I would like to thank Christine Boyle for her permission to reproduce this document.

François Lareau
17 August 2011

APPENDIX "CODE-14"

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October 1, 1992

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

Dear Mr. Dupuis:

Further to my letter of August 12, 1992, relating to the recodification of the general part of the criminal law, I enclose a brief for the consideration of the Committee.

You will see that the enclosed brief has been signed by Jessie Horner. This is because most of the work on it was carried out by her. However, I would like to express my support for her views and indicate that I share her concern that the recodification project is gaining momentum without adequate consideration of the social purposes of a legislative statement of general principles or without adequate consideration of the content of those principles.

Much of the feminist work on criminal law has focused on specific offences such as sexual assault, obscenity, solicitation, and abortion. Nevertheless, some work has been done which questions the universality of ideas which are either traditional or mistakenly presumed to be traditional. A classic example relates to the question of whether it is legitimate for the state to punish people who have sexually assaulted others without taking care to ensure consent. A commitment to subjective mens rea is often cited as one of the cornerstones of the general part. For instance, the Canadian Bar Association Task Force Report, Principles of Criminal Liability: Proposals for a New General Part of the Criminal Law, at 12, states that subjective fault "has for centuries been an integral element of the criminal law". If this means that the courts have always insisted on subjective fault, it is inaccurate, since the principle has only relatively recently, for instance in cases such as Rees, [1956] S.C.R. 640, Beaver, [1957] S.C.R. 531, and Pappajohn (1980), 14 C.R. (3d) 243, been accepted by the Supreme Court of Canada. Indeed it has since been abandoned, with respect to such offences as criminal damage, by the House of Lords. It would be a grave mistake to codify such a controversial principle without full consideration of whether it is appropriate for offences relating to sexual assault, the sexual exploitation of children, the use and storage of firearms, the use and storage of explosives, the grossly negligent causing of injury or death, especially in the context of deliberate breaches of health and safety standards in workplaces and on the roads. The Task Force proposes such a codification, with a false claim to historical acceptance and without discussion of the social costs with respect to dangerous activities.

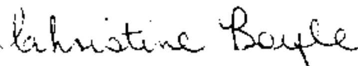
I urge Committee members to test all proposed principles against their knowledge and experience of a range of social issues, discussion of which is absent from the documents in public circulation, such as the Task Force Report and the Framework Document. Many proposals sound innocuous, indeed without ideological bias, when presented in the abstract and without a real-world context. Another example can be found in the Task Force Report, which on page 23 proposes that all duties (underlying liability for omission) should be included in the Code. "Such information on omissions should be available by reference to the Criminal Code, without having to search through thousands of other statutory provisions or Court decisions." Superficially, this might seem like a good idea, promoting the accessibility of law. However, there is no analysis of, for example, the implications for crimes committed by business people and corporations with respect to health and safety standards. It may well be an impossible task to take all the relevant statutory standards and repeat them in the Code, even if one could synthesize various provincial laws. If this were not done and an employer deliberately risked the safety of workers by omission then it would be difficult to hold that employer criminally responsible. There is a great deal of room for debate about the pros and cons of the use of the criminal sanction in the business context. I am not taking a position on that here, although I would be very concerned that the principles of the general part not be tilted in such a way as to facilitate a selection of accused from disadvantaged groups (for instance poor people rather than corporations). My point is that such outcomes should be part of the debate about appropriate principles. There is no sign of such analysis in the Canadian Bar Association Report.

A cost benefit analysis should be applied to proposed principles, as well as to the exercise of codification itself. For example, the question of whether it would be a good idea to codify the judge-made defence of necessity, as asked on page 83 of the Framework Document, fades into insignificance beside the question which was not asked - should the defence be changed so as to be responsive to such chronic "emergencies" as hunger and homelessness?

The timing of heightened attention to recodification is significant, since we have only recently engaged in a public debate about the principles underlying Bill C-49, the reform of the law relating to sexual assault. That debate made it clear that very different visions exist of the fundamental values of the criminal law. Nevertheless Parliament amended the law of sexual assault in a manner supported by very diverse groups of women. In my view this was an historic breakthrough in terms of women acting as framers, rather than objects, of the criminal law. It is of course theoretically possible that recodification at this point of optimism about the potential to re-imagine the criminal law could capture a consensus in the interests of women. In my view the chances are that recodification is more likely to capture principles developed at a time when women were not in a position to play a significant role in academic, legal, and political debates. It is disturbing evidence of this that the Canadian Bar Association Task Force, drawing on a large group of experienced criminal lawyers, can write a report as if the literature on feminist and aboriginal critiques of the criminal law did not exist.

Parliament should not voluntarily place a strait-jacket on itself with respect to the future development of specific offences unless it is given good reasons, supported by comprehensive analysis rather than selective assertion, to do so.

Yours truly,



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