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Liability for Provincial Offences: Fault, Penalty and the Principles of Fundamental Justice in Canada (A Review of Law Reform Proposals from Ontario, Saskatchewan and Alberta)

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I. *Introduction*

While the Canadian Criminal Code is presently in the process of thorough going reform by the federal government, one should not lose sight of the important reforms being proposed in several Canadian provinces to the legal regimes governing provincial offences. A need for reform to provincial offence regimes is evident in relation to both substance and procedure, although the approaches to solving problems in both spheres has traditionally differed from province to province. At the level of procedure, some provinces have been content to enforce their provincial offences through the expedient of adopting by reference the procedures found in Part XVII of the federal *Criminal Code* for the prosecution and trial of summary conviction offences.[1] Other provinces have established complete parallel codes for the enforcement of their own penal laws, on the theory that there is a sufficient difference in kind between provincial offences and minor criminal offences that they ought to be treated quite differently from a procedural point of view.[2] Even those provinces which use the federal summary conviction procedures to try provincial offences have found it necessary to make exceptional, streamlined procedures for processing minor violations through systems of offence tickets and "out of court" payment of fines upon a "plea" of guilty.[3] New proposals for a "Uniform Regulatory Offences Procedure Act" will shortly be coming forward to the Uniform Law Conference,[4] and it will be interesting to see whether it is possible to develop a consensus around new procedures for the enforcement of provincial

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1. For example, *Summary Proceedings Act*, R.S.N.S. 1989, c.450, s.7.

2. See W.D. Drinkwater and J.D. Ewart, *Ontario Provincial Offences Procedure*, (Toronto: Carswell, 1980) *passim*, and the new but unproclaimed Quebec Provincial Offence Code.

3. See, for example, the Nova Scotia approach, *supra*, footnote 1.

4. The Uniform Law Conference at its meeting in Saint John, N.B., August 12-17, 1990 received a report from its Committee for a Uniform Regulatory Offences Procedure Act which constituted drafting instructions for such a statute.

offences where, historically, different administrative needs and resources have given rise to very different procedural systems.

It is in the context of this procedural diversity that proposals are also being made for reform to the substantive law which ought to govern the imposition of liability for provincial offences. The interplay between the *Charter of Rights and Freedoms* and recent developments in the common law principles structuring liability for "public welfare offences" has led to considerable uncertainty in the law concerning the fundamental bases for imposing liability for provincial offences. What fault elements, if any, must be proved in provincial offences? Who bears the burden of proof and according to what standard? What defences are available? What punishments can be imposed and under what circumstances? A non-lawyer might be shocked to learn that under the provincial offence regimes in most provinces of Canada it is virtually impossible to answer any of the foregoing basic questions with any satisfactory degree of certainty. The recent Report of the Ontario Law Reform Commission[5] would, if adopted, provide systematic responses to all of these substantive questions. It is the purpose of this review to assess that Report in the light of the constitutional requirements and common law doctrines recognized by the Supreme Court of Canada. Where possible, comparative reference will also be made to analogous provincial offence reform proposals originating from the Alberta Institute of Law Research and Reform,[6] and the Law Reform Commission of Saskatchewan.[7]

II. *Fault Elements in Provincial Offences*

Just prior to the advent of the Charter, the Supreme Court of Canada, in a bold stroke of judicial law reform, restructured the whole approach to "regulatory" or "public welfare" offences in Canada, including all provincial offences.[8] The landmark *Sault Ste. Marie* case overturned the conventional wisdom, dominant since the middle of the nineteenth century, that there were two types of statutory offences: (a) "true crimes", where the Crown must prove the external elements (actus reus) and mental elements (mens rea) beyond a reasonable doubt; and (b) "public welfare offences of strict or absolute liability", where the simple "doing of the act" was sufficient for conviction, such that the Crown need only

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5. Ontario Law Reform Commission, *Report on the Basis of Liability for Provincial Offences,* Toronto, 1990.
6. Institute of Law Research and Reform, Report No. 39, *Defences to Provincial Charges,* Edmonton, 1984.
7. Law Reform Commission of Saskatchewan, *Proposals for Defences to Provincial Offences: Report to the Minister of Justice,* Saskatoon, 1986.
8. *R. v. City of Sault Ste. Marie,* [1978] S.C.R. 1299; 3 C.R. (3d) 30; 40 C.C.C. (2d) 353.

prove the external elements beyond a reasonable doubt — no mental elements or fault requirements need be proved.[9]

In the *Sault Ste. Marie* decision, the Supreme Court of Canada found that there are three kinds of offences:

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.

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.[10]

The trick, of course, in figuring out what needs to be proved by the Crown for a conviction on any given offence, is to determine what category the offence falls into. The court in *Sault Ste. Marie* gave some guidance on this interpretive question:

> "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 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 consideration in determining whether the offence falls into the third category."[11]

As all criminal law practitioners know, and as the provincial law reform proposals considered here demonstrate, there can be significant

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9. For a brief description see the Ontario Report, *supra,* footnote 5, pp. 8-9 or the Saskatchewan Report, *supra,* footnote 7 at pp.2-3.
10. *Supra,* footnote 8, at 40 C.C.C. (2d) p. 373-4.
11. Ibid., p.374.

disagreement as to how to apply these interpretive principles in any given case, and the decisions of the courts at all levels reflect this. The general thrust of the post - *Sault Ste. Marie* decisions, however, has been as a general rule to place provincial offences in category two, strict liability (negligence with a reverse onus), and only to classify provincial offences as being in the *mens rea* or absolute liability categories in exceptional cases.[12]

The tri-partite classification system of *Sault Ste. Marie* is now having to run the gauntlet of the *Charter*. The Supreme Court of Canada has rendered several decisions which have set new constitutional parameters for assessing the validity of provincial legislation creating offences. In the *B.C. Motor Vehicle Act Reference Case,*[13] it was held that an offence which combined absolute liability with a possibility of imprisonment contravened section 7 of the *Charter* as a deprivation of liberty not in accordance with the principles of fundamental justice. Then there is *R.* v. *Vaillancourt,*[14] in which the Supreme Court of Canada struck down a constructive murder provision of the *Criminal Code* as contrary to section 7 because it imposed liability in the absence of even objective foreseeability of death. In that case the constitutionality of negligence or an objective fault standard for true crime was left as an open question. Subsequently, in *The Queen v. Martineau*[15] a majority of the Supreme Court of Canada held that subjective intent is a constitutional requirement for a murder charge, although in a judgment released simultaneously it stated that the objective standard in *Criminal Code* section 21(2) (parties to offences by common intent) can only have application to principal offences where the fault standard is an objective one.[16] Presumably, on that basis an objective standard for provincial offences might, in general, be acceptable, although the reversal of the burden of proof in strict liability is a separate issue to be addressed below.

(a) *The Abolition of Absolute Liability*

The Ontario Law Reform Commission takes the bull by the horns and advocates the abolition of absolute liability offences. Its recommendation 2(a) states:

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12. For comprehensive lists of the post - *Sault Ste. Marie* jurisprudence see: Ontario Report, pp. 12-13; the Saskatchewan Report, pp. 4-6; and the Alberta Report, pp. 93-123.
13. 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.
14. *Valliancourt* v. *R.*, [1987] 2 S.C.R. 636; 60 C.R. (3d) 289; 39 C.C.C. (3d) 118.
15. *The Queen* v. *Martineau,* Supreme Court of Canada, unreported, September 13, 1990.
16. *The Queen* v. *Logan and Johnson,* Supreme Court of Canada, unreported, September 13, 1990.

> "Absolute liability should be abolished for provincial offences. Liability for every provincial offence should be based on some minimum requirement of fault."[17]

Of course, "absolute liability" is a misnomer in any event. The liability for such offences was "absolute" only in the sense that mistake of fact, intoxication or other defences related to a negation of a subjective or even objective fault requirement are unavailable.[18] As will be discussed below, other defences of general applicability are operative in relation to so-called absolute liability offences. The Alberta and Saskatchewan do not go so far as to advocate abolition of absolute liability offences. Instead, they propose that a rule of interpretation be legislatively enacted to the effect that no provincial offence be construed as one of absolute liability unless "the enactment in which the offence is created expressly so provides"[19] or is "specifically stated to be one of absolute liability".[20]

Given this divergence of views, it is important to examine the policy pros and cons in relation to absolute liability. In this regard the Ontario Law Reform Commission is very firm. It examines policy arguments favouring absolute liability in relation to deterrence, efficiency of enforcement, stigma, respect for the law, and prosecution policy. In relation to deterrence, it concludes "... the punishment of honest mistakes and unavoidable accidents will not, in fact, exact greater deterrence to unlawful behaviour."[21] On efficiency, it states "... 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."[22] Concerning the stigma associated with provincial as opposed to criminal offences, it finds that "... some opprobrium may well attach to the commission of many absolute liability offences" and that "... serious penalties, such as a substantial fine or the loss of a license, may be imposed for such offences".[23] On maintaining respect for law enforcement, the Ontario Law Reform Commission agrees with the Supreme Court of Canada, that "criminalizing blameless conduct leads to 'cynicism and disrespect' for the law on the part of the community."[24] Finally, the Ontario Law Reform Commission argues, with reliance in part on studies undertaken by the Law Reform

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17. Ontario Report, p.45.
18. The Saskatchewan Report makes this point at pp. 13-15.
19. Saskatchewan Report, Recommendation 4, p.16.
20. Alberta Report, Recommendation 2, p.84.
21. Ontario Report, p.43.
22. *Ibid.*, p.43.
23. *Ibid.*, p.43.
24. *Ibid.*, p.44.

Commission of Canada[25] and the English Law Commission,[26] that prosecution policy will remain unchanged with the abolition of absolute liability since in virtually all regulatory areas some degree of fault is required before a decision is made to institute proceedings.[27]

The main objection to absolute liability, is that it is contrary to the basic moral and legal proposition that one ought not to be punished for conduct which one does not intend, did not or could not foresee, and cannot control. As the Saskatchewan Law Reform Commission admits, "... the Supreme Court of Canada retained the concept of absolute liability without clearly establishing a principle to justify it."[28] However, the Saskatchewan and Alberta proposals each retain absolute liability without providing the necessary justification, albeit in "exceptional cases" to be specifically identified by the legislature.[29] One might be forgiven in entertaining the suspicion that the two bodies were reluctant to buck the tide of conventional wisdom that absolute liability is "part of the system", for fear that a frontal attack on the status quo might reduce the political acceptance of their other valuable and less controversial proposals. The Ontario Law Reform Commission is to be commended for its forthright decision to oppose absolute liability. It is an imperial policy which "has no clothes," and has no place in Canadian democracy under the *Charter.*

(b) *Appropriate Standards of Fault for Provincial Offences*

The Ontario Law Reform Commission proposals also break new ground in setting out fault standards for provincial offences. Three situations would be provided for in an interpretation section to be added to the Ontario Provincial Offences Act. The first situation is where "... the Legislature expressly uses language connoting an aware state of mind (*mens rea*), such as 'knowingly', 'intentionally', 'recklessly', 'wilfully blind' or other similar words."[30] This provision for provincial offences based on "subjective" fault principles is also the policy in the Saskatchewan proposal, which states: "An enactment creates an intentional offence if it: (a) prohibits a person from engaging in conduct knowingly, intentionally, maliciously, wilfully, or without lawful excuse;

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25. Law Reform Commission of Canada Studies in Strict Liability, Queens Printer, Ottawa, 1974, pp.63-152.
26. The Law Commission, Strict Liability an the Enforcement of the Factories Act, Working Paper No. 30, H.M.S.O., London 1970.
27. Ontario Report, p.44.
28. Saskatchewan Report, p.9.
29. Saskatchewan Report, Recommendation 3, p.16; Alberta Report, Recommendation 2, p.84.
30. Ontario Report, pp.45 and 53.

or (b) otherwise expressly includes intention on the part of the accused as an element of the offence".[31] The Alberta proposal also foresees the continued creation of provincial "*mens rea* offences" using language virtually identical to that adopted by the Saskatchewan proposals.[32]

The second fault standard advanced by the Ontario Law Reform Commission for provincial offences is that of simple or ordinary negligence which it calls "strict liability".[33] The gravamen of the offence would be the failure of the defendant to act with "reasonable care" in the circumstances. This would be the same standard as adopted by the Supreme Court of Canada for strict liability offences in *Sault Ste. Marie* with the important difference that, unlike the court decision, the Ontario proposals would not reverse the burden of proof on the negligence issue but would substitute a mandatory presumption. By contrast with the Ontario commission, the Saskatchewan and Alberta commissions essentially advocate a statutory restatement of the *Sault Ste. Marie* strict liability approach including the reversal of the onus of proof. As far as the negligence standard is concerned, the Saskatchewan proposals provide a defence where the accused "... exercised reasonable care to avoid or prevent the performance of the acts constituting the commission of the offence" or "reasonably believed in a state of facts which if correct would not have constituted the commission of an offence by him".[34] The Alberta proposals take essentially the same approach, but in verbally formulating the simple negligence standard for strict liability speak not only of "no negligence" and "reasonable mistake", but also "due diligence" — following the Supreme Court in *Sault Ste. Marie*.[35]

The third fault standard proposed for provincial offences by the Ontario Law Reform Commission is that of a "marked and substantial departure from the conduct of a reasonable person in similar circumstances."[36] Here one senses the guiding hand of Professor Don Stuart, the chief consultant on the Ontario Commission's Report and long time proponent of this standard for criminal negligence.[37] It is to be noted that the Ontario Court of Appeal,[38] as well as a substantial minority of the Supreme Court of Canada has adopted this standard as the test of criminal negligence under *Criminal Code* section 219.[39] In

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31. Saskatchewan Report, Proposed Legislation, s.3, p.17.
32. Alberta Report, Recommendation 2, p.84.
33. Ontario Report, pp. 45 and 53.
34. Saskatchewan Report, Proposed Legislation, s.5, p.17.
35. Alberta Report, Recommendation 1, p.84.
36. Ontario Report, pp. 46 and 53.
37. Don Stuart, *Canadian Criminal Law* (2nd. Ed) Carswell, Toronto, 1987, pp. 183-196.
38. *R.* v. *Sharp* (1984), 39 C.R. (3d) 367; *R.* v. *Barron* (1985), 48 C.R. (3d) 334.
39. *R.* v. *Tutton* [1989] 1 S.C.R. 1392; 69 C.R. (3d) 289.

addition the Law Reform Commission of Canada has adopted this standard in its proposed *Draft Criminal Code*.[40] This is an objective standard, in that one is concerned not with the accused's state of mind but rather with what a reasonable person would do in the circumstances. However, it is more than simple or ordinary negligence by virtue of the requirement for proof of a "marked and substantial departure" from the standards of the reasonable person. Proponents hope the language will not drag criminal courts back into the morass of distinguishing "ordinary negligence" from "gross negligence" in the manner of tort litigation. Whether this will be the case remains to be seen.

The Ontario Commission adopts the "marked and substantial departure" standard in the belief that "mere carelessness should not result in a prison sentence", with the corollary that "a higher standard of fault should apply before such a serious penalty may be imposed by the court". It therefore recommends that:

> "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."[41]

Presumably this provision will withstand constitutional scrutiny under *Charter* section 7, since it appears that the Supreme Court of Canada through views expressed in the *B.C. Motor Vehicle Reference, Vaillancourt, Martineau,* and *Logan* cases, will countenance the combination of objective liability and imprisonment if there is a proportional relationship between the degree of culpability, seriousness or stigma of the offence, and the nature of the penalty.

III. *Burdens of Proof in Provincial Offence Prosecutions*

It is common ground that in proving the external elements (*actus reus*) of provincial offences, as in criminal law matters proper, the burden is on the Crown to prove all the elements of the offence beyond a reasonable doubt. There is considerable diversity of opinion abroad in the land, however, when it comes to burdens of proof in relation to fault elements in provincial offences.

Where subjective awareness is an element of the offence, whether as intention, knowledge, recklessness or some other variant, the general view is that the offence should be treated as a true crime. As such the

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40. Law Reform Commission of Canada, Report 31, *Recodifying Criminal Law — A Revised and Enlarged Edition of Report 30,* Ottawa, 1988.
41. Ontario Report, p. 46.

Crown bears the burden of proving this mental element beyond a reasonable doubt. The Ontario Law Reform Commission states:

> "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 the mental element of the offence beyond a reasonable doubt in order to secure a conviction."[42]

Similarly, in retaining intentional offences, the Saskatchewan Law Reform Commission maintains, almost as a matter of definition, that "... the prosecution must prove intention on the part of the accused".[43] In like manner, the Alberta proposals provide that where *mens rea* is an element of a provincial offence. "The prosecution shall bear the burden of proving the *mens rea* of the accused and discharge the burden ... by proof beyond a reasonable doubt."[44] The only dissenting view of note is the majority decision of the Supreme Court of Canada in the aberrant case of *Strasser* v. *Roberge*[45] which is roundly criticized[46], rarely cited, and rightly thought to be confined to its facts.

The hallmark of absolute liability offences, of course, is that the Crown need not prove fault, whether in subjective or objective terms, *and* the accused cannot exculpate him or herself by proving or providing evidence of an absence of fault. As the Saskatchewan Law Reform Commission states in its draft Provincial Offence Act:

> An absolute liability offence is an offence in which:
>
> (a) the prosecution is not required to prove intention or negligence on the part of the accused; *and*
>
> *(b) defences that negate intention or negligence on the part of the accused are not available to the accused.*[47]

The Alberta report states perhaps somewhat unguardedly that "an offence is an absolute liability offence if the enactment uses words indicating that the accused person is liable to be convicted whatever his state of mind".[48] On the face of it, there thus appear to be no burden of proof problems in relation to mental elements of absolute liability offences. Perhaps the matter should be left simply at that. However, in the case of *Vaillancourt* the majority of the Supreme Court of Canada

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42. Ontario Report, p.53.
43. Saskatchewan Report, Proposd Legislation s. 3, p. 17.
44. Alberta Report, p.4.
45. *Strasser* v. *Roberge*, [1979] 2 S.C.R. 953.
46. Stuart, *supra*, footnote 37, has described it as "an astounding perversion in principle" in his first edition at p. 169.
47. Saskatchewan Report, p. 17.
48. Alberta Report, p. 2.

seemingly purports to be capable of divining the "essential elements" of offences, presumably by assessing the proportionality of the seriousness of the conduct to the degree of seriousness of the penalty. Courts may find offences missing "essential elements" to be simply unconstitutional, but they could also read in new requirements, such as mental elements. This opens the possibility for courts to read mental element requirements into absolute liability offences rather than striking them down. The potential results of such a process are mind boggling from a number of points of view.

The central distinction between the Ontario Law Reform Commission's approach to strict liability offences and that of the other provincial commissions and the Supreme Court of Canada relates to burdens of proof and presumptions. Following the Court, the Alberta Institute of Law Research and Reform advises that "the burden of proof should be on the accused on a balance of probabilities" in relation to the "due diligence" or "reasonable mistake of fact" defences which characterize its version of strict liability.[49] Using slightly different wording the Saskatchewan proposals reach the same results by saying "the accused shall be acquitted where he establishes on a balance of probabilities" that he used reasonable care or acted pursuant to a reasonable mistake of fact.[50] The Ontario Law Reform Commission rejected the use of a reverse onus approach for its version of strict liability. In doing so, it reviews with care the cases which have recently been decided by the Ontario Court of Appeal and Supreme Court of Canada concerning the constitutionality of reverse onus clauses and mandatory presumptions. It then concludes that "[s]everal decisions rendered by the Ontario Court of Appeal have indicated that mandatory presumptions are more likely than reverse onus clauses to be found demonstrably justified under the section 1 *Oakes* test."[51]

On the strength of this analysis, the Ontario Commission then makes the following recommendation concerning proof of the elements of what it still calls "strict liability" offences:

> "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

49. *Ibid.*, Recommendation 5, p. 85.
50. Saskatchewan Report, p. 17.
51. Ontario Report, p. 37.

> 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."[52]

The upshot of this approach is that the prosecution can still obtain a conviction upon proof of the external elements (*actus reus*) of the offence. This is common to absolute and strict liability offences according to *Sault Ste. Marie* as well as the Saskatchewan and Alberta proposals. The difference with the latter formulations of strict liability is that under the proposed Ontario approach an accused would merely have to meet an evidential burden, that is, some evidence of reasonable care on the record *capable* of raising a reasonable doubt, in order to require the Crown to assume the normal burden of proof beyond a reasonable doubt on the negligence issue. Under this view, negligence is clearly a fault element in the offence, which the Crown may prove with the aid of the presumption upon proof of the external elements. Under *Sault Ste. Marie* and the Alberta and Saskatchewan approaches, the accused would have both an evidential and a persuasive burden on the negligence issue, cast in terms of a *defence* rather than as an element of the offence. In these latter cases, the practical burden on the Crown, where the accused seeks to prove no negligence, is to prove negligence only on a balance of probabilities, rather than beyond a reasonable doubt. It is submitted that the Ontario approach is sound policy, consistent with the principles of fundamental justice, and to be preferred over the present law and the other proposals which would merely restate that present law.

IV. *Defences to Provincial Offences*

Analysis of the common law reveals that defences to crimes can be divided into the following categories:[53] (a) *failure of proof defences,* where the accused argues that the Crown has failed to prove an element of the offence (for example, evidence of automatism, alibi, physical compulsion and impossibility can be said to "negate" proof of the external elements, while evidence of mistake of fact, intoxication and automatism may negate proof of the mental elements); (b) *justifications,* where a rule applies in the circumstance to legalize the otherwise criminal conduct (self-defence, defence of property, lawful authorization, etc.); (c) *excuses,* where an accused suffers from some medical or situational incapacity recognized by law which vitiates his or her control over the

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52. *Ibid.*, p. 53.
53. For a full discussion of this classification of defences, see Bruce P. Archibald, "The Constitutionalization of the General Part of Criminal Law", 1988, 67 Can. Bar. Rev. 403.

otherwise criminal conduct (insanity, automation, duress, necessity etc.); and (d) *non-exculpatory defence,* where the elements can be proved and the conduct is not justified or excused, but public policy recognized by law prevents conviction (procedural defences such as limitation periods, or defences such as abuse of process, or state induced error). At the federal level, many of these defences have been codified for nearly a century, while others have been left to develop as matters of common law.[54] At the provincial level, where there has been no substantive codification, the nature of these various defences and their applicability to provincial offences is sometimes difficult to determine.

The failure of proof defences have not been codified even at the federal level, but there is abundant Canadian case law discussing the nature of the elements of offences and how they are to be proved. Of course, any defences relating to failure to prove the mental elements of offences, such as simple mistake of fact, intoxication and mental disorder short of insanity, will not be available for provincial strict or absolute liability offences where subjective mental elements need not be proved.[55]

Common law justifications, excuses and non-exculpatory defences are in principle applicable in relation to provincial offences. Unlike the legislation in many provinces, the present Ontario Provincial Offences Act makes this proposition explicit in its section 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 to offences except in so far as they are altered by or inconsistent with this or any other Act."[56]

However, since many of these defences have been restated in the federal *Criminal Code*, Canadian jurists have by and large abandoned consideration of the ancient English case law in which these defences have their roots. While the *Criminal Code* reformulations are thus not technically applicable to provincial offences, sometimes courts have held that the Criminal Code provision is a current and valid statement of the common law rule which is relevant to the provincial case at hand.[57] In other cases, such as duress and mistake of law, it appears that the *Criminal Code* formulation and the developments in the common law are divergent, and that the common law rule is applicable to the provincial offence under consideration.[58]

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54. On the relationship between codified and common law defences see *R.* v. *Kirzner* (1977), 1 C.R. (3d) 138; 38 C.C.C. (2d) 131 (S.C.C.).
55. The Saskatchewan Report makes this point at pp. 13-14.
56. R.S.O. 1980, c. 400.
57. *R* v. *MacDougall,* [1982] 2 S.C.R. 605; (1982) 1 C.C.C. (3d) 65; 31 C.R. (3d) 1.
58. *R* v. *Cancoil Thermal Corp. and Parkinson* (1986), 27 C.C.C. (3d) 295; 52 C.R. (3d) 188 (Ont. C.A.) (mistake of law); *R* v. *Pacquette* (1976), 30 C.C.C. (2d) 417 (S.C.C.) (duress), and *R.* v. *Morrison and McQueen* (1980), 54 C.C.C. (2d) 447 (Ont. Dist. Ct.).

The Ontario and Saskatchewan proposals present a simple and clean solution to this confusing problem of the sources and scope of defences to provincial offences. The Ontario proposal reads as follows:

> "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 or an act or omission, or a defence to an offence, should be available to a person charged with a provincial offence, except in so far as it is altered by or inconsistent with any other Act" (Emphasis added).[59]

This has the advantage of making uniform the federal and provincial law on defences, while leaving open the possibility of developments in the common law and reform to the codified law. The Saskatchewan provision is essentially identical.[60] Unfortunately, the Alberta proposals do not incorporate the *Criminal Code* provisions, and might increase confusion by introducing special provincial rules on the defence of state induce error of law and by abolishing the possible use of the insanity defence for provincial offences.[61] The Ontario and Saskatchewan approach is to be commended as a practical solution, eminently advisable for adoption in other provinces.

The issue of burdens of proof also arises in relation to defences to provincial offences. The general criminal law rule is that, subject to limited statutory exceptions, the Crown bears the burden of proving guilt beyond a reasonable doubt not only in relation to the elements of the offence, but also in relation to any justifications or excuses which have been made live issues through compliance with a simple evidential burden upon the defence. That is, the Crown need not disprove all defences in the abstract, but need only disprove beyond a reasonable doubt those justifications or excuses in relation to which there is sufficient evidence to put the matter before a jury. In relation to most non-exculpatory defences, the accused bears the burden on a balance of probabilities of proving the existence of circumstances which would disentitle the Crown to its conviction. This is the general framework of analysis applicable to federal and provincial offences which, in broad outline, has been found constitutionally valid by the Supreme Court of Canada.[62]

Special statutory rules concerning the burden of proof have been introduced in relation to some defences to provincial offences. The

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59. Ontario Report, pp. 51 and 54.
60. Saskatchewan Report, p. 18.
61. Alberta Report, Recommendations 6-9, pp. 85-89.
62. See *R.* v. *Mack* (1988), 44 C.C.C. (3d) 513; 67 C.R. (3d) 1, and Archibald, *supra,* footnote 53 at pp. 442-452.

present Ontario rule in section 48(3) of the Provincial Offences Act reads:

> "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 [it] does not operate in favour of the defendant, whether or not it is set out in the information".[63]

Those provinces which have adopted by reference the summary conviction procedures in the *Criminal Code* for the enforcement of their provincial offences are governed by an analogous rule in *Code* section 794.[64] In that provision, however, the list of defences in relation to which the burden of proof is said to be reversed is different. Unlike the Ontario rule, it includes "proviso" and "excuse", and omits "authorization".

The Ontario Law Reform Commission takes the position that this blanket reverse onus provision for defences is in contravention of the presumption of innocence enunciated in section 11(d) of the Charter, and is likely to be beyond redemption under Charter section 1. The Ontario proposals recommend that the provision be repealed. The discussion of this issue in the Report is not entirely clear. It seems based on the premise that the general reverse onus provisions are applicable primarily in licensing situations on the issue of whether the accused possessed the required license. In this context the Ontario Report states:

> "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."[65]

It therefore appears that the Ontario approach would remove any reverse onus in relation to the specific defences mentioned in Ontario Provincial Offences Act, s. 48 and that general principles would operate to prevent shifting of burdens to the accused on anything other than non-exculpatory defences, unless an enactment otherwise provided. The Alberta proposals would have the Crown bear the burden of disproving live common law defences, while shifting the burden to the accused the burden of proof on reasonable mistake of law.[66] This, of course, is consistent with the distinction made above between justifications and excuses on the one hand and non-exculpatory defences on the other. In

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63. *Supra,* footnote 56.
64. Criminal Code, R.S.C. 1985, c. C-46.
65. Ontario Report, p. 49.
66. Alberta Report, p. 84-87.

order to avoid the constitutional problems with using the general reverse onus in section 794 of the *Criminal Code,* those provinces which adopt the summary procedure provisions of the *Code* to enforce their provincial offences would be well advised to follow the Ontario lead, and exclude the applicability of section 794 to provincial offences.

V. *Penalties for Provincial Offences*

Sentencing is sometimes seen as a matter of criminal procedure, and penalties are often not discussed when looking at the substantive law governing liability for offences. Thus, it is not surprising that the Alberta and Saskatchewan proposals are silent on this issue. On the other hand, it is the sentence which gives practical meaning to a finding of guilt. Moreover, in analyzing the principles of fundamental justice under section 7 of the *Charter*, and the concept of cruel and unusual punishment under section 12, the Supreme Court of Canada directs us to the nature of the stigma of the penalty and whether there is proportionality between the seriousness of the offence (including degrees of culpability) and the seriousness of the punishment.[67] It is therefore significant and appropriate that the Ontario Law Reform Commission proposals address not only the fault standard where imprisonment can be imposed, as discussed above, but also the problem of imprisonment for nonpayment of a fine.

Statutory provisions which impose mandatory periods of imprisonment in the event of failure to pay a fine are now constitutionally suspect.[68] Moreover, the practice of some judges of imposing a default order at the time of imposing a fine, without evidence of an accused's intention to default or inquiry into the accused's ability to pay, has been described as an abuse of judicial discretion.[69] Following the Canadian Sentencing Commission, the Ontario Report, "as a matter of principle and for ... constitutional reasons" firmly takes the position 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."[70]

To accomplish this end the Ontario Report proposes the statutory enactment of two policies. The first is that "the Provincial Offences Act

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67. See Bruce P. Archibald, "Crime and Punishment: the Constitutional Requirements for Sentencing Reform in Canada", (1988), 22 Revue juridique themis 307, and *Arkell* v. *The Queen,* Supreme Court of Canada, unreported, September 13, 1990.
68. See Keith Jobson and Andrew Atkins, "Imprisonment in Default and Fundamental Justice" (1986), 28 C.L.Q. 251.
69. R.E. Kimball, "In the matter of Judicial Discretion and the Imposition of Default Orders" 1990, 33 C.L.Q. 467.
70. Ontario Report, p. 49.

should be amended to ensure that only clearly wilful defaulters are imprisoned for failure to pay a fine."[71] The second is a provision to ensure that "unless it is unreasonable to do so, the fine option programme under ... the Provincial Offences Act, and the civil enforcement procedure ..., ought to be resorted to before a warrant of committal is issued."[72] By the adoption of such measures the Ontario Commission hopes to ameliorate the situation where 27% of Ontario's prison population is in jail for failure to pay a fine. The same results could be achieved in provinces where legislation inhibits use of imprisonment in default and where fine options programmes are available.[73] The straightforward approach proposed for Ontario, however, may be a better means of ensuring judicial adherence to more enlightened policies for the enforcement of provincial offences.

VI. *Conclusions*

The Ontario, Saskatchewan and Alberta law reform organizations are to be congratulated for their important steps toward the development of provincial offence regimes which are in accordance with sound policy and constitutional standards of fundamental principles of justice. The Ontario Law Reform Commission, in reliance on the progress made by law reformers who have gone before and in the light of evolving Charter litigation, has provided a most sophisticated yet simple model for putting liability for provincial offences on a principled basis. It is to be earnestly hoped that legislators in Ontario will adopt the proposals so carefully articulated by their Law Reform Commission. In the interests of the proper administration of justice, legislators in other provinces would be well advised to follow suit. If they are unwilling to take an active law reform stance on these questions of liability for provincial offences, *Charter* litigation may soon force the issue.

October 5, 1990

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71. *Ibid.*, p. 49.
72. *Ibid.*, p. 49.
73. See for example, the *Alternative Penalty Act*, Stats. N.S. 1989, c.2; and the Summary Proceedings Act, *supra*, footnote 1, s. 12.