I would like to thank Tim Quigley for his permission to reproduce this document.

François Lareau
20 August 2011

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September 21, 1992

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Dear Don:

RE: The C. B. A. Task Force Report

I am responding to your letter dated September 8 which I just received. I am very much in agreement with what you have written, including most of your reservations. I have only a few points to make:

1. I believe that subjective fault should be the norm—i.e. presumed for *code* offences—with room for negligence offences, provided that they are justified under section 1 of the Charter. Section 1 justification should be to the *Oakes* standard, not that set out in *Swain* and *Chaulk:*

2. I would like to see the stipulation of the fault requirement address the issue of whether a mistake trumps recklessness; I believe that, from a common-sense point of view, a person may both believe that she/he is making the correct choice and entertain some doubt--that is, some awareness of the risk of being incorrect. I think that the Supreme Court in *Sansregret* and Wilson J. in *Tutton* may have been hinting at this notion. I think it would alleviate a lot of the concern about honest mistake to require the Crown, for some offences at least, to prove only minimal awareness of a risk;

3. I am a little uneasy about completely foreclosing common law defences, although I agree that the example of common law duress is compelling for your argument. I guess I am somewhat sceptical that the judiciary would necessarily rely on the principles of fundamental justice to accept new defences. For instance, I am uncertain whether officially induced error or entrapment would have been recognized without the specific authority of s. 8 (3) to rely upon;

4. Although I of course agree that abolishing specific and general intent would not cause the heavens to fall in, I do think that a backup offence may be required in certain circumstance. I acknowledge that Bill C-49 has perhaps dealt with this problem in relation to sexual assault, although I suspect interpretation of s. 273.2 may end up suggesting otherwise, or at least not avoid the very cumbersome *Moreau* approach. In any case, C-49 does not touch ordinary assaults--a backup offence might be desirable there for the situation where, for example, an intoxicated offender has made a mistake about consent to the application of force. I don't want to make a great deal of this point, however, because you may well be right from a tactical point of view to have the specific-general intent dichotomy removed and then determine where, if at all, problems lie.

As you can see, my points are not major ones. I am in substantial agreement with your submission. I hope this helps. Maybe we should have it tacked onto the constitutional referendum--in that way, it might actually get passed!

All the best.

Yours truly (*Original signed by*)

Tim Quigley
Associate Professor of Law