

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:

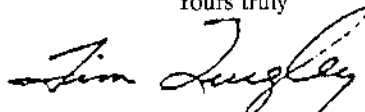
1. I believe that subjective fault should be the norm—i.e. presumed for *code* offences—with room for negligence offences, provided that they are justified under section 1 of the Charter. Section 1 justification should be to the *Oakes* standard, not that set out in *Swain* and *Chaulk*:
2. I would like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