I would like to thank Don Stuart for his permission to reproduce this document.

François Lareau
14 August 2011

APPENDIX "CODE-15"

FACULTY OF LAW

21 October 1992

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Mr. Richard Dupuis
Clerk
Standing Committee on Justice
and the Solicitor General
Room 622, Wellington Building
180 Wellington Street
House of Commons
Ottawa, Ontario
K1A 0A6

re: Recodification of the General Part of the Criminal Code

Dear Mr. Dupuis,

As requested by Nancy Hall of your office on October 20, I enclose a brief on behalf of a group of experienced criminal law professors for consideration by your Committee in November. We strongly support the move to codify general principles of criminal liability and, with qualifications, urge you to pay particular attention to the Report of the C.B.A. Task Force, Principles of Criminal Liability (August 23, 1992).

Given the Committee's original time limits, I hastily prepared the enclosed brief and circulated it to selected criminal law teachers on September 2. Although the timing was difficult for us given the start of another busy term, 15 law teachers have now endorsed this brief in whole or in part. The endorsements of the following professors are appended to our brief:

Bruce Archibald (Dalhousie)
Peter Barton (Western)
Anne-Marie Boisvert (Montreal)
Ronald J. Delisle (Queen's)
Gerry Ferguson (Victoria)
Patrick Healy (McGill)
Winnie Holland (Western)
André Jodouin (Ottawa - Civil)
Diane Labrèche (Montreal)

Allan Manson (Queen's)
Anne McGillivray (Manitoba)
Tim Quigley (Saskatchewan)
Kent Roach (Toronto)
Anne Stalker (Calgary)

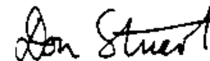
Also included are the responses of Professors Christine Boyle (U.B.C.) and Alan Mewett (Toronto) who each, for very different reasons, have reservations about the move to codification.

Apart from the above two opinions, there is, therefore, agreement amongst criminal law teachers from across Canada that codification of a General Part should be a high priority for Parliament. There are points of disagreement amongst us but also considerable consensus.

Since the brief was written and circulated the Supreme Court of Canada has handed down its decision in Desousa. The ruling stands for the startling proposition that, absent very high stigma, all that is constitutionally required for any criminal or regulatory offence is a subjective or objective fault requirement which need not relate to all the essential ingredients of the offence. The urgent reform of the fault requirement which we urge is now clearly left up to Parliament. Nobody in our group would suggest that fault be limited to subjective awareness of risk but there is substantial agreement that Parliament should resort to the objective standard in a restrained and principled manner.

Anne Stalker, Gerry Ferguson and I wish to appear to present our brief, preferably shortly after the C.B.A.'s presentation. Others of us may also be able to attend, depending on the date.

Yours truly,



Don Stuart
Professor

September 2, 1992

BRIEF ON CODIFICATION OF THE GENERAL PART OF THE CRIMINAL CODE

by
a group of Criminal Law Professors

We are experienced law teachers who have, for a number of years, had a scholarly interest in, and taught, general principles of substantive criminal law. Some of us were involved in various advisory capacities with the work of the Law Reform Commission of Canada.

Need for Codification

We strongly support the move to codify general principles of criminal liability. The 1892 Code deliberately left to the courts the development of the fundamental requirements of conduct and culpability. Canadian jurisprudence on both of these requirements has now reached a level of complexity and confusion that makes it highly desirable and urgent that a codification be attempted. In our adversary system it is fundamental that each side knows, with sufficient clarity, what the legal criteria are. Canada is now out of step with the international trend to codification of the principles of the conduct and culpability requirements. This has long been true of state Criminal Codes throughout the United States and is now the inexorable trend in most parts of the British Commonwealth, in particular in the United Kingdom, Australia and New Zealand.

It also seems high time that all recognized defences (justifications or excuses) be clearly stated in the Criminal Code. Some defences have been codified since 1892. Some defences, conspicuously that of self-defence, have always been stated at a level of complexity that defies comprehension by judges and juries. It is also time to state as clearly as possible in the Criminal Code various common law defences that have been recognized by the courts, such as the defences of necessity and entrapment.

Support for C.B.A. Report

The major purpose of this brief is to give our strong support, with some qualifications, to the impressive Report of the Canadian Bar Association's Criminal Recodification Task Force, Principles of Criminal Liability (August 23, 1992). It is our position that the C.B.A. has undertaken a most comprehensive and useful re-examination of the work of the Law Reform Commission of Canada and that the C.B.A.'s report should form the basis of the new Bill. Once a Bill has been tabled we may well wish to present a more detailed clause-by-clause analysis.

Major advances by C.B.A.

The C.B.A. corrects two major weaknesses of the work of the Law Reform Commission. At a very late stage of the Commission's work on the General Part it introduced a complex distinction which differentiated culpability requirements as they related to conduct, circumstance and then consequences. This would have

introduced a level of complexity not found in the present law and not desirable. The C.B.A. wisely devises a more simplified scheme based on a distinction between conduct prohibited in specific circumstances and conduct prohibited given specific consequences.

The other major achievement of the C.B.A.'s draft Code is that the various defences are defined to allow for more individual factors to be taken into account and avoid mechanical balancing-of-harms tests whereby no accused can be acquitted, if in the agonizing moment, he or she committed more harm than was apprehended. In many respects the codification of defences by the Law Reform Commission was far too restrictive and out of step with modern criminal law and theory. Under the L.R.C's Code there is no defence of duress if the person acting under duress purposely causes serious harm to another person, no defence of necessity if the harm could have been avoided by any lesser means, and no defence of self-defence against a police officer. The C.B.A.'s draft would remove each of these arbitrary restrictions.

Some of us would support the need for more generous and flexible defences on the basis of a philosophical distinction between justifications and excuses. Justifications deal with absolving an accused who did something that was morally right. Excuses on the other hand are acts of compassion for acts which may have been wrong. Most defences are properly categorized as excuses. Balancing-of-harms tests and arbitrary rules frustrate the interests of being compassionate, temperate and realistic.

Others of us who question the validity and utility of the distinction would nevertheless share the concern that defences should not become positivist rules in which individual factors are not sufficiently taken into account with too much emphasis being placed, in hindsight, on the act. The central issue with most defences is whether to punish an agonizing choice. In the case of self-defence, for example, we need to ensure that our law is sufficiently generous that a trier of fact can absolve someone who, as in the famous case of Lavallee, anticipated further abuse by her partner and deliberately shot him.

Before proceeding to nine qualifications that we would enter to the report of the C.B.A. we would like to make it clear that our silence on the other parts of the draft C.B.A. Bill should be taken as our agreement. We would like to emphasize this by indicating our support for several of the C.B.A.'s perhaps more controversial recommendations. We agree that criminal responsibility for omissions should be confined to breaches of legal duties defined in the Criminal Code itself. We support the attempt to codify principles of causation. The present common law which rests on the notion that any contributing cause will be sufficient is too severe. Causation is a very complicated philosophical problem. However the C.B.A.'s three draft principles appear well considered and sensible. We support a wider definition of the defence of mental disorder (wider than Parliament has recently adopted) and like the C.B.A., and Madam

Justice Wilson in Chaulk see no reason to require the accused to prove the defence on a balance of probabilities. We support the reintroduction of the partial defence to murder whereby somebody acting in self-defence but proceeding excessively may be convicted only of manslaughter. This would restore the position accepted by almost all courts of appeal prior to the reversal by the Supreme Court. We support giving trial judges a power to stay criminal matters on the basis that they are too trivial (de minimis). Finally we would like to support the C.B.A.'s impressive restatement and simplification of the present law relating to attempts, conspiracy and parties.

Nine reservations to C.B.A.'s Report

1. Preamble (pp. 15-16) (Declaration of Purpose and Principles)

We are doubtful about the wisdom of the proposed preamble and tend to share the concerns of the majority of the Law Reform Commission (and the brief of the Quebec bar). Given the diverse aims of the criminal justice system it seems highly unlikely that the aims of a Criminal Code could be stated without some degree of conflict. This is certainly true of the statement of principles contained in the Young Offenders Act, which has produced problems and uncertainties. This year a preamble was inserted in the Sexual Assault Bill C-49. It is arguable that the attempt to recognize both the rights of an accused and equality interests of a victim will produce clear tensions for the courts in the future.

2. <u>Criminal Liability can only be based on subjective fault</u> (pp. 12-13) (s. 8)

This is the reservation that we feel most strongly about.

The C.B.A. Task Force concludes that

"subjective fault is a fundamentally important principle which must be respected in every provision of the new Criminal Code. It has for centuries been an integral element of the common law, and is now recognized as a principle of fundamental justice under section 7 of the Charter. It is one of the fundamental distinctions between civil and criminal liability." (pp.12-13)

In fact the clear articulation of a fundamental distinction between a subjective and an objective approach to fault only emerged in the 1950's in the United Kingdom through the work of Professor J.W.C. Turner and Glanville Williams. Although the Supreme Court of Canada has indeed insisted on a subjective awareness standard as a constitutional requirement for a murder conviction it is by no means clear that it will do so for all other offences. The Supreme Court has increasingly emphasized that such a strict requirement will only be required for very few offences. It seems quite clear that an objective form of fault will be held to be constitutional.

From the point of view of an accused the subjective, awareness of risk approach is the fairest possible standard since it takes into account all personal factors. For a vast array of serious offences the subjective standard has worked well and has proved to be a vehicle for restraint. Given our high conviction

rates for pure mens rea offences, such as drug offences, it is clear that the subjective approach has not proved to be a recipe for lawlessness.

However, we cannot accept that subjective awareness must be the test of fault for all types of offences. It is difficult to think of any modern criminal law writer who favours a totally subjectivist approach. Some authors suggest it is time to abandon the distinction between a subjective and an objective approach. Most writers and most modern codes recognize that there is a case to me made for some measure of criminal responsibility for failing to measure up to an objective, reasonable standard. There is a legitimate case to be made for the punishment of negligent conduct, especially if it is defined as a culpable failure to exercise capacity.

Most writers, however, recognize that there are dangers in adopting the objective standard for serious offences. If we convict someone who was not thinking properly we are holding that person up to an external standard which he or she did not meet and thus considerably extending the reach of the criminal law. Most would agree that a modern Criminal Code should clearly distinguish the criminal responsibility of one who is a deliberate risk-taker and one who is merely negligent in the sense that a reasonable person would have thought about the risk and taken precautions. This was recently Parliament's approach in creating a separate offence of arson by criminal negligence with a reduced penalty but not when it later decided that the

definition of sexual assault should include one who did not take reasonable steps to ascertain whether the victim was consenting.

There is a case for the recognition of criminal responsibility based on a negligent standard but there is also a case for proceeding cautiously. Criminal responsibility for negligent conduct could well be limited to offences where serious harm like death or serious injury has been risked. There is, furthermore, much to be said for the point of view of the Law Reform Commission who would further restrict criminal responsibility for negligence to gross negligence in the form of a marked departure from the objective norm. The Supreme Court in Wholesale Travel decided by a narrow majority that in the case of so called regulatory offences simple carelessness is all that can be constitutionally required as the fault requirement and furthermore that the accused can constitutionally bear the onus of proof of due diligence. That standard is not sufficient for criminal responsibility which should require the Crown to prove more than simple carelessness. That Parliament has recently decided on a test of mere unreasonableness in the case of sexual assault should not be determinative of the general question of the proper test of criminal responsibility for other crimes.

3. Definition of the mental element (pp. 41-47) (s. 8)

We are, for the reasons already expressed, pleased that the C.B.A.'s scheme is based on the dichotomy that some crimes penalize conduct in certain circumstances and some penalize

conduct which causes certain consequences. Like the L.R.C. we would add a definition of criminal negligence along the lines of gross departure from the norm.

The C.B.A.'s definitions of intent, knowledge and recklessness are clear and workable. We prefer the C.B.A.'s use of the familiar term intent rather than the Law Reform Commission's "purpose". It seems to be a good idea not to resort to the metaphor of wilful blindness and the problems it causes and simply to insist that knowledge includes somebody who is virtually certain. The C.B.A.'s definition of recklessness is a variation of the Glanville Williams's double-barrelled concept requiring actual foresight of a risk and objectively unreasonable behaviour in assuming that risk. There are advantages to this concept which the C.B.A. mentions. The report does not justify why the objective part of the test is phrased as "highly unreasonable to take the risk" rather than the usual formulation of unreasonable to take the risk. It would appear to unduly load the dice in favour of the accused.

Some of us prefer a simpler model. The double-barrelled approach to recklessness has the real danger that it might confuse and obscure the key distinction between a test of subjective awareness and the objective approach for negligence. On this approach (that of the late Professor Jacques Fortin) the notion of justifiability in running the risk should not be in the definition of culpability but left to issues of justification or excuse. On this view there is much to be said for the majority

definition of the L.R.C that recklessness is a conscious assumption of a probable risk.

Both the L.R.C and C.B.A have a scheme that intent is the usual mens rea requirement and any extension to knowledge or recklessness will have to be specified. Given recent confusing jurisprudence from the Supreme Court it can no longer be said that when the courts refer to a mental requirement they normally include intent, knowledge or recklessness. However, as long as the subjective awareness of risk approach is adopted for some of us it would be preferable to declare that recklessness is the usual standard for subjectively defined offences. It would then be for the legislature to declare which offences, such as attempted murder and murder, have to be limited to proof of intent.

4. Common Law Defences (p. 136) (s. 21)

The C.B.A. recommends the maintaining of a provision similar to the present section 8(3) of the Criminal Code which preserves the possibility of common law defences. According to the Task Force:

> "no defence, justification or excuse shall be unavailable unless expressly prohibited by this Code". (p.136)

In our view it is no longer necessary to have a residual provision allowing for the possibility of common law defences. Section 7 of the Charter already imposes a mandate on courts to recognize defences in accordance with "principles of fundamental justice". If there is any need to reflect this possibility it should be a specific provision such as that:

> "no person shall be convicted of an offence if such conviction would in all the circumstances of the case constitute a violation of the principles of fundamental justice which violation cannot be reasonably justified in a free and democratic society".

We doubt whether any such provision is really necessary. The draft of the C.B.A relies too heavily on the common law. The danger is that it encourages uncertainty as is the present case with the defence of duress where the defence of duress is codified but the courts have nonetheless created a common law defence in the case of parties.

5. <u>Defence of property unavailable in the case of an intent to cause death</u> (p. 86) (s. 13(2))

While the C.B.A. wisely removes arbitrary rules in the case of the defence of self-defence it would impose a rule that in no circumstance would it be reasonable in defence of property to intend to cause death. (p.86)

In our opinion even though the fundamental question of reasonableness may be weighed differently in the case of a defence of property there is no reason to declare arbitrarily in advance that in no circumstances will it ever be reasonable to intend to cause death. It is inconsistent with the flexibility that the C.B.A. recognizes in the case of other defences.

6. <u>Conscious involuntary conduct and automatism</u> (pp. 26-30)

We doubt whether it is necessary to make a distinction between conscious and unconscious involuntary conduct. The true point about allowing somebody to be acquitted on the basis of involuntary conduct is that it was conduct that the accused could not control. The defect is more serious, as H.L.A. Hart put it, than lack of awareness of the risk. What we suggest here is that the C.B.A.'s provisions in sections 6 & 7 can be simplified. We also are concerned that the Code would reflect the majority opinion in <u>Rabey</u> that a defence of automatism will always require an external cause and that the test will be objective. The Supreme Court's recent decision in <u>Parks</u> has allowed for some flexibility which should be reflected in the revised Code.

We support the approach of the C.B.A. which is to suggest that the defence of lack of control will not be available where the fault element of the offence is otherwise satisfied. We would add that once some negligence offences are recognized it is a matter of principle that the defence of lack of control should not be available in such offences where that arose from the accused's negligence in getting into that state.

7. <u>Criminal intoxication</u> (p. 106) (s. 16)

We strongly support the approach of the L.R.C. and C.B.A. to reject the distinction between specific and general intent offences such that the defence of voluntary intoxication is only available in the case of specific intent crimes. The minority judgments in <u>Leary</u> and <u>Bernard</u> make a very strong case for abolishing the distinction. We do, however, have some concerns

as to the C.B.A.'s recommendation (p.106) that in the case of so far unspecified schedule 1 offences someone found not guilty by reason of voluntary intoxication will instead be found guilty of the included offence of criminal intoxication. Practical experience in both Australia and New Zealand, where the defence of voluntary intoxication is recognized for any offence, is that such defences rarely succeed. There is real doubt whether any residual intoxicated-related offence is needed. This is especially true if negligence offences are recognized, as we suggest they should be, to which voluntary intoxication will not be a defence.

8. Counselling an offence which was not committed (p. 173)(s. 24)

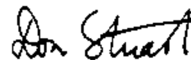
We strongly urge that this incomplete offence not be merged with the law of parties, as appears to be suggested by the C.B.A.. (p.173) One who encourages someone to commit an offence is rightly considered to be a party to that offence. One who tries to encourage the person to commit the offence but the offence is not committed seems to be in a different category which should be kept separate.

9. Double Jeopardy (p. 173) (s. 25)

The C.B.A. in a very brief consideration recommends a provision respecting multiple convictions to the effect that

"No person shall be convicted twice for the same delict".

There is very little protection in existing Canadian Criminal Law either at common law or under S. 11(h) of the Charter against double jeopardy. The C.B.A.'s general proposition would bring little clarity or improvement. We suggest that the matter be reserved for full treatment in a new code of criminal procedure. We recommend an approach along the lines of the detailed consideration of the matter by the Law Reform Commission of Canada's Working Paper No. 63: Double Jeopardy, Pleas and Verdicts (1991).



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