocent and have now become cumbersome, out of date and often ineffectual in convicting the guilty.

Another view is that our criminal justice system has become less and less effective. It has been suggested that there has been a decrease in public confidence in many aspects of the justice system, such as criminal courts, prison and parole systems. According to a recent statement made by the Canadian Minister of Justice:

> "[I]n my view, [our justice system] hasn't kept up with the realities of the 21st century. It moves too slowly. It doesn't give voice to the victims of crime."[25]

However, law enforcement agencies still seem to enjoy the confidence of the public. According to a 1999 Survey, the majority of Canadians believe their local police are doing a good job.[26] Canadian's views of the courts are not as favorable as their views of the police. Less than one-quarter of the respondents felt that the criminal courts were doing a good job, particularly in the categories of determining guilt, helping the victim and providing justice quickly.[27] The courts rated a bit higher when those surveyed were asked whether they ensure a fair trial for the accused. The prison and parole system were rated much less positively than local police.[28]

There is also the expressed view that there is a need to get tougher in sentencing.[29] The belief is that severe penalties, such as mandatory minimum sentences, will deter crime. As Professor Doob notes, "our society has always recognised that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law".[30] Mandatory minimum penalties are seen as powerful forces that can be used to keep Canadians safe. Locking up an offender for "at least" some minimum time sounds like good crime control, especially since people seem to overestimate the likelihood that an offender will re-offend. The public's desire for harsh punishment is often expressed in public opinion polls.[31] Public attitudes in this regard are generally based on media summaries of court proceedings. What is interesting is that research reveals that when respondents are given more detailed

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[25] The speech of the Minister of Justice at the Canadian Bar Association conference *"Towards a More Effective Justice System"*, August 14, 2006.

[26] Juristat *"Public Attitudes Toward the Criminal Justice System"* Vol. 20, no. 12 (December 2000: Canadian Centre for Justice Statistics). The 1999 Survey is the General Social Survey (GSS).

[27] *ibid*.

[28] *ibid*. 26% of the population felt that the prison system was doing a good job at supervising and controlling prisoners, while 14% felt that it was doing a good job at helping prisoners become law-abiding citizens. Regarding the parole system, only 15% of population believed that it was doing a good job at releasing offenders who are not likely to re-offend and 13% believed it was doing a good job at supervising offenders on parole.

[29] Juristat *"Criminal Victimization: An International Perspective: Results of the 2000 International Crime Victimization Survey"* Vol. 22 no.4 (May 2002: Canadian Centre for Justice Statistics). As the Juristat on ICVS notes "Canadians appear to have grown more punitive in their attitudes toward sentencing".

[30] Anthony Doob cited *R v Smith* and Mr. Justice McIntyre's dissent: "there can be no doubt that Parliament, in enacting the Narcotic Control Act, was aiming at the suppression of an illicit drug traffic, a truly valid social aim. The deterrence of pernicious activities, such as the drug trade, is clearly one of the legitimate purposes of punishment. Our society has always recognised that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law. In view of the seriousness of the offence of importing narcotics, the legislative provisions of a prison sentence cannot by itself b attacked as going beyond what is necessary to achieve the valid social aim". Anthony Doob and Cesaroni, *supra* note 7.

[31] Research suggests however that severity may not be the issue – the public is upset with sentencing generally, which gets expressed in terms of sentencing severity, Doob and Cesaroni, *ibid*.

information about a specific case they are likely to recommend sentences that are no harsher than those imposed by the judges.[32]

While public attitudes towards the criminal justice system and crime are not always easy to assess or understand, it is probably fair to say that the current general public attitude towards crime is impatient and punitive.[33] The public often has an unrealistic expectation that the criminal justice system can effectively deal with every conceivable social problem. However, as Don Stuart notes, there are "no magic answers about what causes criminal behavior, how to treat and stop it, and how to predict dangerousness".[34]

The nature of public reaction and assessment and thus public attitudes toward the criminal justice system is complex.[35] While it is beyond the scope of this paper, there has been much written on the social attitudes to the criminal justice process and the links to both personal characteristics and other beliefs regarding the nature of crime and the operation of the criminal justice system.[36] The surveys indicate that the more a person fears for their own personal safety, the more likely they are to be dissatisfied with the criminal justice system and also to prefer the imposition of prison sentences.[37]

1.3 Do the Perceptions Reflect Reality – the Statistics

In a recent speech by the Prime Minister, his main message was that crime rates are high by historic standards and that there is now a trend to more serious crime.[38] He stated:

> "Even if Canada's crime rates are low by international standards, they are still very high by our own historical standards… When I was a boy growing up in Toronto, we knew nothing of street gangs or crack houses. And gun crime was almost unheard of. That began to change in the 1960s. And during the next three decades the violent crime rate in this country more than tripled".[39]

The Prime Minister's statement, while true in that reported crime rates are higher than they were in 1959 when he was born, fails to tell the whole story provided by criminal

[32] See Doob, A.N. and Roberts, J.V. *"Social psychology, social attitudes and attitudes towards sentencing"* (1984) 16 Canadian Journal of Behavioral Science 269 and Canadian Sentencing Commission, "Sentencing reform: A Canadian approach" (Ottawa: 1987) as cited in Juristat on *"Public Attitudes"*, *supra* note 26.

[33] Yvon Dandurand and Brian Tkachuk *"Meeting the Challenges of Violent Crime: A Canadian Perspective"* (1998) International Centre for Criminal Law Reform and Criminal Justice Policy.

[34] Don Stuart, *supra* note 4.

[35] While politicians speak of listening to Canadians who express fear of crime and that their priorities is to ensure that people are safe in Canada, the 2000 International Crime Victimization Survey would illustrate that the majority of people in Canada as well as in the other industrialized countries surveyed feel safe or fairly safe. Canada had the second highest rate at 83%. This is similar to the findings of the 1999 GSS which also indicated a high proportion of Canadians felt safe when walking alone in their area after dark at 88%. While these surveys are a bit dated, the question is whether the public feels more unsafe than 7 years ago? Juristat "Criminal Victimization: An International Perspective: Results of the 2000 International Crime Victimization Survey" Vol. 22 no.4 (May 2002: Canadian Centre for Justice Statistics). The 2000 ICVS asked respondents three questions related to fear of crime: fear of walking alone at night, fear of being home alone at night, and fear of a break-in.

[36] For instance, the level of public satisfaction is often related to a variety of factors including, the respondent's sex, age, level of education, previous contact with the criminal justice system, history of victimization and satisfaction with personal safety. For more information see Flanagan, McGarrell and Brown, *"Public perceptions of the criminal courts: the role of demographic and related attitudinal variables"* (1985) 22 Journal of research in Crime and Delinquency 66 and Sprott and Doob, *"Fear, victimization and attitudes to sentencing, the courts and the police"* (1997) 39 Canadian Journal of Criminology 275.

[37] Juristat, *"Public Attitudes Toward the Criminal Justice System", supra* note 26.

[38] Globe and Mail *"Does Harper's message match the statistics?"* (Monday April 30, 2007).

[39] *ibid*. Speech made by the Prime Minister at an awards dinner for the York Regional Police Force.

justice statistics. As one criminologist has said the question of whether reported crime rates have gone up or down depends on one's starting point.[40]

The recent statistics about violence in Canada create a very different picture from the one that can be drawn from viewing the legislative changes and statements being made by politicians. In 2005, Canada's crime rate fell by 5%.[41] Decreases were seen in most crimes, with the exception of the serious crimes of homicide, attempted murder, assault with a weapon, aggravated assault and robbery.[42] Youth crime rate dropped 5% with violent youth crime declining by 2% and youth property crime down by 12%.[43]

Historically, a review of information from Statistics Canada show that crime rates increased throughout the 1960s, 1970s and 1980s, peaking in 1991. Crime rates then steadily declined since 1992, somewhat stabilizing in the early 2000s.[44] The overall crime rate fell almost 25% from 10,342 crime incidents per 100,000 people in 1991 to 7761 in 2005.[45] The violent crime rate fell by 7.6% from 1991 to 2005. Therefore contrary to what most Canadians believe, violent crime is down.

In the same speech while addressing "worrying trends" toward more serious crime, the Prime Minister noted that "for instance, the most recent report by the Canadian Centre for Justice Statistics shows an increase in homicide, attempted murder, serious assault and robbery. Gang-related homicides in Ontario doubled in a single year and 70% of those murders involved guns".[46] However as another criminologist points out, what the Prime Minister does not mention is that the rates of many other violent crimes went down in 2005, so the overall violent crime rate did not change.[47] The overall trend in homicide and attempted murder has largely been declining since the late 1970s. As explained by Prof. Doob:

> "[H]omicide rates in 2005, for example, were 2/3 of the level reported in 1977, and since that year, they had generally drifted downward until 2004. The rate increased in 2004 and 2005, bringing them back to mid-1990s levels. Attempted murder rates rose by 14% in 2005, but were still 20% lower than in 1995".[48]

While robbery rate was 3% higher in 2005 than in 2004, it was about 15% lower than a decade ago and 25% lower than the 1991 peak. It is fair to say that one of these worrying trends, the robbery rate, has generally been declining since 1991. Sexual assault rates

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[40] Ross Hastings, University of Ottawa criminologist interviewed for the Globe and Mail article, *supra* note, 38.

[41] Juristat *"Crime Statistics in Canada*", Vol. 26, no. 4 (July 2006: Canadian Centre for Justice Statistics).

[42] The overall decrease was driven by declines in non-violent crimes, with property crime falling 6% and other Criminal Code offences falling 5%. In particular large drops were reported for break-ins, 7%, motor vehicle thefts, 7%, counterfeiting, 20% and thefts under $5000.00, 6%. *ibid*.

[43] The youth crime rate is measured by the number of youths formally charged plus youths cleared by means other than the laying of a charge, see *ibid*.

[44] Valerie Pottie Bunge, Holly Johnson and Thierno Balde *"Exploring Crime Patterns in Canada"* Crime and Justice Research Paper Series (June 2005: Statistics Canada). Official statistics have been systematically collected since 1962 through the Uniform Crime Reporting Survey. More specifically, there have been four general trends in the crime rate between 1962 and 2000: rates increased fairly steadily up to the early 1980s, leveled off throughout the decade, increased again in the early 1990s before declining steadily throughout the 1990s. Since 2000, the crime rate has stabilized, increasing slightly in 2003 but declining again in 2005.

[45] 2005 is the most recent yearly statistics gathered by the Canadian Centre for Justice Statistics. See Juristat *"Crime Statistics in Canada*", Vol. 26, no. 4 (July 2006: Canadian Centre for Justice Statistics).

[46] Globe and Mail article, *supra* note 38.

[47] Prof. Anthony Doob interviewed for the Globe and Mail article, *supra* note 38.

[48] *ibid*. Also see Juristat in *supra* note 41 which provides further information: "after increasing 13% in 2004, the homicide rates increased 4% in 2005. There were 658 homicides in 2005, 34 more than in 2004. The 2005 homicide rate was the highest since 1996. Attempted murders were also on the rise, up 14% from the previous year".

remained unchanged in 2005, but was 25% lower than a decade ago. The sexual assault rate peaked in the early 1990s and has generally been declining since.

Gang-related homicides have increased from 1995 to 2005, but numbers move up and down dramatically from year to year. It should be noted that 2005 was the first year that the Centre for Justice Statistics asked police forces to include homicide that are "suspected" of being gang-related. In 2005, there were 107, which was 16% of all homicides, 35 more than in 2004. It should be remembered that homicides account for only a relatively small proportion of all crime, .02%, and still remains below the peaked rate in 1975.[49] The largest increase occurred in the province of Ontario, where the number of gang-related homicides doubled from last year. Two-thirds of all gang-related homicides were committed with a firearms.

The Prime Minister also had something to say about gun violence: "in this city [Toronto] police report that almost 1000 crimes involving firearms or restricted weapons have been committed so far this year. Nearly 40% of them were committed by someone who was on bail, parole, temporary absence or probation. Gun crime is a menace to public safety and protecting Canadians must be the first priority of our bail system".[50] The 2005 statistics do show that 2005 was the third consecutive annual increase in firearms homicides, however this rate is virtually the same as it was 20 years ago.[51] The longer-term trend in the use of firearms to commit homicide has seen a general decline since the mid-1970s, similar to the trend in total homicides.

To place Canada's crime rate in perspective, crime comparisons to other industrialized countries have been made. Consistently with previous years, the 2005 statistics show that the United States had a much higher rate of violent crimes, while Canada generally had slightly higher levels of property crimes. In 2004, the rate of homicide in the United States was nearly triple to the rate recorded in Canada.[52] The United States rate of aggravated assaults were 85% greater than in Canada and a rate of robbery was 59%.

The reliability of statistics depends on reporting behaviour of the population as well as the changes in methodology. Also statistics can be used selectively so as to provide a partial picture, depending on one's agenda. While understanding the causes of crime patterns in Canada is beyond the scope of this paper[53], it is clear from the review of recent statistics, there appears to be a disconnect between the public perceptions of crime and actual crime patterns being recorded by Statistic Canada.

[49] Juristat *"Homicide in Canada"*, Vol. 26, no. 6 (July 2006: Canadian Centre for Justice Statistics).
[50] Globe and Mail article, *supra* note 38.
[51] Juristat, Homicide, *supra* note 49.
[52] According to the Juristat, *ibid* there were 5.5 homicides per 100,000 population in the US as compared with 2.0 homicides per 100,000 in Canada.
[53] To understand more about the analysis behind crime patterns, see *"Exploring Crime Patterns in Canada" supra* note 44. This paper notes that there has been considerable speculation as to the causes behind the crime patterns, such as the changing age structure of the population; changing economic conditions; a change in policing style; increased numbers of police officers; rising incarceration rates; dramatic changes in drug markets; and changing social values. Also important legislative changes are examined.

2. Trends in Law Reform from the Legislature

In Canada, as in other common law countries, criminal law reform involves various actors. The government, that is to say, politicians, make and reform the law. The Ministry of Justice employs lawyers who prepare and draft Bills that are debated by parliament. This section briefly highlights some of the trends seen in criminal justice legislation over the last ten years as well as Bills currently before Parliament. For our Chinese colleagues for whom this paper is written, a summary of recent criminal justice legislation is set out in Appendix 1 and a similar summary of the current bills being debated in Parliament is set out in Appendix 2.

Several major reforms have taken place in the last decade. These have included measures to combat organised criminal groups[54], anti-terrorism provisions[55], changes to the Young Offenders Act[56] and measures taken in the area of firearm regulation[57]. New offences and procedures have been introduced for a range of criminal behaviour, from terrorist activities and hoaxes relating to terrorist activities to participation in organised criminal groups, obtaining proceeds of crime and trafficking in persons.

More recently, eleven Bills were introduced in Parliament within the last year by the newly elected conservative government of which two have passed so far.[58] These Bills deal with bail reform, the offence of impaired driving, dangerous offenders, conditional sentencing, mandatory minimum sentencing, street racing, targeting child sexual predators, corruption and strengthening the national DNA data bank.

Other papers at this symposium will be exploring in more detail the legislative response to criminal law reform so this paper proposes to highlight some of the broader trends that appear to arise from the legislation. There are, of course, many issues that could be discussed and there are text books written about each one of them, therefore due to the scope of this paper only five will be mentioned. These include: (1) responding to international criminal justice instruments; (2) the ad hoc practice of creating "new offences"; (3) responding to calls for tougher sentencing; (4) the increased recognition of victims' rights; and (5) responding to concerns of inefficiencies in the criminal justice system.

2.1 Responding to International Criminal Justice Instruments

Canada has played an active role in the negotiations of a number of criminal justice instruments that have been passed over the last few years, such as the UN Convention Against Organised Crime, the Protocols on Trafficking in Persons and Smuggling of Migrants, the UN Convention Against Corruption, and the Rome Statute Establishing the International Criminal Court. It has also responded to the obligations created by the UN

[54] Bill C-95 – *An Act to Amend the Criminal Code (Criminal Organizations) and to Amend Other Acts in Consequence*, 1997 and Bill C-24 – *An Act to Amend the Criminal Code (organised crime and law enforcement) and to make consequential amendments to other Acts*, S.C. 2001, c.32 found at www.parl.gc.ca/37/1/parlbus/chambus/house/bills/government/C-24/C-24-4/C-24TOCE/html.
[55] Bill C-36 (2001) introduced the Anti-Terrorism Act and Bill C-55 (2004) Public Safety Act.
[56] Bill C-7 (2002) Youth Criminal Justice Act.
[57] Bill C-10A (2003) An Act to Amend the Criminal Code (Firearms) and the Firearms Act, SC 2003, c. 8.
[58] For a summary of these Bills, see Appendix 2.

Security Council resolution 1373 which calls on States to respond to events of 9/11 with appropriate anti-terrorism legislation. These instruments require States Parties to implement obligations which include criminalization and international cooperation measures.

With respect to corruption, Canada signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in December 1997 and subsequently passed Bill S-21 in 1998 before ratifying the OECD Convention. Bill S-21 expressly stated that the Act was intended to meet the obligations set out in the Convention and revised the Criminal Code to ensure that the requirements of the criminalization provisions in the Convention were met.[59] More recently, a Bill has been tabled to introduce technical amendments to the Criminal Code that will allow Canada to ratify and implement the UN Convention Against Corruption.[60]

Regarding organised crime, since 1997 the government has enacted two major pieces of legislation providing for such things as the creation of an agency to combat money laundering, the creation of new offences of participating in a criminal organization and broadening the powers of law enforcement authorities to seize property used in crime and to initiate forfeiture proceedings.[61] The amendments to the Criminal Code in 2001 by Bill C-24 conforms more to the UN Convention definition than the 1997 definition contained in Bill C-95.[62] Bill C-53 which passed at the end of 2005 introduced a "reverse onus" provision in forfeiture of property proceedings.[63] In 2005, amendments to the Criminal Code introduced new offences pertaining to trafficking in persons, also following closely the provisions contained in the UN Protocol on Trafficking in Persons.

The Crimes Against Humanity and War Crimes Act was passed in 2000 to ensure that Canada could ratify the Rome Statute. The Anti-Terrorism Act was introduced shortly after the passing of Security Council resolution in the fall of 2001. These Bills not only created new offences to deal with these "priority crimes" but also revised criminal procedures to provide more power to the police during investigations. For instance, the immunity system giving police officers, generally those "undercover" the power to

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[59] The Corruption of Foreign Public Officials Act came into force as part of Bill S-21, which also amended other federal laws to combat corruption, notably the Income Tax Act and the Criminal Code. The Act creates three offences: bribing a foreign public official, laundering property and proceeds, and possession of property and proceeds.

[60] Bill C-48. These provisions include clarifying that corruption offences in the Criminal Code can be committed directly or indirectly, and whether the benefit is conferred on an official or another person for the benefit of the official; providing for the forfeiture of instruments used in the commission of an offence of bribery of foreign public officials, under the Corruption of Foreign Public Officials Act; amending of the definition of "official" that applies to corruption offences in s. 118 of the Criminal Code to clarify that it includes a person "elected" to discharge a public duty and to codify the interpretation that have been given to the words by Canadian courts.

[61] Bill C-95 and Bill C-24, *supra* note 54.

[62] It reduces the number requirement in a group from five to three, which is the number set out in the UN Convention. However, as discussed in the recent case of *R v Accused No. 1*, the UN Convention expressly requires a nexus between the creation of the group and the purpose or aim of the group of committing one or more serious crimes. Such nexus is not required in the Canadian definition of "criminal organization". The Canadian definition is also broader than the UN definition in that it allows for the aim of the group to be not only the commission of a serious offence but also the facilitation of a serious offence. Both have the requirement that the offence be committed in order to obtain, directly or indirect, a material benefit. The new Canadian definition also adds the limit of excluding a group formed "randomly for the immediate commission of a single offence". See Eileen Skinnider *"Defining Organised Crime in Canada: Meeting our Obligations Under the UN Convention Against Transnational Organised Crime and its Protocols Against Trafficking of Persons and Smuggling of Migrants?"* (Feb 2006: ICCLR) found at www.icclr.law.ubc.ca.

[63] Bill C-53, *An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act*, S.C. 2005 c. 44 (royal assent 25 November 2005).

commit certain offences as part of their investigation of crime was established in Bill C-24 which dealt with organised crime.[64] Other amendments revised the bail hearings and the electronic surveillance regime for investigations of organised crime and terrorism activities. In addition to responding to obligations arising from these recent international criminal justice instruments, Canada must continue to ensure compliance with the obligations under the international human rights instruments. There has been much written about the challenge of not eroding the fundamental values of fair trial and the rule of law when addresses fears for security.[65]

2.2 The ad hoc Practice of Creating "New Offences"

One trend that has been consistently raised by a number of academics is that recent law reform is ad hoc and reactive. More and more offences have been added to the Code over the past ten years, creating a complex and virtually unmanageable Code. Actually this is not just limited to the past ten years. Since the Criminal Code was created in 1892, there have only been a few sessions of Parliament where Bills have not been introduced to change the statutory criminal law.[66] While most of these reforms have been described as "ad hoc reactive measures"[67] there have in the past been some attempts to conduct a more comprehensive review of the criminal justice system, such as the 1979 promise to establish a five year criminal law review[68] and the 1987 work by the Law Reform Commission of Canada[69].

Some believe the reason for this ad hoc practice is that criminal law has increasingly being used to attempt to solve a host of social and economic problems. Some academics believe that the "criminal net is being cast too wide"[70], making more and more acts criminal. They raise the concern that criminal law is not being restricted to behavior that is truly criminal. As one commented: "we've spent 20 years criminalizing everything".[71] Some scholars see this "flood of legislative reforms" as having responded to various interest groups calling for a law and order agenda.[72] Academics argue that politicians must resist the temptation to create a new offence every time there is a crisis. This was

[64] The immunity scheme provided for in Bill C-24 was in response to the 1999 Supreme Court of Canada case of *R v Campbell and Shirose*. In that case, the Court held that the police had to abide by the rule of law. They were not immune from criminal liability for committing acts during an investigation which, in ordinary circumstances would be illegal, unless authorized by Parliament through legislation. The police had engaged in a reverse sting operation where they had offered to sell drugs, which at the time was not authorized by the Narcotic Control Act. The Court ordered a new trial to consider whether there should be a stay of proceedings because of an abuse of process. The Court noted the new Controlled Drugs and Substances Act would legalize reverse sting operations in the future and that Parliament could establish public interest immunities for police operations if these were clearly set out. *R v Campbell and Shirose* [1999] 1 S.C.R. 565 (SCC).
[65] One example is Ronald Daniels, Patrick Macklem and Kent Roach, editors The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (2001: University of Toronto Press).
[66] Manning notes that from 1892 to 1989, only four sessions of Parliament have Bills not been introduced to change the statutory criminal law. Since that time, there have been yearly introductions, some minor, some major, Morris Manning, *supra* note 3.
[67] Don Stuart, *supra* note 4.
[68] In 1979, the PC government of Joe Clark promised to establish a five year criminal law review of all aspects of the criminal justice system, but never happened, due to vote of no-confidence abolished the government.
[69] In 1987, the Law Reform Commission of Canada reported on re-codifying the Criminal Code. A draft was produced in 1988. Not yet materialized.
[70] Minister's Roundtable on Criminal Law (Toronto November 2002) found at http://www.justice.gc.ca/en/cons/roundtable/nov102/appendixb.html.
[71] 2002 Roundtable report, *ibid*.
[72] Don Stuart, *supra* note 4.

raised by Kent Roach in his review of the Anti-Terrorism Act[73] and by Don Stuart's review of the organized crime legislation[74]. Other academics opine that some of these amendments have been made in order to "patch what have been perceived as holes created in the legislative provisions by an overly active Supreme Court of Canada".[75]

2.3 Responding to Calls for Tougher Sentences

A number of the bills being debated before Parliament respond to calls to get tough on sentencing. While there is a strong belief amongst the public that more severe sentences would actually deter criminals, criminologists say this has not been proven. What normally deters criminals is the prospect of getting caught. Bill C-9 was introduced in May 2006 and proposes changes to limit conditional sentences or "house arrest" for serious crime. Currently, when a court can sentence a convicted person to imprisonment of less than two years, it may decide that such sentence can be served in the community if certain criteria exist.[76] Bill C-9 proposes that a conditional sentence no longer be an option for anyone convicted of an offence prosecuted by indictment that carries a maximum prison sentence of ten years or more. Notwithstanding the fact that amongst these offences are designated violent and sexual offences, major drug offences, crimes committed against children, and impaired driving causing death or bodily harm, some other offences with a ten year maximum sentence can be much less serious depending on the circumstances. The Criminal Code generally sets a wide range of sentences for most offences, to allow a short or alternative sentence for less serious acts and the maximum sentence for the most egregious examples.

The government believes that violent offenders "deserve more than a slap on the wrist" and that people who commit serious crime "deserve a harsher penalty than sitting back and enjoying the comforts of home".[77] The Canadian Bar Association does not support Bill C-9 citing it is too broad and would remove a valuable sentencing option for many cases where public safety does not require incarceration.[78] It favors an approach that "takes into account all sentencing principles and relies on judicial discretion in sentencing". It argues that judges should retain the ability to make the punishment fit the crime and follow established sentencing principles of proportionality, restraint and the obligation of imposing the least restrictive sanction appropriate in the circumstances.

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[73] Kent Roach *"Did September 11 Change Everything? Struggling to Preserve Canadian Values in the Face of Terrorism"* (2002) 47 McGill L. J. 893.
[74] Don Stuart, *supra* note 4.
[75] Manning, *supra* note 3. Also see note 59 which discusses the *Campbell and Shirose* case and the legislative response that followed.
[76] The conditional sentence was introduced in 1996 after the passing of Bill C-41 and was seen as providing the courts with an alternative to incarceration and a means to reduce the incarceration rate of adults in Canadian prisons, a rate which has been reported as one of the highest in the world. See "Conditional Sentences" by John Howard Society of Alberta (2000: John Howard Society of Alberta) found at http://www.johnhoward.ab.ca/PUB/A1.htm. During a conditional sentence, the offender is supervised and must abide by a number of conditions set out by the judge. There are a number of compulsory conditions such as keeping the peace, going to court when required and reporting to a criminal justice supervisor regularly. The judge can also impose other conditions which are case specific, such as requiring the offender to remain at home, except for work or medical emergencies, or to stay at home during the evening and weekends, pay restitution to the victim, perform community services or attend a treatment program. The current criteria include: (i) the offence does not involve a mandatory minimum penalty of imprisonment; (ii) the sentence cannot exceed two years less a day; (iii) the judge is convinced that public safety will not be threatened by allowing the offender to serve a sentence in the community; and (iv) the conditional sentence is consistent with the purposes and principles of sentencing in the Criminal Code.
[77] Speech by then Minister of Justice Vic Toews at "What Works Conference 2006, Closing Remarks" (November 2006).
[78] Canadian Bar Associations Submission to the Commons Committee on Justice and Human Rights, found at www.cba.org/CBA/submissions/pdf/06-42-eng.pdf.

Bill C-10 seeks to increase mandatory minimum penalties for firearm-related and gang-related offences and was also introduced in May 2006. While the Criminal Code already contains a number of mandatory minimum sentences, this proposed Bill would introduce an escalating penalty scheme for certain offences, meaning the minimum penalty escalates for second and third offences.[79] The legislation covers both offences where a firearm is actually used in the commission of the offence[80] and other offences relating to firearms such as trafficking and smuggling of firearms.[81] The Canadian Bar Association in its response to the proposed Bill C-10 suggests that it would introduced a "complicated escalating penalty scheme" and that it "will not improve public safety an will more likely add to the current strains on the justice system at great cost to Canadians".[82] It cites the fact that Canada's violent crime rate is stable and much lower than the United States. If the intent of the Bill is to impose harsher sentences, judges already have sentencing tools to achieve that goal, if the offence and the offender warrant an unusually harsh response. It says this is another Bill that will remove trial judges' discretion to impose a fair and appropriate sentence. Mandatory minimum penalties do not allow the judge to weigh all sentencing principles which include rehabilitation.

Another Bill before Parliament is Bill C-27 which would make it easier for the courts to designate an offender as dangerous.[83] An individual will be presumed to meet the criteria of a dangerous offender when he or she has received a third conviction for a violent or sexual crime that is subject to a federal sentence of at least two years. The onus is on the offender to prove that they do not qualify as a dangerous offender. Some have characterized this Bill as being similar to the American "three strikes and your out" legislation. However the Bill does not make the designation of a dangerous offender automatic upon the third conviction. There is a hearing where the offender has the opportunity to explain why they should not be designated as dangerous and the judge retains discretion. The Bill also introduces reforms to peace bond provisions[84] which would extend the supervision period after designated offenders are released back into the communities, from 12 months to 24 months. The provisions clarify that strict

[79] For example, if the offence is gang-related or if a restricted or prohibited firearm is used, then the minimum mandatory penalty that a judge would be required to impose would be five years for a first offence, seven years if the accused had one prior conviction involving the use of a firearm to commit an offence and then ten years if the accused had more than one prior conviction for using a firearm to commit an offence.

[80] Mandatory minimum penalties are proposed for offences involving the use of a firearm which include attempted murder, discharge of a firearm with intent, sexual and aggravated sexual assault, kidnapping, hostage taking, robbery and extortion. This would also extend to offences committed in connection with a gang.

[81] New or higher mandatory minimum penalties are proposed for several serious "non-use" offences: unauthorized possession of a restricted or prohibited firearm with ammunition; firearms trafficking; possession for the purpose of trafficking; making an automatic firearm and firearms smuggling; also for a new offence that would be created – robbery where a firearm is stolen. Mandatory minimum penalties are proposed for non-use offences of possession of a firearm obtained by crime and possession of a firearm contrary to a court order; a new offence that would be created – breaking and entering and stealing or intending to steal a firearm; and for a separate offence of "using" a firearm or imitation firearm in the commission of other offences.

[82] CBA submissions, *supra* note 78.

[83] The Dangerous Offender designation began in 1947 with legislation creating the "Habitual offender" designation. Since then, the provisions have been amended a number of times, most recently in 1997. The current onus is on the Crown to prove the Dangerous Offender sentence is appropriate in the circumstances. The new Bill codifies the principle established in the 2003 decision of the SCC in *R v Johnson*.

[84] Peace bonds first appeared in the Criminal Code in 1892. In recent years, specialized forms of s. 810 have been created. In 1991, s 810.1 was added targeting individuals who police fear may commit a sex offence against someone 14 years old or younger. S. 810.2 was created in 1997, focus on individuals that appear likely to commit violent or sexual offences. Both s. 810.1/2 are designed to be preventative and not punitive. It is not necessary for an offender to have committed a criminal offence in order for a judge to make an order against the individual. Breaches of peace bonds can result in up to 2 years imprisonment.

supervisory, monitoring and residency conditions can be imposed by the court to protect the general public from harm.

2.4 Increasing Focus on Victims' Rights and Vulnerable Groups

The increased concern about victims has been one of the major changes in criminal justice reform in the last decade.[85] There have been major changes in the consideration of evidence[86], criminal procedure[87], substantive criminal law[88] and sentencing[89] to give regard to the concerns of victims. For instance, in 1999 Bill C-79 amended the Criminal Code to provide new provisions for victims of crime. In 2005, Bill C-2 amended the Criminal Code provisions dealing with child pornography and created new sexual exploitation and voyeurism offences. It further abolished the requirement for a competency hearing for children under 14 years of age under the Canadian Evidence Act. Also that year, new provisions were passed to criminalize trafficking in persons as well as changes to the procedure to provide protection to the victims as well as restitution provisions. Most recently, Bill C-22 has been introduced in parliament which, as the government states, targets those who sexually prey upon children, and proposes to raise the age at which youth can give lawful consent to sexual activity from 14 to 16 years of age.[90] The proposed amendments would include a close-in-age exception so that teenagers who engage in consensual sexual activity will not be criminalized.[91] Furthermore, the government has just created an Ombudsman for Victims of Crime.[92]

Kent Roach notes that concerns about victims have been used by some to promote restorative justice, crime prevention and responses that address the needs of the crime victims.[93] The emphasis on victim's rights has also been used by others to call for more punitive measures in the criminal law. The worrying thing is that the tendency when promoting a more punitive model is to use the rights of victims as a reason to limit the rights of the accused. In recent statements from the current Minister of Justice, the term of "balancing" when weighing the rights of the accused and the rights of the victims has been used. He says: "this approach must be tough, but at the same time balance. It respects the rights of the accused but does not allow their rights to take precedence over

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[85] Kent Roach *"Crime Victims and Substantive Criminal Law"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum, editors Don Stuart, R.J. Delisle and Allan Manson (1999: Carswell) at 219.

[86] Evidence law has been affected by legislation and common law reform to make it easier to prosecute sexual violence.

[87] Disclosure regimes have also been affected by legislation designed to protect the privacy and equality rights of complainants in sexual assault cases.

[88] Bill C-49 and C-72 has been accompanied by preambles recognizing the disproportionate victimization of women and children by crimes of sexual and domestic violence and their claims to the equal protection of the law.

[89] In 1988, Parliament provided for victim impact statements and victim fine surcharges. Bill C-41 introduced the provision of reparation for and acknowledgment of harm done to victims as new purposes of sentencing.

[90] The age of protection, or age of consent, refers to the age at which the criminal law recognizes the legal capacity of a young person to consent to sexual activity. Below this age, all sexual activity with a young person, ranging from sexual touching to sexual intercourse is prohibited. The current age of consent is 18 years old when the sexual activity involves exploitative activity. This applies to such cases as prostitution, pornography or where there is a relationship of trust, authority, dependency or any other situation that is otherwise exploitative of a young person. Under the current law, the age of consent for non-exploitative sexual activity is 14 years old.

[91] This would permit 14 and 15 year old youth to engage in sexual activity with a partner who is less than 5 years older. Another time-limited exception would also be available for existing marriages and equivalent relationships. The proposed reforms maintain an existing close-in-age exception that exists for 12 and 13 year olds who engage in sexual activity with a peer who is less than 2 years older, provided the relationship is not exploitative. The legislation also maintains the existing age of protection of 18 years old for exploitative sexual activity.

[92] Department of Justice website announcement, see http://www.justice.gc.ca/en/news/nr/2007/doc_32002.html

[93] Kent Roach, *supra* note 85.

community safety”.[94] Jamie Cameron and David Paciocco have raised their concerns that accused persons have experienced “remarkable setbacks”.[95]

Kent Roach notes that in any future law reform discussions there will be a need to realize that an increased voice has been given to victims and as a result we are in “the midst of a paradigm shift”.[96] This of course challenges traditional concepts of the nature and goals of criminal law, which is seen as a matter between the accused and the state. It also will likely complicate the task of a principled review for law reformers. However he concludes that the role of victims cannot be ignored in future criminal justice law reform or attempts at codification. He suggests that the lack of recognition of the concerns of victims is perhaps one of the reasons why law reform in the last decade or so has been so piecemeal and reactive. He says include their concerns and rights now or else they will emerge during a crisis and at that time politicians will respond to them on an “ad hoc” basis.

2.5 Responding to Concerns of Inefficiencies

There have been a number of discussions amongst federal and provincial Ministers of Justice to address inefficiencies in the criminal justice system. The aim of these types of proposed reforms is for the simplification and acceleration of the criminal justice process without undermining the rule of law and basic standards of fair trial. Cost-efficiency is seen as a major consideration.

Over the past decade, the federal and provincial justice ministry representatives have been examining Preliminary Inquiry reforms. A debate has gone on for a long time reflecting deep divisions in the profession. There were some reforms introduced in 2002 through Bill C-15A but there continue to be calls for more reform in this area. Reclassification of offences has also been explored over the years. This involves changing an offence that can only be prosecuted by indictment into one that can be prosecuted either by indictment or summarily at the discretion of the prosecution, called a “hybrid” offence. The Crown is thereby given discretion to choose to proceed summarily which is generally less costly and more efficient in those cases where the facts suggest the case is a less serious one of its type. When the Crown proceeds summarily the accused is exposed to lesser penalties and therefore, it is argued, that the protections provided by the more elaborate indictable process are not necessary.

There have also been discussions regarding disclosure provisions of the defence. While Bill C-15A introduced a limited obligation on the defence to disclose expert reports, this has remained a contentious issue. Disclosure obligations of the Crown and police in complex cases have also been the subject of discussion. The Crown’s constitutional duty to disclose all relevant information to the defence in complex trials have highlighted how

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[94] Speech for Minister of Justice at the Canadian Bar Association “Towards a More Effective Justice System”, August 14, 2006.

[95] As cited in Manning, *supra* note 3. As stated earlier, they are concerned that everyone is given a voice in criminal law, with community views having a significant influence on the development of criminal law. They argue that this is in conflict with the long held belief that the “function of a criminal trial is to test whether there is sufficient evidence of a condemnable wrong to provide society with moral authority to collectively label, stigmatize, ostracize and punish one of its citizens”.

[96] Kent Roach, *supra* note 85.

the sheer volume of information can create enormous burden for the Crown and defence, resulting in significant additional logistic and resource burdens in complex cases. Proposed amendments to facilitate the electronic disclosure of materials to defence and other management mechanisms have been debated.

More recently, Bill C-27 sets out revisions to the Criminal Code provisions that deal with impaired driving offences. The Bill proposes to increase penalties[97], provide more tools for police[98] and sharply limit witnesses' evidence[99]. Bill C-23 introduces amendments to enhance criminal procedure efficiency, strengthen sentencing measures and clarify the court-related language rights provisions.[100] Some of the amendments are to make certain processes more effective through greater use of technology, such as that which would facilitate obtaining out-of-province search warrants, and by consolidating and rationalizing existing provisions.[101]

3. Recent Case Law from the Supreme Court of Canada

3.1 The Courts and Law Reform

The Courts have a limited ability to engage in law reform. As Tilbury explains:

> "The court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found. The court's facilities, techniques and procedures are adapted to that responsibility; they are not adopted to legislative functions or to law reform activities. The court does not, and cannot, carry out investigations or enquiries with a view to ascertaining whether particular

[97] Drivers will be charged if in possession of an illicit drug; new offence of being in care or control of a vehicle while in possession of a controlled substance under the Controlled Drugs and Substance Act. Drivers with blood alcohol levels exceeding .08 will face a life sentence penalty in the case of causing death; and a max of 10 years in cases of causing bodily harm. Impaired drivers will face higher mandatory minimum penalties. For first offences, a fine will increase from $600 to $1000. For second offence, sentencing increases from 14 days to 30 days. For third offences, sentencing increases from 90 days to 120 days.

[98] Police will be able to demand that a person suspected of driving while impaired by alcohol or drug participate in a sobriety test at the roadside. Police will be able to demand that a person suspects of driving while impaired by drug participate in physical tests and bodily fluid sample tests. Standardized Field Sobriety Tests (SFST), administered at the roadside, when there is a reasonable suspicion that a driver has a drug in the body. Drug Recognition Expert (DRE) evaluations, when a police officer believes a drug-impaired driving offence was committed. This includes a situation where the driver fails the SFST. The DRE evaluations are administered at the police station. A sample of bodily fluid, should the DRE officer identify that the impairment was cause by a class of certain drugs. Refusal to comply with these demands would be a criminal offences, punishable by the same Criminal Code penalties for refusing a demand for an alcohol breath test. DRE testing is currently used across Canada, but only when the driver voluntarily participates.

[99] The proposed legislation will aid in the prosecution of driving while impaired by alcohol. By restricting the use of "evidence to the contrary" (also known as the two-beer" defence) in court, these reforms will help limit impaired drivers to scientifically valid defences. (in recent decades, drivers charged with impaired driving were able to avoid conviction for being over 80 by calling witnesses, often friends, to give sworn testimony that the accused drank small amounts of alcohol (only 2 beers) which would not be enough to make their BAC over 80. This 2 beer defence had the effect of invalidating the presumption that BAC readings of approved instruments equaled the driver's BAC at the time of driving, despite the fact that those instruments were rigorously tested with no indication of improper operation or malfunctioning. The proposed legislative changes will restrict challenges to the BAC result. Evidence for challenges can include evidence that the machine was not functioning properly or was not operated properly. In addition, the Alcohol test record, which is printed by the breath test machine and confirms that it is in good working order, will be admitted as evidence.

[100] June 2006 introduced An Act to Amend the Criminal Code (Criminal Procedure, Language of the Accused, Sentencing and Other Amendments).

[101] These include changes to the process with respect to the challenge of jurors to, among other things, assist in preserving their impartiality; summary dismissal by a single judge of the court of appeal when an appeal has erroneously been filed with that court; an appeal of a superior court order with respect to things seized lying with the court of appeal. a summary conviction trial with respect to co-accused that can proceed where one of the co-accused does not appear; and the re-classification of the offence of possession of break and enter instruments into a dual procedure offence to allow the crown to determine whether this offence should be prosecuted by way of indictment or by the more expeditious procedure of summary conviction.

> common law rules are working well, whether they are adjusted to the needs of the community and whether they command popular assent. Nor can the court call for, and examine, submissions from groups and individuals, who may be vitally interested in making of changes to the law. In short, the court cannot, and does not, engage in the wide-ranging inquiries and assessments which are made by governments and law reform agencies as a desirable, if not essential, preliminary to the enactment of legislation by an elected legislature."[102]

Despite the courts limited ability in law reform, some academics believe that since the Charter, the Supreme Court of Canada has "engaged in the practice of continuing to revise the criminal law in accord with what are perceived by it to be Charter values".[103] They argue that the Courts have little choice but to be activist, saying that they can only work with the material they have.[104] One academic suggests that politicians have abdicated their responsibility to take leadership and left it to the judges to decide what the criminal law should be.[105] He also suggests that the Criminal Code is in the sorry shape it is in because of that. Some see this judicial activism as providing the best protection against what is perceived as law and order expediency on the part of Parliament.[106]

Other academics believe that the Courts play a more limited role in law reform, some suggesting that they pay too much deference to legislators and sometimes as a result Charter standards are set too low. Some academics raise concerns that the Courts have been "put on trial over the last decade and held up to increased public and political scrutiny and at times impatience with their decisions".[107] There is criticism of "judicial activism"[108] and most recently a debate as to how to nominate judges to the Supreme Court of Canada. The increased pressure on the courts by the public and the government must be responded to by reiterating the independence and impartial role of the judiciary.

The recent case of R v Henry provided the Supreme Court of Canada an opportunity to clarify what it sees as its role in interpreting legislation and how its judgments should be viewed by the legal profession.[109] The Court said that it is a misunderstanding that each phrase in a judgment of this Court should be treated as if enacted in a statute. Such an approach is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience. The traditional view is that "a case is only an authority for what it actually decides". The legal point decided by this Court may be as narrow as the jury instruction at issue in Sellars or as broad as the Oakes

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[102] Michael Tilbury *"Why Law Reform Commissions? A Deconstruction and Stakeholder Analysis from an Australian Perspective"* (2005) 23 Windsor Y.B. Access Just. 313.
[103] Morris Manning, *supra* note 3.
[104] *ibid*.
[105] 2002 Roundtable report, *supra* note 70.
[106] Don Stuart, *supra* note 4.
[107] Kent Roach, *supra* note 73.
[108] Canon's model has 6 different dimensions of judicial activism, which range from "majoritarianism" (the degree to which policies adopted through democratic process are judicially negated) to "availability of an alternate policymaker" (the degree to which a judicial decision supersedes serious consideration of the same problem by other agencies). The term "judicial activism" is regularly used by politicians, interest groups and other actors in the public sphere, who often inject arguments about it social merits or dangers into political debates as a means of enhancement of partisan standpoints. While there is a lot of problems with the definition of judicial activism, one has to recognise that there has been lots of debate on the role of the judiciary. This scope of this paper does not allow for thorough analysis of the models of judicial activism. For more information see Margit Cohn and Mordechai Kremnitzer *"Judicial Activism: A Multidimensional Model"* (2005) 18 Can L.J. & Juris 333.
[109] *R v Henry* [2005] S.C.J. No. 76 (SCC).

test.[110] All obiter does not have the same weight, the weight descreases as one moves from the dispositive ratio decidenti to the wider analysis which is intended for guidance and should be considered authoritative. Beyond that there will be commentary and examples which are intended to be helpful but not considered binding. The object of all this is to promote certainty in the law and not to stifle its growth and creativity.

3.2 Some Trends

Each year, academics review the jurisprudence from the Supreme Court of Canada, analysing trends and highlighting major decisions. It can be difficult to make pronouncements as to whether the Supreme Court of Canada is moving in one direction or another but some years or in some areas of law, trends may be easier to see. This section summarizes some of those more recent reviews.

Some academics note that there has "been a dearth of decisions with real significance" dealing with substantive criminal law.[111] For instance, the 2004-2005 term has been described as one without trends in this area.[112] One observation made is that the majority of cases coming from the Court are concerned with the nuances of liability of specific offences and defences and "few principles of overarching application emerge".[113] For substantive criminal law, the cases have been seen to be very technical in nature.

However there have been a few exceptions to this trend where case law has covered interesting doctrinal issues and important social policy dimensions. These includes cases on criminal law and mental illness[114], the deliberate spread of HIV[115], the use of force by parents and teachers against children under their care[116], the constitutionality of criminalizing possession of marijuana[117] and the ability of prisons to protect the lives of prisoners[118].

Regarding recent criminal procedural cases, the Supreme Court has made a number of significant decisions in recent years. In the 2005-2006 term, there were seven criminal cases where Charter claims failed. In R v C.D., First Nations constables were able to set up a RIDE program outside reserves and therefore the accused who were stopped were not held to be arbitrarily detained contrary to section 9 of the Charter.[119] R v Orbanski confirmed that the police may question motorists about their drinking and administer the roadside screening device test without providing the motorist an opportunity to retain

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[110] *Sellars v The Queen* [1980] 1 S.C.R. 527 and *R v Oakes* [1986] 1 S.C.R. 103.

[111] Isabel Grant *"Developments in Substantive Criminal Law: the 2003-2004 Term"* (2004) 26 S.C.L.R. (2d) 215 at 215.

[112] Ian Smith and Gary Trotter *"Developments in Criminal Law: The 2004-2005 Term"* (2005) 30 Supreme Court Law Review (2d) 207 at 207.

[113] *ibid* at 208.

[114] R v Demers [2004] S.C.J. No. 43 (SCC), the Court finds that a permanently unfit accused cannot be detained indefinitely if he or she does not present a danger to the public. R v Fontaine [2004] S.C.J. No.23 (SCC). expands the defence of the mental disorder automatism

[115] R v Williams [2003] S.C.J. No. 41 (SCC) the SCC upholds a conviction for attempt of a man who has knowingly passed on the HIV virus to his partner.

[116] Canadian Foundation for Children, Youth and the Law v Canada (AG) [2004] S.C.J. No. 6 (SCC).

[117] R v Malmo-Levine [2003] S.C.J. No. 79 (SCC).

[118] R v Kerr [2004] S.C.J. No. 39 (SCC) involved a murder by a penitentiary inmate who felt that carrying a lethal homemade weapon was necessary to protect his life in a prison where the institution was out of control.

[119] R v C.D. [2005] S.C.J. No. 79 (SCC).

counsel, with the Court holding that the accused's section 10(b) rights were justifiably suspended under section 1 of the Charter.[120] In R v Chow, wiretap evidence was held admissible in accordance with section 8 of the Charter despite the fact that the accused was not "named" in the wiretap authorization.[121] The Court also held that the accused was not entitled to a separate trial to compel the co-accused to testify. In R v Spence, it was held that counsel for the accused did not have the right to challenge jurors on the basis of sympathy for the race of the victim of the alleged crime.[122] In R v Pires, the Court affirmed the right to cross-examine the affiant police officer in proceedings to obtain wiretap authorization subject to the Garofoli test.[123] In R v Wiles, the mandatory 10 year firearms prohibition required by section 109(1) of the Criminal Code was upheld as not constituting "cruel and unusual" punishment and therefore not in violation of section 12 of the Charter.[124] In R v Henry, it was stated that section 13 of the Charter does not preclude cross-examination of the accused on prior inconsistent statements based on voluntary testimony from an earlier trial on the same indictment.[125] The decision in R v Henry is notable in this group as the Court took the opportunity to look back on 20 years of its own jurisprudence interpreting the protection against self-incrimination in section 13 of the Charter and took the rare step in reconsidering a number of its previous decisions in the area.[126]

In the 2004-2005 term, the court released decisions in three main areas dealing with evidence: the co-conspirator's exception to the hearsay rule, the common law confessions rule and similar fact evidence.[127] The Court held in R v Mapara that double hearsay is admissible under the co-conspirators exception to the hearsay rule.[128] The reliability and necessity requirements are still met regardless of the nature of the hearsay. The Police did not exceed the terms of the wiretap authorization when the recorded conversation between the accused and a third party during a three way call which was initiated by the "target". In R v Grandinetti, the Court refused to apply the person in authority requirement of the confessions rule flexibility in favour of the accused and gave it a narrow interpretation.[129] One observation of the decisions in Mapara and Grandinetti is that the "Court favours considerations such as efficiency and the ability to prosecute over fairness to the accused and reliability".[130] This is perhaps a shift from past decisions where the court had made protection of the accused's rights a priority by emphasizing that a sufficient degree of reliability and voluntariness is generally a precondition to admissibility and specifically, in relation to hearsay and confessions. In R v Perrier, the Court looked at the admissibility of similar fact evidence against an accused where the similar acts had been found to be committed by a gang of which the accused was a

[120] R v Orbanski [2005] S.C.J. No. 37)SCC).
[121] R v Chow [2005] S.C.J. No. 22 (SCC).
[122] R v Spence [2005] S.C.J. No. 74 (SCC).
[123] R v Pires [2005] S.C.J. No. 67 (SCC).
[124] R v Wiles [2005] S.C.J. No. 53 (SCC).
[125] R v Henry [2005] S.C.J. No. 76 (SCC).
[126] Gary Trotter *"R v Henry: Self-Incrimination and Self-Reflection in the Supreme Court"* (2006) 34 S.C.L.R. (2d) 409.
[127] Sandra Forbes and John Adair *"Developments in the Law of Evidence: The 2004-2005 Term"* (2005) 30 S.C.L.R. (2d) 333.
[128] R v Mapara [2005] S.C.J. No. 23 (SCC).
[129] R v Grandinetti [2005] 1 S.C.R. 27 (SCC).
[130] Sandra Forbes and John Adair, *supra* note 127. They argue that the Court moves from a flexible and discretionary approach to the exceptions to the hearsay rule and towards a more predictable categorical approach. The focus is not on the rights of the accused. The focus is on what approach is practical in the circumstances, does not unduly hinder the prosecution and does not overburden the courts.

member.[131] One observation of this case is that the Court continued to apply a cautious and careful approach designed to protect the rights of the accused in the context of what can be extremely prejudicial evidence.

In the 2003-2004 term, the Court dealt with the issue of search and seizure, refined the mental disorder provisions, addressed the interaction of the long-term offender and dangerous offender provisions and also dealt with the newly created provisions in the Anti-terrorism Act.[132] It also rendered significant decisions in three areas of the law of evidence: the scope of cross-examination[133], the crown's duty to disclose all relevant evidence[134] and the test for admissibility of fresh evidence where the crown has breached that duty, and solicitor-client privilege.[135]

One scholar compares the Supreme Court of Canada's case law on the Charter from ten years ago and says that the Court's output has fallen off considerably.[136] He also notes that the once "revolutionary" period of Charter interpretation which moved the Canadian criminal justice system sharply away from a crime control model toward a due process model appears to be ending.[137] Some argue that the "dust has settled" and that by and large, the Charter issues in criminal law have been thoroughly litigated and are firmly established.[138] Others respond that there continues to be much uncertainty around a number of basic Charter issues.[139] Even questions that may seem settled are open for reconsideration under the Canadian common law constitutional system, for example in the area of self-incrimination as reviewed in R v Henry. As Stribopoulos notes this flexibility is essential for the long term health of our Constitution and the integrity of the Supreme Court of Canada.[140]

As noted earlier, some academics have highlighted a recent trend where the Supreme Court appears to be showing more deference to Parliament's legislative authority. Don Stuart notes that "on the Charter front the tide has clearly changed. In Mills a unanimous Court meekly spoke of the need to dialogue with Parliament and upheld Parliament's enactment of the views of the dissenting opinion in O'Connor as to access to medical and other records of complainants in sexual assault cases."[141] In dealing with the terrorism cases, the Courts were seen to be cautious and as one academic noted, inclined to leave

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[131] R v Perrier [2004] S.C.J. No. 54 (SCC).
[132] For a good review see Gary Trotter and Ian Smith *"Developments in Criminal Procedure: the 2003-2004 Term"* (2004) 26 S.C.L.R. (2d) 289.
[133] R v Lyttle [2004] 1 S.C.R. 193 (SCC), the Court confirms a broad right of cross-examination unfettered by the need to provide evidentiary foundation for the questioning.
[134] R v Taillerfer; R v Duguay [2003] S.C.J. No. 75, this case dealt with Crown's obligation to disclose all relevant information to an accused, whether inculpatory or exculpatory, subject to the exercise of the crown's discretion to refuse to disclose information that is privileged or plainly irrelevant. Infringement of the right to disclose is not always an infringement on the right to make full answer and defence. Must show that there was a reasonable possibility that failure to disclose affected the outcome at trial or the overall fairness of the trial.
[135] For a good review see Sandra Forbes and Davit Akman *"Developments in the Law of Evidence: the 2003-2004 Term"* (2004) 26 S.C.L.R. (2d) 355.
[136] James Stribopoulos *"Has Everything Been Decided? Certainty, the Charter and Criminal Justice"* (2006) 34 S.C.L.R. (2d) 381.
[137] *ibid*.
[138] Justice Moldaver speech at the Sopinka Lecture on advocacy at the criminal lawyers Association Annual Fall Conference, October 2005, as cited in Stribopoulos, *supra* note 142.
[139] Stribopoulos, *supra* note 136.
[140] *ibid*. However, he also notes that too much uncertainty in some areas such as the scope of police powers as discussed in R v Orbanski should be avoided.
[141] Don Stuart, *supra* note 4.

many questions for another day.[142] Another commented that the majority's decision in the terrorism cases is a rare example of the Court's willingness to sacrifice or downplay the interests of the accused to achieve what it considers to be a more important purpose.[143] However others note that it is difficult to say this is a general trend as there are times where a unanimous court invalidates Criminal Code legislation.[144]

Another example of deference to Parliament is in the case of upholding mandatory minimum sentences.[145] The sentiment expressed in the dissent in R v Smith[146] of society recognizing the necessity to suppress certain social evils by legislating a prison sentence has become the majority in R v Morrissey. R v Smith's dissent also takes the position of not second guessing parliament, as noted: "in view of the careful and extensive consideration given to this matter by parliament and the lack of evidence before this Court suggesting that an adequate alternative to the minimum sentence… goes beyond what is necessary for the achievement of a valid social aim".[147]

Part II. Selected Topics

1. The Impact of the Media on Public Perception, Political Action and Law Reform

1.1 The Moral Panic Theory

Public attitudes towards the criminal justice system and public fear of crime are not always easy to assess and to understand. To assist in understanding the impact of the media on public perception, the politician's reaction to that public perception and how this influences law reform, Stanley Cohen developed an analysis of what he describes as the "moral panic" theory.[148] He defines "moral panic" as:

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[142] Ian Smith and Gary Trotter, *supra* note 112.
[143] Sandra Forbes and Davit Akman, *supra* note 135.
[144] An example is R v Demers, *supra* note 121.
[145] R v Morrissey (SCC) "Perhaps the most egregious hypothetical reviewed are the individuals playing with guns. Firearms are not toys. There is no room for error when a trigger is pulled. If the gun is loaded, there is sufficient probability that any person in the line of fire could be killed. The need for general deterrence is as great (if not greater) for the hypothetical offenders playing with guns as it is for people such as the appellant…. In such circumstances, there can be no question that the four-year minimum is as appropriate as it is for the appellant. The four year minimum sentence equally sends a message to people who are in a position to harm people to take care when handling their weapon. Hunting accidents occur all too easily. When individuals with weapons are hunting in such a degree of proximity, extra steps are necessary to ensure that other hunters are not harmed…. Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence… serves a general deterrent function to prevent others from acting so recklessly in the future."
[146] R v Smith (SCC) Mr. Justice McIntyre's dissenting opinion: "there can be no doubt that Parliament, in enacting the Narcotic Control Act, was aiming at the suppression of an illicit drug traffic, a truly valid social aim. The deterrence of pernicious activities, such as the drug trade, is clearly one of the legitimate purposes of punishment. Our society has always recognised that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law. In view of the seriousness of the offence of importing narcotics, the legislative provisions of a prison sentence cannot by itself b attacked as going beyond what is necessary to achieve the valid social aim…In view of the careful and extensive consideration given to this matter by Parliament and the lack of evidence before this Court suggesting that an adequate alternative to the minimum sentence exists which would realize the valid social aim of deterring the importation of drugs, I cannot find that the minimum sentence of 7 years goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives".
[147] *ibid*.
[148] Professor Rosemary Way provides a good example of how the media manipulates and the politician use opportunism using Stanley Cohen's "moral panic" theory in Rosemary Cairns Way *"The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism"* (1994) 39 McGill L.J. 379.

> "a condition… merges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by… right thinking people; socially accredited experts pronounce their diagnoses and solutions; ways to cope are evolved….; the condition then disappears, submerges or deteriorates".[149]

Professor Way explores Cohen's thesis in three phases.[150] The first phase deals with the role of the media, exploring how the media defines and conceptualizes the threatening behaviour, often using stereotypical language and failing to address the complexity of the problem. The result of the increased media attention to a problem has often resulted in increased outrage by the public over how ineffective the criminal justice system seems to be in addressing the problem. The second phase is the politization of what is identified as a threat and the reconfiguration of the problem as one which is amenable to legislative intervention. The third phase is where the solution to the problem is by adopting a law to address the problem.

The media's role

As we have seen in the previous part of this paper, Canadian's fear of crime appears to be inconsistent with the reality of the declining crime rate described by the statistics. With crime being reported daily in the mass media, it has become a prominent fact of life for the majority of Canadians. Crime is always in the news. As the old saying goes, "if it bleeds, it leads". Television is very influential showing vivid images of death and destruction instantaneously and repeatedly.[151] To many Canadians, this has been a violent era.

It has been suggested that the media helps shape the attitudes and perceptions of the public.[152] For many people, knowledge about various things for which they have no experience comes from the media. Various studies indicate that most people rely upon newspapers, television and other media their main source of education with respect to information about crime, offenders and the criminal justice system.[153] For example, as one study found, 5 out of 6 respondents closely followed crime-related issues and stories in the media.[154] Newspapers and television were reportedly their most important sources of information about crime and justice issues.

The media tends to report on certain difficult cases which are sensationalized, in a process which gathers momentum by virtue of repetition even though the case itself may be an anomaly and as such, of no particular importance in the grand scheme of things.

[149] Stanley Cohen Folk Devils and Moral Panics 2nd ed. (New York: St Martin's Press, 1980).
[150] Rosemary Way, *supra* note 148.
[151] As Elaine Davis notes the late 1980s and 1990s are periods in which, along with the visual images of death shown immediately and repeatedly on the nation's televisions. Elaine David *"The 1995 Firearms Act: Canada's Public Relations Response to the Myth of Violence"* (2000) 6 Appeal 44.
[152] See Dekeseredy and Schwartz (1996) and Surette (1998) as cited in Juristat *"Public Attitudes Towards the Criminal Justice System" supra* note 26. The term "media" refers to channels of communication that serves many diverse functions such as communicating news and information or providing entertainment. In discussing news media, there sometimes can be a fine line between journalists and entertainers. In Nicholas Cowdery's paper, he describes the phenomenon of talkback shows which "encourage robust debate on issues by people who are not fully informed. They see themselves more as entertainers than journalist, see Nicholas Cowdery *"Getting Justice Wrong: Myths, Media and Crime"* paper delivered at the 2001 International Society for the Reform of Criminal Law conference.
[153] See Erickson, Baranek and Chan (1991) and Roberts (1992) as cited in Juristat, *supra* note 26.
[154] See Bradford (1995) as cited in Juristat, *supra* note 26.

This not only shapes the public perception but also mobilizes the public to call for action and the politicians to react, with the media advocating simplistic solutions. The media often include in their stories the message that the criminal justice system has been unable to address the perceived problem or not effective in so doing. Emphasizing the failure of the criminal justice system increases the dissatisfaction of the public. Also in some stories, the media seems to suggest that the problem arises from relatively new behaviour, characterizing the problem as different from before, such as "stalking" or "gangsterism". Part of the story is that we are all at increased risk and therefore criminalization of the behavior and increased penalties will provide us some safety and is an appropriate and necessary response.

By not discussing the complexities of the problem at hand and understanding the cultural or social-economic assumptions that underlie the problem, the media provides a "comfortable forum for outrage over this abuse without requiring an engagement on its systemic nature".[155] The public and politicians can react with outrage without questioning their own actions or assumptions. Of course not all media is sensationalized or simplifications of complex problems. There are numerous examples of quality reporting, for example the recent article in the Globe and Mail questioning whether the Prime Minister's message on crime reflect the statistics.[156] However some journalists have acknowledged that they believe decreased resources and tight deadlines have pressured journalists to report on what they perceive as easier and straightforward stories as opposed to more complex socio-economic stories.[157]

The role of politicians

The perceived attitudes of the population have implications for the criminal justice system and its processes. Media can create inaccurate perceptions in the minds of the public about crime and the criminal justice system, its goals and what can be achieved. The public's fears and insecurities are sometimes then used as a basis for developing policies for law reform. One Member of Parliament recently stated what he believes is driving the current justice bills before Parliament:

> "There is a pretence out there that Canadian society is beset with crime, that crime is escalating, and that violent crime is taking over our communities. It is true that television and the Internet are giving us access to a lot more information. We are seeing a lot more of it, but data on crime shows the opposite. It shows that crime is reducing. I do not have to repeat too much of that. The data is out there. Since 1991, for reasons that sociologists have not ever been able to fully explain, our violent crime rates and our overall crime rates are decreasing and continue to do so. Thus, there is a pretence that we have a crime problem. While we actually do have crime problems, we just do not have the escalating crime problem that some politicians are urging upon us".[158]

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[155] Rosemary Way, *supra* note 148.

[156] Globe and Mail *"Does Harper's message match the statistics?"* (Monday April 30, 2007).

[157] From a discussion at the International Centre for Criminal Law Reform *"Law in a Fearful Society Symposium"* (September 30 and October 1, 2004: Vancouver, British Columbia) see http://www.icclr.law.ubc.ca/law_fear.htm.

[158] Mr. Derek Lee (Scarborough-Rouge River, Lib) 39:1 Hansard – 143 (2007/4/30).

Politicians play a major role in criminal law reform and it is therefore important to understand the pressures to which they react. There is a need by politicians to be seen to be responding to the community's concerns. They want to be seen to be acting instantly in a way that will attract votes at the next election.[159] Of course, there are politicians that call for debate and informed review, as seen from the quote in the previous paragraph. There are also mechanisms in the legislative law reform process that allows for consultation, such as dissemination of consultation papers to the legal profession, committee hearings, parliamentary reviews and commissions of inquiries.[160] By taking up the cries expressed by the public as reported in the media, politicians shift the focus from defining the problem to looking for solutions.

The laws

There is a constant demand for criminal law reform to respond to specific horrific events that have been given much media attention. Some have argued that reforms to criminal law and procedure have "come to dominate the political agenda because of their symbolic weight and because they are relatively inexpensive compared with other more structural reforms".[161] Kent Roach says we have a "habit of expanding our criminal law in a symbolic attempt to recognise tragic crimes and in a desperate and frequently vain quest for safety, an increased sense of security and an understandable desire to express concern for those victimized by crime".[162]

The passing of a law represents a coping mechanism to address a perceived threat, even if the solution may be more apparent than real. As Rosemary Way notes, the criminalization of the problem may simply assuage public concern about the violence while deflecting political energy away from the systematic analysis and response which is needed.[163] However merely creating a new offence may have little impact on the lives of victims or potential victims. This is not to say that criminal law has no role to play here, but rather that it should not be seen as providing all the solutions.

When our politicians respond with legislation, this can implicitly confirm Canadian's fears that violence is increasing. It also reiterates the message that the law has the power to right all wrongs. These laws become part of a political agenda which emphasizes public safety and law and order solutions to problems of crime and violence. The public perception that the system of law enforcement and justice are not working is much easier to address with a new law creating a new offence rather than by tackling the socio-economic issues that are the source of many problems. When easy solutions such as measures to "get tough on crime", ultimately do not appear to solve the problem of crime, this may "add to the public perception of a justice system that does not work, when significantly more resources are spent prosecuting and incarcerating offenders, while inevitable crime continues to occur."[164]

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[159] Rosemary Way, *supra* note 148.
[160] For more information on these process, see Annemieke Holthuis *"Recent Influences on Criminal Law Reform in Canada"* paper for the Symposium on Canada-China Cooperation in Promoting Criminal Justice reform" (June , 2007).
[161] Rosanna Langer, *supra* note 18.
[162] Kent Roach, *supra* note 73.
[163] Rosemary Way, *supra* note 148.
[164] CBA submissions on Bill C-10, see www.cba.org.

By using law reform as a politically expedient response, there sometimes is very little meaningful debate in parliament or meaningful committee review or consultation with various effected groups as these laws are being drafted. Some argue that such reactive laws are often not necessary. Don Stuart arguing that the Organised Crime Bills of 1997 and 2001 were not necessary as Canada had already strong laws against group criminality, murder, bombing, illegal drugs, proceeds of crime and the police had already wide powers respecting seizure, authorization of electronic surveillance and few limits on undercover operations.[165] Kent Roach made similar arguments regarding the new provisions in the anti-terrorism laws.[166] Rosemary Way argued this view regarding the 1995 criminal harassment laws.[167] While law and order is an easy thing for politicians to push, fortunately the media has less impact on the day to day decision making within the justice system itself. This reinforces the importance of ensuring and maintaining the independence and impartial decision making of prosecutors and judges.

1.2 "Guns, Gangs and Violent Crime"

Stories about gangs and guns have been increasingly covered in the media. In the 1990s, one could read many articles and hear news stories about the fight between two biker gangs. One particular incident which involved the killing of an innocent bystander, a young boy resulted in public outrage with regard to the Quebec biker gangs responsible.[168] Bill C-95 which was passed through Parliament on the eve of a federal election in 1997 was a response to pleas from Quebec officials to address what was perceived as the escalating fight between these two biker gangs.[169] That piece of legislation created new offences regarding organised crime and added to police powers to seize proceeds of crime, electronic surveillance, reverse onus bail provisions, special peace bond provisions and tougher and consecutive sentencing provisions. In 2001, again on the eve of a federal election, another Bill was passed to deal with organised crime. There had also been increased media attention particularly focusing on a Montreal crime reporter who was shot the day after he published an expose on organised crime.

Other significant events, like the Ecole Polytechnique massacre, was seen as one of the main incidents that resulted in the 1995 Firearms Act which increased legislative control of firearms and introduced more mandatory minimum penalties.[170] It focused on the aspect that firearms played in that violent event and the government was seen as responding to demands by the public that something should be done. Even back in 1995, when the then Justice Minister introduced the gun control legislation, he spoke about criminal sanctions, noting:

> "[T]here is a disturbing trend particularly in urban areas toward violence with firearms. Five Canadians each week are victims of homicide by gun…. To strengthen the law and to provide real deterrents in sentencing we will introduce new strong penalties for ten specific serious crimes… Those who choose to use a

[165] Don Stuart, supra note 4.
[166] Kent Roach, *supra* note 73.
[167] Rosemary Way, *supra* note 148.
[168] Don Stuart, *supra* note 4.
[169] *ibid*.
[170] Elaine Davies, *supra* note 151.

> firearm in such a way must know that they will surely incur severe consequences".[171]

Recent events, like the "summer of the gun" in 2005 in Toronto, have added to the national attention on crime and especially gun-related crimes.[172] This also increased the level of rhetoric by all the political parties which were in the midst of an election in 2005 promising to be tougher on crime. The Prime Minister summed up the main message in November 2006 when he stated "as you know, cracking down on gang, gun and drug crime has been one of the top priorities of Canada's new government since we took office nearly ten months ago… We made it a priority because Canadians had made it very clear to us that they wanted the scales of justice rebalanced".[173]

Another message the media has taken up is the need for harsher penalties, particularly for violent and repeat offenders. As previously discussed, the majority of the public overestimates the amount of crime that involves violence and they also overestimate the likelihood that offenders will re-offend. As the Canadian victimization surveys confirm, Canadians are becoming more punitive. The fad of the "three strikes your out legislation", which started in California in 1994 as a result of a highly publicized kidnap killing during an election year, has spread to other American states and other States.[174] Notwithstanding the known and documented studies on the ineffectiveness of the three-strikes legislation, some Canadian politicians call for bringing in three-strike legislation for violent and sexual offenders.[175] In ignoring the research that exists, politicians' actions are more than likely directed toward fulfilling Canadians' wish for something to be done to stem violence.[176]

Media also assists politicians in getting out their message. Being able to state that mandatory minimum sentences will make us safe from bad people is a simple and straight forward message and easy enough to present in a short sound bite over the media. It is much more difficult to explain the complexity of the problem and the concerns of such penalties. Media and politicians promote mandatory minimum policies and speak about them as a way to fight crime. Politicians rely on them as providing an effective deterrence message. The message is that mandatory minimum sentences "are seen as powerful forces that can be used to keep Canadians safe".[177] Initiatives such as this, directed toward locking up an offender for "at least" some minimum time sounds like an effective means of crime control to the general public.

However the research clearly shows that such penalties do not deter criminals any more than less harsh and proportionate sentences.[178] A survey of practitioners in the criminal

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[171] Statement made by Allan Rock, then Justice Minister as cited in Elaine Davis, *ibid*.
[172] Globe and Mail story, *supra* note 38.
[173] Statement of the Prime Minister, *supra* note 80.
[174] Doob and Cesaroni, *supra* note 7.
[175] Stockwell Day in 2000 announced that they would bring in three-strike legislation for violent and sexual offenders, cited in Doob and Cesaroni, *supra* note 7.
[176] Elaine Davies, *supra* note 151. Another good example is the sex offender registry which was instituted notwithstanding studies that suggested that the money would be better spent vetting those who are in positions of authority over vulnerable people such as children rather than on a registry.
[177] Doob and Cesaroni, *supra* note 7.
[178] *ibid*.

justice system showed that most are not in agreement with the proposition that mandatory minimum are such powerful tools. Over half of trial judges surveyed by the Sentencing Commission believed that mandatory minimum penalties restricted their ability to carry out a just sentence. Some believed that they contributed to inappropriate agreements between prosecutors and defence counsel. Most defence counsel and about one –third of prosecutors surveyed believed that such penalties caused prosecutors and defence to enter into agreement that would not normally have entered into.[179] It is generally accepted that, to the extent that criminals consider the consequences of their actions at all, they take into account the likelihood that they will be caught rather than the penalty they might receive if convicted. As reported in a 1994 government report "police, lawyers and judges may alter their behaviour in a variety of ways aimed at mitigating the impact of mandatory minimum penalties on accused for whom the mandatory penalty is perceived to be unduly harsh".[180] The report lists the concerns: including shifting discretion from the impartial judiciary to the adversarial prosecutor; increasing trial rates; increasing prison population; and increasing the likelihood of pressured plea negotiations.[181]

In exploring why mandatory minimum sentences are still so popular with politicians, one commentator suggests: "The reason is that most elected officials who support such laws are only secondarily interested in their effects; officials' primary interests are rhetorical and symbolic. Calling and voting for mandatory penalties, as many state and federal officials repeatedly have done in recent years, is a demonstration that officials are "tough on crime". If the laws "work", all the better, but that is hardly crucial. In a time of heightened public anxiety about crime and social unrest, being on the right side of the crime issue is much more important politically than making sound and sensible policy choices".[182]

The most recent Bills being debated before parliament continue down this road. As stated by the Minister of Justice at a fall conference, the proposed bills "send a clear message that using guns to commit crimes will not be tolerated…. Serious or repeat firearm offenders who use a firearm when committing an offence will spend more time behind bars, so they won't be able to threaten communities".[183] He further claimed that "we will not tolerate gun and gang-related crimes in our communities…. By ensuring that tougher mandatory minimum sentences are imposed for serious and repeat firearms crime, we will restore confidence in the justice system, and make our streets safer."[184] The Canadian Bar Association responded to the proposed Bill C-10 which would introduced what it called a "complicated escalating penalty scheme" and said that it "will not

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[179] Anthony Doob and Carla Cesaroni, *supra* note 7. In a survey carried out by the CSC, 57% of trial judges surveyed stated that mandatory minima restricted their ability to carry out a just sentence. Only 9% of trial judges indicated that MMS "never restricted their ability to impose a just sentence". Trail judges in the mid-late 1980s also indicated that MMS contributed to inappropriate agreements between Crown and defence counsel". Most defence counsel and about 1/3 of Crown surveyed by the CSC indicated that MMS caused Crown and defence to enter into agreements that they would otherwise avoid. They cite Chief Justice McRuer in the Report of the Royal Commission on the Revision of the criminal Code in 1952 wherein he stated that mandatory minimum penalties "tends to corrupt the administration of justice by creating a will to circumvent it".

[180] 1994 Report commissioned by the Firearms Control Task Force and Research Section of the DoJ reviewed the evidence available on the impact of Mandatory Minimum Sentences.

[181] For more discussion on the concerns of the impact of mandatory minimum sentences will have on the criminal justice system, see Elizabeth Sheehy *"Mandatory Minimum Sentences: Law and Policy: Introduction"* (2001) 39 Osgoode Hall L.J. 261.

[182] Anthony Doob and Carla Cesaroni, *supra* note 7.

[183] Minister of Justice's Closing Remarks at the What Works Conference 2006, *supra* note 34.

[184] *ibid*.

improve public safety and will more likely add to the current strains on the justice system at great costs to Canadians".[185] It cited the fact that Canada's violent crime rate is stable and much lower than the United States. If the intent of the Bill is to impose harsher sentences, judges already have sentencing tools to achieve that goal, if the offence and the offender warrant an unusually harsh response. It said this is another Bill that will remove trial judges' discretion to impose a fair and appropriate sentence. Mandatory minimum penalties do not allow the judge to weigh all sentencing principles which include rehabilitation.

As Professor Blakesley succinctly summed up the role of the media and the reactive approach by some politicians can have a negative effect on principled and comprehensive criminal law reform: "It is easy to fall into the trap: politicians gain popularity and votes by looking 'tough on crime', especially organised crime. They become even more popular when they are able to say bad things about courts that try to rectify the constitutional problems created by bad laws. Sadly, often the news media exacerbate the problem by pandering to public fear and appetite for salacious material. Outcries from interest groups are shrill, raising the cost to anyone who wishes to promote reasoned and constitutional laws. This all creates an atmosphere that tends to ignore the larger picture and which may actually hurt the battle against crime, while damaging human rights and democracy".[186]

2. Calls for Recodification

A number of academics have called for recodification of the Criminal Code. They view the Criminal Code as unwieldy, with now over 840 provisions, many of which are long and complex.[187] Some view that new crimes and procedures are being added year after year as a response to what has been described as using criminal law for political expediency. Don Stuart states that "it is time to halt the unremittingly reactive law and order agenda of subsequent Minister of Justice over the past 20 years and to influence a Minister of Justice to insist on a proactive and principle review of federal legislation such as the Criminal Code and the Canadian Evidence Act".[188] Calls for recodification do not necessarily mean establishing rigid and definitive codes. There will continue to be the need for judicial interpretation and legislative change by Parliament. Rather the call for recodification is to make the criminal law clearer and simpler with less duplication. Recodification is to ensure that the law is more accessible. Morris Manning believes that the law is in real danger of "becoming increasingly difficult to discover and less evident in trials"[189] and as such the rule of law is in jeopardy.

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[185] CBA submissions, *supra* note 168.
[186] Prof Christopher Blakesley recently reviewed several national studies presented at an international conference in 1997 as to the dangers of adopting ill-considered criminal legislation on organised crime, as cited in Don Stuart *"A Case for a General Part"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 95.
[187] Manning, *supra* note 3.
[188] Don Stuart, *supra* note 4.
[189] Manning, *supra* note 3.

The calls for recodification and a principled review of the criminal justice system are nothing new. As Gerry Ferguson points out, even when the first Criminal Code was created back in 1892, it was a direct by-product of the codification movement in England.[190] A Royal Commission on the Revision of the Criminal Code established in 1949 made substantial revisions to the Criminal Code in 1951.[191] These revisions were seen as not actively reforming the legal principles but rather to simplify the Criminal Code, removing inconsistency and duplication. The next federal report calling for a comprehensive review of the criminal law was in 1969, the Report of the Canadian Committee on Corrections.[192] In response to this call, the Law Reform Commission of Canada was created in 1971. The Commission published many reports and working papers on their review of the criminal law, procedure, sentencing and evidence.[193] However much of their work did not translate into actual legislative reform. In 1979 the then Minister of Justice announced that a fundamental review of the Criminal Code would take place but before anything could happen an election was called and the Minister was no longer in office.[194] In 1982, another Minister of Justice issued a report "The Criminal Law in Canadian Society" to address continued calls for an overall policy on criminal justice to guide a review.[195] The Law Reform Commission was abolished in 1992 after many reports, draft codes and laws were written but few of which actually resulted in changes to the law.

In 1995, several academics were invited by the Minister of Justice for a focused consultative process on the White Paper, however nothing materialized.[196] By 1998, it was clear that a comprehensive recodification was not on the list of priorities of the Ministry of Justice.[197] In 1998, a conference on "Making Criminal Law Clear and Just" provided a number of ideas for reform of every aspect of the justice system.[198] To date, there has been no significant movement towards recodification.

Calls for recodification raise concerns of whether clarity and justice are best achieved by legislative action or through judicial development.[199] Some argue that expressing rules in statutory form increases accessibility, consistency, efficiency and legitimacy in the process.[200] Others argue against codification because the "flexible application of common law principles is better suited to the pursuit of principle and sound policy".[201] Christine Boyle raises concerns of codifying a general part to the Criminal Code arguing that for a

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[190] Gerry Ferguson *"From Jeremy Bentham to Anne Mclellan: Lessons on Criminal Law Codification"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Alan Mason (1999: Carswell) at 192.
[191] Report of the Royal Commission on Revision of the Criminal Code (Feb 22, 1952) as cited in Gerry Ferguson, *ibid* at 201.
[192] Report of the Canadian Committee on Corrections (The Ouimet Report) (1969).
[193] For a good summary, see Gerry Ferguson, *supra* note 190.
[194] Minister of Justice Jacques Flynn in the short-lived Joe Clark PC government, see *ibid*.
[195] The Criminal Law in Canadian Society, *supra* note 16.
[196] The White Paper on a General Part to the Criminal Code was first prepared by the federal government on the eve of an Ottawa conference of The Society for the Reform of Criminal Law on "100 Years of Criminal Codes", see Don Stuart *"A Case for a General Part"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 95.
[197] Statement made by Minister of Justice Anne McLellan, as cited in Don Stuart, *ibid.*
[198] See various articles from Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell).
[199] Hamish Stewart *"Clarity, Justice and Interpretation"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 78.
[200] Ronald Delisle as cited in Hamish Stewart, *ibid*.
[201] David Paciocco as cited in Hamish Stewart, *ibid*.

feminist criminal lawyer she sees a risk that codification would entrench mainstream views which have traditionally marginalized the vulnerable in society.[202] Others argue that there are many settled areas of the law as a result of judicial consideration and recodification could open these areas of the criminal law to new litigation.

Any recodification will be subject to judicial interpretation. And further any judicial interpretation can be subject to statutory intervention. Some say that the critical issue is to ensure that any revisions, whether by legislative intervention or judicial interpretation is informed by underlying common law and constitutional values and not just by demands of social police.[203]

One of the main questions is whether there is the political will necessary to conduct a principled review necessary for recodification. While such a review might matter more to the day to day operations of the system and impact on victims and offenders, as one academics writes, "unfortunately, the value of such reforms cannot be reduced to a sound bite that will generate votes at the next election".[204] High-profile voter friendly crime issues are more easy to pass in Parliament than a comprehensive meaningful review. However, Morris Manning provides two examples where in the past Ministers of Justice have risen above political expediency to reform the criminal law despite opinion polls, including the bail reforms in 1972 and the abolishment of the death penalty in 1976.[205] Most recently, the 2002 Roundtable report recognizes that any reform must take into account the capacity of Parliament to carry out the work.[206] It is recognised that Parliament does not have the capacity to deal with an entire new Code. At the Roundtable, there was a consensus that comprehensive reforms would be much more manageable if written in stages or chunks.

3. Role of Law Reform Commissions

The government has recognised in the past that criminal law reform through ad hoc amendments to the existing Code is inherently flawed.[207] To ensure systematic reform of the law, a research and policy development phase was considered essential. Law reform commissions were seen as able to provide independent legal policy advice.[208] The role that these commissions play in law reform differs from the role the legislature and courts play in law reform. Commission do not themselves change the law but can really only provide advice on how law should be reformed. In a society where the public is inundated with media reports of sensationalizing crime, and politicians reacting to often uninformed public perceptions, law reform commissions can add value to legal policy discussions in

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[202] Christine Boyle *"Commentary"* in Towards a Clear and Just Criminal Law: A Criminal Reports Forum edited by Don Stuart, R.J. Delisle and Allan Mason (1999: Carswell) at 146.
[203] Hamish Stewart, *supra* note 199.
[204] Don Stuart, *supra* note 196.
[205] Manning, *supra* note 3.
[206] 2002 Roundtable report, *supra* note 70.
[207] Gerry Ferguson, *supra* note 190.
[208] Michael Tilbury, *supra* note 109. In his paper he says his discussion leaves open the more fundamental question of whether the function of law reform commissions ought to be the provision of legal policy advice.

providing independent and informed advice. They can help to depoliticize the process of law reform.

Modern institutional law reform commissions first emerged in common law countries in the 1960s.[209] They were considered to be most prolific in the early to mid-1980s. However by the late 1980s to early 1990s, things had changed. In the 1990s many law reform agencies in common law countries were abolished, restructured or downsized. Tilbury suggests that with the influence of neo-liberalism emphasizing individuals over society, this lessened the space for law reform commissions to engage in legal policy advice. Law Reform Commissions are generally separate from the ordinary machinery of government and are independent of government control.[210] The President of the Australian Law Reform Commission lists what he sees as essential characteristics of law reform commissions: “permanent, full-time, independent, authoritative, generalist, interdisciplinary, consultative and implementation-minded”.[211]

Law reform commissions, composed largely of lawyers, have commitment to certain legal values, such as fairness, efficiency, clarity and certainty.[212] Most governments will accommodate these considerations. But they will not accept a commission that they regard as hostile to their political agenda. For some, law reform commissions may be seen as ineffectual, especially if measured against implementation legislation or they may simply be regarded as expensive luxuries.[213] Some argue that there is no longer a need for law reform commissions as there are now many different sources for legal policy advice: such as parliamentary committees, government departments, working groups, royal commissions, private consultants.

In Canada, the Law Reform Commission was first created in 1971 with the intention of being a permanent government institution for monitoring the need for Canadian law reform.[214] The Canadian Law Commission’s function was to ensure “a just legal system that meets the changing needs of Canadian society and of individuals in that society”. The reason given for its abolishment in 1993 was to save costs. Some of the Commissions wide range of reports on law reform included: a draft Code of Substantive Criminal Law (1987); Report on General Principles for Recodification of Criminal Procedure (1988); draft new Code of Criminal Procedure (1991). The Supreme Court of Canada would refer to positions adopted by the Law reform Commission frequently when making judgments.

The Law Commission of Canada was revived in 1997, established by the Law Commission of Canada Act. This replaced the Law Reform Commission of Canada which had been dissolved in 1993. On September 25, 2006, the government removed funding to the Commission although the Act establishing the commission has not been repealed. The Canadian Bar Association voiced its concerns over the demise of the Law

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[209] The English and Scottish Law Commissions were established in 1965. Tilbury, *supra* note 109.
[210] Part of Hulbert’s 1986 list of distinctive characteristics of law reform commissions, William Hurlburt, Law Reform Commissions in the United Kingdom, Australia and Canada (1986).
[211] Tilbury, *supra* note 102.
[212] *ibid*.
[213] *ibid*.
[214] Gerry Ferguson, *supra* note 190.

Commission of Canada as well as the Court Challenges Program.[215] It argued that an independent Law Commission can "engage in innovative research and adopt a multi-disciplinary approach to law reform, engaging experts in law, social sciences and humanities to study these issues on a macro level".[216] It also responded to suggestions from some Ministers that Canadian Bar Association could fill the role played by a law reform commission. It stated that it was "simply unrealistic to expect this work to be done by an organisation with a different mandate and no funds for the task, through the volunteer efforts of CBA members who are primarily lawyers with full-time legal practices".[217]

Conclusion

As one eminent jurist summarizes:

> "Under the social contract between state and individual, the latter surrenders to the former the right, and perhaps, the power to exact penalties upon those who do him/her harm and, in return, expects to receive from the former the freedom to live an unthreatened life within the limits of the social consensus and the law. As politicians and citizens move further and further apart, the politicians seek ever more stridently to tap into what they call "public opinion". Whether the opinion they aim at is genuinely that of the public and not merely an echo of the tabloid screech is not important. For the politicians, there is no difference. There is nothing very difficult in recognizing that if citizens feel unable to live within their own society without threat or fear, law and order becomes a totem for the politicians. And so, the criminal law, its enforcement, the administration of criminal justice, the penal system become the stuff of party politics. Slogans such as "tough on crime and tough on the causes of crime" ring through the chattering classes and pound at the remainder of society through the media. The statistics of crime are massaged to show that the government of the day has or has not been successful in "returning the streets to the residents". No government in any jurisdiction of which I have any experience shows any sign of stepping back from the puerile superficiality of the debate to think beyond giving the state and its agents increasing powers and visiting punishment of increasing severity upon those defendants who actually emerge from investigation and trials as convicted criminals. The fallacies have been known to us all for decades".[218]

What are the principles to guide law reform? At the 2002 Minister's Roundtable the principles to consider when reforms are being developed continue to be those articulated in the 1982 report "Criminal Law in Canadian Society".[219] The criminal law should be employed to deal with conduct for which the means of social control are inadequate or inappropriate and in a manner which interferes with individual rights only to the extent

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[215] Canadian Bar Association *"Study of the Effects of Abolishing the Court Challenges Program and the Law Commission of Canada*" (CBA: November 2006).
[216] *ibid*.
[217] *ibid*.
[218] Michael Hill QC in his message from the President" in the June 2001 issue of The Reformer, cited in Cowdery's paper, *supra* note 152.
[219] 2002 Roundtable report, *supra* note 70.

necessary. Criminal law needs to be clear and accessible. The criminal law should clearly define powers necessary to facilitate the conduct of criminal investigations. Penalties are to reflect the gravity of the offence and the degree of responsibility of the offender, as well as reflect the need for protection of the public and for adequate deterrence. Regarding sentences, preference should be given to the least restrictive alternative that is adequate and appropriate in the circumstances. Wherever possible, criminal law should also promote victim's concerns.

Do these principles continue to have a place in law reform development in Canada? Or has criminal law reform simply become an exercise in political expediency? Academics, like Kent Roach, emphasis the need to uphold proposed law reform to such principles and the need to do this during the legislative process and not to wait for challenges to the courts.[220] There needs to be greater engagement with law reform, more attention to empirical studies, and a more comprehensive and principled approach.

[220] Kent Roach, *supra* note 73.

Appendix 1 – Federal legislative highlights over the last decade

Recently passed federal legislation

2007

Bill C-26 – provides an exemption to small short-term loans to the criminalization of the payment of a criminal interest rate.

2006

Bill C-19 – introduced amendments to increase the maximum penalties for offences involving street racing.

2005

An Act to Amend the Criminal Code (Proceeds of Crime) and the Controlled Drugs and Substances Act and to Make Consequential Amendments to Another Act, SC 2005, c. 44 (Bill C-53)

-Provides a reverse onus of proof in proceeds of crime applications involving offenders who have been convicted of a criminal organizational offence or certain offences under the Controlled Drugs and Substances Act. The court shall make an order of forfeiture against any property of an offender if the court is satisfied that the offender has engaged in a pattern of criminal activity or has an income unrelated to crime that cannot reasonably account for all of the offender's property. The offender has to show, on a balance of probabilities, the property is not proceeds of crime.

An Act to Amend the Criminal Code (Trafficking in Persons) SC 2005, c. 43. (Bill C-49)

-Creates three new offences, prohibits trafficking in persons; prohibits a person from benefiting economically from trafficking; prohibits the withholding or destroying of identity, immigration or travel documents to facilitate trafficking in persons. Also provisions to expand the ability to seek restitution to victims.

An Act to Amend the Criminal Code and the Cultural Property Export and Import Act, SC 2005, c. 40

-Amends the Criminal Code to prohibit certain offences, including theft, robbery, mischief and arson against cultural property protected under the 1954 Convention for the Protection of Cultural Property in the Even of Armed Conflict. Allows for prosecution of such offences when committed outside Canada by Canadians.

An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act, SC 2005, c. 32

-Amends the child pornography provisions, creates a new sexual exploitation and voyeurism offence, and abolishes the requirement for a competency hearing for children under 14 years of age under the Canada Evidence Act.

An Act to Amend the Criminal Code, the DNA Identification and the National Defence Act SC 2005 c. 25

-Amends provisions to authorize DNA data banking orders against offenders serving sentences for certain offences.

An Act to Amend the Criminal Code (Mental Disorders) and to Make Consequential Amendments to other Acts SC 2005 c 22

-Amends the Criminal Code to permit courts to hold inquiries in respect of, and stay proceedings against, permanently unfit accused who pose no threat to public safety.

2004

An Act to Amend the Criminal Code (Capital Markets Fraud and Evidence Gathering) SC 2004 c. 3

-New offences of insider trading, tipping and employment related intimidation. Creates new procedural mechanisms to require persons and financial institutes to provide documents, data, etc.

Public Safety Act, SC 2004 c. 15 (Bill C-55)

-New offences relating to hoaxes regarding terrorist activities and revision to the electronic surveillance scheme.

The Sex Offender Information Registration Act SC 2004, c.10

-provisions requiring offenders to report and creating a new offence for failure to comply.

An Act to Amend the Criminal Code and Other Acts SC 2004 c. 12

-Amendments which establish more serious offences for setting traps likely to cause death or bodily harm, permit the use of reasonable force on board aircrafts to prevent the commission of certain offences.

An Act to Amend the Criminal Code (Hate Propaganda) SC 2004

-Expands the definition of 'identifiable group' for the purpose of these provisions.

2003

An Act to Amend the Criminal Code (Firearms) and the Firearms Act, SC 2003 c. 8 (Bill C-10A)

-Amendments relate to the firearms as well as amends the Firearms Act.

An Act to Amend the Criminal Code (Criminal Liability of Organizations) SC 2003, c. 21 (Bill C-45)
-amendments deal with criminal liability of organizations.
2002
Youth Criminal Justice Act (Bill C-7)
-replaces the old Young Offenders Act.
Criminal Law Amendment Act 2001 (Bill C-15A)
-makes amendments to the Criminal Code which addresses a variety of issues relating to such substantive matters as child sexual exploitation via the internet, criminal harassment, and home invasions, and such procedural matters as preliminary inquiries, conviction reviews and disclosure of expert evidence.
Court Administration Service Act (Bill C-30)
-covers amendments to the Criminal Code and the Canada Evidence Act.
2001
Bill C-24 amendments focus on organized crime and law enforcement.
C-36 introduced the Anti-Terrorism Act.
2000
Bill C-19 enacts the Crimes Against Humanity and War Crimes Act.
Bill C-22 enacts the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.
1999
Bill C-79 amends the Criminal Code providing new provisions for victims of crime.
Extradition Act, 1999
1998
Bill S-21 introduces the Act respecting the corruption of foreign public officials and the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and to make related amendments to other Acts
1997
Bill C-16 introduces new provisions dealing with powers to arrest and enter dwellings.
Bill C-17 enacts the Criminal Law Improvement Act.
Bill C-46 amends the Criminal Code relating to production of records in sexual assault cases.

Appendix 2 - Bills before Parliament

Recent Bills before Parliament
2007
(1) Bill C-9 – introduces amendments to end conditional sentencing or “house arrest” for serious and violent offences.
(2) Bill C-10 – introduces amendments to increase mandatory minimum penalties for firearm-related offences.
(3) Bill C-18 – proposes strengthening the national DNA Data Bank.
(4) Bill C-21 – introduces measures to remove the requirement for licensed firearms owners to register certain firearms.
(5) Bill C-22 – introduces amendments to increase the age at which youth can consent to sexual activity, in order to better protect them against sexual exploitation by adult predators.
(6) Bill C-27 – introduces amendments to toughen the Dangerous Offender provisions and creates stricter peace bond provisions.
(7) Bill C-32 - introduces amendments to the Criminal Code that focus on impaired driving. It proposes to increase penalties; provide more tools for police and sharply limit witnesses’ evidence.
(8) Bill C-35 – introduces a reverse onus for serious crimes involving firearms.
(9) Bill C-48 - introduces technical amendments to the Criminal Code that will allow Canada to ratify and implement the UN Convention Against Corruption.
(10) Bill C-23 – introduces amendments to the Criminal Code to make certain process more effective through greater use of technology and by consolidating and rationalizing existing provisions; strengthen sentencing measures; and clarify court-related language rights provisions.

Appendix 3 – Recent Supreme Court of Canada jurisprudence

R v McKay [March 23, 2007]	Defence of property
R v Spencer [March 8, 2007]	Evidence - statements
R v Trochyn [2007]	Evidence – similar fact and post-hypnotic
R v Angelillo [December 8, 2006]	Appeal – fresh evidence Sentence – consideration of other offences
R v Khelawon [December 14, 2006]	Evidence - hearsay
R v Larch [2006]	Sentencing
R v Dery [November 23, 2006]	Offences - attempts
R v R.D. [November 16, 2006]	Offences – criminal negligence
R v Krieger [October 26, 2006]	Jury – direction by trial judge
R v Hazout [October 5, 2006]	Appeals – right of appeal Procedure – adjournments
R v Shoker[2006]	Sentencing – conditions of probation
R v Kong [September 8, 2006]	Defence – self-defence
R v Wiles [December 22, 2005]	Charter, section 12 (cruel and unusual punishment).
R v MacKay [December 15, 2005]	Offence - assault
R v Boulanger [July 13, 2006]	Offence – breach of trust
R v Pham [June 21, 2006]	Narcotic offence- knowledge
R v Gagnon [May 4, 2006]	Appeal - jurisdiction
R v Graveline [April 27, 2006]	Appeal - grounds
R v Rodgers [April 27, 2006]	Charter – section 8 and DNA data banking
R v Chaisson [March 30, 2006]	Appeal – role of appeal court
R v Lavigne [March 30, 2006]	Criminal organization – proceeds of crime
R v Pittiman [March 23, 2006]	Appeal – inconsistent verdicts
R v Labaye [December 21, 2005]	Offences – keeping a common bawdy house
R v Stender [June 10, 2005]	Sexual assault - consent
R v Henry [December 15, 2005]	Charter – section 13, self incrimination
R v C.D. [December 16, 2005]	Sentencing – Youth Criminal Justice Act
R v Dionne [May 19, 2005]	Theft – recent possession
R v Spence [December 2, 2005]	Charter – section 11(d) and 11(f)
R v Boucher [December 2, 2005]	Impaired driving – evidence to the contrary
R v Escobar-Benavidez [2005]	Evidence – Corbett application
R v Rodrique [November 17, 2005]	Dangerous weapons
R v Pires and R v Lising [2005]	Wiretap – cross-examination on affidavit
R v R.C. [October 28, 2005]	DNA data bank – young offender
R v Turcotte [September 30, 2005]	Charter – section 7 – evidence admissibility
R v G.R. [July 22, 2005]	Offence – included offence
R v Woods [June 29, 2005]	Charter – section 8
R v Orbanski and R v Elias [2005]	Charter – section 10(b)
R v Gunning [May 19, 2005]	Defence – defence of property Charge to jury
R v Fice [May 20, 2005]	Sentencing – conditional sentence
R v Mapara [April 27, 2005]	Evidence – hearsay rule
R v Chow [April 27, 2005]	Procedure - severance