I would like to thank Ronald J. Delisle for his permission to reproduce this document.

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Professor Donald Stuart
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October 6, 1992

Dear Don:

Thank you for your letter of September 8, 1992, regarding the codification of the general part of the Criminal Code. May I applaud your initiative in moving us to react to the Canadian Bar Association's report. Given the time frame within which we are asked to respond, the comments must be cursory and I hope that we can later respond in greater depth. May I first say, as a matter of housekeeping, I think the brief could benefit from better references to the particular provisions being commented on; perhaps citing the recommendation rather than the page.

I think the inclusion of a preamble is really quite wise. If we can agree on a statement of the fundamental principles that underlie the criminal law stating them might be a helpful reminder when difficulties in interpretation arise. If we cannot agree on the fundamental principles we will, of course, then have to go back to square one.

I believe the reservation that you express to the C.B.A.'s report on criminal liability being based on subjective fault should be stated even more strongly. While the Task Force quotes Chief Justice Dickson in Sault Ste. Marie for its position, it's noteworthy that the same judge, in the same year, upheld a conviction for manslaughter with no requirement of any advertence to the possibility of death, Smithers. The Task Force is fooling itself if it does not recognize that an objective form of fault is constitutional and recognized as, in some instances, necessary.

With respect to the definition of the mental element you criticize the report because it "does not justify why the

objective part of the test is phrased as 'highly unreasonable to take the risk'". You say that it would "appear to unduly load the dice in favour of the accused", but isn't it comparable to your earlier insistence on a "marked" departure when dealing with negligence?

With respect to common-law defences the specific provision that you recommend on page 11 is, I believe, as unnecessary as the Task Force's recommendation No. 21 and for the same reasons that you give regarding it.

With respect to qualification 5., I think that arbitrariness is sometimes preferable and I think so particularly with respect to the Task Force's decision that it will never be reasonable to intend death in defence of property. I wouldn't want to see flexibility on that issue.

With respect to qualification 6., I would say that the Task Force's provisions in sections 6 and 7 can be greatly simplified.

With respect to criminal intoxication, while defences of intoxication may rarely succeed in Australia and New Zealand, it is nevertheless possible and the question remains what do you then do with the "offender".

I don't think I understand qualification 8.

With respect to qualification 9., I think you are quite correct.

I hope that these hastily drawn thoughts are of some worth to you.

Yours sincerely,

Ronald J. Delisle
Professor