"MURDER" SHE SAID: CANADIAN, INDIAN AND AUSTRALIAN FORMULATIONS OF THE FAULT ELEMENTS FOR MURDER

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This article compares the fault elements for murder under s. 229 of the Criminal Code *with those under s. 300 of the* Indian Penal Code. *In doing so, the strengths and weaknesses of the Canadian provision are highlighted. The article also presents the definition of murder proposed recently by the law reform body responsible for formulating a national criminal code for Australia. Comparing this proposed definition with the Canadian and Indian provisions further strengthens the case for reforming the Canadian provision in certain respects.*

Introduction

Is there a real need for revising the fault elements (that is, the *mens rea*) for murder under s. 229 of the *Criminal Code*? If so, should we start with a clean slate and rewrite the law anew as the Law Reform Commission of Canada[1] and the *Working Group on Homicide*[2] would have us do; or, will it suffice to retain s. 229 as a working base on which to make some essential modifications which clarify existing ambiguities? In this article, I take the latter option on the ground that it would, from a political perspective, be more palatable than a complete overhaul of such a potentially divisive issue involving, as it were, one of the most heinous offences in the Code. But there is another good reason for doing so. It is because there exists a convenient tool with which to identify any weaknesses of s. 229 and to suggest ways of rectifying those problems. I refer to the fault elements for murder under s. 300 of the *Indian Penal Code*.

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[1] Law Reform Commission of Canada, *Report No.31: Recodifying Criminal Law*, Rev. Ed. (Ottawa: Law Reform Commission of Canada, 1987).

[2] Department of Justice, *Final Report of the Federal/Provincial Working Group on Homicide* (Ottawa: Department of Justice, 1990, updated April 1991).

The first part of this article comprises a comparative analysis of the fault elements for murder under the Canadian and Indian codes. The second part furthers this analysis by comparing the Canadian and Indian definitions of murder with the murder provision recently proposed by the law reform body charged with formulating a national model criminal code for Australia.[3]

I. Comparing the Fault Elements for Murder under the Canadian and Indian Codes

For those unfamiliar with the *Indian Penal Code*, it was the work of several law reform committees spanning a period of well over twenty-two years from 1834 to 1857. The principal draftsperson was Thomas Babington Macaulay, a highly respected 19th century English jurist.[4] Section 300, the murder provision, was criticized by James Fitzjames Stephen, another well known English jurist of the time, as the weakest part of the code, which he otherwise praised in glowing terms.[5] Given that the Canadian code was based on Stephen's draft criminal code, a comparison of the murder provisions contained in the two codes should prove illuminating. The diagram appearing below aligns as closely as possible the various types of fault elements for murder in the two codes.[6]

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[3] Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper, Chapter 5. Fatal Offences Against the Person* (Canberra: The Model Criminal Code Officers Committee, 1998). Presently, the criminal laws of some Australian States and Territories are to be found in criminal codes while others are governed by the common law.

[4] For a brief history of the *Indian Penal Code*, see S. Yeo, *Fault in Homicide* (Sydney: Federation Press, 1997) at 98-101; R. Cross, "The Making of English Criminal Law: (5) Macaulay" [1978] Crim. L.R. 519.

[5] J.F. Stephen, *A History of the Criminal Law of England*, Vol. III (London: MacMillan, 1883) at 313-314.

[6] The fault element spelt out in s. 229(b) of the Canadian criminal code has not been included in the diagram. It is essentially the same as that under s. 229(a)(ii) but incorporating the doctrine of transferred malice. The Indian code also recognizes the doctrine of transferred malice in murder cases. Section 301 states: "If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

The Canadian Criminal Code	The Indian Penal Code
Culpable homicide is murder where the person who causes the death of a human being:-	Culpable homicide is murder where the conduct by which the death is caused is done:-
means to cause his death (s. 229(a)(i)); or	with the intention of causing death (s. 300(1)); or
means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not (s. 229(a)(ii)); or	with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused (s. 300(2)); or
No equivalent	with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death (s.300(3)); or
where a person, for an unlawful object, does anything that he knows is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being. (s. 229(c))	with the knowledge that the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is likely to cause death. (s. 300(4))

I shall now embark on a comparative analysis of each of these types of fault elements.[7]

Section 229(a)(i) of the Canadian code compared with s. 300(1) of the Indian code

The phrases "means to cause death" and "intention to cause death", appearing in the Canadian and Indian provisions respectively, bear exactly the same meaning of having the purpose, aim, or objective of killing a person. Whether the words "means" and "intention" should extend beyond their purposive sense is open to debate.[8] In particular, there is the question whether a person who foresees the virtual

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[7] I have also excluded the words "or ought to know" from s. 229(c) on account of the majority opinion of the Supreme Court of Canada in *R.* v. *Martineau*, [1990] 2 S.C.R. 633, that this objective type of fault for murder is unconstitutional. See also *R.* v. *Nienhuis* (1991), 113 A.R. 12 at 16 (Alta. C.A.). Admittedly, this type of fault has yet to be formally struck down by the Supreme Court and has not been legislatively abrogated. However, it can be safely ignored for the purposes of this discussion since there do not appear to be any post-*Martineau* cases where the prosecution as relied on it.

[8] This debate has occurred most clearly in England: see *Hyam* v. *D.P.P.*, [1974] 2 All E.R. 41 (H.L.); *R.* v. *Moloney*, [1985] A.C. 905 (H.L.); *R.* v. *Hancock*, [1986] A.C. 455 (H.L.); and most recently, *R.* v. *Woollin*, [1998] 3 W.L.R. 382 (H.L.). For a critical evaluation of these cases, see A. Norrie, "After *Woollin*" (1999) Crim.L.R. 532.

certainty of a consequence occurring should be regarded as having meant or intended that consequence.[9] Canadian case authority on the question is sparse and, what little there is, appears to be conflicting. For instance, the Ontario Court of Appeal in *R.* v. *Buzzanga* has held that "as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he [sic] does in order to achieve some other purpose, intends that consequence...."[10] This stands in contrast to the British Columbia Court of Appeal ruling in *R. v. Miller* that "intention is not synonymous with foresight however certain that foresight may be...for a man [sic] cannot be said to intend the consequences unless it is his [sic] conscious purpose to bring them about."[11]

Professors Isabel Grant, Dorothy Chunn and Christine Boyle in their text *The Law of Homicide* contend that the scope of intention is not of great significance under the Canadian provision for murder because ss. 229(a)(ii) and 229(c) recognize forms of recklessness as sufficient *mens rea* for murder.[12] This is not entirely correct since these types of fault for murder comprise a hybrid of recklessness *and* intention that are not quite the same as recognizing recklessness alone as satisfying the *mens rea* for murder. In contrast, s. 300(4) of the Indian code does just this. As an aside, the formulation of murder under Stephen's *Digest of Criminal Law*, which preceded his draft code (on which the Canadian code is based), also recognized a type of recklessness without an accompanying intention as sufficient for murder.[13] This is Article 223(b), which declares that malice aforethought for the purposes of the law of murder includes a state of mind in which there is:

> Knowledge that the act which causes death will probably cause death...to some person...although such knowledge is accompanied by indifference whether death...is caused or not, or a wish that it may not be caused.

However, Stephen subsequently modified this Article in his draft code so as to read

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[9] The Law Reform Commission of Canada, *supra* note 1, answered this question in the affirmative by defining murder as purposely killing another person. "Purposely" covers acting to bring about another consequence which the accused knows will involve causing death. The Working Group on Homicide, *supra* note 2, did not answer the question because it merely adopted the expression "means to cause death" contained in s. 229(a)(i) without defining the word "means".

[10] (1979), 49 C.C.C. (2d) 369 at 384, Martin J.A. Even then, Martin J.A. accepted, without elaborating, that there may be cases in which "intention" is confined to its purposive sense.

[11] (1959), 125 C.C.C. 8 at 31, O'Halloran J.A.

[12] I. Grant, D. Chunn & C. Boyle, *The Laws of Homicide* (Scarborough: Carswell, 1994) at 4-39.

[13] J.F. Stephen, *Digest of Criminal Law*, 1st ed. (London: MacMillan, 1877).

what is now s. 229(c) of the Canadian code. My point is that it is by no means clear whether the word "means" appearing in s. 229(a)(i) of the Canadian code includes foresight of the substantial certainty of causing death. If such a mental state is considered to be sufficiently culpable to warrant liability for murder, the Canadian code should expressly state so, as has been done in s. 300(4) of the Indian code. I shall examine the suitability of this provision later.

Section 229(a)(ii) of the Canadian code compared with s. 300(2) of the Indian Code

These two clauses are almost identical save for the additional requirement under s. 229(a)(ii) that the accused was reckless whether death ensued or not. It is unclear what "reckless" means in this context. If it describes a person who, foreseeing that her or his conduct is likely to cause death, nevertheless proceeds with such conduct, this requirement is superfluous since the earlier part of the clause covers such a case. If "reckless" connotes an objective form of wrongdoing, such as "wicked recklessness" under Scots criminal law, this requirement may be criticised for its vagueness. It effectively transfers power over to the jury to decide, depending on the equity of the case, whether a person should be labelled a murderer.[14] Another criticism against imposing this objective requirement is that it runs counter to the view of the Supreme Court of Canada that the fault elements for murder should be confined to purely subjective mental states.[15] For these reasons, it would have been preferable for s. 229(a)(ii) to have followed its Indian counterpart by omitting any reference to "reckless".

This criticism of s. 229(a)(ii) aside, the fact that such a type of fault element is recognized under another well regarded criminal code provides strong support for its retention.[16] Furthermore, the provision bears a close similarity to the fault element

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[14] See the *Select Committee of the House of Lords on Murder and Life Imprisonment*, Paper 78-1 (London: H.M.S.O., 1989) at para. 76. See also G. Gordon, *Criminal Law of Scotland*, 2nd ed. (Edinburgh: Green, 1978) at 737.

[15] See *R.* v. *Martineau*, [1990] 2 S.C.R. 633; *R.* v. *Sit*, [1991] 3 S.C.R. 124. *Cf.* the expression "wanton or reckless disregard" appearing in s. 219 of the Canadian code to describe the fault element for criminal negligence.

[16] *Contra*. The Working Group on Homicide, *supra* note 2, proposed removing the requirement that the accused intend to cause bodily harm on the ground that it was too restrictive. The Group recommended that knowledge that death is likely and recklessness as to its occurrence should suffice for murder. I shall also be advocating later for reckless murder to be recognized. However, such a recognition is not a sufficient reason for rejecting the hybrid type of fault for murder based on intention and recklessness

recently proposed by the English Law Commission on codification of the criminal law.[17] The Commission recommended that, in addition to an intention to kill:

> [A] person is guilty of murder if he causes the death of another intending to cause serious personal harm and being aware that he may cause death.[18]

Section 229(c) of the Canadian code compared with s. 300(4) of the Indian code

As noted earlier, Stephen regarded the wording of s. 229(c) as an improvement of Article 223(b) of his *Digest of Criminal Law*. The latter provision more closely compares with s. 300(4) of the Indian code since, like the Indian provision, it specifies a fault element for murder based on recklessness alone. In contrast, s. 229(c) prescribes a mental state comprising a hybrid of intention (that is, does anything with intent to effect an unlawful object) and recklessness (that is, knowing that the thing done is likely to cause death).

A problem with s. 229(c) is that we are uncertain as to what constitutes an "unlawful object". For instance, is it confined to certain types of serious crimes requiring subjective *mens rea*[19] or might crimes based on negligence be included?[20] I venture to suggest that, at the very least, the unlawful object must be a crime requiring actual foresight of the likelihood of causing bodily harm. Such a subjective *mens rea* is needed so as to render the fault element under s. 229(c) comparable in terms of moral culpability with that under s. 229(a)(ii).

Another criticism of s. 229(c) is that the closing words of the provision (namely, "notwithstanding that he desires" et cetera) seem to be redundant and could be safely removed. As one commentator has asserted:

> [T]he essence of the criticism is not that the agent does not care about the consequences but that he persists in behaving as he does in the face of a very serious risk... What the lawyer is interested in is not whether the defendant cared about the consequences but whether or not he knowingly took a risk and whether to take this

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under s. 229(a)(ii) of the Canadian code.

[17] Law Commission No. 177, *Codification of the Criminal Law of England and Wales* (London: H.M.S.O., 1989).

[18] *Ibid.*, cl. 54(1) of its Draft Criminal Code. For a comparison of this recommendation and s. 300(2) of the Indian code, see Yeo *supra* note 4 at 123-124.

[19] See *R.* v. *Vasil*, [1981] 1 S.C.R. 469.

[20] See Grant, Chunn and Boyle *supra* note 12 at 4 - 50.

> risk was quite unjustified in the circumstances. The question whether it was justified can only be answered by considering the social utility of the defendant's activity.[21]

This last comment views unjustifiable risk-taking as an integral component of the fault element for murder based on recklessness. Section 229(c) does not impose such a requirement. In contrast, s. 300(4) of the Indian code does so by having the words "without excuse for incurring the risk" of causing death. The need for such a requirement seems entirely correct because a person "cannot be both acting recklessly and acting justifiably."[22] Certainly, what amounts to unjustifiable risk-taking cannot be defined with any precision since the concept of justification or excuse is normative and value-laden. The American Law Institute's Model Penal Code has provided a possible model definition, namely, that:

> The risk must be of such a nature and degree that, considering the circumstances known to [the actor], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[23]

Should the Canadian code replace the type of fault element for murder under s. 229(c) with one based on recklessness alone like the one under s. 300(4) of the Indian code? It is submitted that there are sound reasons for doing so. One reason is that such an amendment will make for neatness and simplification of the law by confining the word "means" in ss. 229(a)(i) and 229(a)(ii) to its purposive sense, leaving all cases involving foresight of a risk (including substantial certainty of such a risk) occurring to be dealt with under the fault element of recklessness alone.[24] Another is that such a provision would avoid the various problems presently encountered under s. 229(c), as discussed earlier. A third is that there will be cases where recklessness alone is sufficiently culpable to warrant a murder conviction without the need to additionally prove the causing of intentional harm.[25] This was,

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[21] P. Fitzgerald, "Carelessness, Indifference and Recklessness: Two Replies" (1962) 25 Mod. L. Rev. 49 at 54.

[22] M. Goode, "Fault Elements" (1991) 15 Crim. L.J. 95 at 105.

[23] Model Penal Code, *Proposed Official Draft*, § 2.02(2)(c) (Philadelphia: American Law Institute).

[24] *Cf.* The definition of murder proposed by the Law Reform Commission of Canada incorporates foresight of substantial certainty within its definition of "purposely". See *supra* note 1. To clearly maintain the distinction between intention and recklessness, there should be a separate sub-clause afforded solely to recklessness.

[25] The Working Group on Homicide, *supra* note 2 at 28, shares this view. In contrast, the Law Reform Commission of Canada has recommended that a person who knows that death will probably occur is guilty of manslaughter, not murder.

after all, what Stephen regarded as the law of England before he sought to improve it.

Should it be thought that this type of recklessness must constitute a very high degree of moral blameworthiness in order to render it comparable with the paradigm fault element for murder of an intention to kill, then s. 300(4) of the Indian code is a good model. As we have observed, to secure a murder conviction under that provision, the prosecution must establish that the accused knew that her or his conduct was so imminently dangerous as to involve a very high probability of causing death.

Should the Canadian code incorporate s. 300(3) of the Indian code?

There is no equivalent type of fault for murder under the Canadian code. Section 300(3) of the Indian code has essentially two requirements that are disjunctive. The first is subjective and requires an intentional infliction of the injury that caused the death. The second is objective in the sense that, looking at the intended injury, the court must be satisfied that it was sufficient in the ordinary course of nature to cause death. The words "ordinary course of nature" means that the injury intended by the accused must have been one which would normally result in death if there was no medical intervention.[26]

It is debatable whether Canadian law should recognize such a type of fault for murder over and above those prescribed under ss. 229(a). The Indian provision certainly prescribes a more stringent type of fault than the one recognized by the English and Australian common law of an intention to cause grievous bodily harm.[27] I have suggested elsewhere that the English and Australian laws should adopt s. 300(3).[28] However, this appears unnecessary in Canada since the law here does not recognize an intention to cause grievous bodily harm as sufficient for murder. In any event, based on the Supreme Court of Canada decision in *R.* v. *Martineau*,[29] this Indian provision is likely to be treated as unconstitutional for failing to insist on a subjective foresight of the likelihood of death.[30]

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[26] *State v. Kishore Singh* A.I.R. 1977 S.C. 2267.

[27] *R.* v. *Cunningham*, [1982] A.C. 566 (H.L.); *R.* v. *Crabbe* (1985), 156 C.L.R. 464.

[28] Yeo *supra* note 4 at 119-120.

[29] See *supra* note 15 and accompanying text.

[30] [1990] 2 S.C.R. 633.

II. A New Murder Provision for Australia

Presently, each of the States and Territories of Australia has its own set of criminal law.[31] As a result, numerous inconsistencies in the criminal law have been created throughout that nation. In recognition that this state of affairs is completely unjustifiable, a sub-committee of the Standing Committee of Australian Attorneys-General was created in 1991 and charged with formulating a national criminal code.

This sub-committee (which I shall call the "Model Criminal Code Committee") published a discussion paper on *Fatal Offences Against the Person* in June 1998.[32] I shall present the Committee's definition of murder and compare the various fault elements contained therein with those found in the Canadian and Indian codes.

The Committee recommended the retention of the murder/manslaughter distinction and proposed the following definition of murder:

> **Murder**
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> A person:
>
> a) whose conduct causes the death of another person; and
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> b) who intends to cause, or is reckless as to causing, the death of that or any other person by that conduct,
>
> is guilty of the offence of murder.[33]

The concepts of "intention" and "recklessness" appearing in this provision are defined in the General Part of the draft Model Criminal Code as follows:

> **Intention**: A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.[34]
>
> **Recklessness**: A person is reckless with respect to a result if:

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[31] See *supra* note 3.

[32] *Ibid.*

[33] *Ibid.*, Draft Model Criminal Code, cl. 5.1.9.

[34] *Ibid.*, cl. 5.2(3).

a) he or she is aware of a substantial risk that the result will occur; and

b) having regard to the circumstances known to him or her, it is unjustifiable to take that risk.[35] The question whether taking a risk is unjustifiable is one of fact.[36]

Hence, three types of fault elements for murder are discernible from the Model Criminal Code Committee's definition of murder:-

1. Where D means to bring about death;

2. Where D is aware that death is virtually certain to occur;[37] and

3. Where D is aware of a substantial risk that death will occur and, having regard to the circumstances as known by him or her, it is unjustifiable to take the risk.

Comparing these types of fault elements for murder with those contained in the Canadian and Indian codes produces some interesting findings. The first type of fault for murder is covered by s. 229(a)(i) of the Canadian code and by s. 300(1) of the Indian code and is uncontroversial.

The second type of fault for murder is arguably covered by s. 229(a)(i) if the word "means" found in the Canadian provision is interpreted as going beyond its purposive sense. Earlier on, I suggested that it would be preferable for this ambiguity to be removed by expressly describing such a mental state as "recklessness" and recognizing it as satisfying the fault element for murder. This type of fault is covered by s. 300(4) of the Indian code but with one major difference, namely, that the Indian provision imposes a requirement of unjustifiable risk-taking while the Model Criminal Code Committee's proposal does not.

The third type of fault for murder has no equivalent in the Canadian code. It comes closest to s. 300(4) of the Indian code, with the material difference found in the lesser degree of known risk required under the Model Criminal Code Committee's proposal ("a substantial risk") compared to the Indian provision ("in all probability"). The correctness of either formulation is ultimately one of social judgment so that there is no absolutely right answer. However, what can be said in

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[35] *Ibid.*, cl. 5.4(2).

[36] *Ibid.*, cl. 5.4(3).

[37] See the Model Criminal Code Officers Committee, *supra* note 3 at 45 where the Committee described the words "in the ordinary course of events" as connoting the "inevitable" or "a virtual certainty".

favour of raising the degree of risk is that it brings recklessness closer to the paradigm fault element for murder. Additionally, raising the degree of probability produces the positive side effect of relegating the role of unjustifiable risk-taking to a secondary position. This is because the higher the level of probability of the risk eventuating, the less justifiable the risk-taking will be. Professor Brent Fisse has explained this effect lucidly:

> An indeterminate balancing test is less necessary if foresight of high likelihood is required. The lower the degree of foreseen risk required for reckless murder the greater the chance that D may take a socially justifiable or socially tolerable risk outside the narrow limits of necessity and other defences and hence the more the need to condition liability on the taking of a socially unjustified risk. Thus, where D foresees a high likelihood of causing death then almost invariably he [or she] should desist unless the situation is covered by a defence of necessity or by some other defence option.[38]

This is not at all to say that unjustifiable risk-taking should have no role to play in reckless murder. The previous explanation for giving it a role remains. What the comment does say is that foresight of the risk of harm should be viewed as the predominant requirement over unjustifiable risk-taking in the determination of this type of fault for murder.

Whether the Model Criminal Code Committee's proposal is correct not to recognize the other types of fault for murder contained in the Canadian and Indian codes is a matter for debate. In particular, there is the fault element of an intention to cause bodily harm that the offender knows to be likely to cause death (s. 229(a)(ii) of the Canadian code and s. 300(2) of the Indian code). As for improving the Canadian law, serious consideration should be given to prescribing a form of reckless murder either in terms of the Model Criminal Code Committee's proposal or, if a more culpable type of recklessness is needed, by adopting s. 300(4) of the Indian provision.[39]

Summary of Propositions

This comparative analysis of the Canadian and Indian laws on the fault elements for murder, together with the latest Australian law reform proposal on the matter, yields

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[38] *Howard's Criminal Law*, 5th ed. (Sydney: Law Book Co., 1990), 492.

[39] *Cf.* The Working Group on Homicide, *supra* note 2 at 28-32, which has likewise proposed a form of reckless murder, namely, "[knowledge that] death is likely to be caused by his or her conduct and is reckless whether death ensues or not."

the following propositions for improving the Canadian law:

1. The word "means" in ss. 229(a)(i) and 229(a)(ii) of the *Criminal Code* should be confined to its purposive sense and not extended to include foresight of the virtual certainty of a result occurring.

2. The reference to "reckless" in s. 229(a)(ii) is superfluous and should be removed from the provision.

3. The "unlawful object" requirement in s. 229(c) should constitute a crime requiring a subjective *mens rea* component.

4. The concluding words "notwithstanding. . . to any human being" in s. 229(c) are superfluous and should be removed from the provision.

5. The fault element under s. 229(c) should include an element of unjustifiable risk-taking.

6. Serious consideration should be given to introducing into Canadian law a fault element for murder based on recklessness alone, such as the one contained in s. 300(4) of the Indian code or else that proposed by the Australian Model Criminal Code Committee.

7. There is no necessity and, indeed, it would be unconstitutional, to introduce into Canadian law the type of fault for murder contained in s. 300(3) of the Indian code.