

I would like to thank Judge Patrick Healy for his permission to reproduce this document.

**François Lareau
2 September 2011**



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Professor Don Stuart,
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Don
Dear Professor Stuart,

Re General Part of the Criminal Law

Thank you for sending me a copy of your draft brief to the parliamentary committee concerned with the General Part of Canadian criminal law.

A parliamentary review of the General Part is overdue, as is legislative revision of the Code. There are anomalies in the current provisions of the Code and further anomalies have been created by judicial decisions. These together provide one good reason for review, although I must say that I do not share the view that all of these anomalies are indefensible in policy. Another reason for review is that recent decisions suggest that the development of the law would be better guided by a stronger legislative assertion of policy.

I agree with you that the Report of the Task Force of the Canadian Bar Association could be used as a focal point for discussion in the Committee, or at least for representations made to the Committee. It identifies most of the issues of importance and provides a synopsis of options proposed by the late Law Reform Commission and of recent developments in the courts. A further virtue is its brevity.

The Report of the Task Force will not attract unanimous approval; nor will there be agreement on its weaknesses. There is not likely to be unanimity in the conclusions of the parliamentary committee with respect to legislative reform. This is all obvious but it might be helpful to use the Report as a focal point for discussion before the Committee if a long, wordy and unproductive exercise is to be avoided. Legislative action in the centenary of the original Code is illusory, in my opinion, but inaction is certain if the proceedings are unfocussed. Hence, once again, I hope that the Report of the Task Force is used as a focus for discussion.

I would also support your proposal that academics concerned with the criminal law should make submissions to the Committee. No doubt there is among them a wide variety of views on controversial questions. An obvious example is the requirement of fault for criminal liability, which brings into question the broader issue whether there is or should be a normative distinction made between criminal and regulatory liability. These issues are conspicuously unsettled, and the first of

them is likely to become more intractable with decisions in *DeSousa*, *Findlay* and *Cretghton*. The position taken by the Task Force to favour a subjective standard of fault would provide a basis for careful consideration of the viability of a formal distinction between criminal and regulatory liability.

With respect to your draft of comments on the Report of the Bar, I have some queries, some reservations and some points on which I am not clear.

As regards a codification of the General Part, you appear to favour legislation that would exclude a provision similar to section 8(3), and yet you would achieve largely the same effect by your own proposal. I would agree with the Bar's position on this point. More broadly, there are other issues to be addressed concerning the scope of the proposed codification.

The relationship between standards of fault and conduct, circumstances or consequences does require express attention in my view, certainly after *DeSousa*.

You identify and criticise "arbitrary restrictions" in the Bar's approach to defences. Some of the restrictions are perhaps arbitrary, notably the bar to self-defence against a peace officer, but not all of the restrictions are indefensible in my view.

I do not see why it is necessary to say that silence on parts of the Report should be taken as "our agreement" with them.

I am not persuaded that the attempt to codify causation is successful or necessary.

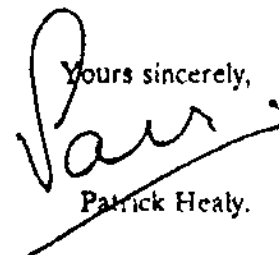
I oppose a preamble to the *Criminal Code*.

I agree with the broad thrust of your comments on fault but as they are stated in terms that are not especially precise. This is certainly the most difficult and controversial issue in a review of the General Part. I would suggest that if you can gather and organise views from law teachers on this one important topic it will greatly assist the committee. This is too vast a question for discussion in this hasty note. The same is true of your comments on the mental element, although I would say that I am not sure that your preferred view of recklessness would overcome the difficulties in the position taken by Williams. I have no firm view on the idea that recklessness be the basic standard of subjective fault but my view at the moment would be to side with the Task Force.

I share the view that the fiction of specific and general intent should be abolished and I am also uncomfortable with the proposal for an offence of criminal intoxication. It appears to substitute one fiction for another.

These are some areas of concern that I have about the Report of the Task Force and your draft brief. There are some others. In short, however, I support your suggestion that representations be made to the Committee by law teachers, that the Report of the Task Force be used as a focal point for discussion and for those representations, and that law teachers encourage the Committee and the Government to proceed deliberately, and with a minimal waste of time, to concrete recommendations for legislative amendment.

Yours sincerely,

A handwritten signature in cursive script, appearing to read 'P. Healy', written over a horizontal line.

Patrick Healy.