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On 26 October 2009, Vincent M. Del Buono gave me the permission to put on my web site his brief "Comments by Vincent M. Del Buono to the Canadian House of Commons Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code", June 8, 1992, 11 p.

François Lareau
27 October 2009

Doit d'auteur

Le 26 octobre 2009, Vincent M. Del Buono m'a accordé la permission de mettre sur mon site web son mémoire "Exposé portant sur la recodification de la partie générale du Code criminel présenté par Vincent M. Del Buono au Comité permanent de la justice et du Solliciteur général (Chambre des communes du Canada)", 8 juin 1992, 12 p.

François Lareau
27 octobre 2009

HOUSE OF COMMONS

Issue No. 1

Wednesday, March 25, 1992
Thursday, March 26, 1992
Monday, March 30, 1992
Tuesday, May 12, 1992
Monday, June 8, 1992

Chairperson: Blaine Thacker

CHAMBRE DES COMMUNES

Fascicule nº 1

Le mercredi 25 mars 1992
Le jeudi 26 mars 1992
Le lundi 30 mars 1992
Le mardi 12 mai 1992
Le lundi 8 juin 1992

Président: Blaine Thacker

Minutes of Proceedings and Evidence of the Sub-Committee on the

Recodification of the General Part of the Criminal Code

of the Standing Committee on Justice and the Solicitor General

Procès-verbaux et témoignages du Sous-comité sur la

Recodification de la Partie générale du Code criminel

du Comité permanent de la justice et du Solliciteur général

RESPECTING:

Pursuant to Standing Order 108(1)(a) and (b) and the Order of Reference of June 13, 1991 of the Standing Committee to the Sub-Committee:

Organization meeting

Briefing Session by Senior Officials of the Department of Justice

CONCERNANT:

Conformément à l'article 108(1)a) et b) du Règlement et de l'Ordre de renvoi du Comité permanent du 13 juin 1991 au Sous-comité:

Réunion d'organisation

Séance d'information par les hauts fonctionnaires du ministère de la Justice

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APPEARING:

Tuesday, May 12, 1992

The Hon. Kim Campbell,
Minister of Justice and
Attorney General of Canada

WITNESSES:

(See back cover)

COMPARAÎT:

Le mardi 12 mai 1992

L'honorable Kim Campbell,
Ministre de la Justice et
Procureure générale du Canada

TÉMOINS:

(Voir à l'endos)

Third Session of the Thirty-fourth Parliament,
1991-92

Troisième session de la trente-quatrième législature,
1991-1992

APPENDIX "CODE-2"

Comments by Vincent M. Del Buono to the Canadian House of Commons Standing Committee on Justice and the Solicitor General on the Recodification of the General Part of the Criminal Code

June 8, 1992

Mr. Chairman, I am honoured to appear before you today and wish to express to you my sincere thanks and those of the Society for Reform of the Criminal Law for having undertaken this important work. I should say at the outset that although I am the President of the Society and have solicited and benefited from the views of many of our members with regard to my proposed remarks today, the opinions I will express are mine and mine alone and should not be attributed to any other person or organization.

The codification or re-codification of the criminal law is a difficult task at the best of times. But it is a process which must be undertaken periodically by democratic societies to give or restore coherence to the criminal law which, imperfect as it is, is one of the important expressions of our fundamental values as a community and a nation. The state of a country's criminal law is important for as Prof. Herbert Wechsler, a member of our Society's Council and one of this century's most successful criminal law codifier, said:

> Whatever view one holds about the penal law, no one will question its importance in society. This is the law on which men [and women] place their ultimate reliance for protection against the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit officials agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy.
>
> If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its coils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community, for the individual.
>
> (The Challenge of a Model Penal Code, 65 Harv. L. Rev. 1097, 1098)

Codifying or re-codifying a country's criminal law is not an abstract or academic exercise but a very practical one. One of the Executive members of our Society, Ronald L. Gainer, has stated it quite succinctly:

> The criminal law is of fundamental importance to the effective operation of a civilized society. At an abstract level, it defines the outer boundaries beyond which individual freedom cannot be exercised without seriously transgressing the freedom of others. At an operational level, it establishes the points at which the government will intercede to protect those freedoms. If the law is to realize its potential value, the government must be able to intercede with sufficient frequency and even-handedness to instill and maintain public confidence in, and respect for the criminal law. Only then can it achieve a fair degree of deterrence.
>
> A reasonable level of deterrence is exceptionally important to the practical utility of the criminal law. Any nation attempting to reduce a high crime rate cannot rely solely on enforcement measures; the reality is that it would be prohibitively costly, both from a monetary stand-point and from the stand-point of risking an oppressive level of law enforcement, to attempt to prosecute all the criminal offences - the serious and the minor - that take place. Any attempt to provide effective protection against crime, therefore, must rely heavily upon deterrence. In order to deter, though, the criminal laws must be, and must publicly be perceived to be, sensible, certain, impartial, and efficient. A nation can achieve neither the reality nor the perception of these qualities if the laws are confusing and complex, if important legal consequences turn on accidents in legislative drafting, and if just dispositions of offenders rests as much on change as design.
>
> It is a basic responsibility of government to assure that the criminal law is adequate to meet both its abstract and practical purposes. Certainly the law must set a standard, it must reflect moral principles, it must provide fair notice of its provisions, and it must specify fair procedures and just penalties for redressing its violation. But most of all, it must assure a sound basis for protecting the safety and security of the nation's citizens, their property, and their institutions. To do so, it must be capable of efficient application, for only through efficient application can it engender a significant level of deterrence.

On July 1, 1993, we in Canada will mark the 100th anniversary of the coming into force of our present Criminal Code. Although our Code has served us well, it remains fundamentally both in its style and in much of its content a document of a century ago. In 1893, your province, Mr. Chairman, Alberta, and yours, Mr Laporte, Saskatchewan, did not yet exist; women did not have the right to vote; to sit in this House, on the bench, or on juries in this country. The ultimate court of justice for Canada was not in Ottawa but across the ocean in London. The time has now come to modernize the Code to ensure that it accords with the present-day views of Canadians.

Immediately after Confederation, our first Prime Minister, Sir John A. Macdonald, faced two major tasks: cementing the union by legislating effectively for the new Canada and engendering a sense of national unity among its people. As the historian, Desmond H. Brown, noted in his The Genesis of the Canadian Criminal Code of 1892, Macdonald, in large part, saw the adoption of a common criminal law as a means of fostering this sense of national unity. That goal was shared by many on all sides of this House, in the Senate, on the bench and in the bar of this country.

Since it was enacted in 1893, there have been few sessions of Parliament which did not see one or more amendments to the Code. Over the last century, many have urged useful amendments to the Code. Not only have the provincial attorneys-general, judges, and members of the bar been active in seeking amendments but so also have many other Canadians. Social reformers have been very successful in securing changes to the Code to protect Canadians at risk. Business groups have also been active in seeking amendments which promote greater honesty and fairness in commercial dealings. And of course our criminal law has had to respond to the exigencies of technological change.

In addition, there have been calls, over the years, for the wholesale renewal of the Code. In 1938, the Archambault Commission into the penal system in Canada recommended that " [a] complete revision of the Criminal Code should be made at once." Various members of this House over the years have also called for a complete overhaul. That famous criminal lawyer, noted civil libertarian, and future prime minister, John Diefenbaker, in 1947, called upon the then minister of justice to "proceed with the recodification of the Criminal Code so as to bring it up to date, to remove many of the sections which are obsolete in effect, and to amend the punishments."

In the 1950s, there was a major revision of the Criminal Code. The revision did reduce the Code's bulk and did address some problems left unresolved in the 1893 Code but the revision was exactly that - a restructuring and rationalization - rather than a fundamental and principled renewal of the criminal law.

The present re-codification effort owes a great deal to the work of the Law Reform Commission of Canada and especially its President from 1983 to 1990, the Hon. Mr. Justice Allen Linden, who lead the Commission to consolidate its previous work in criminal law into the proposed new criminal code outlined in Report 31. I had the privilege of being the Department of Justice's representative on the team which did that consolidation and very much believe that it provides, subject to a number of improvements that will urged upon you, a good basis for the recodification of our criminal law.

The Commission began its work in criminal law in the 1970s with a fundamental rethinking of the bases and purposes of the criminal law. Its early work articulated a philosophy of criminal law which stressed the need for restraint in the use of the criminal sanction. The criminal law should only be an instrument of last resort. As well, the Commission identified the need to draw a clear distinction in our law between crimes and less serious offences, infractions.

The ideas found in the Commission's early reports and working papers have, over time, come to form part of the bed-rock of thinking about the criminal law in Canada. Many were reflected in the Government of Canada's 1982 statement of policy in the criminal justice field - The Criminal Law in Canadian Society. Many have also found their way into decisions of the Supreme Court of Canada, particularly those of The Rt. Hon. Antonio Lamer, Chief Justice of Canada, who in the 1970s was the Commission's first Vice-Chairman, then its Chairman and is a member of our Society's Council.

As you well know, our work has not been carried on in isolation. Work is proceeding on criminal law codification or recodification in Australia, England and Wales, France, Hungary, Israel, New Zealand, Nigeria, Poland, the new republics of the former Soviet Union and Zimbabwe, to mention only a few. Many in our Society are leading these national efforts. We were delighted to have the members of this Standing Committee and your staff be part of this international movement though your participation in our founding conference at the Inns of Court in London in July 1987; in our meeting on Reform of Sentencing, parole and early release which occurred in this building in August 1988; and finally in our conference on Criminal Code Reform which was held on Capitol Hill in Washington, D.C. in January of 1990 as Mr. Rideout will remember.

This international movement for codification is occurring at a very troubling time for the administration of criminal justice in many countries. Very difficult questions about the role that racial and ethnic prejudice plays in the administration of criminal justice which have long been ignored must now be confronted. Many of us have had to turn from our other interests to tend to this darker side of the administration of the criminal law. I am proud of the fact that many of the members of our Society have been in the forefront of struggles to confront and begin to remedy these problems whether they be aboriginal deaths in custody in Australia, detention without trial in South Africa or the need to prevent future miscarriages of justice in England. The administration of criminal justice generally needs to be reformed. Re-codifying the criminal law is an important step in that process.

I thought it might be useful if I canvassed for you today briefly the state of codification or recodification efforts in those jurisdictions with which I am most familiar: Australia, England & Wales, New Zealand and the United States to give you a flavour of what is happening internationally.

Australia

Australia is not a single criminal law jurisdiction but nine separate ones. Each of the six states, two territories, and the Commonwealth all have their own criminal law. In spite of this fact or because of it, Australia is at the present time forging ahead with what is a national movement for criminal code reform.

The present Australian movement began in 1987 when the then Attorney-General appointed a committee (the Review Committee) to "review" the criminal laws of the Commonwealth with a view to recommending changes. The Committee decided that the soundest way to rationalize the federal criminal law would be to codify, by a Commonwealth act, the general principles of criminal responsibility to be applied with regard to federal criminal matters. The Committee issued a score of discussion papers. The third interim report, Principles of Criminal Responsibility and other Matters set out the Committee's recommendations. These were the subject of a seminar organized by the Australian members of our Society at Parliament House in Brisbane, in April 1991. The delegates agreed that it was important to achieve consistency in the criminal law among the Australian jurisdictions. From this perspective, the participants undertook to examine the proposals in the report with a view to whether they might provide a model for codification at the state and territorial level.

The report of the seminar was taken up by the Standing Committee of Attorney-Generals which established an officers' committee to draft a common criminal code for all of the Australian jurisdictions. As of last month, the officers had completed their work and will report to the Standing Committee in the near future. The draft will be circulated for comment at a meeting of the Australian Criminal Lawyers Association in Auckland this September. If it proves necessary, the draft will be further refined at a follow-up seminar which the Society's Australian members will have in Sydney around Easter of next year. I expect that a new General Draft of a common Australian criminal code will be enacted by one or more jurisdictions in the next year or so.

England & Wales

In April 1989, Lord Mackay, the Lord Chancellor, laid before the Parliament the Law Commission's proposed Criminal Code for England and Wales. Part I of the draft Bill included with the report (clauses 1 to 52) covers the general principles of criminal liability applicable to a criminal code. Part II (clauses 53 to 220) contains specific offences grouped in five Chapters dealing with: offences against the person; sexual offences; theft, fraud, and related offences; other offences relating to property; and offences against public peace and safety.

In January 1990, the English members of the Society held a seminar at Cambridge to discuss the prospects for the Code. The Seminar attracted a wide cross-section of all those whose support would be necessary to get the Code into and through Parliament. The discussion was extremely useful and mapped out a way towards an eventual codification. The English government has for the moment directed its attention over the last two years to completing a reform of sentencing in that country. As well, the energies of those involved in criminal justice in England and Wales are being absorbed by the need to address some of the deep concerns about the state of English criminal justice which have lead to the establishment of a Royal Commission on Criminal Justice headed by Lord Runciman.

Nevertheless, the Law Commission in its 25th Annual Report set out a strategy for the consideration and adoption of a new criminal code. It said:

> There was strong support for the objective [of codification] but, at the same time, appreciation of the difficulties which the introduction of a Bill as large and wide-ranging as the draft code would involve. The English Law Commission considers that the work on the Code could best be furthered by means of a series of reports recommending the reform or restatement of areas of specific crime along the lines envisaged in the Code Report, together with the reformulation in "Code" terms of general principles relevant to the offences in question. The area choosen for the first such report is that of offences against the person. A report on this subject has recently been issued by the Commission for public consultation."

New Zealand

When the Rt. Hon. Geoffrey Palmer, the then Deputy Prime Minister and one of the founding members of our Society, introduced the Crimes Bill in the New Zealand Parliament May 2, 1989 he said:

> [The introduction]... marks an important occasion in the history of the criminal law in New Zealand. It represents the first comprehensive review of the substantive criminal law since the preparation of the Crimes Act 1961. The 1961 Act introduced a multitude of changes to New Zealand. In particular, the whole penalty structure was rationalized, as were the definitions of crimes against the person and the relationship between those crimes and property offences. However, the objectives of the current review were somewhat broader: first, to build on the process of codification of the law that began in 1893 with the adoption of an indigenous New Zealand Crimes Act; and, second to subject every offence in the Crimes Act to close scrutiny and revision.
>
> Debates 1989, 10285

The Bill proposed a number of important changes in the criminal law of New Zealand. For the first time the principles of criminal responsibility were codified. It abolished the distinction between murder and manslaughter and created a new offence of culpable homicide with a discretionary life sentence. Where a finite term of imprisonment was imposed for the offence of culpable homicide, the judge would have power to fix a period during which the offender would not be eligible for parole. There was a new offence of endangerment and the Bill created a new offence of aggravated violence (Clause 148) which would carry a maximum penalty of 20 years.

These were only three of the most notable changes proposed. There were many others; the age of criminal responsibility was set at 12. There was no longer an exemption for school teachers to use corporal punishment. Property offences were reformulated and streamlined and the central concept of dishonesty was defined. There were new offences of dishonestly taking trade secrets and dishonest use of computers.

The Bill which was drafted over three years had not be extensively consulted on before being introduced in Parliament. To encourage public and professional comment on the Bill, the Government established a select committee to tap into the wealth of views on the matters raised by the Bill. Mr. Palmer acknowledged the obvious on May 2 when he stated that:

> ...[the process of codification] is a long way from being complete, because we will have many submissions on the controversial provisions in it. Any Bill of this kind that changes the criminal law is bound to be scrutinized with great care, and it should be.
>
> Debates 1989, 10289

In 1989 and 1990. a special committee headed by the Rt. Hon. Maurice Casey of the New Zealand Court of Appeal heard submissions from a number of interested persons on the proposed Crimes Bill and submitted a report last year. However, the new government seems to be taken up by the need to deal with their economic crisis.

The United States

The movement for the codification of the Federal criminal law in the United States is dormant for now but like Rip Van Winkle it will one day awaken. The criminal law codification movement generally in the United States was one of the most successful legal reform movements of this or any other century. The impetus for reform which led to the adoption of the Model Penal Code at the state level also prompted a federal effort which worked from 1966 to 1982. In 1978, the United States Senate by a vote of 72 to 15 passed a revised U.S. Criminal code. Unfortunately, over the next four years, the vagaries of politics conspired to prevent agreement on the Code by the Senate and House until the effort ground to a halt in 1982.

A report prepared for the Attorney-General of the United States in 1989 on the Federal Criminal Code Reform described the present state of the Federal Criminal law in the following terms:

> The current federal criminal law [of the United States] is an anachronism. It is an odd collection of two hundred years of ad hoc statutes, rather than a unified, interrelated, comprehensive criminal code. Some of its individual provisions - particularly some of the more recent ones - are well drafted and useful. As a whole though, it is chaotic, inefficient, overly narrow in some respects, and overly broad in others. Certainly it is not a body of criminal law that one would expect to find in a modern, highly developed nation.
>
> The specific deficiencies of the current federal criminal law are numerous ... [They] however are amenable to piecemeal correction. Successful repair of narrow difficulties has been frequent, and may be expected to continue. But remedial enactments and court interpretations simply add to the complicated patchwork of the federal criminal law. They do nothing to alleviate fundamental shortcomings, which are far more serious than cumulative specific deficiencies. The fundamental difficulty is that the federal criminal law, with its thousands of statutes and case decisions is almost incomprehensible. As a consequence, it is very inefficient in its application. Its ambiguities, conflicts, and irrelevancies drain way from more productive work the limited time and resources of investigators, prosecutors and judges.
>
> (1989) 1 Criminal Law Forum 99

This is important work. The Framework Document prepared by the Department and the Law Reform Commission of Canada is an extremely useful vehicle for assisting interested Canadians in expressing their views on some of the fundamental issues. As you know from the Table of Contents to the Document, your consideration will range over a large number of subjects. Although all are important, I would like to touch on just a few today. The Framework Document sets out a large number of fundamental public policy issues which should be decided through the parliamentary process.

In our complex society each of us not only has a number of important rights and freedoms, but we also have a number of duties we owe to others. In our world, we are all interdependent upon each other in some way. To date, the Criminal Code has not clearly stated which duties we owe to each other the breach of which will attract criminal responsibility. The Law Reform Commission of Canada has attempted to set out, for the first time, all these duties clearly. You will consider their recommendations and I hope, at the end of your deliberations, suggest a clearer, more useful statement of these duties for inclusion in either the General Part or possibly the Special Part. Such a statement's clarity would benefit all Canadians by leaving no one in doubt as to what duties she or he owes others.

Our present Code has a medley of terms to describe the requisite state of blame worthiness for criminal responsibility. The list is a long one: willfully, fraudulently, corruptly, knowingly, maliciously, recklessly, intentionally, means to, with intent, for a purpose, contrary to a direction, for a fraudulent purpose, and so on. The Law Reform Commission has proposed that this list be consolidated into three or four terms whose meaning would be defined. If this can be done, this would be a significant improvement over the present medley in which many terms mean the same thing.

The General Part should also deal clearly with how the criminal law fixes criminal responsibility to corporations for the criminal conduct of their directors, managers and employees. This is an area of law which is becoming increasingly important particularly in the fight to protect our physical environment. I am sure that many Canadians will wish to give you the benefit of their views on the subject.

The criminal law in all countries has always been concerned with setting out the justification which citizens have when they go to assist someone in danger, or to protect themselves, their families, or their property from unlawful interference. This is one area of the law that should be as clear and simple as possible so that all citizens can know what they can and cannot do in such common situations. It should also encourage, rather than discourage, each of us to go to the assistance of another who is in physical danger. The Commission has proposed that this area of the law be simplified. I hope that you will endeavour to do so.

To date, our Criminal Code has permitted parents and others to use reasonable force by way of correction of children. The Law Reform Commission has recommended that the scope of this provision be re-examined to restrict the justification of the use of force to parents, and those expressly authorized by them to use reasonable force on their children. This is obviously an important social issue that you will be grappling with.

Although most violent crimes in this country are committed by persons who are drunk or on drugs, there has never been a determination by the Parliament of Canada as to whether self-induced impairment by alcohol or drugs should provide the accused with complete, a partial, or no defence to a serious crime. Rather we have based our law on a 1920 decision of the House of Lords in England. The Supreme Court of Canada's most recent consideration of the defence illustrates a difference of judicial approach that invites legislative resolution. Furthermore, I think it is long overdue that our Parliament make its own determination as to what policy our criminal law should contain in this regard. This is an area which should be governed by a policy made in Canada by Canadian parliamentarians for Canadians.

As the Framework Document illustrates, there are many more issues which will be before you in this important review. The hearings that you will hold will be crucial to the development of the criminal law of Canada. Your deliberations will give all Canadians an opportunity to be heard on the fundamental issues of criminal responsibility, many of which go to the very heart of who we are as a compassionate but just community and nation. It will be especially important to hear those whose voices were not heard in 1893 specifically, women and aboriginal people, many of whom claim that our present criminal law and its administration neither adequately reflects their values nor treats them justly.

I said at the outset of my remarks today that a codification or re-codification of the criminal law although an important if not essential task is a difficult one at the best of times. Let me end today with notes of caution. Criminal law codifications once embarked upon always carry some risks for the administration of criminal justice in a country. If a codification is successful, it invariably fosters new confidence in all those responsible for criminal justice and steels them to tackle a multitude of other pressing issues involving law and social justice. If however the codification exercise fails, there is often a loss of nerve on the part of the political leadership, the judiciary and the profession in dealing with crime and criminal justice reform. This loss of nerve, in turn, needless to say, creates a multitude of other problems.

There are useful lessons to be learnt from the near-miss which occurred with Federal criminal law codification in the United States in the late 1970s and early 1980s. Keep in mind that a very good code was passed by an overwhelming vote in the United States Senate in 1978 only to grind to a halt in the House of Representatives in the early 1980s. In effect, it was killed by the political clumsiness of its own supporters. The House Judiciary sub-Committee considering the new Code made at least two mistakes. The first was to misunderstand what was required of them. Rather than act as legislators and focus needed attention upon policy issues, they allowed themselves to become mired in the details of legislative drafting. While the members of the sub-Committee argued about the choice of a word or the placement of a comma, the political consensus and momentum for codification dissipated. With its supporters demoralized, the new code became vulnerable to being torn to pieces by single-issue interest groups.

My second caution would be to not believe that the judiciary is in a better position than you to made the hard decisions as to which fundamental values the Code should protect. Litigation in a specific criminal case is seldom the best forum in which to assess and then decide broad issues involving public policy choices. The legislative process, although far from ideal, is a better forum in which to hear and weigh all points of view before making some of the difficult value choices you have before you for all Canadians.

I and many others very much look forward to the report which will conclude your deliberations. I know that individual members of our Society will wish to appear to give you the benefits of their views this autumn. I hope that you will find their views useful.

Our Society is planning a national conference in Ottawa the week of July 1 next year to mark the centenary of the coming into force of the Criminal Code. It will examine which values the Code has expressed over the last one hundred years and how it has mirrorred, at time, opaquely, at times, distortingly, images of who we, as a country, anted to be and who were, in fact, were. I hope that your success in these hearings will ensure that the conference is not only a look back to our past but also a look forward to our future. I know that your report will not only be a milestone in history of the development of the criminal law of Canada but will also be studied closely in other countries around the world.