I would like to thank Gerry Ferguson for his permission to reproduce this document.

François Lareau
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October 1, 1992

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Professor Don Stuart
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Dear Don:

Re: CBA Task Force Report, Principles of Criminal Liability

As a member of the CBA Task Force which prepared the above Report, I strongly endorsed the Report as a very significant step forward in the move to codify general principles of criminal liability in Canada. The individual recommendations in the Report represent the majority opinion of the members of the Task Force who are senior criminal law practitioners and prosecutors from across the country. Not surprisingly, from time to time, individual members of the Task Force did not concur with the majority recommendations in the Report. What follows are my own individual comments and suggestions on the Task Force Report. I welcome the law teachers efforts to support the CBA Task Force Report where they can, and to add their own separate opinions where they feel appropriate.

1. I agree with your statement on the need for codification.

2. I agree that the law teachers should in general support the CBA Task Force Report as a thoughtful, well-reasoned, sound Report. I further agree with you that once the Bill has been tabled we may well wish to present a more detailed clause by clause analysis.

3. I agree with your assessment of the major advances and strengths of the CBA Task Force Report.

4. I am ambivalent on whether a new Code should contain a preamble although on balance I currently favour inclusion of a preamble. No doubt, additions could be made to the preamble proposed by the CBA.

5. I agree that it is not practical to advocate subjective awareness as the only test for fault for all types of offences. Further I agree that there are serious dangers in adopting the objective standard for serious offences. It is a slippery slope. Once one accepts objective liability for some offences, it is difficult in principle to resist the expansion of that approach to all criminal offences. I believe there should be a strong presumption in favour of subjective liability with only modest and occasional deviations from that standard. In other words, the proponents of objective liability should bear a heavy burden of proof to establish that subjective liability is totally

inadequate for the particular offence under consideration. Finally, I believe that liability for criminal offences should be based upon criminal negligence (i.e. gross negligence) and not on ordinary or civil negligence.

6. I agree with your comments on the definition of mental elements in the CBA Task Force Report.

7. I agree that it is no longer necessary to have a residual provision such as section 8(3) of the Criminal Code which preserves the possibility of common law defences. Codes which have not had such provisions (e.g. Indian, Malaysian and Singaporian penal codes) have been able to develop and expand existing defences by a generous interpretation of the existing general principles set out in their Codes.

8. I believe that there is some merit in stating clearly that the defence of property must give way to loss of life, and hence I agree with the CBA Task Force recommendation that the defence of property be unavailable in the case of an intent to cause death.

9. I agree that it is not essential to separate conscious and unconscious involuntary conduct as recommended in sections 6 and 7 of the Task Force Report. However, as the principal architect of the CBA approach, I still support it on purely pragmatic grounds. In my report to the CBA on this point I stated (at pp. 23 and 29):

> This decision to separate involuntary conduct into two distinct sections is purely pragmatic in the sense that including all forms of involuntary conduct under one provision would make the provision unduly complex and therefore harder to draft and harder for the reader to comprehend. LRCC Report 31, section 3(1) only uses one section but in my opinion it is seriously inadequate, especially in regard to automatism. Section 3(H) of the proposed Australian Crimes (Amendment) Act, 1990 is a more complete effort, but still wanting in some respects.
>
> The discussion proposal limits the automatism defence to unconscious, involuntary behaviour. The automatism proposal does not include other forms of involuntary behaviour where the accused is not unconscious. These other forms of involuntary behaviour are dealt with in section 6 of this proposed codification. To attempt to unite these various forms of conscious but involuntary behaviour into one proposal on automatism, which also has as its major concern incidents of unconscious, involuntary behaviour, would tend to make the defence of automatism complex, difficult to draft, and less certain. In addition, the word "automatism" is normally used in medicine and law to refer to unconscious behaviour (see Rabey definition), although it has been used on occasion to include all forms of involuntary behaviour (see Bratty v. A.G. Northern Ireland, [1963] A.C. 386, at 409-410).

Secondly, the CBA provision was approved prior to the Supreme Court of Canada decision in Parks and thus it needs to be reassessed with a view to deciding whether or not "likelihood of continuing danger or reoccurrence" is a factor to be used in distinguishing between "insane" and "non-insane" automatism.

Thirdly, I proposed, but the CBA did not accept, a special verdict and disposition provision for automatism cases:

> Where the accused is found not responsible on account of automatism, the court may, in lieu of any other disposition, dispose of that person in the same manner as if that person had been found not guilty by reason of mental disorder, provided that person's automatism is likely to occur again in a manner which poses a substantial danger to the lives or safety of others; and such persons shall be subject to the same safeguards, procedures and reviews as persons who are found not guilty due to mental disorder.

Such an approach seems to have found some favour with the Supreme Court of Canada in Parks.

10. The CBA Task Force recommendation in regard to intoxication reflects a strong public sentiment that voluntary intoxication should not relieve an accused from all criminal responsibility. This provision is important to the CBA's overall scheme whereby they suggest that criminal liability be based upon subjective fault, in which case intoxication could excuse persons from all liability. I agree with you that if the new Criminal Code recognizes negligence offences, then voluntary intoxication will not be a defence to those negligence offences and hence there is less need to adopt the CBA's suggestion of a new and included offence of criminal intoxication.

11. I strongly agree with your position on counselling an offence which was not committed. I do not recall any serious discussion of this recommendation at our CBA Task Force meetings. I am prepared to go so far as to suggest that the Task Force simply wanted to acknowledge that this offence is related to a discussion of the law of parties, but that it also wanted to continue to treat the offence as an inchoate offence. I was surprised to see the Report's final recommendation on this point.

12. I agree with your comments on double jeopardy.

Many thanks for your efforts in attempting to put together some comments by Canadian law teachers. If I can be of further assistance please let me know. I hope that I can attend the subcommittee hearings for both the presentation of the CBA Report as well as any presentation which the law teachers may make. I have testified before the subcommittee in the past on two issues (the Mental Disorder bill and the Corrections bill). In the past the subcommittee has paid my travel expenses.

Kindest regards.

Yours sincerely,

Gerry Ferguson,
Professor of Law