REPORT

ON

THE BASIS OF LIABILITY FOR PROVINCIAL OFFENCES

ONTARIO LAW REFORM COMMISSION

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THE BASIS OF LIABILITY FOR PROVINCIAL OFFENCES

ONTARIO LAW REFORM COMMISSION

1990

The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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Ontario
Law Reform
Commission

The Honourable Ian G. Scott, QC
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on the Basis of Liability for Provincial Offences*.

Rosalie S. Abella
Chair

Richard E.B. Simeon
Vice Chair

Earl A. Cherniak
Commissioner

J. Robert S. Prichard
Commissioner

Margaret A. Ross
Commissioner

PREFACE

The Commission's Project on the Basis of Liability for Provincial Offences was initiated in July 1988. The central issue to be examined concerned whether a person should be held liable for a provincial offence in the absence of fault and, if fault were required, whether subjective fault (*mens rea*) or objective fault (strict liability or negligence), or some mix of both, ought to be imposed. In addition, the Project was to study the burden of proof in provincial offences and several other related matters.

At the outset, we commissioned two memoranda on the basis of liability for provincial offences, one from Professor Don Stuart, of the Faculty of Law, Queen's University, and the other from Professor Alan Brudner, of the Faculty of Law, University of Toronto. Subsequently, the Commission produced an Issues Paper (September 1988), which dealt with the various matters to be canvassed in the Project, and which included the two memoranda by Professors Stuart and Brudner.

In order to assist the Commission in its deliberations, we advertised in the Ontario Reports and in The Lawyers Weekly for written submissions. The Issues Paper was circulated to selected persons and groups and to those who indicated to us that they wished to make submissions. The names of the thirty persons from whom submissions were received are listed in Appendix 2 of this report.

Professor Stuart was retained to review the written comments, to conduct further research, and to produce a draft report for the Commission. An Advisory Board was established, comprising thirteen members, to comment on the issues raised in Professor Stuart's draft report. The members of the Advisory Board were: Professor Peter G. Barton, Faculty of Law, University of Western Ontario; David Beck, Assistant Corporate Counsel, Regional Municipality of Hamilton-Wentworth; Garth Dee, Barrister and Solicitor, Toronto; Denise K. Evans, Director, Transportation Regulation Development Branch, Ontario Ministry of Transportation; Paula Kashul, Counsel, Legal Services Branch, Ontario Ministry of Tourism; Brian Beamish, Policy Analyst, Corporate Policy, Corporate Policy Secretariat, Ontario Ministry of Correctional Services; Professor Alan W. Mewett, Faculty of Law, University of Toronto; Howard C. Rubel, Legislative Coordinator, Criminal Justice Executive, Canadian Bar Association–Ontario; Maureen Simpson, Director, Legal Services Branch, Ontario Ministry of Culture and Communications; Marie Rounding, Director, Legal Services Branch, Ontario Ministry of Financial Institutions; John Swaigen, Barrister and Solicitor, Legal Department, Municipality of Metropolitan Toronto; Marianne Orr, Solicitor, Legal Services Branch, Ontario Ministry of Agriculture and Food; and Donald J. Chiasson, Director, Legal Services Branch, Ontario Ministry of Labour.

The Commission wishes to thank Professor Don Stuart, Professor Alan Brudner, the members of the Advisory Board, those persons who made written submissions, and others who offered us guidance, for their significant contributions to our study. Particular thanks are due to Professor Stuart for his invaluable assistance throughout the Project.

The Commission also wishes to thank Peter Sibenik, the Commission Counsel who initially had carriage of this Project. Finally, we extend our grateful appreciation to Ronda Bessner, Counsel at the Commission, who took responsibility for the Project at an early stage and who prepared the final report in consultation with Mel A. Springman, General Counsel and Director of Research at the Commission

CHAPTER 1

INTRODUCTION

There is a need for fundamental reform in the field of provincial offences in Ontario. Lying at the heart of the problem is the existence, although now in circumscribed form, of absolute liability offences. Under such offences, a person may be convicted where she has merely committed the physical act, or *actus reus*, of the offence, but has not been at fault.

At the outset, the Commission wishes to state its firm belief that no person should be held liable in the absence of fault, that is, where she has not engaged in morally blameworthy conduct. Our rejection of absolute liability offences is reflected in the central recommendation of this report, namely, that absolute liability should be abolished for provincial offences and that liability for all such offences should be based on some minimum requirement of fault. In our view—one widely shared by those with whom we consulted—this proposal is mandated, as a matter of principle, by the dictates of justice. It is also buttressed by section 7 of the *Canadian Charter of Rights and Freedoms*,[1] particularly as asserted by the Supreme Court of Canada in its watershed decision in *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288.*[2] The Supreme Court held that absolute liability violates "principles of fundamental justice" and is unconstitutional in virtually all cases in which that liability threatens the liberty of a person. This assertion has had, and will continue to have, a substantial impact on the law respecting provincial offences.

The Commission believes that, unlike existing law, our proposal would strike the proper balance between fairness to the individual and the essential law enforcement requirements of the larger community.[3] With respect to the question of fairness, we have already indicated our principled opposition to absolute liability and its present or anticipated constitutional illegitimacy. In terms of law enforcement, there is no evidence to suggest that the abolition of absolute liability will hamper the effective prosecution

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[1] Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

[2] [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289.

[3] It has been argued that, by relieving the Crown of the obligation to prove fault, absolute liability offences promote administrative efficiency in the enforcement of legislation which would otherwise be difficult or impossible to enforce. See *infra*, ch. 2, sec. 1(c).

of provincial offences. Indeed, we understand that, in practice, absolute liability is sometimes ignored and a warning is issued by those administering the legislation. As a result, any failure to heed the warning necessarily involves some degree of fault on the part of the offender. To the extent that absolute liability is effectively superseded in this manner, it is rendered meaningless, and perceived to be so by those involved in the administration of justice. This can only exacerbate disrespect for the law. Finally, in our view absolute liability does not exact greater deterrence to aberrant conduct than a provincial offences regime founded on some notion of fault. More care in the conduct of affairs cannot be expected by punishing blameless conduct.

The problem caused by the existence of absolute liability offences is made acute by the number, as well as by the nature and scope, of such offences. There are thousands of provincial offences, many of them imposing absolute liability, which appear throughout the statutes, regulations, and municipal by-laws[4] of this jurisdiction. It hardly needs emphasizing that such legislation is of critical importance in the daily lives of all members of the community. Over time, provincial law and the offences enacted thereunder have come to regulate a myriad of activities in relation to such diverse areas as highway traffic, occupational health and safety, landlord and tenant relations, agriculture, education, financial and commercial affairs, and the environment.

There is yet another fundamentally important dimension to the notion that the law relating to provincial offences is flawed and in need of reform. This further problem arises independently of the inherent injustice caused by absolute liability offences.

At the present time, there is no clear guidance concerning the categorization of, or the basis of liability for, provincial offences. Ontario legislation, including the *Provincial Offences Act*,[5] does not deal comprehensively with the basic issue concerning the degree of fault, if any, which must be established in order to obtain a conviction for different kinds of offences. While on many occasions the courts have attempted to articulate general principles respecting the basis of liability for provincial and federal offences,[6] the existing tests are simply not adequate: they are difficult to interpret and have resulted in a number of conflicting court decisions. Moreover, in some instances they may not meet the constitutional standards set by the *Canadian Charter of Rights and Freedoms*.

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[4] The reference to "provincial offences" in this report includes a reference to offences under municipal by-laws as well as to offences under provincial statutes and regulations.

[5] R.S.O. 1980, c. 400.

[6] See, for example, *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (subsequent references are to 40 C.C.C. (2d)), discussed *infra*, ch. 2, sec. 1(c).

Serious consequences flow from this deficiency in the law. While such consequences clearly affect all those involved in the provincial justice system, including the Crown and the judiciary, they are most prejudicial in relation to persons who are accused of committing a provincial offence. Such persons frequently do not know in advance of their trial what elements must be established by the Crown in order to secure a conviction, since they may be uncertain whether the offence is one of absolute liability, strict liability, or *mens rea*.

As indicated above, in an absolute liability offence, the Crown must establish merely that the accused[7] committed the physical act of the offence; it need not be concerned with the question of fault. Where, however, it is determined that liability is not absolute, but is based on some notion of fault, it is not always clear whether the offence is one of *mens rea* or strict liability. In a *mens rea* offence, the prosecution must prove that, in committing the offence, the accused had an "aware" state of mind, that is, that she did the wrongful act with, for example, intent, knowledge, recklessness, or wilful blindness. In a strict liability offence, the standard is objective, not subjective as in the case of *mens rea*, and is based on the conduct of the reasonable person in similar circumstances. The accused may raise as a defence that she exercised reasonable care and, therefore, was not negligent.

Because of this lack of clarity respecting the basis of liability for provincial offences—whether the specific offence is one importing absolute liability, strict liability, or *mens rea*—accused persons are often confronted with an uncertain burden of proof. Therefore, in addition to our proposal to abolish absolute liability offences, the Commission will recommend the adoption of a new statutory regime designed to deal comprehensively with the classification of provincial offences.

In our attempt to articulate clear, comprehensible, and fair principles by which to determine the basis of liability for provincial offences, we take the position that a rigid distinction between so-called "true crimes" and regulatory or "public welfare" offences has never been, and cannot be, satisfactorily made. Factors such as the penalty, the subject matter of the offence, and the seriousness of the harm caused, are clearly relevant, but have proved to be unreliable criteria for making any such distinction. Although as a general rule a conviction under the *Criminal Code*[8] carries a more severe penalty and results in a greater stigma than a conviction for a provincial offence, this is not always the case. Violation of provincial statutes may result in the imposition of serious penalties. The Ontario Legislature may expressly provide, and indeed has provided,[9] for a penalty of

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[7] For ease of reference the term "accused" will be used in chs. 1-4 of this report to refer to a person charged with an offence, whether under federal or provincial law.

[8] R.S.C. 1985, c. C-42.

[9] See, for example, *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 146.

imprisonment for the infringement of a statutory provision. In addition, there are provisions in the *Provincial Offences Act* which impose imprisonment on individuals for default of payment of a fine.[10] Finally, it is important to note that certain penalties, such as loss of a licence, may have serious economic consequences which should not be minimized.

In this report, the Commission will discuss existing substantive law and the effect of the Charter. In order to provide some background to our analysis, we wish to make a few general observations concerning the constitutional framework for criminal and quasicriminal offences and the nature and scope of the *Provincial Offences Act*.

Although the Parliament of Canada has exclusive powers with respect to the enactment of criminal law and procedure pursuant to section 91.27 of the *Constitution Act, 1867*,[11] the provincial legislatures have the power, by virtue of section 92.15 of the *Constitution Act, 1867*, to impose "punishment by fine, penalty or imprisonment for enforcing any law of the province". Providing that the subject matter falls within provincial jurisdiction, a provincial legislature has the constitutional power to prosecute persons who contravene its statutes.

Since Confederation, provincial legislatures have exercised their right to pass legislation which, as we have said, regulates a great number of matters of daily importance to all persons. Although there are many forms of regulation other than prosecution, provincial legislation invariably resorts to the possibility of prosecution and punishment for violation of provincial statutes.

Until 1979, there had been no attempt by the Ontario Legislature to address the general question of prosecutions for provincial offences. Rather, the Ontario *Summary Convictions Act*[12] stipulated that the procedure in the *Criminal Code* of Canada for summary conviction offences was to be adhered to for all provincial prosecutions.

In 1979, *The Provincial Offences Act, 1979* was proclaimed.[13] The Act was designed to deal primarily with the procedural aspects of offences arising under Ontario legislation. The government was of the view that the *Criminal Code* procedure was inappropriate for the prosecution of provincial matters. In particular, it thought that the federal criminal procedures were too complex for what were generally minor regulatory provincial offences. In addition, it was believed that the *Criminal Code* placed undue emphasis on incarceration for the failure to pay a fine. The then Attorney

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[10] *Supra*, note 5, s. 70(3).

[11] 30 & 31 Vict., c. 3.

[12] R.S.O. 1970, c. 450.

[13] S.O. 1979, c. 4.

General of Ontario was firmly convinced that the new *Provincial Offences Act, 1979* would offer a "simple and flexible procedure for truly minor offences which will provide convenience to the person charged, without in any way diminishing his fundamental legal rights".[14] He claimed that the Act was designed "to ensure fair, expeditious, and inexpensive justice in Ontario". Section 2(1) of the present *Provincial Offences Act* clearly describes the purpose of the statute:

> 2.—(1) The purpose of this Act is to replace the summary conviction procedure for the prosecution of provincial offences, including the provisions adopted by reference to the *Criminal Code* (Canada), with a new procedure that reflects the distinction between provincial offences and criminal offences.

Although the *Provincial Offences Act* deals mainly with the procedure relating to provincial prosecutions, it is important to note that a small number of substantive provisions are included in the "General Provisions" portion of the Act. They cover persons who aid and abet the commission of an offence, those who are party to a common intent, and persons who counsel an offence that has been committed. The provision that ignorance of the law is no excuse, as well as a provision on the applicability of common law defences, are also included in the *Provincial Offences Act*. These substantive provisions are borrowed *verbatim* from the *Criminal Code*. In addition, a wide reverse onus clause respecting certain types of defences is provided in section 48(3) of the *Provincial Offences Act*:

> 48.—(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

The preceding discussion reveals a number of deficiencies in the law relating to provincial offences. As indicated earlier, the *Provincial Offences Act* does not address comprehensively the issue of the categorization of provincial offences. Moreover, it appears anomalous that an accused is precluded from relying on the types of statutory defences that appear in the *Criminal Code*, such as the defence of property, self-defence, or the defence of duress. Furthermore, the constitutional validity of the broad reverse onus clause in section 48(3) of the *Provincial Offences Act* is suspect.

This report is divided into four chapters. In chapter 2, the Commission will describe the existing substantive law with respect to the basis of liability for provincial offences. The limitations imposed by the Charter on the classification of offences and other matters are discussed in chapter 3. In chapter 4, the Commission examines various reform alternatives and proposes several recommendations which will significantly reform the law of

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[14] Ministry of the Attorney General, *Minor Offences* (1980), at 6.

Ontario regarding the categories of provincial offences, the burden of proof, the requisite elements which must be established in order to imprison a provincial offender, statutory defences available to an accused, and the circumstances in which a person can be jailed for the failure to pay a fine. The recommendations of the Commission have been incorporated into a Draft Bill, which appears in Appendix 1 of this report.

CHAPTER 2

EXISTING SUBSTANTIVE LAW

1. THE BASIS OF LIABILITY FOR PROVINCIAL OFFENCES

In this chapter, the Commission will describe the existing law with respect to the classification of offences. In particular, the law both prior and subsequent to the Supreme Court of Canada decision in *Sault Ste. Marie*[1] will be discussed.

(a) INTRODUCTION

A precondition to a discussion of the law on the basis of liability for provincial offences is an understanding of the terms absolute liability, strict liability and *mens rea*. Although we have already had occasion to use these terms, it is desirable to define them once again.

An absolute liability offence imposes criminal liability irrespective of fault. In other words, a conviction follows mere proof of the physical act, or *actus reus*, of the offence.[2]

Strict liability is based on simple negligence. There is a fault requirement, which is based on the objective reasonable person standard. An individual will be convicted of a strict liability offence unless she can demonstrate that she had taken as much care over her conduct as could reasonably be expected in the circumstances.[3]

Mens rea refers to fault based on certain aware states of mind, such as intent, knowledge, recklessness or wilful blindness respecting the circumstances and/or consequences of the offence. In *mens rea* offences, the trier of fact must ascertain, to the best of her ability, what was in the mind of the particular accused at the time of the offence. This has variously been described as a requirement of awareness, conscious thought or advertence. What is vital is that the accused, given his personality, situation and circumstances, actually intended, knew or foresaw the consequences and/or

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[1] *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353 (subsequent references are to 40 C.C.C. (2d)).

[2] Stuart, *Canadian Criminal Law: A Treatise* (2d ed., 1987), at 157.

[3] Colvin, *Principles of Criminal Law* (1987), at 155.

circumstances of the offence. Whether the accused "ought to" or "should" have foreseen, or whether a reasonable person would have foreseen, is not the appropriate test.[4]

The Commission will now briefly discuss the basis of liability for offences prior to the *Sault Ste. Marie*[5] decision in 1978.

(b) Prior to 1978

In Canada, the question of absolute liability has generally arisen in the case of non-*Criminal Code* federal offences and in provincial offences where *mens rea* is not expressly indicated by the wording of the offence. Until the pivotal decision of the Supreme Court of Canada in *R. v. City of Sault Ste. Marie*,[6] the stark choice lay between the polar positions of full subjective awareness, or *mens rea*, and absolute liability. This involved a complex, uncertain and frequently controversial process of statutory construction. The courts loosely applied a number of contradictory considerations, such as the need for deterrence, the difficulty of law enforcement, the subject matter of the offence and the severity of the penalty. When courts abandoned the *mens rea* requirement, many were criticized for not regarding that decision as a fundamental question of policy and for failing to develop a principled, integrated approach to the classification of offences.[7]

An example of the process is to be found in the Supreme Court of Canada decision in *R. v. Pierce Fisheries Ltd.*[8] In an 8:1 decision, the court held that the offence of possession of undersized lobsters in the federal Fishery Regulations imposed absolute liability. Ritchie J., speaking for the majority, reasoned that the regulations were intended as a conservation measure in the public interest and did not create a new crime. He also stated that this offence did not carry the heavy stigma associated with a criminal conviction.[9]

The court contrasted the "minor offence" of possessing undersized lobsters in order to protect the lobster industry with the serious crime of possession of narcotics. It stated that a presumption of *mens rea* exists only with respect to serious criminal offences. The court also stressed that *mens rea* terms such as "knowingly", "wilfully" and "with intention", used in other provisions of the Fishery Regulations, was another strong indication

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[4] Stuart, *supra*, note 2, at 123-24.

[5] *Supra*, note 1.

[6] *Ibid*.

[7] See Weiler, *In the Last Resort* (1974), at 91-100.

[8] [1971] 5 C.R. 5, 12 D.L.R. (3d) 591, [1970] 5 C.C.C. 193 (S.C.C.) (subsequent references are to [1970] 5 C.C.C.).

[9] *Ibid*., at 201.

that the offence in issue was one of absolute liability. A further reason enunciated by the majority for its decision to categorize the offence as absolute liability was that a requirement of *mens rea* would make it "virtually impossible" to secure a conviction.[10]

Subsequent to *Pierce Fisheries*, there was an overwhelming judicial trend to use the standard of absolute liability in the case of federal non-*Criminal Code* offences[11] as well as provincial offences.[12] Indeed, there is only one reported decision[13] since *Pierce Fisheries* and prior to *Sault Ste. Marie* which asserts a *mens rea* requirement for a provincial offence or federal non-*Criminal Code* offence in the absence of express *mens rea* words.

We shall now examine the landmark 1978 decision of the Supreme Court of Canada in *Sault Ste. Marie*, which radically transformed both federal and provincial offences from a dual to a tripartite system with the introduction of strict liability offences.

(c) *SAULT STE. MARIE:* NEGLIGENCE WITH A REVERSE ONUS

The issue before the Supreme Court of Canada in *Sault Ste. Marie* was whether the offence of causing water pollution, contrary to the *Ontario Water Resources Act*,[14] required proof of fault. Mr. Justice Dickson, speaking

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[10] *Ibid.*, at 206.

[11] See *R. v. Standard Meats Ltd.*, [1973] 6 W.W.R. 350, 24 C.R.N.S. 257, 13 C.C.C. (2d) 194 (Sask. C.A.) (false advertising under the *Food and Drugs Act*, R.S.C. 1970, c. F-27); *R. v. The Vessel "Dilkara"* (1973), 15 C.C.C. (2d) 90 (B.C.C.A.); *R. v. M.V. "Allunga"*, [1977] 3 W.W.R. 673, 35 C.C.C. (2d) 204 (B.C.C.A.) (pollution contrary to Shipping Regulations under the *Canada Shipping Act*, R.S.C. 1970, c. S-9); *R. v. Lakaire Homes Ltd.* (1974), 19 C.P.R. (2d) 92, 21 C.C.C. (2d) 53 (B.C. Co. Ct.) (misleading advertising under the *Combines Investigation Act*, R.S.C. 1970, c. C-23); *R. v. Brydon*, [1975] 2 W.W.R. 705, 21 C.C.C. (2d) 513, 55 D.L.R. (3d) 540 (Man. C.A.) (delivering barley in excess of the quotas set by the *Canadian Wheat Board Act*, R.S.C. 1970, c. C-12).

[12] *R. v. Oyer* (1972), 8 C.C.C. (2d) 479 (Alta. Dist. Ct.) (possession of a male mountain sheep with horns under four-fifths curl); *R. v. Burkinshaw; R. v. Zora*, [1973] 5 W.W.R. 764, 12 C.C.C. (2d) 479 (Alta. C.A.); *R. v. Slegg*, [1974] 4 W.W.R. 402, 17 C.C.C. (2d) 149, 16 Cr. L.Q. 225 (B.C. Prov. Ct.) (securities); *R. v. Statham* (1974), 18 C.C.C. (2d) 435 (B.C. Prov. Ct.) (driving without insurance); *R. v. Westeel-Rosco Ltd.* (1975), 10 O.R. (2d) 709, 27 C.C.C. (2d) 467 (Div. Ct.) (construction safety); *R. v. Levesque* (1977), 17 N.B.R. (2d) 120, 38 C.R.N.S. 251 (C.A.) (permitting underage person in licensed lounge); *R. v. Lambrinoudis* (1978), 5 Alta. L.R. (2d) 180, 8 A.R. 158, 39 C.C.C. (2d) 12 (C.A.) (failing to affix tag to game carcass); *R. v. Gillis* (1974), 18 C.C.C. (2d) 190 (N.S.C.A.); *R. v. Hickey* (1976), 13 O.R. (2d) 228, 70 D.L.R. (3d) 689, 30 C.C.C. (2d) 416 (C.A.); *R. v. Lemieux* (1978), 3 C.R. (3d) 284, 41 C.C.C. (2d) 33 (Que. C.A.) (speeding); and *Hill v. The Queen* (1973), 24 C.R.N.S. 297, 14 C.C.C. (2d) 505 (S.C.C.).

[13] The decision was *R. v. D'Entremont* (1973), 15 C.C.C. (2d) 395 (N.S. Mag. Ct.). The offence of possession of lobster on an unlicensed ship contrary to federal Fishing Regulations was held to require *mens rea*. This decision seems odd in view of the decision in *R. v. Pierce Fisheries Ltd.*, *supra*, note 8.

[14] R.S.O. 1970, c. 332, s. 32(1). See R.S.O. 1980, c. 361, s. 16(1)), as am. by S.O. 1986, c. 68, s. 23; rep. by S.O. 1988, c. 54, s. 61.

for the court, engaged in a comprehensive and principled review of "public welfare offences", which were described as "in substance of a civil nature" and which included such "everyday matters as traffic infractions, sales of impure food, violation of liquor laws, and the like".[15]

The judgment first addressed the competing social policy considerations involved in any decision to impose absolute liability. The court put forth the two principal arguments in favour of absolute liability offences. The first is that absolute liability is likely to exact a higher standard of care if people know that their ignorance or mistake will not excuse their behaviour.[16] The second argument is that absolute liability offences will promote administrative efficiency in the enforcement of the law, since "proof of fault is just too great a burden in time and money to place on the prosecution".[17] Moreover, it is stated that because absolute liability offences generally carry light penalties and little stigma, an individual convicted of such an offence will not be seriously prejudiced.[18]

Nevertheless, the Supreme Court of Canada stated that arguments of "greater force" could be marshalled against the imposition of absolute liability offences. Dickson J. stated in unequivocal terms that absolute liability violates fundamental principles of penal liability.[19] Moreover, Dickson J. stated that absolute liability

> rests upon assumptions which have not been and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked.[20]

The court refused to accept the argument that little or no stigma attaches to absolute liability offences. Dickson J. stated that an accused will suffer loss of time, legal expenses, exposure to the processes of the criminal law and, "however one may downplay it, the opprobrium of conviction".[21] The court was also of the view that the administrative efficiency justification

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[15] *Supra*, note 1, at 357.

[16] *Ibid.*, at 363.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] *Ibid.*, at 363-64.

[21] *Ibid.*, at 364.

for absolute liability offences had little merit. Moreover, the court asserted that while the penalty for some "health and safety" offences may be minor, many other such offences impose heavy fines and the possibility of imprisonment.[22]

For the above-mentioned reasons, the court created a "half-way house" between *mens rea* and absolute liability offences known as strict liability offences. Thus, a third classification, which imposed a fault requirement, was added to the traditional two categories of *mens rea* and absolute liability offences.

In a strict liability offence, as in an absolute liability offence, the prosecution must establish the physical element or *actus reus* beyond reasonable doubt. However, by contrast to absolute liability offences, in a strict liability offence, the accused is completely exonerated if he can prove on a balance of probabilities that he exercised reasonable care. Dickson J. explained the constituent elements of the three categories of offences as follows:[23]

> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
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> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving [on a balance of probabilities] that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. . . .
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Dickson J. also attempted to provide guidance with respect to the circumstances in which an offence should be classified as *mens rea*, strict liability, or absolute liability:[24]

> Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall

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[22] *Ibid.*

[23] *Ibid.*, at 373-74.

[24] *Ibid.*, at 374.

in the first category only if such words as 'wilfully', 'with intent', 'knowingly', or 'intentionally' are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

The significant aspect of the *Sault Ste. Marie* scheme is the assertion that public welfare offences are *prima facie* classified as imposing strict liability. Seven years before the enactment of the Charter, at a time of parliamentary supremacy, the courts were compelled to acknowledge that the provincial legislature could insist on absolute liability. Nonetheless, the Supreme Court attempted to make such liability exceptional. Negligence was clearly to be the usual yardstick for public welfare offences.

More than ten years of litigation have passed since the *Sault Ste. Marie* decision was rendered.[25] It would appear that the Supreme Court of Canada has been successful in halting the earlier overwhelming trend toward absolute liability. In a wide variety of offences,[26] courts have opted instead

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[25] See the survey in Appendix A of the report of the Alberta Institute of Law Research and Reform, *Defences to Provincial Charges*, Report No. 39 (1984), at 93-123.

[26] *Re Ghilzon and Royal College of Dental Surgeons of Ont.* (1979), 22 O.R. (2d) 756, 94 D.L.R. (3d) 617, (Div. Ct.) (professional misconduct); *R. v. Cummins*, [1979] 3 W.W.R. 593 (Sask. Prov. Ct.) (unlawful gaming: the *Game Act*, S.S. 1967, c. 78, s. 39); *R. v. Z-H Paper Products Ltd.* (1979), O.R. (2d) 570, 107 D.L.R. (3d) 163, 52 C.C.C. (2d) 91 (Div. Ct.); and *R. v. United Ceramics Ltd.* (1979), 52 C.C.C. (2d) 19 (Ont. Prov. Ct.) (failure to ensure industrial safety procedures: *Industrial Safety Act*, S.O. 1971, c. 43, s. 24(1)(c), now appearing in *Occupational Health and Safety Act*, R.S.O. 1980, c. 321, s. 37(2)(b), which expressly confers a lack of due diligence defence). See, also, *R. v. Rio Algom Ltd.* (1988), 66 O.R. (2d) 674, 46 C.C.C. (3d) 242 (C.A.); *Re Travelways School Transit Ltd. and R.* (1980), 52 C.P.R. (2d) 63, 52 C.C.C. (2d) 399 (Ont. H.C.J.) aff'd (1980), 52 C.C.C. (2d) 399 (Ont. C.A.), at 406 (bid-rigging: *Combines Investigation Act*, R.S.C. 1970, c. C-23, s. 32.2); *R. v. Rogo Forming Ltd.* (1980), 56 C.C.C. (2d) 31 (Ont. Prov. Ct.); *R. v. Rohan's Rockpile Ltd.* (1981), 26 B.C.L.R. 125, 57 C.C.C. (2d) 388 (C.A.) (failing to remit taxes withheld at source: *Income Tax Act*, S.C. 1970-71-72, c. 63, s. 238(2); in *Rogo*, but not in *Rohan*, the offence involving the individual directors was held to require *mens rea*); *R. v. Richardson* (1981), 34 O.R. (2d) 348, 62 C.C.C. (2d) 417 (Div. Ct.), aff'd (1982), 39 O.R. (2d) 438n, 68 C.C.C. (2d) 447 (C.A.), leave to appeal denied, (1983), 48 N.R. 228 (S.C.C.); *R. v. Bouchard* (1984), 15 C.C.C. (3d) 282 (Que. S.C.) (trading in unregistered securities: *Securities Act*, R.S.O. 1970, c. 426, s. 137 (1)(c)); *R. v. Blackburn* (1980), 25 B.C.L.R. 218, 9 M.V.R. 146, 57 C.C.C. (2d) 7 (C.A.) (driving a motor vehicle without insurance and illegal use of licence plates: *Motor Vehicle Act*, R.S.B.C. 1960, c. 253, s. 18(2); see, now, *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 23); *R. v. Hammond* (1978), 1 M.V.R. 210 (Ont. Co. Ct.) (failing to stop at red light: *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 124(5)); *R. v. Higgins* (1981), 46 N.S.R. (2d) 80, 89 A.P.R. 80, 60 C.C.C. (2d) 246 (C.A.) (failing to obey traffic signs and signals: *Motor Vehicle Act*, R.S.N.S. 1967, c. 191, s. 74(2)); *R. v. MacDougall* (1981), 46 N.S.R. (2d) 47, 60 C.C.C. (2d) 137 (C.A.), rev'd [1982] 2 S.C.R. 605, 142 D.L.R. (3d) 216, 1 C.C.C. (3d) 65 (classification confirmed by the Supreme Court of Canada at (1982) 31 C.R. (3d) 1 (S.C.C.) (driving while licence cancelled: *Motor Vehicle Act*,

for strict liability with its lack of negligence defence. It is important to note, however, that in a small proportion of cases, the courts continue to interpret the offences as imposing absolute liability. These have involved such offences as possession of an uncased rifle,[27] failing to stop a vehicle at an intersection,[28] operating an overloaded truck,[29] selling and advertising a new drug before submitting it for testing,[30] and permitting a minor to enter licenced premises.[31]

(d) The Use of Express Legislative Language

The *Sault Ste. Marie* interpretation of how offences should be classified is applicable solely to situations in which the legislature has not expressly addressed the requirement of fault.

Provincial legislatures sometimes expressly require proof of *mens rea*.[32] In Ontario, for example, such offences include knowingly overloading a commercial motor vehicle[33] and wilfully avoiding the police[34] under

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R.S.N.S. 1967, c. 191, s. 258(2)); *R. v. Boardman* (1979), 47 C.C.C. (2d) 334 (Ont. Co. Ct.) (supplying liquor to one under 19 years: *Liquor Licence Act*, S.O. 1975, c. 40, s. 45(2); see, now, R.S.O. 1980, c. 244, s. 44(2); *R. v. Highland Enterprises Ltd.* (1981), 30 Nfld. & P.E.I.R. 515, 60 C.C.C. (2d) 78 (P.E.I.S.C.) (failing to file tax return: *Income Tax Act*, R.S.C. 1952, c. 148, s. 238(2)); *Singh v. R.* (1981), 12 Man. R. (2d) 319, 6 W.W.R. 445, 63 C.C.C. (2d) 156 (Co. Ct.) (entering Canada after deportation: *Immigration Act*, S.C. 1976, c. 52, ss. 57, 96); *R. v. Gonder* (1981), 62 C.C.C. (2d) 326 (Y.T. Terr. Ct.) (interfering with trap: Game Ordinance, R.O.Y.T. 1971, c. G-1, s. 28(1)); and *R. v. Watch* (1983), 10 C.C.C. (3d) 521, 37 C.R. (3d) 374, 24 M.V.R. 224 (B.C.S.C.) (hit and run offence: *Motor Vehicle Act*, R.S.B.C. 1979, c. 228, ss. 62, 76).

[27] *R. v. Morrison* (1979), 31 N.S.R. (2d) 195, 52 A.P.R. 195 (C.A.).

[28] *R. v. Walker* (1979), 48 C.C.C. (2d) 126, 5 M.V.R. 114 (Ont. Co. Ct.). But see *R. v. Hammond*, *supra*, note 26.

[29] *R. v. Allen* (1979), 59 C.C.C. (2d) 563, 3 M.V.R. 203 (Ont. Dist. Ct.).

[30] *R. v. Trophic Can. Ltd.* (1980), 25 B.C.L.R. 211, [1981] 3 W.W.R. 158, 57 C.C.C. (2d) 1 (C.A.).

[31] *R. v. Capozzi Enterprises Ltd.* (1981), 60 C.C.C. (2d) 385, 22 C.R. (3d) 349 (B.C.C.A.).

[32] But see the Supreme Court of Canada decision in *Strasser v. Roberge*, [1979] 2 S.C.R. 953, 103 D.L.R. (3d) 193, 50 C.C.C. (2d) 129, which held that although the provincial offence of participating in an illegal strike contrary to the Quebec *Labour Code* implicitly requires proof of an intention to participate, the offence was nevertheless to be classified as strict liability. The decision has been criticized and several appellate courts have ignored, side-stepped or flouted it. See, especially, Stuart, *supra*, note 2, at 175-78, and *Latulippe v. Desruisseaux* (1986), 50 C.R. (3d) 277 (Que. C.A.). See, also, *Pichette v. Quebec (Dept. Min. of Rev.)* (1982), 29 C.R. (3d) 129 (Que. C.A.), and *R. v. Brown* (1982), 30 A.R. 312, 69 C.C.C. (2d) 301, 29 C.R. (3d) 107 (C.A.), leave to appeal denied (1982), 40 A.R. 450, 46 N.R. 85 (S.C.C.).

[33] *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 107.

[34] *Ibid.*, s. 189.

the *Highway Traffic Act*, knowingly contravening certain provisions of the *Landlord and Tenant Act*,[35] and wilfully failing to abide by the terms of a probation order pursuant to the *Provincial Offences Act*.[36]

Provincial offences sometimes expressly invoke the negligence standard. For example, all provinces have objectively-worded offences of careless driving. The Ontario *Highway Traffic Act*[37] provides:

> 111. Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and on conviction is liable to a fine of not less than $100 and not more than $500 or to imprisonment for a term of not more than six months, or to both, and in addition his licence or permit may be suspended for a period of not more than two years.[38]

Occasionally, legislatures attempt to draft statutory provisions to ensure that they are not interpreted as requiring fault. For example, in *Canada Cement Lafarge Limited v. Municipality of Metropolitan Toronto*,[39] the appellant company was charged with violating a municipal by-law which made it an offence to discharge, into a water course, effluent having an acidic or alkaline content beyond specified limits. The penalty for contravention of the by-law was a fine; there was no penalty of imprisonment. The Provincial Court Judge held that the provision constituted an absolute liability offence on the basis of a section of the by-law which stated that "[i]t is the intention of the by-law that all offences created herein are deemed to be of absolute liability".[40]

2. IMPRISONMENT FOR NONPAYMENT OF A FINE

We now turn to consider section 70 of the *Provincial Offences Act*,[41] which provides for imprisonment for the failure to pay a fine. Section 70 reads as follows:

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[35] R.S.O. 1980, c. 232, s. 122.

[36] S.O. 1979, c. 4. See, now, R.S.O. 1980, c. 400, s. 75.

[37] *Supra*, note 33.

[38] Although this provision appears to invoke a test of simple negligence, the Ontario Court of Appeal, in *R. v. Beauchamp*, [1953] O.R. 422, 4 D.L.R. 340, 16 C.R. 270 (C.A.) (subsequent references are to 16 C.R.), held that this offence requires a more serious form of negligence in order to secure a conviction. The court stated that the conduct must "be of such a nature that it can be considered a breach of duty to the public and deserving of punishment": *ibid*., at 278.

[39] Unreported (December 28, 1988, Ont. Prov. Ct.), *per* Vanek, Prov. Ct. J.

[40] By-law No. 148-83.

[41] R.S.O. 1980, c. 400.

70.—(1) The payment of a fine is in default when any part of the fine is due and unpaid for fifteen days or more.

(2) Where a justice is satisfied that payment of a fine is in default, the justice,

(a) shall order that any permit, licence, registration or privilege in respect of which a suspension is authorized by or under any Act for non-payment of the fine be suspended, not renewed or not issued until the fine is paid; and

(b) may direct the clerk of the court to proceed with civil enforcement under section 69.

(3) A justice may issue a warrant in the prescribed form for the committal of the defendant where,

(a) an order or direction under clause (2)(a) has not resulted in payment within a time that is reasonable in the circumstances;

(b) all other reasonable methods of collecting the fine have been tried and failed or, in the opinion of the justice, would not likely result in payment within a reasonable time in the circumstances; and

(c) the defendant has been given fifteen days notice of the intent to issue a warrant and has had an opportunity to be heard.

(4) In exceptional circumstances where, in the opinion of the court imposing the fine, to proceed under subsection (3) would defeat the ends of justice, the court may,

(a) order that no warrant of committal be issued under subsection (3); or

(b) order imprisonment in default of payment of the fine and that no extension of time for payment be granted.

(5) Imprisonment under a warrant issued under subsection (3) or (4) shall be for three days, plus one day for each $25 or part thereof that is in default, subject to a maximum period of,

(a) ninety days; or

(b) half of the maximum imprisonment, if any, provided for the offence, whichever is the greater.

(6) Any payment made after a warrant is issued under subsection (3) or (4) shall reduce the term by the number of days that is in the same proportion to the number of days in the term as the amount paid bears to the amount in default and no amount offered in part payment of a fine shall be accepted unless it is sufficient to secure reduction of sentence of one day, or a multiple thereof.

While it has been maintained that section 70 is aimed at wilful defaulters, it is arguable that under section 70(3)(b) a person who may be unable to pay a fine, even if the court grants an extension of time pursuant to section 67 of the Act,[42] can be imprisoned. At best, it is not as clear as it should be that impecunious defaulters cannot be incarcerated. Indeed, in *Re Dennis Hill and The Queen*,[43] Mr. Justice Trainor stated that there is routine imprisonment in Ontario of thousands of persons too poor to pay their fines. Recent statistics of the Ministry of Correctional Services for imprisonment in default of fine show the following:

1988-89: 27.1% of Ontario's prison population were in jail for default of fine[44]

1987-88: 31.1% of Ontario's prison population were in jail for default of fine

Furthermore, it should be observed that the Ontario Legislature has not implemented any fine option program pursuant to section 68 of the

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[42] Section 67 provides:

67.—(1) A fine becomes due and payable fifteen days after its imposition.

(2) Where the court imposes a fine, the court shall ask the defendant if he wishes an extension of the time for payment of the fine.

(3) Where the defendant requests an extension of the time for payment of the fine, the court may make such inquiries, on oath or otherwise, of and concerning the defendant as the court considers desirable, but the defendant shall not be compelled to answer.

(4) Unless the court finds that the request for extension of time is not made in good faith or that the extension would likely be used to evade payment, the court shall extend the time for payment by ordering periodic payments or otherwise.

(5) Where a fine is imposed in the absence of the defendant, the clerk of the court shall give the defendant notice of the fine and its due date and of his right to apply for an extension of the time for payment under subsection (6).

(6) The defendant may, at any time by application in the prescribed form filed in the office of the court, request an extension or further extension of time for payment of a fine and the application shall be determined by a justice and the justice has the same powers in respect of the application as the court has under subsections (3) and (4).

[43] Unreported (March 11, 1985, Ont. H.C.J.).

[44] Although over 27% of Ontario's prison population in 1988-89 were in jail for default of fine, the sentences for the fine defaulters account for only 8% of all the sentenced time to be served in provincial institutions.

Act.[45] Finally, it is noteworthy that although sections 70(2)(b) and 69 of the *Provincial Offences Act* provides for the civil enforcement of a fine, and that section 70(3)(b) appears to countenance such enforcement as one of several "reasonable methods of collecting the fine", it is the Commission's understanding that civil enforcement is rarely used. The absence of these alternate remedies necessarily places greater emphasis on imprisonment as a means of dealing with defaulters.

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[45] Section 68 reads:

> 68. The Lieutenant Governor in Council may make regulations establishing a program to permit the payment of fines by means of credits for work performed, and, for the purpose and without restricting the generality of the foregoing may,
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> (a) prescribe classes of work and the conditions under which they are to be performed;
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> (b) prescribe a system of credits;
>
> (c) provide for any matter necessary for the effective administration of the program,
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> and any regulation may limit its application to any part or parts of Ontario.

On fine option programs, see the comments of Kelly J. in *R. v. Hebb* (1984), 89 N.S.R. 137, 47 C.C.C. (3d) 193, 69 C.R. (3d) 1 (S.C.T.D.).

CHAPTER 3

CONSTITUTIONAL STANDARDS UNDER THE CHARTER

The *Canadian Charter of Rights and Freedoms*, entrenched by the *Constitution Act, 1982*,[1] applies to provincial as well as to federal laws.[2] Furthermore, section 52(1) of the Charter provides:

> 52.—(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This provision requires courts to measure legislation against this entrenched yardstick of human rights and freedoms. This report is not the appropriate place to analyze the considerable impact the Charter has had on criminal law. Our intention is to examine the minimum constitutional standards that have been delineated by the courts with respect to the basis of liability for provincial offences.

1. THE CONSTITUTIONALITY OF ABSOLUTE LIABILITY OFFENCES

The most significant ruling in this area is that of the Supreme Court of Canada in *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*,[3] in which the court considered section 7 of the Charter. Section 7 provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The court held that the "principles of fundamental justice" are not confined to procedural safeguards but apply as well to substantive law. Therefore, it is incumbent upon the courts, in determining the constitutionality of a

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[1] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102.

[2] Charter, *ibid.*, s. 32.

[3] *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289 (subsequent references are to 48 C.R. (3d)).

provision under section 7, to examine the content of the legislation.[4] Mr. Justice Lamer, speaking for the majority, stated that "the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system".[5]

In the *Motor Vehicle Act Reference*, the Supreme Court held that a penal law which imposes absolute liability will violate section 7 of the Charter and be of no force or effect if the sanction potentially involves a deprivation of liberty. Accordingly, an absolute liability offence which imposes imprisonment as a possible penalty is unconstitutional.[6] Heavy reliance was placed by the court on the principle enunciated in *Sault Ste. Marie* that absolute liability in penal law offends principles of fundamental justice.[7] Lamer J. also made it clear that arguments of law enforcement expediency will rarely save such an offence as a demonstrably justified reasonable limit under section 1 of the Charter:[8]

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

At issue in the *Motor Vehicle Act Reference* was the constitutionality of a provision of the British Columbia *Motor Vehicle Act*[9] which essentially stated that a person who drives a motor vehicle while prohibited is guilty of an absolute liability offence and subject to a mandatory penalty of seven days of imprisonment. The Supreme Court, in holding the British Columbia provision to be unconstitutional, made it clear that the ruling was not confined to mandatory prison sentences. Lamer J. stated in unequivocal language that the possibility of imprisonment, or even probation, would sufficiently deprive persons of their liberty contrary to section 7 of the

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[4] *Ibid.*, at 306-10.

[5] *Ibid.*, at 317.

[6] *Ibid.*, at 300, 319-21.

[7] *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, at 357 (subsequent references are to 40 C.C.C. (2d)).

[8] *Supra*, note 3, at 321.

[9] R.S.B.C. 1979, c. 288, as am. by *Motor Vehicle Amendment Act 1982*, S.B.C. 1982, c. 36, s. 94(2).

Charter.[10] It is important to note that the court left open the question whether imprisonment as an alternative to the nonpayment of a fine also had the potential of depriving a person of her section 7 rights.[11] In addition, the court stated that different considerations might be applicable to corporations under both sections 7 and 11 of the Charter.[12]

The *Motor Vehicle Act Reference* decision makes negligence the minimum constitutional standard for offences in which the penalty is the possibility of imprisonment. The issue is no longer restricted to a determination of the legislative intent in promulgating the statutory provision. In other words, the courts are not concerned solely with whether it was the intention of the legislature to create a *mens rea*, strict liability or absolute liability offence. The courts must also consider whether there has been a violation of the Charter.

Since *Sault Ste. Marie*, there has been a legislative trend to incorporate the due diligence defence into new offences as well as into some existing offences. In earlier cases, some courts[13] held, by contextual construction, that this would preclude the possibility of invoking a common law due diligence defence for another offence in the same statute where that offence did not expressly incorporate this defence. It has already been confirmed by several courts that the *Motor Vehicle Act Reference* case slams the door shut on this route to the avoidance of the assertion of fault. For example, in *R. v. Cancoil Thermal Corporation*,[14] the accused was charged with breaching two provisions in the *Occupational Health and Safety Act*:[15] (1) failing to equip a machine with a guard which prevented access to a moving part, contrary to section 14(1)(a); and (2) failing to ensure that an employee worked with proper protective devices, pursuant to section 14(1)(c) of the Act. The prescribed penalty for each offence was a fine or imprisonment. The *Occupational Health and Safety Act*[16] specifically provided that a due diligence defence could be relied upon by an accused charged with violating section 14(1)(c). There was no mention in the Act of the availability of this defence to an accused charged with contravening section 14(1)(a). The Ontario Court of Appeal held that because the penalty for violation of section 14(1)(a) is the possibility of imprisonment, this provision, according to the principles enunciated in the *Motor Vehicle Act Reference*, could not be interpreted as an absolute liability offence. The

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[10] *Supra*, note 3, at 319-21.

[11] *Ibid.*, at 319-20.

[12] *Ibid.*, at 322.

[13] See, for example, *R. v. Grottoli* (1978), 43 C.C.C. (2d) 158 (Ont. C.A.).

[14] (1986), 52 C.R. (3d) 188 (Ont. C.A.).

[15] R.S.O. 1980, c. 321, s. 14(1)(a) and (c).

[16] *Ibid.*, s. 37(2).

court stated that section 14(1)(a) constitutes a strict liability offence in which the defence of due diligence is available to an accused.[17]

An important issue not addressed in the *Motor Vehicle Act Reference* is whether the constitutional requirement of fault should be determined subjectively or objectively. The Supreme Court did, however, give fleeting approval to the *Sault Ste. Marie* strict responsibility compromise for so-called "public welfare" offences. In deciding that the British Columbia provision was not justified under section 1 of the Charter, the court measured the absolute liability offence against a strict liability standard, which, Lamer J. stated, would do "nothing more than let those few who did nothing wrong remain free".[18]

It should be mentioned that it is not even clear whether the subjective standard must be asserted for *Criminal Code* offences. This is important for our purposes because if, as a matter of constitutional law, the objective standard can be successfully asserted for these offences, it would seem to be even more justifiable in the context of provincial offences.

In *Vaillancourt v. R. and Attorney General of Ontario*,[19] the Supreme Court of Canada struck down the felony murder provision in section 230(d) of the *Criminal Code*.[20] The court held the provision to be unconstitutional

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[17] *Supra*, note 14, at 195.

[18] *Supra*, note 3, at 324.

[19] [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399, 60 C.R. (3d) 289, 39 C.C.C. (3d) 118 (subsequent references are to 60 C.R. (3d)).

[20] Section 230(d) provides:

> 230. Culpable homicide is murder where a person causes the death of a human being while committing or attempting to commit high treason or treason or an offence mentioned in section 52 (sabotage), 75 (piratical acts), 76 (hijacking an aircraft), 144 or subsection 145(1) or sections 146 to 148 (escape or rescue from prison or lawful custody), section 270 (assaulting a peace officer), section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), 273 (aggravated sexual assault), 279 (kidnapping and forcible confinement), 279.1 (hostage taking), 343 (robbery), 348 (breaking and entering) or 433 or 434 (arson), whether or not the person means to cause death to any human being and whether or not he knows that death is likely to be caused to any human being, if
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> . . . .
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> (d) he uses a weapon or has it upon his person
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> (i) during or at the time he commits or attempts to commit the offence, or
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> (ii) during or at the time of his flight after committing or attempting to commit the offence,
>
> *and the death ensues as a consequence*. [Emphasis added]

on the ground that sections 7 and 11(d) of the Charter require the Crown to prove at least objective foreseeability of death in order to secure a murder conviction.[21] Therefore, even in the case of murder, the Supreme Court has not yet asserted a constitutional requirement of subjective foreseeability of death.

2. REVERSE ONUSES AND THE PRESUMPTION OF INNOCENCE

In this section, the Commission will examine the constitutionality of reverse onus clauses. In particular, we shall consider whether casting the burden of proof on an accused to establish due diligence in strict liability offences violates the presumption of innocence in section 11(d) of the Charter and, if so, whether it is justifiable under section 1. Furthermore, the issue whether evidentiary burdens infringe the Charter will be examined. Finally, the Commission will assess whether the reverse onus clause in section 48(3) of the *Provincial Offences Act*[22] is likely to survive a constitutional challenge.

(a) General

The classic affirmation of the presumption of innocence principle is found in the words of Viscount Sankey in the English murder case of *Woolmington v. Director of Public Prosecutions*:[23]

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt subject . . . to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner . . . the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.[24]

This passage was soon relied on by the Supreme Court of Canada in *R. v. Manchuk*[25] in 1938 and has been cited consistently ever since. Moreover, it is clear that the principles enunciated in *Woolmington* with respect to the presumption of innocence are applicable to provincial offences.[26]

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[21] *Supra*, note 19, at 326.

[22] R.S.O. 1980, c. 400.

[23] [1935] A.C. 462 (H.L.).

[24] *Ibid*., at 481-82.

[25] [1938] S.C.R. 341, at 349, [1938] 3 D.L.R. 693, 70 C.C.C. 161.

[26] See, for example, *R. v. Vincent* (1971), 4 N.B.R. (2d) 289, 18 C.R.N.S. 330 (Co. Ct.).

Since 1981, the presumption of innocence has been entrenched in section 11(d) of the Charter:

> 11. Any person charged with an offence has the right
>
> . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The presumption of innocence is the cornerstone of our adversary system of criminal justice. In the leading interpretation of section 11(d), Chief Justice Dickson in *R. v. Oakes*[27] stated that the presumption of innocence not only embodies cardinal values lying at the heart of penal law, expressly protected by section 11(d), but is also integral to the general protection of life, liberty, and security of the person in section 7 of the Charter. Dickson C.J.C. stated:[28]

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

In *Oakes*, the Supreme Court[29] held that the right in section 11(d) to be presumed innocent until proven guilty requires, at the minimum, the following three elements:[30]

1. An individual must be proven guilty beyond a reasonable doubt;

2. The state must bear the burden of proof; and

3. Criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

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[27] [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. 321 (subsequent references are to 50 C.R. (3d)).

[28] *Ibid.*, at 15.

[29] Chouinard, Lamer, Wilson and Le Dain JJ. concurred with Dickson C.J.C. Estey J. (McIntyre J. concurring) preferred the approach of the court below, the Ontario Court of Appeal.

[30] *Supra*, note 27, at 16.

At issue in *Oakes* was the constitutionality of section 8 of the *Narcotic Control Act*.[31] This provision placed the onus on an accused, who was charged with possession of drugs for the purpose of trafficking, to establish that he was not in possession of the drug for that purpose. The Supreme Court held that section 8 of the *Narcotic Control Act*[32] constituted a reverse onus and was contrary to section 11(d) of the Charter. The court reasoned that it was possible for an accused to be convicted of this offence despite the existence of a reasonable doubt in the minds of the judge or jury:[33]

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence in question violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

The Supreme Court of Canada has not yet heard a challenge to a reverse onus clause in respect of a provincial offence. However, in several decisions subsequent to *Oakes*, the court has articulated important principles respecting the presumption of innocence. These principles are discussed in the following sections.

(b) Applicability to Defences

Since *Oakes*, it is clear that a reversal of the onus of proof of an essential element of an offence is *prima facie* contrary to section 11(d)[34] and can be saved only if the Crown can demonstrate that the burden is justified as a reasonable limit under section 1 of the Charter. The issue which remained was whether the Supreme Court would uphold reversals of the onus of proof with respect to defences. Some appellate courts[35] expressed the view that the principles articulated in *Oakes* are applicable

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[31] R.S.C. 1970, c. N-1. See, now, R.S.C. 1985, c. N-1.

[32] *Ibid.*

[33] *Supra*, note 27, at 25.

[34] See, for example, *R. v. Driscoll* (1987), 54 Alta. L.R. (2d) 251, 60 C.R. (3d) 88, 38 C.C.C. (3d) 28 (C.A.) (presumption that things obtained by N.S.F. cheque are obtained by false pretences), and *R. v. Nadeau*, unreported (May 1, 1989, Ont. Prov. Ct. (Fam. Div.)) *per* Weisman Prov. Ct. J. (s. 75(4) of *Child and Family Services Act, 1984*, S.O. 1984, c. 55, placing the onus on the accused to prove reasonable provision for supervision of a child under 10 years).

[35] See, for example, *R. v. Singh* (1987), 83 A.R. 69, 61 C.R. (3d) 353, 41 C.C.C. (3d) 278 (C.A.) (lawful justification or excuse for entry).

to the defences of justification and excuse. However, most courts, including the Ontario Court of Appeal, distinguished between essential ingredients of an offence, to which section 11(d) *Oakes* principles apply, and defences, which have been held not to violate the presumption of innocence in section 11(d).[36]

It is noteworthy that commentators in Canada,[37] England[38] and the United States[39] have argued that the presumption of innocence applies equally to elements of an offence and to defences. These writers suggest that it is dangerous for the courts to accept the distinction between defences and elements of an offence, as it encourages legislative drafting to avoid the strictures of the presumption of innocence.

After some vacillation, the Supreme Court of Canada, in *Whyte v. R. and A.G. of Canada*,[40] decided to extend the protection of the presumption of innocence beyond proof of essentials to include defences. The issue in *Whyte* was the constitutionality of a presumption in the *Criminal Code*[41] in respect of having care or control of a motor vehicle while impaired. According to section 258(1)(a) of the *Criminal Code*, the person who occupied the driver's seat of a motor vehicle was required to prove an absence of an intent to set the vehicle in motion. The Crown argued that because the provision did not compel the accused to disprove an essential element of the offence of having care and control of a vehicle while impaired, it did not infringe the presumption of innocence in section 11(d) of the Charter. Dickson C.J.C., speaking for the court, refused to accept this argument:[42]

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[36] See, for example, *R. v. Holmes* (1983), 41 O.R. (2d) 250, 32 C.R. (3d) 322, 4 C.C.C. (3d) 440 (C.A.), aff'd [1988] 1 S.C.R. 914 (lawful excuse for housebreaking implements); *R. v. Burge* (1986), 8 B.C.L.R. (2d) 89, 55 C.R. (3d) 131, 32 C.C.C. (3d) 389 (C.A.) (lack of knowledge of counterfeit nature of money as matter of justification or excuse); and *R. v. Conrad* (1983), 8 C.C.C. (3d) 482 (N.S.S.C.A.D.) (certificate for firearms offence).

[37] Finley, "The Presumption of Innocence and Guilt: Why Carroll Should Prevail over Oakes" (1984), 39 C.R. (3d) 115; Cromwell and McKay, "Oakes in the Supreme Court: A Cautious Initiative Unimpeded by Old Ghosts" (1986), 50 C.R. (3d) 34; and Weiser, "The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens" (1989), 31 Crim. L.Q. 318.

[38] Williams, "Offences and Defences" (1982), 2 Legal Studies 233; and Healy, "Proof and Policy: No Golden Threads" (1987), Crim. L. Rev. 355.

[39] Jeffries and Stephen, "Defences, Presumptions and Burdens of Proof in the Criminal Law" (1979), 88 Yale L.J. 1323.

[40] [1988] 2 S.C.R. 3, 64 C.R. (3d) 123, 42 C.C.C. (3d) 97 (subsequent references are to 64 C.R. (3d)). Dickson C.J.C., speaking for six judges, reversed a ruling on this point by the majority of a five judge panel only two months earlier in *Holmes*, *supra*, note 36. See, further, Stuart, "Holmes and Whyte: Zig-Zags on Reversing the Onus, s. 1 and Care and Control" (1988), 64 C.R. (3d) 143.

[41] R.S.C. 1985, c. C-46, s. 258(1)(a).

[42] *Whyte*, *supra*, note 40, at 135-36.

> The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
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> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused. The trial of an accused in a criminal matter cannot be divided neatly into stages, with the onus of proof on the accused at an intermediate stage and the ultimate onus on the Crown.

Therefore, *Whyte* stands for the proposition that any type of persuasive burden[43] on the accused is *prima facie* offensive to the presumption of innocence in section 11(d), and, to survive, must be demonstrably justified as a reasonable limit under section 1 of the Charter.

The ruling in *Whyte* is essential to a determination of the constitutionality of the reversal of the onus of proof in strict liability offences. It will be recalled that in *Sault Ste. Marie*[44] the Supreme Court of Canada expressly allowed the accused to avoid liability by proving reasonable care on a balance of probabilities. Dickson J. stated that the defence would be available "if the accused reasonably believed in a mistaken set of facts, which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event".[45]

What is involved under either formulation is a determination of whether the accused acted unreasonably. This makes the fault requirement for the offence one of simple negligence, which is not for the Crown to prove but for the accused to disprove. *Whyte* now makes it clear that it is not possible to argue, as some have, that this reversal of the onus of proof does not involve a violation of the presumption of innocence since it is merely the creation of a defence. *Prima facie*, the reversal of the burden of proof in strict liability offences infringes section 11(d) of the Charter. Whether the violation can be justified under section 1 is a separate issue which will be discussed below.

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[43] See *infra*, this ch., sec. 2(d).

[44] *Supra*, note 7.

[45] *Ibid.*, at 374.

In connection with reverse onuses, it is important to examine the recent Ontario decision in *R. v. Wholesale Travel Group Inc. and Colin Chedore*.[46] An issue before the court was the constitutionality of two strict liability offences in the *Competition Act*[47] respecting false and misleading advertising. In particular, the Ontario Court of Appeal was asked to decide whether these offences, which placed the onus on the accused to prove due diligence, violated section 11(d) of the Charter. Interestingly, section 1 of the Charter was not argued.

Tarnopolsky J.A., for the majority, cited *Whyte* and stated that a distinction between elements of the offence and other aspects of the charge is irrelevant for constitutional purposes.[48] The court held that the two provisions in the *Competition Act* infringed section 11(d) because they imposed a persuasive burden on the accused to prove on a balance of probabilities that he exercised reasonable care to prevent false or misleading representations to the public. These offences permitted a conviction despite the existence of a reasonable doubt in the minds of the triers of fact. According to the Court of Appeal, an accused is merely required to raise a reasonable doubt regarding the exercise of due diligence.[49]

(c) Legislative Avoidance by Exclusion of Elements or Defences from Offence Definition

In *Vaillancourt*,[50] the Supreme Court of Canada has emphatically stated its position with respect to the exclusion by legislation of essential elements from the definition of an offence. As previously mentioned, the court struck down the murder provision in section 230(d) of the *Criminal Code* on the basis that section 7 of the Charter mandates that the Crown establish, at a minimum, objective foreseeability of death. Speaking for seven members of the court,[51] Mr. Justice Lamer stated that a legislature is prohibited from omitting an essential element of an offence if that element is required as a principle of fundamental justice under section 7 of the Charter:[52]

> [B]efore an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all of the essential

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[46] (1989), 35 O.A.C. 331 (C.A.).

[47] R.S.C. 1970, c. C-23, ss. 36(1)(a) and 37.3(2).

[48] *Supra*, note 46, at 340-41.

[49] *Ibid.*, at 342.

[50] *Supra*, note 19.

[51] Dickson C.J.C., Estey and Wilson JJ. concurred. The concurring opinions of Beetz, Le Dain and La Forest JJ. expressed no reservations on this point. Only McIntyre J. dissented.

[52] *Supra*, note 19, at 326.

> elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the Charter. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss. 7 and 11(d).

Lamer J. also held that a legislative substitution of a different element will be constitutional only

> if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element.[53]

(d) Applicability to Evidentiary Burdens

The crucial distinction between persuasive and evidentiary burdens is often misunderstood.[54] The true essence of a persuasive or legal burden is that it arises for resolution at the end of the case, it never shifts, and the trier must find against the burden holder in borderline cases. In circumstances in which the persuasive burden is on the accused, the standard of proof is on a balance of probabilities. However, the *Oakes* and *Whyte* judgments make it clear that casting this burden on an accused constitutes a violation of the presumption of innocence, as an individual who is unable to discharge a persuasive burden may be convicted despite the existence of a reasonable doubt.

In the case of an evidentiary burden, on the other hand, the burden holder is not obliged to prove anything, the burden may shift in the limited sense of diverting a "finger of suspicion",[55] and it may, but not must, result in the trier of fact finding against the burden holder in borderline cases. It is often stated that an individual who has an evidentiary burden must "raise" a reasonable doubt. This comes very close to implying that the accused must prove usually a denial, beyond reasonable doubt. The better view is simply to emphasize that the evidentiary burden can be discharged by merely adducing sufficient evidence to place the matter in issue. Chief Justice Dickson described the distinction between persuasive and evidentiary burdens in a very clear manner:[56]

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[53] *Ibid.*, at 327.

[54] See writers referred to in Stuart, *Canadian Criminal Law: A Treatise* (2d ed., 1987), at 175-76.

[55] Williams, *Criminal Law—The General Part* (2d ed., 1961), at 880.

[56] *Schwartz v. R. and Attorney General of Canada*, [1988] 2 S.C.R. 443, 45 C.C.C. 97, 66 C.R. (3d) 251, at 270 (subsequent references are to 66 C.R. (3d)). Dickson C.J. was in dissent but the majority made no comment on this analysis. *Schwartz* is discussed at text following note 68, *infra*.

> While any combination of phrases has its advantages and drawbacks, I prefer to use the terms 'persuasive burden' to refer to the requirement of proving a case or disproving defences and 'evidential burden' to mean the requirement of putting an issue into play by reference to evidence before the court. The party who has the persuasive burden is required to persuade the trier of fact, to convince the trier of fact that a certain set of facts existed. Failure to persuade means that the party loses. The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed. The phrase 'onus of proof' should be restricted to the persuasive burden, since an issue can be put into play without being proven. The phrases 'burden of going forward' and 'burden of adducing evidence' should not be used, as they imply that the party is required to produce his or her own evidence on an issue. As we have seen, in a criminal case the accused can rely on evidence produced by the Crown to argue for a reasonable doubt.

Since the imposition of an evidentiary burden on an accused does not require either proof beyond reasonable doubt or on a balance of probabilities, an argument could be made that an evidentiary burden does not violate the presumption of innocence in section 11(d). However, as the Ontario Court of Appeal cautioned in *Re Boyle and The Queen*,[57] it is fundamental to make a distinction between mandatory as opposed to permissive evidentiary burdens.

The issue before the Ontario court in *Re Boyle* was the constitutionality of a mandatory presumption in the *Criminal Code* created by the words "in the absence of any evidence to the contrary".[58] As the court explained, in a mandatory presumption a particular conclusion is required to be drawn, in the absence of evidence to the contrary. The court then discussed the essential difference between a mandatory presumption and a reverse onus. It stated that in a mandatory presumption, the presumption can be displaced by the accused merely by adducing evidence which raises a reasonable doubt. In a reverse onus provision, by contrast, the presumption is displaced only by proof to the contrary on a balance of probabilities. However, the court emphasized that an important common feature exists between a mandatory presumption and reverse onus, that is, the mandatory nature of the conclusion required to be drawn. According to Martin J.A., this common feature requires the court to treat mandatory presumptions and reverse onuses alike for the purpose of determining their constitutional validity.[59]

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[57] (1983), 41 O.R. (2d) 713, 35 C.R. (3d) 34 (C.A.) (subsequent references are to 35 C.R. (3d)).

[58] Section 312(2). See Ziff, "The Presumption of Innocence and 'Evidence to the Contrary': A Comment on Re Boyle and The Queen" (1984), 22 U.W. Ont. L. Rev. 29, at 143-46.

[59] *Supra*, note 57, at 57.

Since *Oakes*, the Ontario Court of Appeal in several decisions[60] has held that mandatory presumptions violate the presumption of innocence. However, we shall soon discover that in each case these infringements were found to be justified under section 1 of the Charter. The courts have stressed that the degree of impairment of the presumption of innocence is considerably less in situations in which the accused must merely adduce evidence rather than establish the evidence on a balance of probabilities.[61]

(e) Reverse Onuses in the Case of Licensing and other Similar Offences

We now turn to consider the burden of proof in the context of offences involving conduct for which a licence or other similar regulatory sanction is required. There has been some suggestion that for constitutional purposes, these types of offences ought to be treated differently from other provincial offences. Two separate but related issues arise. One deals with the constitutionality of the broadly worded reverse onus provision in section 48(3) of the *Provincial Offences Act*; the other concerns the constitutional validity of a much narrower reverse onus clause which requires the accused to prove the existence of a licence to engage in a specific type of conduct.

Section 48(3) of the *Provincial Offences Act* provides as follows:

> 48.—(3) The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

This provision, which is applicable to all provincial offences, was borrowed *verbatim* from the *Criminal Code* in the section applicable to summary conviction offences.[62]

The constitutionality of section 48(3) was challenged in *R. v. Lee's Poultry Ltd.*[63] The accused was charged with operating a slaughtering plant without a licence, contrary to the *Meat Inspection Act (Ontario)*.[64] At trial,

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[60] *R. v. Phillips* (1988), 64 C.R. (3d) 154, 42 C.C.C. (3d) 150 (Ont. C.A.); *R. v. Nagy* (1988), 67 C.R. (3d) 329, 45 C.C.C (3d) 350 (Ont. C.A.) (subsequent reference is to 67 C.R. (3d)); and *R. v. Gosselin* (1988), 45 C.C.C. (3d) 568, 67 C.R. (3d) 349 (Ont. C.A.).

[61] See cases cited *supra*, note 60.

[62] Section 794(2).

[63] (1985), 17 C.C.C. (3d) 539, 43 C.R. (3d) 289 (Ont. C.A.) (subsequent references are to 17 C.C.C (3d)).

[64] R.S.O. 1980, c. 260.

the Crown relied upon section 48(3). The accused called no evidence and was convicted, the trial judge holding that the accused had failed to discharge the onus under section 48(3). On appeal, the Ontario Court of Appeal held that section 48(3) of the *Provincial Offences Act* did not contravene the presumption of innocence in section 11(d) of the Charter. Moreover, even if it did, it was said to be justifiable under section 1.[65]

Brooke J.A. emphasized that section 48(3) was clearly distinguishable from the type of reverse onus provision in *Oakes*. The court stated that section 48(3) does "not purport to create a presumption but rather to express in statute form an exception to the general rule of pleading and proof in summary conviction cases".[66] In deciding that section 48(3) was demonstrably justified under section 1 of the Charter, the court held that it was rationally open for an accused to prove the existence of a licence and, furthermore, that an accused could produce a licence with great facility.[67]

By way of contrast to the broad reverse onus provision in section 48(3) of the *Provincial Offences Act*, is the much narrower reverse onus provision considered in the recent decision of the Supreme Court of Canada in *Schwartz v. R. and Attorney General of Canada*.[68] The accused was charged with the *Criminal Code* offence of having "in his possession a restricted weapon for which he does not have a registration certificate" (section 91(1)). At issue in *Schwartz* was the constitutional validity of section 115(1) of the *Criminal Code*, which required the accused to prove that he possessed a firearm registration certificate.

The Supreme Court held that section 115(1) of the Code does not constitute a reverse onus and does not infringe the presumption of innocence in section 11(d) of the Charter. Mr. Justice McIntyre, speaking for the majority, stated that the *Criminal Code* provision does not compel the accused "to prove or disprove any element of the offence or for that matter, anything related to the offence".[69] At most, the accused is required to produce the registration certificate in order to demonstrate that he is exempt from the offence. As McIntyre J. stated:[70]

> Although the accused must establish that he falls within the exemption, there is no danger that he could be convicted under s. 89(1) [now s. 91(1)] despite the existence of a reasonable doubt as to guilt, because the production of the certificate resolves all doubts in favour of the accused and in the absence of

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[65] *Supra*, note 63, at 545.

[66] *Ibid*., at 543.

[67] *Ibid*., at 544.

[68] *Supra*, note 56.

[69] *Ibid*., at 284.

[70] *Ibid*., at 284-85.

> the certificate no defence is possible once possession has been shown. In such a case, where the only relevant evidence is the certificate itself, it cannot be said that the accused could adduce evidence sufficient to raise doubt without at the same time establishing conclusively that the certificate had been issued. The theory behind any licensing system is that when an issue arises as to the possession of the licence, it is the accused who is in the best position to resolve the issue. Otherwise, the issuance of the certificate or licence would serve no useful purpose. Not only is it rationally open to the accused to prove he holds a licence . . ., it is the expectation inherent in the system.

In his dissenting judgment,[71] Dickson C.J.C. held that section 115(1) of the *Criminal Code* constitutes a reverse onus provision which violates the presumption of innocence. Furthermore, he stated that the provision could not be justified under section 1 of the Charter. Relying on *Whyte*, Dickson C.J.C. held that requiring an accused to prove the registration of a restricted weapon, whether it is an essential element or a defence, was contrary to section 11(d). The Chief Justice stated that a statutory provision which compels an accused to "prove" or "establish" a fact creates a persuasive and not an evidentiary burden.[72] In his view, section 115(1) of the Code requires the accused to establish on a balance of probabilities, and not merely raise a reasonable doubt, that he possesses a registration certificate for a restricted weapon. The effect of this provision, wrote Dickson C.J.C., is that an accused who cannot discharge this persuasive burden may be convicted despite the existence of a reasonable doubt that the possession is in fact lawful.[73]

The majority judgment in *Schwartz* has been the subject of criticism.[74] Weiser has argued that *Schwartz* is simply irreconcilable with the *Whyte* decision. Moreover, she has observed that it is difficult to understand how the court could conclude that the absence of a registration certificate is not a factor affecting the verdict in section 91(1) of the Code when that offence is described as possession of "a restricted weapon for which [the accused] does not have a registration certificate".[75]

With respect to the constitutionality of section 48(3) of the *Provincial Offences Act*, it bears repeating that that provision is considerably broader in scope than the provision at issue in *Schwartz*, since section 48(3) applies to all provincial offences, and, as well, encompasses a wide variety of defences. It seems clear that if the *Whyte* approach were endorsed, section 48(3) would be held to violate section 11(d) of the Charter.

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[71] Lamer J. concurred.

[72] *Supra*, note 56, at 272.

[73] *Ibid.*, at 268.

[74] Weiser, *supra*, note 37, at 334-35.

[75] *Ibid.*, at 334.

The important issue which remains is whether the Supreme Court of Canada is likely to hold that section 48(3) is demonstrably justified under section 1 of the Charter. It is noteworthy that the minority in *Schwartz* expressly stated that *Lee's Poultry Ltd.* should be re-examined in light of the decisions of the Supreme Court of Canada in *Oakes*, *Vaillancourt*, and *Whyte*. As we shall see,[76] aside from the constitutional arguments discussed above, the Commission is of the view that licensing and similar offences ought not to be treated differently from other provincial offences.

(f) Justifying Reverse Onus Clauses and Mandatory Presumptions Under Section 1 of the Charter

Section 1 of the Charter provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The widely accepted blueprint for the interpretation of section 1 was established by Chief Justice Dickson in the Supreme Court of Canada's decision in *R. v. Oakes*.[77] In *Oakes*, the court held that the onus of proving that a limitation on a Charter right is reasonable and demonstrably justified rests upon the party seeking to uphold the limitation. The standard of proof is on a preponderance of probabilities.[78] Dickson C.J.C., speaking for the court, stated that two central criteria must be established under section 1 of the Charter. First, the objective of the limitation must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. At a minimum, the objective must relate to societal concerns which are pressing and substantial in a free and democratic society. Second, the party invoking section 1 must satisfy the three components of the proportionality test:[79]

1. The measures must be rationally connected to the objective;

2. They must impair as little as possible the right or freedom in question; and

3. There must be a proportionality between the effects of the measure which is responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".

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[76] See *infra*, ch. 4, sec. 3(b).

[77] *Supra*, note 27.

[78] *Ibid.*, at 28-29.

[79] *Ibid.*, at 30.

It has become very difficult to predict how the Supreme Court of Canada will rule on when section 1 justifies a violation of the presumption of innocence in section 11(d). The justifications put forth by counsel in *Oakes* and *Vaillancourt*[80] were readily dismissed. However, in *Whyte*,[81] the court held that the reverse onus provision in the *Criminal Code*, which required an accused charged with care and control of the vehicle while impaired to prove an alternative reason for entering the vehicle and occupying the drivers seat, was a demonstrably justified limit under section 1. Dickson C.J.C., speaking for a unanimous court, stated that section 237(1)(a) of the *Criminal Code* constitutes a restrained legislative response to a pressing social problem and only minimally interferes with the presumption of innocence.[82] Furthermore, the majority of the Supreme Court in *Schwartz* held that if the provision in question had been considered to be a reverse onus clause, it would have satisfied the requirements of section 1.[83]

The reasoning in *Schwartz* merits further analysis, as this decision constitutes the most recent pronouncement by the Supreme Court of Canada on the constitutionality of reverse onus clauses. As previously mentioned,[84] the provision at issue was section 115(1) of the *Criminal Code*, which required the accused, on a charge of possession of a restricted weapon, to prove that he was the holder of a firearms registration certificate. In holding that the *Criminal Code* provision met the section 1 *Oakes* test, the court stated that the objective of the legislation was of sufficient importance to warrant overriding the presumption of innocence. According to McIntyre J., "[t]he private possession of weapons and their frequent misuse has become a grave problem for law enforcement authorities and a growing threat to the community".[85] In addition, the court held that the three prongs of the proportionality test were satisfied. First, it was rational, fair and not arbitrary to expect an accused to produce a firearms registration certificate where a question arose as to whether a proper certificate had been issued. Second, section 115(1) of the *Criminal Code* impaired as little as possible the right to be presumed innocent. In the court's view, it was improbable that an accused would ever be forced to testify in order to produce his certificate. Third, the court stated that the measures adopted were carefully tailored to balance the community interest against the interest of individuals who wish to possess weapons. The legislation, therefore, was held to be appropriate to the objective and only minimally interfered with the right of the individual weapon holder.[86]

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[80] *Supra*, note 19.

[81] *Supra*, note 40.

[82] *Ibid*., at 142.

[83] *Supra*, note 56, at 285.

[84] *Supra*, this ch., sec. 1(e).

[85] *Supra*, note 56, at 285.

[86] *Ibid*., at 289.

In dissent, Chief Justice Dickson agreed with the majority that the objective of comprehensive gun control legislation to discourage the use of firearms for criminal purposes was of sufficient importance to override a constitutionally protected right. However, Dickson C.J.C. was of the view that the proportionality test had not been satisfied. He stated that there was no rational connection between the *Criminal Code* provision and the objective. The proven fact, the possession of a restricted weapon, in no way tended rationally to prove the presumed fact that the accused did not have a registration certificate. Moreover, the presumption of innocence was not impaired as little as possible. Section 115(1) of the *Criminal Code* would either require an accused to testify or would require him to subpoena a police officer as a defence witness to testify about information contained in police files. While under some regulatory schemes it might be very difficult for the prosecution to determine whether the accused had the required licence, this was not the case here. It was not unreasonable to require the Crown to consult the police and, if necessary, to produce the certificate in court.[87] It is important to note that Dickson C.J.C. held that section 115(1) was not completely invalid. The Chief Justice left open the question of whether the *Criminal Code* presumption in connection with other offences concerning different certificates and licences would be treated differently.[88]

Mr. Justice Lamer, the other dissenting judge in *Schwartz*, also held that the provision could not be justified under section 1 of the Charter. However, Lamer J. was of the opinion that section 115(1) of the Code did not even satisfy the "sufficiently important" objective test enunciated in *Oakes*. He stated that the sole purpose of the provision was administrative convenience, which is not an objective of sufficient importance to warrant overriding the accused's right to be presumed innocent under section 11(d). Lamer J. stated:[89]

> The objective of a section such as s. 106.7(1) [now s. 115(1)] is to relieve the prosecution of the inconvenience – a slight one in these days of computers and of instant communication facilities – of securing a certificate from the appropriate authority attesting to the absence of any record establishing registration. It is in no way part of the arsenal in the war against crime involving weapons. Its sole purpose is administrative convenience. When the cost of this convenience is the restriction of an accused's rights under s. 11(d) in the context of the prosecution of a Criminal Code offence, it is clearly not an objective of sufficient importance to warrant overriding such a right. This to me ends the s. 1 enquiry.

Lamer J. did state, however, that administrative convenience arguments could possibly prevail over the rights of citizens in circumstances where

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[87] *Ibid.*, at 279.

[88] *Ibid.*, at 280.

[89] *Ibid.*, at 290.

imprisonment is not a penalty and where conviction for the offence does not carry the stigma of a criminal record.[90]

Several decisions[91] rendered by the Ontario Court of Appeal have indicated that mandatory presumptions are more likely than reverse onus clauses to be found to be demonstrably justified under the section 1 *Oakes* test. The Ontario courts have held that although mandatory presumptions violate the presumption of innocence in section 11(d), unlike reverse onus clauses they satisfy the three prongs of the proportionality test. Morden J.A. in *R. v. Nagy*[92] stated that a mandatory presumption infringes the entrenched right as little as possible as the accused must merely adduce evidence. He emphasized that the degree of impairment of the presumption of innocence is considerably less than if the accused had the persuasive burden under a reverse onus provision to establish the evidence on a balance of probabilities. The Ontario Court of Appeal also stated that as the onus of proving the section 1 justification is on the party seeking to uphold the limitation, in "close cases" the courts ought to "pay due deference to Parliament's determination respecting the evidentiary device selected".[93]

3. IMPRISONMENT FOR NONPAYMENT OF A FINE

We shall now consider section 70 of the *Provincial Offences Act*, which provides for imprisonment for nonpayment of a fine.

Aside from the precise ambit of section 70 and its application in practice,[94] there arises a fundamental issue concerning the constitutionality of the default provisions[95]. It has been argued that imprisonment for the nonwilful failure to pay a fine violates section 7 of the Charter (substantive unfairness), section 9 (arbitrary imprisonment), section 12 (cruel and unusual punishment) and section 15 (equality before the law).[96]

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[90] *Ibid.*

[91] See *supra*, note 60.

[92] *Supra*, note 60, at 345.

[93] *Ibid.*, at 346.

[94] See *supra*, ch. 2, sec. 2.

[95] We are not considering the question whether the possibility of imprisonment in such a case may sufficiently threaten a person's liberty to trigger s. 7 Charter guarantees for the *original* offence. As indicated in our discussion of the *Motor Vehicle Act Reference*, this question was left open by the Supreme Court of Canada (see *supra*, this ch., sec. 1).

[96] MacDougal, "Are There No Prisons? Hebb: Imprisonment in Default of Fine Payment and S. 7 of the Charter" (1989), 69 C.R. (3d) 23; and Jobson and Atkins, "Imprisonment in Default and Fundamental Justice" (1985-86), 28 Crim. L.Q. 251.

In *R. v. Hebb*,[97] it was held that the *Criminal Code* provisions[98] on imprisonment for default in payment violate section 15 of the Charter, as discriminating on the basis of economic circumstances. In that case, a woman who lived on social assistance payments was convicted of theft of a package of cigarettes. The court stated that it was unconstitutional to imprison an accused solely because she did not have the financial resources to pay the fine. According to Kelly J., imprisonment for non-wilful default constitutes a violation of section 15 of the Charter for the following reasons:[99]

> It is irrefutable that it is irrational to imprison an offender who does not have the capacity to pay on the basis that imprisonment will force him or her to pay. If the sentencing court chooses a fine as the appropriate sentence, it is obviously discarding imprisonment as being unnecessary under the particular circumstances. However, default provisions may be appropriate in circumstances where the offender may *choose* not to pay, presumably on principle, and would elect to spend time incarcerated rather than make a payment to the state. For the impecunious offenders, however, imprisonment in default of payment of a fine is not an alternative punishment—he or she does not have any real choice in the matter. At least, this is the situation until fine option programmes or related programmes are in place. In effect, imprisonment of the poor in default of payment of a fine becomes a punishment that wouldn't otherwise be imposed except for the economic limitations of the convicted person.

In *R. v. Burt*,[100] the Saskatchewan Court of Appeal stated that for the purposes of a section 7 Charter analysis, the issue concerning the constitutional validity of the default provisions ought to be treated in the same way as the issue concerning the constitutionality of the original offence. Wakeling J.A., relying on the *Motor Vehicle Act Reference*, stated:[101]

> With reference to the application of s. 7, is there a basis to distinguish a sentence which is restricted to payment of a fine, with imprisonment for non-payment, from one where the sentence is for imprisonment in the first instance? To the person in prison, it is of little consequence to have it said that the original sentence only required payment of a fine and he is in jail because of his failure to do so. The prisoner will surely be convinced that he is in jail because he was found guilty of the original offence and will be inclined to accuse judges and lawyers who say otherwise of exercising their legal skills to distinguish where no real difference exists.

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97 (1989), 89 N.S.R. 137, 47 C.C.C. (3d) 193, 69 C.R. (3d) 1 (S.C.T.D.) (subsequent references are to 47 C.C.C. (3d)).

98 R.S.C. 1970, c. C-34, ss. 646 and 722(2).

99 *Supra*, note 97, at 204 (emphasis in original).

100 (1987), 60 C.R. (3d) 372 (Sask. C.A.).

101 *Ibid.*, at 390-91.

> If the penalty of imprisonment or the prospect of imprisonment for the commission of an absolute liability offence is offensive to the principles of fundamental justice referred to in s. 7, it seems logical to conclude that imprisonment for failure to pay a fine for the same offence is also offensive. To conclude otherwise is to draw rather narrow distinctions which the Supreme Court has so far been careful not to do, no doubt for the reason that it prefers to take a broader, more purposive approach to the interpretation of the Charter than it has done to other instruments.

In chapter 2, we have seen that section 70 of the *Provincial Offences Act* may permit an impecunious person who has been fined for committing a provincial offence to be imprisoned for nonpayment of the fine. Therefore, since a non-wilful defaulter may be incarcerated, an argument can be made that section 70 violates the Charter.

CHAPTER 4

RECOMMENDATIONS

In this chapter, the Commission discusses the need for legislative intervention with respect to the basis of liability for provincial offences, by which we mean to include those offences which appear in the statutes, regulations and municipal by-laws of this jurisdiction. Several recommendations are then proposed. They include the abolition of absolute liability offences; the adoption of strict liability for provincial offences, unless the Legislature expressly uses language connoting *mens rea*; the introduction of an evidentiary burden rather than a persuasive burden on an accused in strict liability offences; the repeal of section 48(3) of the *Provincial Offences Act*;[1] and the amendment of provisions in the *Provincial Offences Act* to ensure that only wilful defaulters are imprisoned for nonpayment of fines.

1. THE NEED FOR LEGISLATIVE INTERVENTION

In recent years, the courts have increasingly scrutinized the basis of liability for provincial offences. In the landmark decision of *Sault Ste. Marie*,[2] the Supreme Court of Canada introduced the notion of ordinary negligence when it created strict liability offences. Furthermore, since the *Motor Vehicle Act Reference*,[3] negligence has become the minimum constitutional standard for all offences in which the penalty includes the possibility of imprisonment.

Despite the fact that the courts are now construing most provincial offences as imposing strict liability, in which the defence of due diligence is available to an accused, the Commission is of the view that express legislation is required. There is still a need in this province for clear criteria to deal comprehensively with the basis of liability for provincial offences. The Commission believes that reform of the law in this area should not be left exclusively to the courts. Although the trend towards strict liability appears to be overwhelming, there continues to be haphazard resort to the

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[1] R.S.O. 1980, c. 400.

[2] *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, at 357 (subsequent references are to 40 C.C.C. (2d)).

[3] *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288*, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289 (subsequent references are to 48 C.R. (3d)).

mens rea standard. In addition, the courts continue to classify some offences as imposing absolute liability. There are cases in which courts have subjected the same offence to different standards of liability. Furthermore, the *Motor Vehicle Act Reference* has thrown into doubt the constitutionality of hundreds of provincial offences.

There is also, in our opinion, a need for legislative intervention in respect of the burden of proof for strict liability offences. Such intervention is essential both as a matter of principle and because of the dictates of the Charter. Finally, the Commission is of the view that there are certain provisions in the *Provincial Offences Act* which ought to be repealed or amended.

2. THE BASIS OF LIABILITY FOR PROVINCIAL OFFENCES

(a) The Abolition of Absolute Liability Offences

The Supreme Court of Canada launched a frontal attack on absolute liability in 1978 when it asserted the strict liability standard for what are called "public welfare" offences. Moreover, the court stated in the *Motor Vehicle Act Reference*[4] that although absolute liability offences are not *per se* unconstitutional, such offences will be held to violate the Charter if the penalty threatens the liberty or security of the person. It has been argued that the Supreme Court of Canada is now only a short step away from holding that where the penalty for an offence is a fine, but imprisonment may be imposed to deal with default in payment, absolute liability for the original offence is unconstitutional.[5]

Notwithstanding the constitutional challenge, the status of absolute liability offences continues to be in flux. Moreover, aside from the mandates of the Charter, many arguments have been made in favour of the abolition of absolute liability. In our view, it is essential to canvass the issue as a matter of principle. We shall review first the reasons put forth in support of the preservation of this category of offences and then offer our critique of such reasons and our proposal for reform.

One argument advanced in support of the retention of absolute liability is that it exacts a higher standard of care than other forms of liability, since persons know that mistakes and accidents will nevertheless result in a penalty. Such knowledge, it is alleged, promotes even greater vigilance in the conduct of one's affairs than would otherwise be exercised. However, as the Supreme Court of Canada[6] has emphasized, there are no empirical

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[4] *Ibid.*

[5] Stuart and Manson, Annotation to *Reference re Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288* (1985), 48 C.R. (3d) 292.

[6] *Sault Ste. Marie*, *supra*, note 2, at 363-64.

studies which demonstrate that a higher standard of care does in fact result from the imposition of absolute liability. In our view, the punishment of honest mistakes and unavoidable accidents will not, in fact, exact greater deterrence to unlawful behaviour.

A further reason given for the retention of absolute liability is that it promotes administrative efficiency. It is argued that it is too onerous to compel the Crown to establish fault in every case. Yet, in the twelve years since the creation of strict liability offences, it has not been demonstrated that legislation is unenforceable where it has been classified as imposing strict liability.

It has also been suggested that absolute liability offences should not be abolished, since they result in light penalties and little stigma is attached to a conviction. However, as the court stated in *Sault Ste. Marie*,[7] some opprobium may well attach to the commission of many absolute liability offences. Moreover, it is clear that serious penalties, such as a substantial fine or the loss of a licence, may be imposed for such offences.

The Commission has come to the firm conclusion that the arguments in favour of absolute liability are not sufficiently compelling and therefore that, as a matter of principle, absolute liability should be abolished for provincial offences. We subscribe to the view that it is wrong in principle to convict individuals purely for committing the prohibited physical act or *actus reus*, particularly where the accused acted with reasonable care and did not engage in morally blameworthy conduct. We believe, therefore, that responsibility for any provincial offence, however minor, should be based on some notion of fault.

A decision worth examining in this regard is the Ontario Divisional Court decision in *R. v. Hickey*.[8] The issue before the court was whether the offence of speeding in the *Highway Traffic Act*[9] imposed absolute or strict liability. The accused testified that he honestly believed, because of the speedometer reading on the vehicle, that he was not exceeding the speed limit. A test conducted by the police officer at the scene demonstrated that the speedometer was in fact not working properly. The Divisional Court held that offence was to be characterized as a strict liability offence.

In a forceful dissenting judgment in the Divisional Court, which was subsequently endorsed by the Court of Appeal,[10] Chief Justice Estey held that the speeding offence imposed absolute liability. He stated that the

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[7] *Ibid.*, at 364.

[8] (1976), 29 C.C.C. (2d) 23 (Ont. Div. Ct.).

[9] R.S.O. 1970, c. 202, s. 82.

[10] (1977), 30 C.C.C. (2d) 416 (Ont. C.A.).

Highway Traffic Act[11] constituted a simple code of rules for "the conduct of people who by their own volition take recourse to the highways in motor vehicles".[12] According to Estey C.J., the precise speed limits constituted "effective and simple" regulation in the interest of the safety of users of highways, which could "hardly be promoted by a subjective test of the propriety of the conduct of an individual".[13] He also stated that the availability of a defence of honest and reasonable belief in cases in which the limits had been "so clearly and precisely imposed because of the needs of the community" would encounter "community disapproval".[14] In addition, he was of the opinion that a conviction for the violation of speed limits involved no stigma.[15]

We do not subscribe to the arguments advanced by Chief Justice Estey in *Hickey*. It is not difficult to envisage situations that are not so clear as those described by Chief Justice Estey. For example, the speed limit signs may have fallen down or may simply have been badly posted.

The Commission takes the position that a conviction should not be imposed by the state for conduct which the individual could not have avoided. As the Supreme Court stated in *Sault Ste. Marie*,[16] criminalizing blameless conduct leads to "cynicism and disrespect" for the law on the part of the community. Morover, the Commission foresees no serious possibility that the abolition of absolute liability will result in the wholesale acquittal of individuals acting cavalierly or irresponsibly.

The abolition of absolute liability in provincial offences is not as substantial a change as it may first appear. For example, in an empirical study conducted by the Law Reform Commission of Canada on the enforcement of laws by the federal Department of Consumer and Corporate Affairs relating to misleading advertising, weights and measures, and food and drugs, it was found that, despite the wording of the legislation, some degree of fault was required in all three areas before a decision was made to initiate criminal proceedings.[17] In misleading advertising offences, there was a practice not to prosecute an accused who was doing his best to comply with the particular law. In the areas of weight and measures and food and drugs, prosecutions were launched only after a person had received a warning. Similar findings were made by the English Law Commission with regard to

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[11] *Supra*, note 9.

[12] *Supra*, note 8, at 27.

[13] *Ibid.*, at 28.

[14] *Ibid.*

[15] *Ibid.*

[16] *Supra*, note 2, at 364.

[17] *Studies in Strict Liability* (1974), at 63-152.

the enforcement of occupational health and safety legislation.[18] We understand that this practice has also occurred in respect of the enforcement of several Ontario statutes.

For the above reasons, the Commission recommends that absolute liability should be abolished in provincial offences and that liability for every provincial offence should be based on some minimum requirement of fault.

(b) The Proposed Fault Requirement

(i) General Rule

The issue that must now be confronted is the degree of fault necessary to secure a conviction. Should full subjective awareness (*mens rea*) or objective negligence (strict liability) be the required standard of liability for provincial offences?

From the perspective of the accused, *mens rea* is the fairest concept of fault, as it takes into account all of an individual's capacities and incapacities. The Commission is of the opinion, however, that *mens rea* as the standard fault for all provincial offences is unworkable in practice and indefensible as a matter of policy.

The Commission recommends that strict liability, or negligence, ought to be the standard of culpability in provincial offences unless the Legislature, by using such language as "knowingly", "intentionally", "recklessly", "wilful blindness", or other similar words, expressly requires *mens rea*. We believe that the failure to exercise reasonable care is sufficiently morally blameworthy to attract a conviction. In terms of deterrence, the Commission is of the view that the requirement to exercise reasonable care, the absence of which will result in liability, is sufficient motivation to comply with provincial legislation.

It is essential to appreciate that in the majority of provincial offences, the Legislature is seeking to regulate and not to prohibit particular types of conduct. What the Legislature is attempting to penalize is conduct that does not conform to an objective norm. For example, it surely cannot be contended that an accused should be acquitted on a charge of speeding if evidence is adduced that he did not bother to look at his speedometer as he travelled through the city. Equally, a driver who backs into someone else's vehicle should not be acquitted of the offence of careless driving on the ground that he did not take the precaution of ensuring that no cars were behind him before he accelerated.

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[18] *Strict Liability and the Enforcement of the Factories Act 1961*, Working Paper No. 30 (1970).

(ii) Where the Penalty is Imprisonment

While we have recommended generally the adoption of a strict liability regime for provincial offences, we are of the view that mere carelessness should not result in a prison sentence. A higher standard of fault should apply before such a serious penalty may be imposed by the court. We do not take the position that an individual can be imprisoned only if *mens rea* is established. However, the Commission does propose that the standard should be more than ordinary negligence. We believe that the minimum standard for the imposition of a prison sentence in a strict liability offence should be a marked and substantial departure from the conduct of a reasonable person. This higher standard has already been resorted to by courts with respect to the criminal negligence provision in the *Criminal Code*.[19] In addition, this standard has been used by Ontario courts in careless driving offences.[20]

Accordingly, the Commission recommends that, before imprisonment can be imposed for a provincial offence, either an aware state of mind (*mens rea*) or a marked and substantial departure from the standard of care expected of a reasonably prudent person in the circumstances, should be required to be alleged and proved. We further recommend that where such a marked and substantial departure has been alleged in a charge, it should continue to be possible to convict the person charged of a lesser included offence, as it now is under section 56 of the *Provincial Offences Act*.

3. THE BURDEN OF PROOF IN PROVINCIAL OFFENCES

(a) General Rule

In this section, the Commission will examine the issue of the burden of proof in provincial offences. We take the position that in situations in which the Legislature expressly creates a *mens rea* offence, the traditional burden of proof for *mens rea* offences should be retained. The prosecution

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[19] Section 219. See, for example, *R. v. Sharp* (1984), 39 C.R. (3d) 367, 3 O.A.C. 26, 12 C.C.C. (3d) 428 (C.A.); *R. v. Tutton* (1985), 44 C.R. (3d) 193, 6 O.A.C. 367, 18 C.C.C. (3d) 328 (C.A.), aff'd [1989] 1 S.C.R. 1392, 69 C.R. (3d) 289, 48 C.C.C. (3d) 129; *R. v. Anderson*, unreported (March 1, 1990, S.C.C.); *R. v. Barron* (1985), 48 C.R. (3d) 334, 12 O.A.C. 335, 23 C.C.C. (3d) 544 (C.A.); and *R. v. Waite* (1986), 41 M.V.R. 119, 15 O.A.C. 215, 52 C.R. (3d) 355 (C.A.).

[20] *R. v. Beauchamp* (1953), 16 C.R. 270. We do not believe that the problems and criticisms associated in the civil law with gross negligence under the so-called gratuitous passenger rule are applicable in the context of provincial offences. Under this rule, now abolished in Ontario (see S.O. 1977, c. 54, s. 16), a gratuitous passenger in a vehicle could not recover damages from the driver unless the latter was shown to be grossly negligent. The difficulties under the rule had less to do with the alleged elusiveness of the concept of gross negligence as a general proposition than with the various attempts by the courts to circumvent the rule in order to avoid perpetrating an injustice on gratuitous passengers.

should continue to be required to establish both the physical element and the mental element beyond a reasonable doubt in order to secure a conviction. We now turn to the more difficult issue concerning the burden of proof in strict liability offences.

We have seen that the *Sault Ste. Marie*[21] compromise for strict liability offences was to allow the accused to be acquitted if he could prove that he exercised reasonable care on a balance of probabilities. Since proof of lack of fault is squarely placed on the accused, there can be little doubt that, under the Charter, the reverse onus is *prima facie* unconstitutional. Given the embryonic nature of the jurisprudence in the Supreme Court of Canada with respect to section 1 of the Charter, it is difficult to predict whether the imposition of a reverse onus in strict liability offences will be held to be a reasonably justified limitation.

The Law Reform Commission of Saskatchewan[22] as well as the Alberta Institute of Law Research and Reform[23] have recommended the preservation of reverse onuses in strict liability offences. According to the Saskatchewan Law Reform Commission,[24]

> it is reasonable to take into consideration the difficulties of large scale enforcement of public welfare offences. As public welfare offences, provincial offences are generally not considered serious or criminal. Placing the burden of proving negligence on the prosecution in provincial offences would impair the efficiency of prosecutions, and ultimately the utility of prosecutions as a deterrent factor.

We do not endorse this view for several reasons. We do not accept that a rigid distinction can be made between criminal and public welfare or regulatory offences. For the reasons previously enunciated, the Commission considers many provincial offences to be serious in terms of both penalty and stigma. In addition, reverse onus clauses constitute a substantial violation of the presumption of innocence and may well be in violation of the Charter. Finally, leaving aside for the moment the case where, for example, large corporations are involved, the fact that a matter is peculiarly within the knowledge of the accused is not a satisfactory rationale for shifting the onus, since this is equally true of *mens rea* offences, where no such shift occurs. The accused's testimony is only one source of evidence. Experience has demonstrated that the Crown has had little difficulty establishing *mens rea*, as the trier of fact is entitled to draw reasonable inferences from all the evidence presented, whether or not the accused testifies.

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[21] *Supra*, note 2.

[22] *Proposals for Defences to Provincial Offences* (1986), at 12-13.

[23] *Defences to Provincial Charges*, Report No. 39 (1984), at 31-38.

[24] *Ibid.*, at 37.

It may be argued that the reversal of the onus of proof can be justified in the context of corporations and other like institutions. Many provincial statutes, such as those involving environmental protection, occupational health and safety, and financial matters, involve violations by institutions which have very complex damage control or damage prevention systems. Evidence of the operation of these systems and, in particular, the aspect of the system which failed, may be known only to the alleged violator. Arguably, the effectiveness of important social legislation would be jeopardized if the persuasive burden were not placed squarely on the corporation. The Commission does not agree. The presumption of innocence is a fundamental right that ought to apply to both individuals and institutions.

With respect to the burden of proof for strict liability offences, the Commission proposes a compromise solution that balances the fundamental rights of the accused with the need for effective law enforcement. We recommend the enactment of a mandatory presumption rather than a reverse onus. In other words, in the absence of evidence to the contrary, negligence will be presumed. The Crown will continue to bear the burden of establishing the physical element or *actus reus* beyond a reasonable doubt. However, in a strict liability case, it will be necessary that evidence of conduct capable of amounting to reasonable care be adduced, either by the testimony of the accused, through the examination or cross-examination of a Crown or defence witness, or in some other way. The accused will merely have an evidentiary burden and will no longer be required to satisfy the persuasive burden of establishing, on a balance of probabilities, that he was not negligent. Where evidence of reasonable care has been adduced, thereby rebutting the presumption, in order to secure a conviction the prosecution should be required to establish the accused's negligence beyond a reasonable doubt.

In our view, if a justification for imposing a reverse onus is to elicit evidence that the accused exercised reasonable care, the imposition of a mandatory presumption accomplishes essentially the same purpose. However, a mandatory presumption is significantly less onerous on an accused and is more likely to survive constitutional scrutiny than a reverse onus.

(b) Licensing and Other Similar Offences

It was emphasized in chapter 3 that section 48(3) of the *Provincial Offences Act* imposes an extremely broad reverse onus clause that applies to all provincial offences and encompasses a wide variety of defences. For the reasons discussed in that chapter, the Commission is of the view that section 48(3) violates the presumption of innocence in section 11(d) of the Charter and is unlikely to be justified under section 1. A similar constitutional argument has been made in respect of much narrower reverse onus

clauses which, as in the *Schwartz* case,[25] require the accused to prove the existence of a licence to engage in a specific type of conduct.

It has been contended that a distinguishing feature of the licensing provisions in which the onus has been reversed is that the law is aimed at controlling or regulating, rather than prohibiting, a particular activity. It is our view that this distinction between licensing offences and other provincial offences is neither workable nor advisable. The vast proportion of provincial offences, including licensing offences, are regulatory.

Accordingly, the Commission recommends that the burden of proof in licensing and similar types of offences should be treated in the same way as other provincial offences. The proposed mandatory presumption should govern; a persuasive burden of proof should not be imposed on the accused. It follows that section 48(3) of the *Provincial Offences Act* should be repealed, and we so recommend.

4. IMPRISONMENT FOR NONPAYMENT OF A FINE

We have seen in chapter 2 that in 1988-89 more than 27% of Ontario's prison population were in jail for nonpayment of a fine. We have also noted that it may be possible under section 70 of the *Provincial Offences Act*[26] for an impecunious person, sentenced to pay a fine for the commission of an offence, to be imprisoned for nonpayment of the fine.

In a report of the Canadian Sentencing Commission entitled *Sentencing Reform: A Canadian Approach*,[27] it was stated that imprisonment for failure to pay a fine should be based on wilful default and not on the inability to pay. We firmly endorse this view. We take the position, both as a matter of principle and for the constitutional reasons discussed in chapter 3, that a fine defaulter should not be imprisoned solely because she does not have the financial resources to pay the fine imposed by the court.

Accordingly, we recommend that section 70 of the *Provincial Offences Act* should be amended to ensure that only clearly wilful defaulters are incarcerated. In addition, we recommend that, unless it is unreasonable to do so, the fine option program under section 68 of the Act, and the civil enforcement procedure delineated in section 69, should be resorted to before a warrant of committal is issued.

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[25] [1988] 2 S.C.R. 443, 45 C.C.C. 97, 66 C.R. (3d) 251, at 270.

[26] *Supra*, note. 1

[27] Report of the Canada Sentencing Commission (February 1987).

5. DEFENCES, JUSTIFICATIONS AND EXCUSES

Section 80 of the *Provincial Offences Act*[28] provides:

> 80. Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of offences, except in so far as they are altered by or inconsistent with this or any other Act.

The incorporation of common law justifications, excuses and defences[29] in section 80 of the Act triggers a wide range of defences, such as automatism,[30] necessity,[31] entrapment,[32] and officially induced error of law.[33] Some common law defences, such as voluntary intoxication[34] and the defence of honest mistake of fact,[35] apply only to *mens rea* offences. In the case of strict liability offences, mistake of fact is incorporated as a defence, in that an accused will be acquitted if he can establish an honest and reasonable mistake.[36] In our view, common law defences should continue to apply in the case of provincial offences.

We now turn to consider what statutory defences ought to be made available to an accused charged with a provincial offence. The *Provincial Offences Act* does not permit an accused to rely on the types of statutory defences that appear in the *Criminal Code*, such as the defence of duress,[37] self-defence,[38] insanity,[39] the protection of persons administering and enforcing the law,[40] and the defence of property.[41] It is possible that some of

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[28] *Supra*, note 1.

[29] In the remainder of this section, except for our recommendation, we shall use the term "defences" to refer to "justifications, excuses and defences".

[30] *Rabey v. The Queen*, [1930] 2 S.C.R. 513, 114 D.L.R. (3d) 193, 15 C.R. (2d) 427; and *R. v. King*, [1962] S.C.R. 746, 35 D.L.R. (2d) 386, 133 C.C.C. 1.

[31] *Perka v. The Queen*, [1984] 2 S.C.R. 233, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113.

[32] *R. v. Mack*, [1988] 2 S.C.R. 903, 67 C.R. (3d) 1, 44 C.C.C. (3d) 513.

[33] *R. v. MacDougall*, [1982] 2 S.C.R. 605, 31 C.R. (3d) 1, 1 C.C.C. (3d) 65; and *R. v. Cancoil Thermal Corp.* (1986), 11 C.C.E.L. 219, 14 O.A.C. 225, 52 C.R. (3d) 188 (C.A.).

[34] *R. v. Bernard*, [1988] 2 S.C.R. 833, 67 C.R. (3d) 113, 45 C.C.C. (3d) 1.

[35] *R. v. Pappajohn*, [1980] 2 S.C.R. 120, 14 C.R. (3d) 243, 52 C.C.C. (2d) 481.

[36] *Supra*, note 2, at 373.

[37] Section 17.

[38] Sections 24 *et seq.*

[39] Section 16.

[40] Section 25.

[41] Section 38. However, it is interesting to note that the *Provincial Offences Act*, like the

these defences would rarely be resorted to in the context of provincial offences. However, one can envisage many situations in which self-defence or the defence of property could be relied on by an accused in a provincial offence case. But since these statutory defences are not available to the accused, she must rely only on the common law.

Even aside from the value of uniformity, the Commission can see no reason why in principle a person who has breached a provincial Act should not be entitled to rely on the same defences, where relevant, as he would if he had committed an offence under the *Criminal Code*. Accordingly, the Commission recommends that there should be a provision in the *Provincial Offences Act* stipulating that all common law defences, as well as all of the defences in the *Criminal Code*, are available to an accused charged with a provincial offence. The Commission recommends the following statutory provision, similar to the one proposed by the Law Reform Commission of Saskatchewan:[42]

> Every rule or principle of the common law, and every provision of the *Criminal Code* (Canada) as amended from time to time that is not limited to a specific offence, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, is available to a person charged with an offence, except insofar as it is altered by or is inconsistent with any other Act.

In proposing this recommendation, the Commission is cognizant of the fact that deficiencies may exist with respect to the defences in the *Criminal Code*. The Law Reform Commission of Canada[43] has undertaken an extensive review of the *Criminal Code* and Parliament may well enact amendments to some of the defences in the Code. Whether or not any such changes are made to the Code, it is always open to the Ontario Legislature to decide at some future date to engage in an independent study of defences with a view to codifying some or all of them in the *Provincial Offences Act*.

Criminal Code, does deal with the effect of the accused's ignorance of the law. Section 81 provides:

> 81. Ignorance of the law by a person who commits an offence is not an excuse for committing the offence.

[42] *Supra*, note 22, at 16.

[43] *Recodifying Criminal Law—A Review and Enlarged Edition of Report 30*, Report 31 (1988).

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The following recommendations apply to all "provincial offences", that is, to offences which appear in provincial statutes and regulations and in municipal by-laws.

2. (a) Absolute liability should be abolished for provincial offences. Liability for every provincial offence should be based on some minimum requirement of fault.

   (b) Every provincial offence should be interpreted as imposing strict liability, unless the Legislature expressly uses language connoting an aware state of mind (*mens rea*), such as "knowingly", "intentionally", "recklessly", "wilfully blind" or other similar words.

   (c) (i) Before imprisonment can be imposed for a provincial offence, either an aware state of mind or a marked and substantial departure from the conduct of a reasonable person in similar circumstances should be required to be alleged and proved.

   (ii) Where such a marked and substantial departure has been alleged in a charge, it should continue to be possible to convict the person charged of a lesser included offence, as it now is under section 56 of the *Provincial Offences Act.*

3. (a) The traditional burden of proof in *mens rea* offences should be retained. The prosecution should continue to be required to establish both the physical element and mental element of the offence beyond a reasonable doubt in order to secure a conviction.

   (b) A mandatory presumption rather than a reverse onus should exist in strict liability offences. In the absence of evidence to the contrary, negligence should be presumed. In a strict liability case, it should be necessary that evidence of conduct capable of amounting to reasonable care be adduced, either by the testimony of the defendant, through the examination or cross-examination of a Crown or defence witness, or in some other way. The defendant should not be obliged to establish that she was not negligent on a balance of probabilities. Where such evidence of reasonable care has been adduced, thereby rebutting the presumption, in order to secure a conviction the prosecution should be required to establish the defendant's negligence beyond a reasonable doubt.

4. (a) The burden of proof for offences involving conduct for which a licence or other similar regulatory sanction is required should be the same way as for any other provincial offence (see Recommendation 3).

   (b) Section 48(3) of the *Provincial Offences Act* should be repealed.

5. Every rule or principle of the common law, and every provision of the *Criminal Code* as amended from time to time that is not limited to a specific offence, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, should be available to a person charged with a provincial offence, except insofar as it is altered by or is inconsistent with any other Act.

6. (a) Section 70 of the *Provincial Offences Act* should be amended to ensure that only clearly wilful defaulters are imprisoned for failure to pay a fine.

   (b) Unless it is unreasonable to do so, the fine option program under section 68 of the *Provincial Offences Act*, and the civil enforcement procedure in section 69, ought to be resorted to before a warrant of committal is issued.

CONCLUSION

Animating this report is our firm belief in the need for fundamental reform of the law concerning provincial offences. The existence of absolute liability offences, under which a person may be held liable merely for committing the physical act of the offence irrespective of fault, the absence of clear and comprehensive guidance concerning the basis of liability for provincial offences, the reversal of the burden of proof in strict liability offences, and the existence of other important deficiencies in the law, detrimentally affect in some way all those involved in the provincial justice system. The recommendations made in this report, particularly the proposal that absolute liability be abolished and that liability for provincial offences be based on some minimum requirement of fault, represent an attempt to remedy these defects by striking the proper balance between fairness to the individual and the essential law enforcement requirements of the larger community.

APPENDIX 1

DRAFT BILL

Bill 00 **199__**

An Act to amend the Provincial Offences Act

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

1. Section 48(3) of the *Provincial Offences Act*, being chapter 400 of the Revised Statutes of Ontario, 1980, is repealed.

2. Section 70 of the said Act is amended by adding thereto the following subsection:

Wilful non-payment

(3.1) A warrant of committal for non-payment of a fine may be issued only if such non-payment is clearly wilful.

3. The said Act is amended by adding thereto the following section:

Interpretation

75a. In this Part,

(a) "aware state of mind" means what it means at common law and includes knowledge, intent, recklessness and wilful blindness;

(b) "negligence" means a departure from the standard of care expected of a reasonably prudent person in the circumstances.

4. The said Act is amended by adding thereto the following sections:

Principles of liability

79a.—(1) Unless an aware state of mind is stated expressly to be an element of an offence, negligence shall be the standard of liability for all offences.

Imprisonment

(2) Before imprisonment can be imposed for an offence, an aware state of mind or a marked and substantial departure from the standard of care expected of a reasonably prudent person in the circumstances must be alleged and proved.

Standard of proof

79b.—(1) Every element of an offence must be proved by the prosecutor beyond a reasonable doubt.

Presumption of negligence

(2) Where the prosecutor proves the act or omission specified in an offence for which the standard of liability is negligence, the defendant is presumed to have acted negligently in the absence of evidence to the contrary.

Idem

(3) Evidence to the contrary under subsection (2) means evidence of conduct capable of amounting to reasonable care.

Idem

(4) Where evidence to the contrary has been adduced in accordance with subsection (3), the prosecutor must prove beyond a reasonable doubt that the defendant was negligent.

5. Section 80 of the said Act is repealed and the following substituted therefor:

Common law and statutory defences R.S.C. 1985, c. C-42

80. Every rule or principle of the common law, and every provision of the *Criminal Code* (Canada) as amended from time to time that is not limited to a specific offence, that renders any circumstance a justification or excuse for an act or omission, or a defence to an offence, is available to a person charged with an offence, except insofar as it is altered by or is inconsistent with any other Act.

6. This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

7. The short title of this Act is the *Provincial Offences Amendment Act, 199–*.

APPENDIX 2

PERSONS MAKING SUBMISSIONS IN RESPONSE TO ISSUES PAPER

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Mr. G. H. Brereton, Executive Director, Ontario Petroleum Association

Dr. Thomas A. Brzustowski, Deputy Minister, Ontario Ministry of Colleges and Universities

The Honourable Paul Cosgrove, Judge, District Court of Ontario

Mr. B. P. Davies, Deputy Minister, Ontario Ministry of Housing

Mr. Garth Dee, Lawyer, Toronto Workers' Health & Safety Legal Clinic

Mr. Daniel J. Gagnier, Deputy Minister, Ontario Ministry of Energy

Mr. Bruce A. Glass, Barrister & Solicitor

Mr. David G. Hobbs, Deputy Minister, Ontario Ministry of Transportation

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Mr. Howard J. Kaufman, Chair, Legislation Committee, The Canadian Manufacturers' Association

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The offices or affiliations listed above represent those at the time the submissions were made.

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