REGULATORY OFFENCES, THE MENTAL ELEMENT AND THE *CHARTER*: ROUGH ROAD AHEAD

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I. INTRODUCTION

Recent Supreme Court of Canada decisions[1] and a spate of lower court decisions[2] interpreting and applying section 7 and subsection

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[1] *E.g.*, *Reference re section 94(2) of Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, 48 C.R. (3d) 289 [hereinafter *Motor Vehicle* cited to C.R.]; *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321 [hereinafter *Oakes* cited to C.C.C.]; *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118 [hereinafter *Vaillancourt* cited to C.C.C.]; *R.* v. *Holmes*, [1988] 1 S.C.R. 914, 41 C.C.C. (3d) 497 [hereinafter *Holmes* cited to C.C.C.]; *R.* v. *Stevens*, [1988] 1 S.C.R. 1153, 51 D.L.R. (4th) 394; *R.* v. *Whyte*, [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97 [hereinafter *Whyte* cited to C.C.C.]; *R.* v. *Schwartz* (1988), 88 N.R. 90, 66 C.R. (3d) 251 (S.C.C.) [hereinafter *Schwartz* cited to N.R.]; *R.* v. *Wigglesworth* (1987), 37 C.C.C. (3d) 385, 60 C.R. (3d) 193 (S.C.C.) [hereinafter *Wigglesworth* cited to C.C.C.]; *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385 [hereinafter *Big M* cited to C.C.C.]; *R.* v. *Tutton and Tutton* (1989), 98 N.R. 19, 69 C.R. (3d) 289 (S.C.C.) [hereinafter *Tutton* cited to N.R.]; *Irwin Toy Ltd* v. *Quebec (Attorney-General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Irwin Toy* cited to D.L.R.]; *Edwards Books and Art Ltd* v. *R* [1986] 2 S.C.R. 713, 30 C.C.C. (3d) 385 [hereinafter *Edwards Books* cited to C.C.C.].

[2] *See, e.g.*, *R.* v. *Gray* (1988), 66 C.R. (3d) 378, [1989] 1 W.W.R. 66 (Man. C.A.) [hereinafter *Gray* cited to W.W.R.]; *R.* v. *Burt* (1987), 60 C.R. (3d) 372, [1988] 1 W.W.R. 385 (Sask. C.A.) [hereinafter *Burt* cited to C.R.]; *R.* v. *Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295, 52 C.R. (3d) 188 (Ont. C.A.) [hereinafter *Cancoil* cited to C.R.]; *R.L. Crain Inc.* v. *Couture* (1983), 6 D.L.R. (4th) 478, 10 C.C.C. (3d) 119 (Sask. Q.B.) [hereinafter *Crain* cited to D.L.R.]; *Smith, Kline and French Laboratories Ltd* v. *Canada (Attorney-General)* (1986), [1987] 2 F.C. 359,

11(d) of the *Canadian Charter of Rights and Freedoms*[3] have thrown into doubt the future existence of regulatory offences[4] in Canada, as we now know them. Although these decisions have not directly addressed or struck down such integral regulatory offence forms as the strict liability offence with the due diligence defence[5] or, of less importance, the absolute liability offence[6] with penalties short of imprisonment, the legal territory immediately surrounding them is quickly being judicially "staked out", so that, by implication, these forms have become suspect, and highly susceptible to successful *Charter* challenges.

Regulatory offences are the main coercive mechanisms employed by Canadian governments to implement public policy objectives[7] outside the criminal[8] sphere. The forms of regulatory offence currently most prevalent (absolute and strict liability) were originally created by

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34 D.L.R. (4th) 584 (A.D.) [hereinafter *Smith, Kline* cited to D.L.R.]; *Abbotsford Taxi Ltd* v. *Motor Carrier Comm'n (B.C.)* (1985), 23 D.L.R. (4th) 365 (B.C.S.C.) [hereinafter *Abbotsford Taxi*]; *Balderstone* v. *R.* (1983), 8 C.C.C. (3d) 532, [1983] 6 W.W.R. 438 (Man. C.A.); *R.* v. *Videoflicks Ltd* (1984), 14 D.L.R. (4th) 10, 15 C.C.C. (3d) 353 (Ont. C.A.) [hereinafter *Videoflicks* cited to C.C.C.]; *R.* v. *Maidment* (1984), 7 D.L.R. (4th) 171, 10 C.C.C. (3d) 512 (N.S.S.C.A.D.) [hereinafter *Maidment* cited to C.C.C.]; *R.* v. *Ireco Canada II Inc.* (1988), 43 C.C.C. (3d) 482, 65 C.R. (3d) 160 (Ont. C.A.) [hereinafter *Ireco* cited to C.C.C.]; *R.* v. *Alston* (1985), 22 C.C.C. (3d) 563, 36 M.V.R. 67 (B.C.C.A.) [hereinafter *Alston* cited to C.C.C.]; *R.* v. *Metro News Ltd* (1986), 32 D.L.R. (4th) 321, 29 C.C.C. (3d) 35 (Ont. C.A.) [hereinafter *Metro News* cited to D.L.R.]; *R.* v. *Westfair Foods Ltd (Supervalu)* (1985), 16 D.L.R. (4th) 668, 18 C.C.C. (3d) 178 (Sask. Q.B.) [hereinafter *Westfair* cited to D.L.R.]; *Re Seaboyer and the Queen* (1987), 61 O.R. (2d) 29, 37 C.C.C. (3d) 53 (C.A.) [hereinafter *Seaboyer* cited to C.C.C.].

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

[4] The term "regulatory offences" is admittedly somewhat ambiguous. It is used in this article to describe penal offences outside the criminal sphere adjudicated upon by the ordinary courts which are designed to protect the public welfare, and which normally do not require proof of subjective intent to obtain a conviction. This definition is based primarily on the analysis of Dickson J. (as he then was) in *R.* v. *City of Sault Ste Marie*, [1978] 2 S.C.R. 1299 at 1324-28, 40 C.C.C. (2d) 353 at 373-75 [hereinafter *Sault Ste Marie* cited to C.C.C.].

[5] *Ibid.* at 373-74; strict liability offences are defined as those offences where an accused will be convicted upon proof of the *actus reus*, unless the accused establishes on a balance of probabilities that due diligence or reasonable care was exercised, or that a reasonable mistake of fact occurred.

[6] *Ibid.* at 374; absolute liability offences are defined as those where the accused will be convicted upon proof of the *actus reus*.

[7] Law Reform Commission of Canada, POLICY IMPLEMENTATION, COMPLIANCE AND ADMINISTRATIVE LAW, Working Paper 51 (Ottawa: The L.R.C.C., 1986) at 38.

[8] The "criminal sphere" will be taken in this article to denote the *Criminal Code*, R.S.C. 1985, c. C-46, and other legislation promulgated solely pursuant to the federal power to legislate with respect to the criminal law (*i.e. Constitution Act, 1867*, s. 91(27)). The author fully supports efforts to develop a more analytically sound (as opposed to constitutionally sound) basis for the distinction between criminal and regulatory offences.

courts and legislatures in an attempt to address behaviour which was not subjectively intended but was nevertheless potentially harmful.[9] Traditional criminal offences — where the prosecution is required to establish beyond a reasonable doubt both the *actus reus* and the *mens rea* of the offence — have proven to be impractical in this regard, because of the limited scope of behaviour they address (that is, subjectively intended behaviour) and the virtual impossibility of the prosecution being able to prove fault in regulatory contexts (that is, where only the accused is likely to have the information upon which a finding of fault could be based).

Strict and absolute liability offences are used in a wide variety of social contexts, including transportation of dangerous goods,[10] environmental protection,[11] worker health and safety,[12] and consumer protection,[13] to name but a few. There are an estimated 97,000 regulatory offences created by federal statutes alone,[14] and, indicative of the seriousness with which today's legislatures view regulatory misconduct, the penalties for some offences included in these regimes can be severe — for example, it is not uncommon now to see environmental offences with both enormous fines and imprisonment available as penalties.[15]

The position taken in this paper is that, if current regulatory offence structures are struck down by the courts, the entire regulatory approach to implementation of public policy objectives could be seriously and detrimentally affected, and indeed, undermined. Given the pervasiveness of the regulatory offence mechanism, the impact of unfavourable judicial decisions on the regulatory landscape of Canada is potentially enormous. Whether or not this bleak scenario will

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[9] For a more detailed discussion on this point, *see infra* THE ORIGIN AND DEVELOPMENT OF REGULATORY OFFENCES.

[10] *See, e.g., Transport of Dangerous Goods Act*, S.B.C. 1985, c. 17, Part 5 in particular.

[11] *See, e.g., Lands and Forests Act*, R.S.N.S. 1967, c. 163; the nature of the regulatory offences contained therein are discussed in *Maidment, supra*, note 2. *See also Ontario Water Resources Act*, R.S.O. 1980, c. 361; the nature of the regulatory offences contained therein (as in R.S.O. 1970, c. 332) are discussed in *Sault Ste Marie, supra*, note 4.

[12] *See, e.g., Occupational Health and Safety Act*, R.S.O. 1980, c. 321; the nature of the regulatory offences contained therein are discussed in *Cancoil, supra*, note 2.

[13] *See, e.g., Combines Investigation Act*, R.S.C. 1985, c. C-34; the nature of the regulatory offences contained therein (as in R.S.C. 1970, c. C-23) are discussed in *Westfair, supra*, note 2.

[14] *Supra*, note 7 at 38. The author highly recommends that more statistical studies be undertaken in order to gain an appreciation of the magnitude of federal and provincial regulatory offences currently in legislation, the penalties attached, dispositions, etc. Only when such information has been accumulated and analyzed will it be possible to make informed legal reforms in this area.

[15] *E.g., The Environment Act*, S.M. 1987-1988, c. 26, s. 33.

transpire is, at first instance, largely in the hands of the Canadian courts. That is where the constitutionality of regulatory offences will be decided over the next short period, building on the foundation already provided by the *Charter* and recent judicial interpretations of its pertinent provisions.

A flexible and sensitive approach by courts to section 7 and subsection 11(d) *Charter* challenges concerning regulatory offences could salvage the most important forms of these offences. On the other hand, an overly rigourous judicial application of the principles contained in the recent decisions could lead to the striking down of key types of regulatory offences, significantly impeding the ability of administrators to impose high standards of care and thus protect the public welfare. From the standpoint of achieving effective, expeditious and fair regulatory regimes, such a result would turn the legal clock back to the early nineteenth century, before the hard-fought solutions to many of the inadequacies of the criminal approach had been won. The road past the halfway house at *Sault Ste Marie*, via recent Supreme Court of Canada decisions, could be very rough indeed for regulatory offences.

How is the regulatory approach put into jeopardy by section 7 and subsection 11(d) of the *Charter*? The basic elements of the current situation are set out here, and elaborated upon more fully in the body of the paper. The general section 7 right — not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice — has been interpreted by the Supreme Court of Canada in *Motor Vehicle* to mean that in cases where the state resorts to restrictions of liberty, such as imprisonment, to assist in the enforcement of even a "mere provincial regulatory offence", then at the very least, a defence of due diligence must be made available to an accused. To paraphrase the views of the Supreme Court of Canada concerning section 7, there is a minimum mental state as an essential element of all offences where there is a potential loss of liberty; that minimum mental state is objective negligence (that is, the accused's conduct must be considered to have fallen below the standard of care of a reasonable person).

While judicial pronouncements concerning section 7 have gone a long way towards articulating this minimum acceptable mental element, they have not conclusively determined *how* the mental element must be established: is the onus on the Crown to prove negligence? Will the defence of due diligence withstand *Charter* challenges? On this issue the subsection 11(d) presumption of innocence comes into play. In *Oakes*, a narcotics trafficking case, the Supreme Court of Canada held that the presumption of innocence guarantee requires that the prosecution prove every essential element of the offence beyond a reasonable doubt. A reverse onus provision, where an accused must disprove the existence of some element of the offence on the balance of probabilities violates this presumption since it would be possible for an accused to be convicted despite a reasonable doubt as to the existence of that element of the offence. Applying this reasoning to

strict liability offences as we now know them (where an accused can escape conviction by establishing a due diligence defence on the balance of probabilities), it would appear that *prima facie* such offences will not pass muster under subsection 11(d), given that the due diligence defence would probably be characterized as similar in effect to a reverse onus clause.

There remains the question of whether strict or absolute liability offences which are in violation of section 7 and/or subsection 11(d) could be saved by section 1 as reasonable limits in a democratic society. In this regard, court decisions to date have articulated rigourous tests for determining these reasonable limits. The Supreme Court of Canada has explicitly stated that arguments based on administrative efficiency will generally not be sufficient grounds for an abrogation of *Charter*-protected rights.[16] Ironically, the language used and the tests developed by the Court in determining the constitutionality of absolute liability and *Criminal Code* offences may force it to reach negative conclusions regarding the constitutionality of strict liability offences.

Although the removal of absolute liability offences with imprisonment could impede effective enforcement of regulatory regimes, it is the potential loss of strict liability offences which could prove to be the most detrimental to the continued operation of these systems. The strict liability offence provides the government with a practical method of imposing a high standard of care (that of a reasonable person) on regulated entities. Arguably, persons are more likely to maintain high standards of care if they know that they will be prosecuted not only when they intended their acts, but also when their acts can be characterized as negligent.[17] There appears to be little indication that such offences are demonstrably unfair to an accused engaging in regulated activities since, if an accused has done everything a reasonable person would do, he or she could escape conviction upon establishment of this fact. Given that in most cases, only the accused would be in a position to show that he or she had done everything possible to meet the standard, it seems justifiable that the burden of proving this should rest on the accused.[18]

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[16] *See, e.g., Motor Vehicle, supra*, note 1, *per* Lamer J.

[17] *See* D. Stuart, CANADIAN CRIMINAL LAW, 2d ed. (Toronto: Carswell, 1987) at 194:

> A strong case can be made for punishing some forms of negligent conduct on the basis of general and, less convincingly, specific deterrence. The imposition of criminal sanctions rests heavily on the admittedly unproven notion of deterrence and there seems little reason for not using the same rationale to penalize certain forms of negligent conduct. *We can and do teach ourselves to take care when we know that, if we do not, we will be punished. We are often capable of becoming less inadvertent.* [emphasis added]

Stuart further elaborates on justifications for use of an "objective negligence" fault standard in his text (at 195).

[18] In *Sault Ste Marie, supra*, note 4, Dickson J. (as he then was) made this point.

A finding that such a burden would violate subsection 11(d) and could not be saved as a reasonable limit under section 1 might lead courts or legislatures to impose an evidential rather than a persuasive burden with respect to due diligence — an accused could escape conviction by raising evidence which would provide a reasonable belief that due diligence had been exercised. This evidential burden has been considered less offensive under the *Charter*.[19] Given the accused's position of superior knowledge with respect to his or her own activities, and the informational disadvantage of the prosecution in this situation, it is not capricious to suggest that raising a reasonable doubt would be an easier task for the accused in most situations than for the prosecution. As a result, it is arguable that few convictions would arise, and that the ability of government to impose a high standard of care on regulatees could be severely compromised.

Even in light of this preliminary description and analysis of the current situation, it is apparent that the recent cases raise many important and fundamental issues, including:

1. What is the future of absolute liability offences under the *Charter*? Will only those which have the potential punishment of imprisonment be in violation of the *Charter* in most circumstances?
2. How will the *Charter* affect strict liability offences? Again, will only those strict liability offences which have the potential penalty of imprisonment be in violation of the *Charter*? Will the due diligence defence survive? Will regulatory *mens rea* offences be necessary?
3. Will *Charter* decisions in this area lead to widespread adoption of different regulatory offences for persons and corporations?
4. Will courts read down regulatory offences in order to save them under the *Charter*? If so, how?
5. How will the changes wrought by the *Charter* affect regulatory enforcement? What can administrators do to minimize the negative impact?
6. What can legislatures do?

In an attempt to address these and other related issues the article is organized in the following manner. First, the legal situation with respect to regulatory offences prior to the introduction of the *Charter* is described. In this section, the origin and development of regulatory offences in the nineteenth century are briefly examined and traced to the landmark 1978 decision of the Supreme Court of Canada, *Sault Ste Marie*. This decision, and its classification of offences into absolute, strict and "true crimes" categories, are analyzed in some detail. Then the period after this decision and before the *Charter* is described, so that the reader will gain an appreciation of how workable the *Sault*

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[19] *Ireco*, *supra*, note 2.

Ste Marie classification system has been in practice. Next, a general overview of the *Charter* is undertaken. Following this, the implications of court decisions which have interpreted sections 7, 11(d) and 1 are discussed as they apply to absolute liability and strict liability offences. The implications for regulatory enforcement are speculated upon; possible responses by administrators are suggested, as are possible legislative responses to this *Charter* analysis. Finally, some general conclusions and broad observations are provided.

Taken as a whole, it is apparent that the introduction of the *Charter* has forced a wholesale re-examination of all offences. The old "criminal" and "regulatory" labels are by themselves virtually meaningless in the *Charter* era. What matters now are the penalties imposed, the mental element and the procedures required to obtain conviction, analyzed in light of the purposes that the offences are designed to achieve. In some respects, this is undoubtedly a welcome development: now, for example, the statement in *Sault Ste Marie* that "there is a generally held revulsion against punishment of the morally innocent",[20] which before the introduction of the *Charter* carried only persuasive weight, has largely been elevated by section 7 interpretation to a constitutional requirement. As a result, a *Criminal Code* absolute liability offence with imprisonment as a penalty is, in theory, just as likely to fall pursuant to a section 7 challenge as is a provincial motor vehicle absolute liability offence with imprisonment as a penalty.

Unfortunately, however, the values which the *Charter* embodies are not necessarily equally appropriate to all types of offences. The presumption of innocence now codified in subsection 11(d), for example, is a traditional principle of criminal law developed in the context of, and particularly well suited to, regimes based on notions of subjective intent and personal fault such as the *Criminal Code*. On the other hand, the presumption of innocence is arguably less relevant in a regulatory setting, where objective negligence rather than subjective intent is the requisite mental element, and proving the offence is notoriously difficult. It was in light of these factors that Dickson J. (as he then was) in *Sault Ste Marie* found the presumption of innocence inapplicable to public welfare (regulatory) offences. Through section 1, it is still possible that due diligence defences based on the balance of probabilities will be upheld, but the elevation of the presumption of innocence to *Charter*-protected status has left this possibility a last-ditch option rather than an accepted proposition in its own right.

Given the rather gloomy overtones to the foregoing summary of the current situation, it may seem surprising to some that the author (cautiously) predicts a generally healthy and prosperous future for regulatory offences in Canada. Three reasons for this positive outlook are put forward in the paper:

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[20] *Supra*, note 4 at 363.

(1) a reasonable interpretation of the latest Supreme Court of Canada decisions could salvage the strict liability offence for use in most regulatory contexts;
(2) creative use of certain existing sanctioning procedures should largely be able to compensate for the anticipated regulatory offence *Charter* casualties; and
(3) a number of legislative initiatives are possible which, if implemented, would do much to minimize the negative impacts on *Charter* decisions.

In the final analysis, what may emerge is a more rational and sophisticated hierarchy of offences. These points are elaborated upon in the article.

II. The Origin and Development of Regulatory Offences

A. *Early Regulatory Offences*

Although it might be thought that regulatory offences are a twentieth century phenomenon, in reality they, or earlier versions thereof, have existed in England since at least the fourteenth century.[21] The protection of the public from impure or adulterated food, for example, has necessitated regulatory action from early times to the present.[22] There are reports of a conviction in 1387 of a baker who put an iron rod in a loaf of bread (perhaps to increase the weight, and thus the price).[23] A commentator explains that:

> [I]t is uncontested that one may be guilty of a violation by merely possessing the adulterated articles or of exposing them for public sale. The offense is complete without actual injury to anyone. The probability of damage suffices.[24]

Even in these fourteenth century offences one can see characteristics bearing a striking resemblance to twentieth century regulatory offences. Note first that, as with many modern regulatory offences and in contrast to most criminal offences, the *potential* for harm rather than actual harm to society was all that was necessary to attract sanction. Second,

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[21] *See generally* J. Starrs, *The Regulatory Offense in Historical Perspective* in G. Mueller, ed., Essays in Criminal Science (New Jersey: Rothman, 1961) 233.

[22] *Ibid.* at 260. *See also* I. Paulus, The Search for Pure Food: A Sociology of Legislation in Britain (London: Martin Robertson, 1974).

[23] Starrs, *ibid.* at 261, citing Riley, Memorials of London and London Life in the 13th, 14th and 15th Centuries (1868) at 498.

[24] Starrs, *ibid.*

and again as with modern regulatory offences, proof of intent was not necessarily essential to conviction.[25]

However, by the nineteenth century the general rule had been established and accepted that *mens rea* was a required element for conviction of all crimes.[26] In the face of a newly industrialized Britain which increasingly mechanized and de-personalized the workplace and generally resulted in appalling living conditions for many, the need for exceptions to this rule became more and more pressing. Ingeborg Paulus, in an informative article entitled *Strict Liability: Its Place in Public Welfare Offences*,[27] describes the intolerable legal and practical situation which had arisen in nineteenth-century Britain:

> Some one hundred years ago people starved to death; were accidentally killed during work; lived in indescribably unhealthy and filthy conditions and, as a consequence, died of infectious diseases; . . . were poisoned or made ill by unwholesome food — *all because means were lacking to prove that those who were exploitative or negligent were in fact guilty of morally reprehensible crimes.* This history of the Passenger Acts, factory legislation, sanitary and public health regulations, and the food and drug law, clearly shows that the overall abuses resulting from the industrial revolution, could *only be curbed by a compulsorily enforced criminal law which suspended the requirement of mens rea.*[28]

Paulus looks in detail at the development of nineteenth-century food and drug legislation. She provides documentation of the mid-1800s period, and describes the great difficulties in enforcing these laws, caused in large part by a general requirement of *mens rea*.[29] While several amendments to improve the likelihood of enforcement were passed in this period, complete removal of the *mens rea* requirement was resisted, and apparently considered "too novel".[30] Finally, in an

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[25] In the fourteenth century, reported cases indicate that a defence of lack of knowledge of adulteration was a successful ground for acquittal (Starrs, *ibid.* at 262, citing Riley at 241), but there were other offences for which this lack of knowledge defence was insufficient for acquittal (Starrs, *ibid.*, citing Riley at 328).

L. Radzinowicz and J. Turner, eds, *Editorial Note* in MENTAL ABNORMALITY AND CRIME (1944) (Nendeln, Liechtenstein: Kraus Reprint, 1968) at *x* comment that:

> Legal history shews us that in the earliest period of our [English Common] law, before the maxim as to *mens rea* became established, the mental processes of the wrongdoer were taken into account very little, if at all.

They explain that generally, ". . .a man had to pay for what he had done, and it made no difference what he may have been thinking or intending at the time". Apparently changes to this rule of absolute liability began as early as the twelfth century (*ibid.* at *xi*).

[26] Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND (1809), Book IV, 15th ed., c. 15 at 21.

[27] (1977-78) 20 CRIM. L.Q. 445.

[28] *Ibid.* at 451 [emphasis added].

[29] *Ibid.* at 451 and 453.

[30] *Ibid.* at 452.

1873 Queen's Bench decision, *Fitzpatrick* v. *Kelly*,[31] Blackburn J. noted that the preamble to the amended food and drug statute then in question specifically mandated "that the practice of adulterating articles of food and drink required to be repressed by more effectual laws",[32] and went on to interpret a subordinate clause in an offence provision as not necessitating proof of knowledge. Blackburn J. elaborated as follows:

> Whereas the first clause requires knowledge on the part of the seller, and makes it an offence to sell articles adulterated so as to be injurious to health. . .the second clause does not require knowledge. . ..[33]

In spite of the ensuing uproar caused by this decision and by Parliament's subsequent attempts to decrease further the *mens rea* requirement (Paulus notes particularly heavy opposition from the legal and business communities[34]), more extensive use of absolute liability offences in food and drug legislation eventually prevailed.[35] Apparently, after initial resistance, "the Act came to be perceived over time to be in the best interest of the business community itself."[36]

From a general perusal of studies examining regulatory activity[37] and judicial decisions in this period, it can be seen that the struggle to remove proof of *mens rea* in food and drug legislation was but one front in a larger battle. Legislators and the courts were urging recognition of the need for removal of the *mens rea* requirement in much nineteenth-century regulatory legislation. Commentators point to the 1846 decision of *R.* v. *Woodrow*[38] as being one of the first where courts found that proof of intent was not necessary in cases of adulterated products.[39] The *Woodrow* decision dealt with an alleged adulteration of tobacco contrary to the provisions of the *Excise Regulation Act*.[40] Parke B. interpreted the offence as not requiring proof of

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[31] *Fitzpatrick* v. *Kelly* (1873), L.R. 8 Q.B. 337, 28 L.T. 558 (followed in *Roberts* v. *Egerton* (1874), L.R. 9 Q.B. 494, 30 L.T. 633) [hereinafter *Fitzpatrick* cited to L.R. Q.B.].

[32] *Ibid.* at 341.

[33] *Ibid.*

[34] *Supra*, note 27 at 453.

[35] *Ibid.* at 454.

[36] *Ibid.*

[37] *See generally* O. MacDonagh, A PATTERN OF GOVERNMENT GROWTH 1800-60: THE PASSENGER ACTS AND THEIR ENFORCEMENT (London: Macgibbon & Kee, 1961); B. Hutchins & A. Harrison, A HISTORY OF FACTORY LEGISLATION, 3d ed. (London: King & Son, 1926); R. Lambert, SIR JOHN SIMON, 1816-1904, AND ENGLISH SOCIAL ADMINISTRATION (London: Macgibbon & Kee, 1963).

[38] (1846), 15 M. & W. 404, 153 E.R. 907 (Ex. Div.) [hereinafter *Woodrow* cited to E.R.].

[39] *See, e.g.*, Law Reform Commission of Canada, STUDIES ON STRICT LIABILITY (Ottawa: Information Canada, 1974) at 171 and 183, n. 74.

[40] *Excise Regulation Act* (U.K.), 5 & 6 Vict., c. 93.

knowledge. He entertained arguments concerning injustices caused by removal of the necessity of proof of *mens rea* and concluded:

> It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so.[41]

Here we see the Court explicitly engaging in an exercise of balancing individual and collective interests — the collective interests of society as a whole are found to prevail. By the late 1800s, there was a well-accepted judicial exception to the requirement of proof of *mens rea* in criminal offences for "a class of acts. . .not criminal in any real sense, but. . .acts which in the public interest are prohibited under a penalty".[42] Thus, for example, Wright J. in the 1895 Queen's Bench decision *Sherras* v. *De Rutzen*[43] states as follows:

> There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.[44]

It is interesting to note that as the English courts were developing exceptions to the requirement of *mens rea* for regulatory offences, so too were the Americans — and independently from English efforts, apparently.[45] This suggests that in several jurisdictions, the criminal law personal fault approach to liability was crumbling in the face of eighteenth-century industrialization.

By removing the necessity for proof of subjective intent, a higher standard of responsibility was imposed upon persons engaging in regulated activity and on their employees. In effect, regulated persons could be held liable not only for intentional behaviour, but also for unintentional behaviour which should have been anticipated. Further, even behaviour of which they were not aware, or which they had attempted to avoid could give rise to liability. This absolute approach to liability was problematic in that it was arguably too all-encompassing and harsh — it didn't provide relief even to those persons who had done everything that a reasonable person would have to avoid the

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[41] *Woodrow*, *supra*, note 38 at 913.

[42] *See Sherras* v. *De Rutzen*, [1895] 1 Q.B. 918 at 922, [1895-99] All E.R. Rep. 1167 at 1169, *per* Wright J. [hereinafter *Sherras* cited to Q.B.].

[43] *Ibid.*

[44] *Ibid.* at 921.

[45] *See* F.B. Sayre, *Public Welfare Offences* (1933) 33 COL. L. REV. 55 at 62.

violation. Since 1905 in New Zealand,[46] and the 1930s in Australia,[47] there has existed a line of court decisions recognizing a defence of reasonable mistake of fact for regulatory offences which do not require proof of *mens rea*. There was also haphazard recognition of this limited defence by some lower Canadian courts in the 1960s and early 1970s.[48] However, it was not until 1978, with the Supreme Court of Canada decision in *Sault Ste Marie*, that Canadian courts formally recognized the defences of reasonable mistake of fact and due diligence as a middle ground between absolute and *mens rea* offences.[49]

At the legislative level, from the beginning of the twentieth century to the 1970s, there were a number of attempts by provincial legislatures and Parliament to attenuate the harshness of absolute liability by excluding responsibility for non-negligent conduct. For example, since the early 1900s, motor vehicle legislation in Manitoba[50] and Alberta[51] has contained provisions allowing judges to dismiss certain charges where they are of the opinion that the offence was committed wholly by accident or misadventure and without negligence, and could not by the exercise of reasonable care or precaution have been avoided. Moreover, in the period 1968-1970, 24 pieces of federal legislation were amended to include due diligence defences.[52]

Although these examples suggest that the harshness of absolute offences was recognized by at least some Canadian legislators before the *Sault Ste Marie* decision of 1978, a 1974 study completed by the

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[46] *See R.* v. *Ewart* (1905), [1906] 25 N.Z.L.R. 709 (C.A.); *R.* v. *Strawbridge*, [1970] N.Z.L.R. 909 (C.A.).

[47] *See Maher* v. *Musson* (1934), [1934-35] 52 C.L.R. 100 (Aust. H.C.); *Proudman* v. *Dayman* (1941), [1943] 67 C.L.R. 536 (Aust. H.C.).

[48] *See, e.g., R.* v. *King* (1961), 129 C.C.C. 391, 34 C.R. 264, Mackay J.A. (Ont. C.A.); *R.* v. *McIver* (1965), 2 O.R. 475, 45 C.R. 401, Mackay J.A. (C.A.); *R.* v. *Custeau* (1972), 2 O.R. 250, 6 C.C.C. (2d) 179, Mackay J.A. (C.A.).

[49] *Supra*, note 4.

[50] *The Motor Vehicle Act*, S.A. 1911-1912, c. 6, s. 46, stated that:

> Upon any person being charged with an offence under any of the provisions of this Act, if the justice of the peace or magistrate trying the case be of the opinion that the offence was committed wholly by accident or misadventure and without negligence, and could not by the exercise of reasonable care or precaution have been avoided, such justice of the peace or magistrate may dismiss the complaint.

Note that the judge *may*, not *must*, dismiss the case. A version of this provision which is identical in all important respects can be traced through all the Alberta motor vehicle legislation between 1911 and the present. The current version is the *Highway Traffic Act*, R.S.A. 1980, c. H-7, s. 171.

[51] As with the Alberta legislation, the Manitoba *Motor Vehicle Act*, R.S.M. 1913, c. 131, s. 54, authorized a judge to dismiss a charge where he or she was of the opinion that the offence was committed wholly by accident or misadventure and without negligence, and could not by the exercise of reasonable care or precaution have been avoided. The current version of this provision (which applies only to limited cases of excess weight driving) is s. 230(2) of the Manitoba *Highway Traffic Act*, R.S.M. 1970, c. H-60, *as am.* S.M. 1976, c. 62, s. 48.

[52] STUDIES ON STRICT LIABILITY, *supra*, note 39 at 229-32.

Law Reform Commission of Canada revealed that an estimated 90 percent of regulatory offences were of an absolute responsibility nature.[53] Of federal regulatory offences examined in the study, only 27 percent were punishable by fines alone, while 73 percent had some possibility of imprisonment in addition to fines.[54]

In summary, research reveals that the "modern" versions of absolute liability offences are an invention of the judiciary of nineteenth-century Britain. These judges used the absence of clear wording with respect to intent in regulatory offences as justification for their actions. For the most part, the judges arrived at their conclusions only after noting that the objectives of such public welfare, non-criminal legislation would be defeated if proof of full *mens rea* were required. Courts were, in effect, responding to legislative and public concern about the abuses occurring in the then newly industrialized Britain, and were recognizing that by imposing absolute liability, a higher standard of care would be required of persons engaging in regulated activity. Gradually, there began to be some judicial and legislative realization that exculpation in cases where the accused had done everything reasonable would not defeat the objectives of regulatory legislation.

B. The Sault Ste Marie Decision

The *Sault Ste Marie* decision represented formal recognition by the Supreme Court of Canada of the strict liability middle category between absolute liability and criminal offences. The reasoning of the case is set out below in considerable detail because, although the decision itself pre-dates the *Charter*, the analysis contained therein is extremely relevant to the current debate on the future of regulatory offences.

In *Sault Ste Marie*, the municipality was charged pursuant to the *Ontario Water Resources Act*[55] that it had discharged, deposited, or caused or permitted to be discharged or deposited materials into a body of water which might impair the quality of that water. The penalty upon conviction for a first offence was a fine of not more than $5,000, and for each subsequent offence a fine of not more than $10,000, or imprisonment for not more than a year, or both fine and imprisonment.[56]

Dickson J. (as he then was), speaking for the Court, commenced his judgment by noting that "regulatory", "public welfare" offences

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[53] *Ibid.* at 10. It should be noted that the authors refer to what are now known as "absolute" liability offences as "strict" liability offences; STUDIES ON STRICT LIABILITY pre-dates the *Sault Ste Marie* case, with its absolute/strict/true crime classification scheme and terminology.

[54] *Ibid.* at 215-16, n. 52.

[55] Then R.S.O. 1970, c. 332, s. 32(1).

[56] *Sault Ste Marie*, *supra*, note 4 at 358.

such as the one at bar, as well as traffic infractions, sales of impure food, violations of liquor laws, and the like "are not criminal in any real sense, but are prohibited in the public interest".[57] He noted that, "[a]lthough enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application."[58]

Dickson J. observed that "[p]ublic welfare offences obviously lie in a field of conflicting values" in that, on the one hand, "[i]t is essential for society to maintain, through effective enforcement, high standards of public health and safety," but that on the other, "there is a generally held revulsion against punishment of the morally innocent".[59] He briefly reviewed the historical development of the absolute liability offence, stating that it evolved in mid-nineteenth-century Britain, and was a judicial creation founded on expediency which was now firmly embedded in the concrete of Anglo-American and Canadian jurisprudence.[60] According to Dickson J., there were two main arguments in favour of absolute liability.[61] First, protection of social interests requires a high standard of care, and persons are more likely to maintain those standards if they know that ignorance or mistake will not excuse them. Second, the difficulty of proving *mens rea* would impede enforcement and nullify the regulatory statutes.

Dickson J. felt, however, that the arguments against absolute liability were of greater force.[62] In particular, he stated unequivocally that "[absolute liability] violates fundamental principles of penal liability."[63] In addition, he stated that there was no evidence to support the claim that higher standards of care result from absolute liability: where people are already exercising every reasonable precaution, why would they bother to do more when it is no defence? Dickson J. noted that persons charged and convicted of absolute liability offences are subject to an unfavourable stigma, and must suffer loss of time, legal costs, exposure to the processes of the criminal law at trial and the opprobrium of conviction.[64] He concluded that the "administrative argument has little force".[65] He noted that some existing regulatory legislation authorized the judge to dismiss the case where he or she was of the opinion that there was no negligence and all reasonable care had been exercised.[66]

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[57] *Ibid.* at 357.
[58] *Ibid.*
[59] *Ibid.* at 362-63.
[60] *Ibid.* at 363.
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid.* at 364.
[65] *Ibid.*
[66] *Ibid.*

Dickson J. examined the solution proposed by several commentators that a "half-way house" between the two extremes of absolute liability and true crimes be created — an offence of negligence.[67] He reviewed the idea that the prosecution should prove the *actus reus*, but that the accused could escape liability by proving on the balance of probabilities that all due diligence had been exercised.[68] Dickson J. stated that the defence of due diligence could be derived from existing Canadian and other cases which had recognized a defence of reasonable mistake of fact.[69] On this point, some commentators[70] have criticized the judgment for confusing the distinction between a legal (also called "persuasive") burden of proof (where the accused is required to establish an element of an offence on a balance of probabilities) and an evidentiary burden (where the accused need only raise a reasonable doubt about an element of the offence). Even if this distinction was glossed over in analyzing the cases, there can be no doubt that the commentators in *Sault Ste Marie* explicitly favoured shifting the burden of proof of due diligence to the accused.[71]

In light of the "virtual impossibility in most regulatory cases of proving wrongful intention",[72] Dickson J. suggested that the correct approach was to relieve the prosecution of the burden of proving wrongful intention.[73] The burden of proving due diligence should fall upon the defendant "as he is the only one who will generally have the means of proof".[74]

Dickson J. specifically considered the presumption of innocence as embodied in the 1931 House of Lords' decision in *Woolmington* v. *Director of Public Prosecutions*,[75] reaffirming that in criminal cases there is no burden on the accused to prove his or her innocence.[76] That general principle was distinguished with respect to regulatory offences. "[I]t is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences."[77] As a result of making this distinction, Mr Justice Dickson concluded that there was no barrier in public welfare offences to

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[67] *Ibid.* at 364-65.

[68] *Ibid.* at 365.

[69] *Ibid.* at 366.

[70] *See, e.g.*, Stuart, *supra*, note 17 at 171-74; *see also* R. Mahoney, *The Presumption of Innocence: A New Era* (1988) 67 CAN. BAR REV. 1 at 50.

[71] *See Sault Ste Marie, supra*, note 4 at 365 where Dickson J. quotes, most notably, from works by Williams and Howard.

[72] *Ibid.* at 373.

[73] *Ibid.*

[74] *Ibid.*

[75] [1935] A.C. 462, 25 Cr. App. R. 72 (H.L.).

[76] *Sault Ste Marie, supra*, note 4 at 366-67.

[77] *Ibid.* at 367.

shifting the burden of proof to the accused to establish due diligence on the balance of probabilities.[78]

In adopting three categories of offences[79] — absolute, strict and *mens rea* — Dickson J. stipulated that public welfare offences would *prima facie* be in the strict liability category, unless words such as "wilfully" or "with intent" were specifically used to indicate *mens rea*.[80] A conclusion that an offence was one of absolute liability would only be reached when statutory language clearly indicated that "guilt would follow proof merely of the proscribed act".[81] Primary considerations in determining whether an offence is absolute include an examination of the overall regulatory pattern adopted by the legislature, the seriousness of the penalty and the precision of the language used.[82]

In applying this three-fold offence classification system to the case at bar, Dickson J. characterized pollution offences as "undoubtedly public welfare offences", not subject to the presumption of full *mens rea*.[83] Moreover, as valid provincial legislation, the *Ontario Water Resources Act* could not "possibly create an offence which is criminal in the true sense",[84] thus exempting the legislation from the criminal law *mens rea* standard. The verbs used in the offence (permit, cause, discharge, deposit) did not clearly indicate intent. Taking all these factors together, it was concluded that the pollution offence in question was of a strict liability nature. Although the test for negligence was clearly stipulated as objective (that is, reasonable care, involving consideration of what a reasonable person would have done in the circumstances), the judgment hints that this standard is somewhat variable depending upon the specific characteristics of the accused.[85] For example, it would appear that a municipality is in a different position than a non-governmental accused because it has legislative power which others lack.[86] Finally, Dickson J. noted that the availa-

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[78] *Ibid.* However, with the enactment of the *Charter*, the constitutional protection granted with respect to the presumption of innocence in s. 11(d) may preclude any such shifting of the burden of proof. See discussion *infra*.

[79] *Ibid.* at 373-74.

[80] *Ibid.* at 374.

[81] *Ibid.*

[82] *Ibid.*

[83] *Ibid.*

[84] *Ibid.* at 375. This constitutes an example of a constitutional rather than an analytical distinction between criminal and regulatory offences.

[85] *Ibid.* at 377.

[86] *Ibid.* This suggests that the real test of liability is whether a reasonable person *in the position of the accused* would have exercised the same degree of diligence. A great deal of latitude for recognition of individual circumstances is possible here: Was the situation in which the offence took place highly unusual? Was there some aspect of the accused (*e.g.*, weight, height, strength, mental development, education, etc.) which should be factored into determination of whether the accused's actions demonstrated reasonable care? In this way, subjective elements can be imported into an objective test. See discussion of *Tutton*, *infra* at 450ff.

bility of the defence to a corporation would depend on whether or not the due diligence was taken by those who are "the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself".[87]

It is clear that *Sault Ste Marie* was a milestone decision in Canadian judicial development in the articulation of regulatory offences as a category distinct from criminal offences. It is important to note that Mr Justice Dickson carefully took into account the presumption of innocence in criminal offences, the wide range of penalties attached to regulatory offences, fundamental principles of penal liability, the merits and drawbacks of shifting burdens of proof, and the practical impossibilities of requiring the prosecution to prove intent or negligence. Only after carefully weighing all these factors did the Court reach its conclusions.

C. *The Period Between Sault Ste Marie and the Charter*

While the *Sault Ste Marie* decision was undeniably a turning point in the Canadian approach to regulatory offences, in some respects it raised as many questions as it answered. Would courts find the suggested three-tier classification of offences practical? Had the Court sounded the death-knell for absolute liability offences? How would courts apply the due diligence and reasonable mistake of fact defences? Would the courts be overloaded, entertaining such defences? Was shifting the burden of proof too onerous for prosecutors? Was refuting a due diligence defence too onerous for prosecutors? Would legislators amend old legislation to maintain explicitly absolute liability offences? Would they explicitly include due diligence defences? To the best of this writer's knowledge, there has been no systematic study to gather and analyze such information.[88] What follows, then, is a modest accumulation of some evidence concerning these questions.

At the judicial level, according to one commentator,[89] the pre-1978 fixation with absolute liability as the only alternative to *mens rea* offences appears to have been halted by the *Sault Ste Marie* decision, and replaced by a conscientious preoccupation with strict liability responsibility and its due diligence defence. "The unmistakable pattern has been one of reclassification of previously absolute liability offences

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[87] *Ibid.* at 377-78. The issue of corporations and regulatory (criminal) liability is a complex one which will only tangentially be discussed in this paper. For a good recent discussion of vicarious and primary liability, their relation to absolute and strict liability offences and true crimes in a corporate setting, *see* D. Hanna, *Corporate Criminal Liability* (1989) 31 CRIM. L.Q. 452.

[88] The need for such a comprehensive study is undeniable. More research on the law in action would enhance our understanding of what is working and what is not, and on this basis informed legal reform can take place.

[89] Stuart, *supra*, note 17 at 178.

to allow the new reduced fault defence."[90] Some courts have continued to find offences to be of absolute responsibility,[91] but they appear to be a small minority.[92] One line of reasoning which has been used to defeat the *Sault Ste Marie* presumption in favour of strict responsibility and arrive at an absolute offence characterization can be paraphrased roughly as follows:

> Although *Sault* suggested that absolute liability should only be found where there is express language to this effect, if a statute specifically attached a due diligence defence to a particular offence, then other offences in the statute which did not expressly contain this defence should be held to be absolute.[93]

The problem with this approach is that it defeats Mr Justice Dickson's counsel that courts should only regard offences as absolute where the legislation *made it clear* that guilt would follow upon there being proof of the proscribed act.[94]

Just as there have been some breakdowns in the definitional distinctions between the strict and absolute liability categories, so too have there been occasional problems with the distinction between strict and *mens rea* offences. In the 1979 decision *Strasser* v. *Roberge*,[95] the majority held that provinces can create full *mens rea* regulatory offences, but only exceptionally should such offences be treated as truly criminal. Speaking for the majority, Beetz J. stated that the fact that a provincial regulatory offence contains an intentional element does not necessarily take it out of the strict liability category.[96] By maintaining that this was an intentional strict liability offence, the majority was able to conclude that the prosecution need not prove the

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[90] *Ibid.*

[91] *E.g.*, *R.* v. *Canadian International Paper Co.* (1983), 12 C.E.L.R. 121 (Ont. Co. Ct). The Court held that procedural breaches such as licensing requirement transgressions are absolute; potential application of the *Charter* was not discussed. *See also R.* v. *Grottoli* (1979), 43 C.C.C. (2d) 158 (Ont. C.A.); *R.* v. *Cappozzi Enterprises* (1981), 22 C.R. (3d) 249, 60 C.C.C. (2d) 385 (B.C.C.A.); *R.* v. *Morrison and MacKay* (1979), 31 N.S.R. (2d) 195, 52 A.P.R. 195 (S.C.A.D.); *R.* v. *Trophic Can. Ltd* (1981), 25 B.C.L.R. 211, 57 C.C.C. (2d) 1 (C.A.); *R.* v. *Malhotra*, [1981] 2 W.W.R. 563, 57 C.C.C. (2d) 539 (Man. Prov. Ct).

[92] *See* Stuart, *supra*, note 17 at 178.

[93] *See*, *e.g.*, the reasoning of Blair J.A. (Martin J.A. concurring) in *R.* v. *Grottoli*, *supra*, note 91 at 168. In *Grottoli* the legislation did not *make it clear* that guilt would follow upon mere proof of the act. Rather, the legislation made it clear that there *was* a due diligence defence for certain specified offences. Arguably, this does not exclude the possibility of the defence for other offences.

[94] In *Sault Ste Marie*, *supra*, note 4 at 374. *But see Motor Vehicle*, *supra*, note 1 which, arguably, introduced a *Charter* presumption against absolute liability offences where imprisonment is a possible penalty.

[95] [1979] 2 S.C.R. 953, 103 D.L.R. (3d) 193 [hereinafter *Strasser* cited to D.L.R.].

[96] *Ibid.* at 222.

intentional element; instead, the accused had to prove lack of intent.[97] Beetz J. noted that if the prosecution was required to prove intent, the offence would be virtually impossible to enforce.[98]

In a strong dissent, Dickson J. (as he then was), agreed that the province could create *mens rea* offences, but added that the burden of proof should not shift to the accused to prove absence of intent unless this was clearly stipulated in the statute.[99] The strict liability shifting of the burden of proof put forward in *Sault Ste Marie* was intended for offences of negligence and was created to relieve the harshness of absolute liability.[100] According to the minority judgment, "mere difficulty of enforcement cannot justify the shifting of a burden of proof of the mental element to the accused".[101]

With respect to judicial treatment of the due diligence defence, it appears that courts are generally applying a rather rigourous objective standard of negligence. This is perhaps most clearly evident with respect to due diligence defences raised by corporations in environmental offences. Thus, for example, in *R.* v. *Gulf of Georgia Towing Co.*,[102] a case involving an oil spill caused by valves improperly being left open, the British Columbia Court of Appeal held that it was not enough that the company had established that it had hired and trained its employees properly. Instead Seaton J.A. suggested, drawing on the words of the trial judge in that case, that:

> "[R]easonable precautions" must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout.[103]

Clearly, this is a strict standard for an accused to meet, but on the other hand, anything short of such a standard would have allowed the creation of "paper" due diligence defences, arguably defeating the purposes of much regulatory legislation.

This is not to suggest that accused have been unable to raise successfully the due diligence defence. One commentator concludes, "[m]any acquittals are reported, but also some convictions where lack of negligence was not proved."[104] The due diligence defence also puts a heavy burden on the prosecution to provide evidence sufficiently

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[97] *Ibid.* at 223.
[98] *Ibid.*
[99] *Ibid.* at 203.
[100] *Ibid.*
[101] *Ibid.*
[102] (1979), 10 B.C.L.R. 134, [1979] 3 W.W.R. 84 (C.A.) [hereinafter *Georgia Towing* cited to W.W.R.].
[103] *Ibid.* at 88.
[104] Stuart, *supra*, note 17 at 178. Footnote omitted.

convincing to defeat due diligence claims once they have been established.[105] In the environmental arena, it was initially felt by some that this burden of defeating the due diligence defence would put government officials at an extreme disadvantage.[106] However, it has apparently forced government to adopt more complete and rigourous investigatory tactics.[107] Again, in the environmental context, commentators report that the due diligence defence has led to more lengthy and expensive trials.[108]

At the legislative level, one commentator has concluded that there has been a "trend since *Sault Ste Marie* to incorporate due diligence defences into some existing or new offences".[109] Unfortunately, however, the material cited by this commentator to support his claim is rather limited. Regardless, it should be reiterated that legislators began incorporating due diligence defences into statutes *before* this decision had been reached. Legislators have continued to make use of the absolute liability offence in certain circumstances.[110]

What emerges from this admittedly limited discussion of how the *Sault Ste Marie* decision has been applied up to the introduction of the *Charter*, is that, generally, the new strict liability category has become the preferred judicial and legislative approach to regulatory liability. With only a few exceptions, the three-tiered offence classification system put forward by Mr Justice Dickson has proven to be flexible and workable enough so that it can be used in most regulatory contexts. For the most part, the absolute liability offence seems to have fallen out of favour with both courts and legislatures. The strict liability offence appears to have become the offence of choice in most regulatory contexts. The due diligence defence seems to have been applied in a rigourous manner, imposing an objective negligence standard of care on regulated actors. At the same time, however, accused persons have successfully invoked the due diligence defence to escape convictions. In short, the strict liability offence has generally proven to be an eminently practical and fair compromise to the previously

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[105] *See generally* K.R. Webb, *Pollution Control in Canada: The Regulatory Approach in the 1980's*, Law Reform Commission of Canada, Study Paper (1989) at 37.

[106] *See, e.g.*, J.Z. Swaigen, *Procedure in Environmental Regulation* in P.Z.R. Finkle and A.R. Lucas, eds, ENVIRONMENTAL LAW IN THE 1980's: A NEW BEGINNING (Calgary: Canadian Institute of Resources Law, 1982) 85 at 94-95.

[107] M. Jeffery, *Environmental Enforcement and Regulation in the 1980's: R. v. Sault Ste Marie Revisited* (1984) 10 QUEEN'S L.J. 43 at 68.

[108] *Ibid.* at 66-69. *See also* E. Anthony, *The Fraser River Task Force* in L. Duncan, ed., ENVIRONMENTAL ENFORCEMENT (Edmonton: Environmental Law Centre, 1985) at 79.

[109] *See* Stuart, *supra*, note 17 at 182.

[110] *See, e.g.*, the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 94(2), *as am. Motor Vehicle Amendment Act, 1982*, S.B.C. 1982, c. 36, s. 19. *See also Municipality of Metropolitan Toronto By-law No. 148-83, s. 12*, discussed below at 465.

existing extreme choices of absolute liability on the one hand, and true crimes on the other. Strict liability offences achieve regulatory objectives and yet at the same time provide relief to persons who can prove that they have not acted negligently.

III. THE *CHARTER* ERA

A. Overview of the Charter

There seems to be little doubt that the introduction of the *Charter* on April 17, 1982 marked the dawning of a radically new era in Canadian judicial history. The *Charter* binds orders of both Parliament and provincial legislatures and the federal and provincial governments.[111] By section 52(1) of the *Constitution Act, 1982*, the *Constitution* of Canada (including the *Charter*) is made "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".[112] As was stated at the outset, the key *Charter* provisions relevant to analysis of the mental element in regulatory offences are sections 7, 11(d) and 1. It should be noted that, while several provisions of the *Charter* are concerned specifically "with offences", there is only one explicit reference to offences as "criminal" in nature, and that reference is not relevant to discussions here (subsection 11(g)).

Under subsection 24(1), anyone whose rights or freedoms guaranteed by the *Charter* have been infringed or denied may apply to a court to obtain such remedy as the court considers appropriate and just in the circumstances. Subsection 33(1) provides that Parliament or provincial legislatures may expressly declare their respective legislation or provisions thereof operative notwithstanding a provision included in section 2 or sections 7 to 15 of the *Charter*. Synthesizing these various sections and applying them in a preliminary manner to the question of the mental element in regulatory offences, what emerges is the following: anyone who feels their rights and freedoms are violated under section 7 and/or subsection 11(d) with respect to a regulatory offence, may apply to the court for such remedy as the court deems suitable. However, even if the court reaches the conclusion that a violation has taken place, the violation may not lead to any judicial relief — the court may determine that it is a reasonable limit demonstrably justified in a free and democratic society pursuant to section 1, or Parliament or the legislature concerned may specifically declare in legislation that

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[111] S. 32(1).

[112] Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

the statute or provision in question will operate notwithstanding the *Charter* violation. In short, a *prima facie* violation may not be fatal to the continued operation of a regulatory scheme; if the limit is vital to its operation, the provision could be saved by judicial (section 1) or legislative (subsection 33(1)) action.

The formula for testing the constitutionality of regulatory offences as set out under the *Charter* emphasizes protection of individual rights first, but allows for judicial abrogations of its terms in cases where collective rights are deemed to be sufficiently important to override those of individuals.

B. Absolute Liability Offences

1. *Absolute Liability Offences with Imprisonment*

(a) *Section 7*

Absolute liability offences with imprisonment available as a penalty represent the only type of regulatory offence which has thus far been directly considered by the Supreme Court of Canada in the context of a *Charter* challenge. In *Motor Vehicle*, the courts were asked by the Lieutenant-Governor-in-Council of British Columbia to rule on the constitutionality of a provision which provided that a person who drives a motor vehicle while prohibited from driving or whose licence has been suspended, commits an absolute liability offence carrying a mandatory penalty of seven days' imprisonment. The offence could be characterized as one of absolute liability because guilt was established "by proof of driving, whether or not the defendant knew of the prohibition or suspension".[113]

Although the penalty upon conviction for first time offenders was for not less than seven days' imprisonment *plus a minimum fine*, Mr Justice Lamer, speaking for the majority of the Court, specifically chose to address his decision to the determination of the constitutionality of *imprisonment only* for absolute liability offences. Thus, Lamer J. said:

> [B]ecause of the fact that only deprivation of liberty was considered in these proceedings and no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited. . .to determining the scope of the words "principles of fundamental justice"; I will not attempt to give any further content to "liberty" nor address that of the words "life" or "security of the person".[114]

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[113] *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 94(2), *as am. Motor Vehicle Amendment Act, 1982*, S.B.C. 1982, c. 36, s. 19.

[114] *Motor Vehicle*, *supra*, note 1 at 307.

According to Lamer J., each element of section 7 is a distinct though related concept.[115] Section 7 protects the right not to be deprived of these three interests when it is done in breach of the principles of fundamental justice.[116] Therefore, the Court concluded that the principles of fundamental justice are a qualifier of the right not to be deprived of life, liberty and security of the person.[117] Lamer J. also characterized sections 8 to 14 of the *Charter* as specific deprivations of the rights found in section 7 and thus are illustrative of the meaning of the "principles of fundamental justice" in criminal or penal law.[118] These principles are to be found in the basic tenets of our legal system.[119]

After reaching these general conclusions, Lamer J. turned his attention to the specific offence at issue. He noted the long-held principle that "the innocent not be punished"[120] and stated that absolute liability *per se* does *not* offend section 7.[121] Rather, such an offence violates section 7 "only if and to the extent that it has the potential of depriving life, liberty, or security of the person".[122] The potential of depriving liberty arises "as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in subsection 94(2), be made mandatory."[123] After stating he would not address the issue of imprisonment in default of fine, Lamer J. went on to observe that "no imprisonment may be imposed for an absolute liability offence and, consequently. . .an offence punishable by imprisonment cannot be an absolute liability offence".[124]

The argument that absolute liability offences relating to particularly important public interest contexts, such as pollution, might be justified as not constituting a breach of section 7, was specifically disputed by Mr Justice Lamer. He suggested that such concerns might be addressed through section 1.[125] In light of this analysis, it would seem that any potential for imprisonment attached to an absolute liability offence (including imprisonment in default of fine) would be highly susceptible to a section 7 challenge.

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[115] *Ibid.*
[116] *Ibid.*
[117] *Ibid.* at 307-08.
[118] *Ibid.* at 317.
[119] *Ibid.*
[120] *Ibid.* at 318.
[121] *Ibid.* at 319.
[122] *Ibid.*
[123] *Ibid.*
[124] *Ibid.* at 320.
[125] *Ibid.* at 321.

(b) *Section 1*

In *Motor Vehicle*, there was a generally expressed reluctance to uphold a section 7 deprivation of liberty on the grounds of administrative efficiency:

> Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of section 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.[126]

The Court then considered whether the specific offence at issue could be salvaged under section 1. While viewing the objective of maintaining road safety in British Columbia as laudable, the "risk of imprisonment of a few innocents"[127] was found to be an unreasonable and unjustifiable limit in a free and democratic society. This conclusion was reached by comparing the absolute liability approach with other available methods:

> That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.[128]

It should be noted that Lamer J. did not suggest here that strict liability motor vehicle offences with imprisonment available as a penalty would pass muster under section 1. He merely noted that this alternative seemed less offensive to section 1 than did absolute liability. On this point, more will be said below. Mr Justice Lamer's comments that the innocent should not be punished, and that the due diligence defence let those who did nothing wrong go free, will also be discussed in more detail.

Thus, it would appear on the basis of a reading of *Motor Vehicle*, that in regulatory contexts short of emergencies, absolute liability offences with the potential of imprisonment will not survive scrutiny under sections 7 and 1. Surprisingly, however, there have been various lower court decisions which have approved of absolute liability offences with a penalty of imprisonment.

Most notable of these is the 1988 Manitoba Court of Appeal case, *R.* v. *Gray*.[129] Speaking for the Court, Huband J.A. found that a Manitoba motor vehicle absolute liability offence with imprisonment available as punishment did violate section 7, but concluded that it was a reasonable and demonstrably justified limit under section 1. The question of the remote possibility of imprisonment, though irrelevant

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[126] *Ibid.*
[127] *Ibid.* at 324.
[128] *Ibid.*
[129] *Supra*, note 2.

for the purposes of the section 7 analysis, was deemed crucial in determining whether the law in question constituted a reasonable limit under section 1:

> As has been noted, the specific charges against this accused could result in a term of imprisonment only in default of any fines levied upon the accused, and then only if the accused sleeps on his rights under the fine option program.[130]

Huband J.A. specifically referred to Crown counsel's argument that, in practical terms, there was *no* risk of imprisonment.[131] However, the distinction between "in practical terms" and "legal terms" may be crucial. It would appear that the Manitoba Court of Appeal is discounting comments made in *Motor Vehicle* that, from a legal standpoint, as long as there is *any potential* for imprisonment, and a less offensive alternative exists, then a section 1 argument should fail.

Other courts have taken a different approach to that adopted by the Manitoba Court of Appeal. Notable among these is the Saskatchewan Court of Appeal in its 1987 decision in *R.* v. *Burt*.[132] Once again a motor vehicle absolute liability offence with imprisonment available as punishment was under scrutiny. One Judge referred to a study citing statistics which showed that, "imprisonment for default in payment of a fine is by no means a rarity".[133] The Court unanimously held that arguments of administrative efficiency were insufficient to save the offence under section 1 of the *Charter*.

In *R.* v. *Cancoil Thermal Corp.*,[134] the Ontario Court of Appeal held that an absolute liability offence with the potential of imprisonment violated section 7 of the *Charter*. To avoid a violation of section 7, therefore, it should be treated as an offence of strict liability with a due diligence defence. Although the Court arrived at what appears to be a reasonable solution, its approach was less than ideal. First, the Court did not consider whether the absolute liability offence could be saved pursuant to section 1. Second, it did not consider the constitutional validity of strict liability offences under section 7 and subsection 11(d) of the *Charter*. This having been said, the strategy of changing absolute to strict liability offences in order to avoid *Charter* infringements under section 7 may gain favour if, and when, strict liability offences survive *Charter* challenges.

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[130] *Ibid.* at 76. Earlier in the judgment, in his s. 7 analysis, Huband J.A. had determined that under the Manitoba *Highway Traffic Act* (S.M. 1985-86, c. 3), an accused who defaulted in paying a fine imposed under that *Act* could be imprisoned by administrative act, without a further judicial step. However, in practical terms, the risk of imprisonment was low. In 1988, a fine-option program was established which allowed the accused the opportunity to elect to perform community work as an alternative to paying the fine, thereby avoiding the risk of imprisonment.

[131] *Ibid.* at 70.

[132] *Supra*, note 2.

[133] *Ibid.* at 378, *per* Bayda C.J.S.

[134] *Supra*, note 2.

In short, it would appear that absolute liability offences which have imprisonment as a potential punishment are in violation of section 7 of the *Charter*, and will probably not be salvageable under section 1. In spite of the argument in *Gray* that for some offences the practical risk of imprisonment may be nil, thus rendering the offences justifiable under section 1, it is suggested that the reasoning in *Motor Vehicle* will probably prevail to disallow all such absolute liability offences, except where the offences are part of a regulatory regime pertaining to emergencies, wars and the like.

2. *Absolute Liability Offences without Imprisonment*

(a) *Section 7*

Given that the *Motor Vehicle* decision did not negatively comment on absolute liability offences which have penalties short of imprisonment, it could be argued by inference that these lesser absolute liability offences will survive *Charter* challenges. This may be true, but on the other hand, a strong case can be made that at least some of these may still be successfully challenged under the *Charter*. First, as has been noted above, Lamer J. in *Motor Vehicle* was careful to limit his decision to those offences involving imprisonment as a deprivation of liberty; other forms of penalties which unduly limit liberty or security of the person attached to absolute liability offences may also be in violation of section 7. Second, as we have seen, prior to the introduction of the *Charter*, the Supreme Court of Canada expressed in no uncertain terms its general distaste for *all* absolute liability offences, irrespective of types of penalties, finding such offences to violate fundamental principles of penal liability. In short, at the very least it is clear that the Supreme Court is negatively disposed towards all absolute liability offences. The penalties short of imprisonment which can be attached to absolute liability offences are diverse, ranging from fines, to licence suspensions and forfeitures.

Courts have held that the suspension of a driver's licence constitutes a deprivation of the right of an accused to liberty, and therefore can only take place pursuant to a process which is in accordance with the principles of fundamental justice.[135] Even assuming that this type of interpretation will eventually be ruled an overextension of the

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[135] *See, e.g., R.* v. *Robson* (1985), 19 C.C.C. (3d) 137, 45 C.R. (3d) 68 (B.C.C.A.). *Compare, e.g., R.* v. *Neale* (1986), 46 Alta L.R. (2d) 225, 52 C.R. (3d) 376 (C.A.) and the accompanying annotation by J. Whyte concerning the potential elasticity of the concept of "liberty" under s. 7. Both the *Robson* and *Neale* decisions are concerned with roadside suspensions, and, as such, raise issues of procedural justice more basic than those with absolute liability offences (*i.e.* the ability of a constable to order a roadside licence suspension on mere suspicion of the driver's alcohol consumption, without notice or a hearing).

concept of "liberty", there still remains tremendous scope for wide protections under the "security of the person" component of section 7. Lamer J. in *Motor Vehicle* noted that "life, liberty and security of the person are distinct, though related concepts".[136] This is in line with other judicial observations concerning the phrase which have noted that, read in conjunction with "life, liberty. . .of the person", security of the person seems to refer to a protection from invasion of physical privacy, and to physical and mental integrity of the person.[137] In *Irwin Toy*, the Supreme Court of Canada, while not deciding on the issue of the meaning of "security of the person", noted that "economic rights as generally encompassed by the term 'property' are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within 'security of the person'."[138] In light of this, it would appear that challenges focussing on arguments of financial deprivations may fail under the security of the person component of section 7.

A more constructive approach might be to emphasize the loss of moral and physical integrity which flows from being susceptible to convictions for absolute liability offences. In this respect, the words of Dickson J. (as he then was) in *Sault Ste Marie*, that persons charged and found guilty of absolute liability offences are subject to an unfavourable stigma, and must suffer loss of time, legal costs, exposure to the processes of the criminal laws at trial and the "opprobrium of conviction"[139] are relevant. Given that a person could be convicted, fined, and potentially lose a licence to engage in a certain activity despite moral innocence, it could be argued that this amounts to legal and judicial interference with the opportunity to make a living.[140]

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[136] *See, supra*, note 1 at 307.

[137] *Per* Tarnopolsky J.A., speaking for the Ontario Court of Appeal in *Videoflicks*, *supra*, note 2 at 391. *See also* Scheibel J., speaking for the Saskatchewan Queen's Bench in *Crain*, *supra*, note 2 at 502. Strayer J., speaking for the Federal Court Trial Division in *Smith, Kline*, [1986] 1 F.C. 274 at 313, 24 D.L.R. (4th) 321 at 362-64 stated that:

> [T]he concepts of "life, liberty and security of the person" take on a colouration by association with each other and have to do with the bodily well-being of a natural person. As such they are not apt to describe any rights of a corporation nor are they apt to describe purely economic interests of a natural person.

Strayer J.'s findings that the individual plaintiffs possessed the necessary standing to assert claims in their own behalf, thus avoiding the problem of corporate plaintiffs asserting *Charter* rights, was not an issue on appeal. *See supra*, note 2 at 588 n. 1; leave to appeal to the Supreme Court of Canada refused 9 April 1987, [1987] 1 S.C.R. xvi.

[138] *Supra*, note 1 at 633.

[139] *Supra*, note 4 at 364.

[140] In *Abbotsford Taxi*, *supra*, note 2 at 376, the B.C. Supreme Court held that the *opportunity* to make a living, although not the *making* thereof, may be a liberty protected by the *Charter*, because the *Charter* was not intended to be an economic document.

It is clear that serious legal consequences flow from charges and convictions for absolute liability offences, whether or not imprisonment is available as a potential penalty. It is also clear that these consequences are considered by the Supreme Court of Canada to be serious deprivations for morally innocent persons, perhaps even deprivations which encroach upon an individual's physical and moral integrity, thus impinging upon the right to "life, liberty and security of the person". If this type of reasoning is adopted, it is possible for the courts to conclude that absolute liability offences with penalties short of imprisonment might also be in violation of the principles of fundamental justice under section 7.

(b) *Section 1*

Even if absolute liability offences without imprisonment are held to be in violation of section 7, they may be salvaged through section 1. At first blush, it might seem that, since the consequences of a violation are considerably less serious (for instance, mere payment of a fine or suspension of a licence), the likelihood of such offences being found reasonable and demonstrably justifiable are increased. While this may be true, the fatal blow may lie in the existence of an alternative, less offensive to the *Charter*, such as the strict liability offence with a due diligence defence. This approach would follow the reasoning of Lamer J. in *Motor Vehicle*, as earlier discussed.[141]

To the author's knowledge, there have been no reported cases since the *Motor Vehicle* decision concerning *Charter* challenges to absolute liability offences which do not have the potential of impri-

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[141] *But see Grant* v. *British Columbia* (1986), 2 B.C.L.R. (2d) 223, 40 M.V.R. 56 (S.C.) [hereinafter *Grant* cited to B.C.L.R.], in which the B.C. Supreme Court held that a regime for processing minor violations under the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288 (whereby motorists were served with a Traffic Violation Report, which they had the option of disputing and having the allegations contained therein determined by a Provincial Court Judge) was in violation of s. 11(d) and s. 7, but was justifiable in the interests of preventing overloading of the courts. Although the decision does not concern absolute liability offences, it is mentioned here because it demonstrates a recognition by some judges of administrative efficiency interests, regardless of whether less intrusive methods are available.

sonment.[142] This is perhaps not surprising, given the small number of such offences and the relatively minor consequences facing an accused (that is, why fight a $200 fine to the Supreme Court of Canada?). In the absence of such decisions, the general observations made here stand unchallenged, namely, that absolute liability offences with penalties of only fines, licence suspensions or forfeitures might nevertheless be considered deprivations of one's right to "liberty and security of the person" because of the potential judicial and governmental interference with a person's ability to engage in certain activities, despite morally blameless conduct. In addition, following the reasoning of Lamer J. in *Motor Vehicle*, given the fact that a less offensive measure might be available (that is, strict liability offences with a due diligence defence), courts could hold that even such minor absolute liability offences cannot be justified under section 1. Although the position that absolute offences with penalties short of imprisonment are in violation of the *Charter* is extreme and therefore an unlikely one for the courts to adopt, it is defensible on the basis of the Supreme Court's own decisions.

3. *Absolute Liability Offences and Corporations*

In *Motor Vehicle* Mr Justice Lamer used language suggesting that corporations might not be able to avail themselves of the protections provided by section 7 with respect to absolute liability offences; even if they could, such offences applying only to corporations might be salvageable under section 1.[143] However, the subsequent decision in *Irwin Toy* made it completely clear that section 7 is intended to confer protection only to natural, and not artificial persons such as corporations.[144]

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[142] In *Maidment*, *supra*, note 2, a case decided immediately prior to the Supreme Court of Canada decision in *Motor Vehicle*, an accused was charged with breach of a deer hunting regulation made pursuant to the Nova Scotia *Lands and Forest Act*, R.S.N.S. 1967, c. 163. The penalty for breach of the provision was not less than $100.00 and not more than $300.00, as well as forfeiture of the accused's deer hunting licence. Two of three Judges of the Nova Scotia Supreme Court Appeal Division held that the offence was absolute in nature (at 516-17). Speaking for the majority, Cooper J.A. also reviewed the B.C. Court of Appeal version of the *Motor Vehicle* case [(1983), 42 B.C.L.R. 364, 4 C.C.C. (3d) 243], which, like the Supreme Court of Canada decision, held the offence to be in violation of s. 7 and s. 1 of the *Charter*. Cooper J.A. felt that since the offence involved no possibility of imprisonment and involved conservation or protection of a natural resource, there was no infringement of s. 7 (at 518). Since the Nova Scotia Court had not had the benefit of reading the Supreme Court of Canada decision in *Motor Vehicle*, it is suggested that *Maidment* should not be considered influential. Note in particular that the comments of the B.C. Court of Appeal with respect to a possible non-violation of s. 7 where environmental protection interests are concerned were specifically rejected by Lamer J. (*supra*, note 1 at 321).

[143] *Motor Vehicle*, *ibid.* at 322.

[144] *Supra*, note 1 at 632.

To the best of this author's knowledge there are few absolute liability offences currently in the statute books which distinguish between corporate and individual accused. Courts have determined that corporations are as entitled to raise *Charter* challenges as are natural persons; where the challenged provision does not distinguish between corporate and natural persons, and it is decided that the provision infringes *Charter*-protected rights only as it relates to individuals, corporations can nevertheless benefit from a provision struck down on this basis as much as any individual accused.[145] Courts have shown a reluctance to re-write or read down a provision so that it applies *only* to corporations and not to individuals. Thus, for example, in *Metro News*,[146] the Ontario Court of Appeal held that it was open to a corporate accused to challenge the validity of an absolute liability offence which had the potential penalty of imprisonment, even though, as a corporation, it was not subject to imprisonment if convicted. The Court of Appeal held that it was clear that Parliament had intended the offending section in question to apply to corporations and individuals, and that the removal of a defence to that charge applied to both corporate and individual accused. Speaking for the unanimous Court, Martin J.A. held that it was not open to the courts to re-write the statute so that the removal of the defence applied only to corporations.[147]

It may be that, in light of the *Motor Vehicle*, *Irwin Toy* and *Metro News* decisions, separate absolute liability offences applying only to corporations will become more common. Such an approach would deprive corporations of the ability to challenge successfully absolute liability offences which do not distinguish between a corporate individual accused on the basis of violations of an individual accused's rights.

C. Strict Liability Offences

1. *Strict Liability Offences with Imprisonment*

In *Motor Vehicle*, although many questions regarding the future of absolute liability offences with the potential of imprisonment and the *Charter* were squarely addressed and answered, the Court was fairly careful to avoid directly discussing the more sophisticated cousin of absolute liability offences, the strict liability offence. While it is true that Lamer J. did contrast the harshness of absolute liability offences with strict liability offences, thus casting a favourable light

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[145] *See, e.g.*, Dickson C.J.C. in *Big M*, *supra*, note 1 at 400-01 and Martin J.A., for the Ontario Court of Appeal, in *Metro News*, *supra*, note 2 at 335-36.

[146] *Ibid.*

[147] *Ibid.* at 336. Nor does it appear that the constitutional exemption doctrine, as described in *Seaboyer*, *supra*, note 2 or *Edwards Books*, *supra*, note 1, would apply here. Discussion of this doctrine to follow.

on the latter as the better alternative, it is not at all clear whether strict liability offences can withstand a direct *Charter* challenge. The main difficulty would appear to be that, in the course of making decisions about the *Charter* constitutionality of absolute liability and *Criminal Code* offences, the Supreme Court has developed tests which may force judges to reach negative conclusions regarding the constitutionality of strict liability offences. All this being said, however, it will be suggested in this part of the article that if some tacit assumptions underlying some of the recent Supreme Court decisions (most notably *Whyte*) are articulated, there emerges a reasonable and defensible basis for upholding the validity of the strict liability offence in many regulatory contexts.

(a) *Section 7*

The first hurdle which strict liability offences will have to overcome is section 7. To be more specific, the issue is whether a potential deprivation of liberty pursuant to such an offence is in accordance with the section 7 principles of fundamental justice. To answer this question, it is first necessary to determine what principle of fundamental justice is the focus of concern.

Both the *Motor Vehicle* and *Sault Ste Marie* decisions are instructive on this point. As we have seen, Dickson J. (as he then was) stated unequivocally that "there is a generally held revulsion against punishment of the morally innocent",[148] while Lamer J. observed that there is a long-held principle that "the innocent not be punished".[149] Although in theory this could be taken to mean that proof of subjective intent on the part of the accused is necessary, and that convictions in the absence of subjective intent are an infringement of the principle, it appears that the Supreme Court will settle for less in certain circumstances. Thus, for example, in *Sault Ste Marie*, the Court was apparently satisfied that the morally innocent are adequately protected in the context of public welfare offences when they have the opportunity to establish a defence of due diligence or reasonable mistake of fact upon the Crown proving the *actus reus* of the offence. In *Motor Vehicle* Mr Justice Lamer seems to have reached the same conclusion — he compared absolute to strict liability offences and noted that the success of a due diligence defence "does nothing more than let those few who did nothing wrong remain free".[150]

In *Vaillancourt* Lamer J. confirmed, bolstered and elaborated upon his observations in *Motor Vehicle* when he stated that *Motor Vehicle*:

> [A]cknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even,

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[148] *Sault Ste Marie*, *supra*, note 4 at 363.
[149] *Motor Vehicle*, *supra*, note 1 at 318.
[150] *Ibid.* at 324.

> as in. . .*Motor Vehicle*. . ., a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element in *Sault*. . .to a constitutionally-required element. *Motor Vehicle*. . .did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence *at least* negligence was required, in that *at least* a defence of due diligence must *always* be open to an accused who risks imprisonment upon conviction.[151]

Thus, the strict liability offence coupled with a due diligence defence is apparently considered as embodying the minimum acceptable mental element for the purposes of section 7. Note as well that this minimum mental element is referred to as an essential element of the offence. While Lamer J.'s statement amounts to a show of approval for the strict liability offence, in *Vaillancourt* he was careful to point out that it was the exception, not the rule:

> It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the "morally innocent".[152]

This exception may arise where the language in which the offence is framed lacks any clear indication that subjective intentional conduct is necessary to attract liability.[153] Lamer J. goes on to suggest that there may be certain crimes for which, because of the special nature of the stigma associated with conviction or penalties associated with them, the principles of fundamental justice require a certain level of *mens rea* (he gives murder and theft as examples).[154]

It is interesting to compare these comments in support of an objective negligence standard as the minimum mental element with the remarks of the same Court with respect to criminal negligence in *R. v. Tutton and Tutton*.[155] Pursuant to section 202 of the *Criminal Code*, every one is criminally negligent who in doing anything, or omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons. In *Tutton*, the two accused were charged with manslaughter for causing their child's death by criminal negligence in omitting to provide the necessaries of life, contrary to sections 197 and 202 of the *Criminal Code*. A six person Supreme Court split 3:3 on whether the test for criminal negligence in this circumstance was wholly objective or whether it had a subjective component.

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[151] *Supra*, note 1 at 133 [emphasis in original].
[152] *Ibid.*
[153] *Ibid.* at 133-34.
[154] *Ibid.* at 134.
[155] *Supra*, note 1.

McIntyre J., speaking for Lamer J. (except for a minor elaboration) and L'Heureux-Dubé J. stated that negligence connotes the opposite of thought directed action: "its existence precluded elements of positive intent".[156] On the basis of his reading of the section (particularly the phrase "*shows* wanton or reckless disregard"), McIntyre J. stated that: "[w]hat is punished. . .is not the state of mind but the consequences of mindless action."[157] In essence, the test is an objective one — whether there is a significant departure from the standard which could be expected of a reasonably prudent person in the circumstances.[158] In the case of manslaughter caused by criminal negligence, a defence of mistake of fact must be reasonable as well as honestly held to meet the objective standard involved.[159] Lamer J. basically agreed with McIntyre J.'s conclusions, but felt that where death is involved, a generous allowance for specific factors of the accused (for instance, age, education, mental development) should be taken into consideration.[160]

For Wilson J. (Dickson C.J.C. and La Forest J. concurring), criminal negligence requires a subjective test — the accused must have known of the risks created by his or her conduct. Mme Justice Wilson found that section 202 was ambiguous as to whether or not a subjective intent was required;[161] because criminal negligence is a serious criminal offence, she started from the presumption that a subjective intent was necessary.[162] Following discussion of a number of scholarly articles on the topic, Wilson J. concluded that there are only two states of mind which constitute *mens rea*: intent or recklessness.[163] Only *advertent* negligence could constitute recklessness, since it connotes a positive state of mind on the part of the accused.[164] The McIntyre objective approach to criminal negligence was characterized as creating an absolute liability offence, possibly in violation of the *Charter*.[165] It is perfectly permissible, in Wilson J.'s opinion, for the trier of fact to reason from an objective standard and ask the question: "must not the accused have had the minimal awareness of what he or she was doing?", since this rebuttal question would leave room for acquittals in cases where the accused lacked minimal awareness.[166]

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[156] *Ibid.* at 33.
[157] *Ibid.*
[158] *Ibid.* at 34.
[159] *Ibid.* at 37.
[160] *Ibid.* at 38. Lamer J. stated that he did not wish his concurrence with McIntyre J. to be taken as a decision on the issue of substituted element (*per Vaillancourt*), as it might apply to the case at bar (at 39).
[161] *Ibid.* at 47-48.
[162] *Ibid.* at 48.
[163] *Ibid.* at 49.
[164] *Ibid.* at 50-57.
[165] *Ibid.* at 44 and 57.
[166] *Ibid.* at 68.

At first glance, the *Tutton* decision would not seem to pose any insurmountable barriers to courts approving the objective negligence standard as the mental element in strict liability offences. The McIntyre position suggests that the only distinction between criminal and regulatory negligence is that criminal negligence involves a gross departure from reasonable conduct. Clearly, if an objective test for criminal negligence is acceptable to three of six Supreme Court of Canada Judges hearing such cases, this bodes well for strict liability offences. Wilson J.'s decision in *Tutton* seems to hinge on the fact that the offence of criminal negligence is a serious criminal offence and hence, in the absence of clear language to the contrary, a subjective *mens rea* mental state should be assumed to be in place. Given that regulatory offences are in legislation other than the *Criminal Code* and are not expressly labelled "criminal negligence" offences, this presumption would not prevent a court from finding an objective negligence standard to be acceptable.

But is Mme Justice Wilson's criminal negligence regulatory offence distinction sound? Given that an accused could face equally onerous consequences under otherwise equal offences, one in the *Code*, one not, how can it be justified on the basis of the *Charter* that one can be subject to a different mental element than the other? Is the distinction defensible?

An argument can be made that it is, but this requires reading a great deal between the lines. *Criminal Code* offences are typically but not always outright prohibitions of certain conduct, not part of a larger administrative regime which permits specified behaviour to take place under controlled circumstances. This is in direct contrast to regulatory offences, which are typically an adjunct to legal schemes permitting activities within pre-established limits and subject to certain conditions. Before a regulator will authorize a regulatee to engage in controlled activities, the regulatee must agree to abide by a set of rules, and must be found fit to carry out the regulated activity. A driver's licence is a good example of such an arrangement. In effect, this arrangement *establishes and certifies that the regulatee knows the standards which he or she must meet, is capable of meeting them, and accepts that should his or her conduct fall below these standards, he or she may be subject to administrative actions and penalties prescribed in legislation, according to procedures which take into account the special knowledge of a regulatee*. The fact that an accused is participating in a regulated activity and has met the initial "entrance requirements" leads to a legally imposed or assumed awareness on his or her part of the risks associated with that activity. Similar reasoning has been adopted in relation to *Charter* section 8 analysis, to distinguish between criminal search and seizure and administrative inspections or "spot checks".[167] Huband J.A., speaking for the Manitoba Court of Appeal,

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[167] *Re Ozubko and Manitoba Horse Racing Comm'n*, [1987] 33 D.L.R. (4th) 714, [1987] 1 W.W.R. 149 (Man. C.A.) [hereinafter *Ozubko* cited to D.L.R.].

made the following observation:

> By applying for and obtaining a licence, and functioning as an owner, trainer, or driver at the track, Ozubko and Chabot, in common with all other licencees, *give tacit consent to the reasonable enforcement of the rules*. . . . [A]ll licencees recognize that there must be procedures to ensure that the rules are being obeyed. . ..[168]

Looked at from this perspective, the Wilson J. distinction between serious criminal offences located in the *Criminal Code* and those located in regulatory statutes is not merely a question of semantics.[169] Arguably, an objective negligence standard is justifiable when it is part of a regulatory regime because advertence, the full *mens rea* mental element, has been reasonably attributed to the regulated accused as a pre-condition to that accused being permitted to engage in a certain activity.

In short, for section 7 purposes, the Supreme Court of Canada considers subjective intent to be the preferred mental state which must be an essential element for offences which could deprive persons of their liberty. However, the Court seems prepared to accept the lesser standard of objective negligence as the minimum mental element in the proper regulatory contexts. This lesser mental element is reasonable and justifiable as a substitute for full subjective *mens rea* because of the peculiar nature of regulatory regimes.

(b) *Section 11(d)*

On a preliminary point, it will be assumed without further discussion that regulatory offences are subject to section 11 protections, following the reasoning and statements to this effect by Wilson J., speaking for the majority in *R.* v. *Wigglesworth*.[170] For purposes of presumption of innocence analysis under subsection 11(d), it is the

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[168] *Ibid.* at 720. For similar reasoning, *see R.* v. *Quesnel* (1986), 53 O.R. (2d) 338 at 343, 12 O.A.C. 165 at 168-69(C.A.).

[169] It is interesting to note that other Judges of the Supreme Court have also recently been struggling with the distinction between criminal and regulatory regimes. McIntyre J., in *Schwartz*, *supra*, note 1 at 98, stated the following with respect to the gun registration schemes set out in the *Criminal Code*, which regulates the use of guns, but does not prohibit them:

> 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.

This argument articulates one of the special characteristics of regulated accused, which distinguishes them from the typical criminal accused. The suggestion is that certain expectations flow from the existence of a licensing arrangement which do not exist with respect to an accused subject to a typical criminal prohibition. For a discussion of the criminal/regulatory distinction as an explanation for this decision, *see* I. Weiser, *The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens* (1989) 31 CRIM. L.Q. 318 at 331-35.

[170] *Supra*, note 1 at 397.

nature of the due diligence defence which becomes the focus of attention. As we have seen, according to Lamer J. in *Vaillancourt*, the minimum mental state of simple negligence (an objective standard of fault) is an *essential element* of the offence.

In *Oakes*, Dickson C.J.C. stated that to meet the presumption of innocence requirement set out in subsection 11(d), the Crown must prove beyond a reasonable doubt *all the essential elements of the offence*:

> 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.[171]

Synthesizing the Supreme Court decisions in *Wigglesworth, Vaillancourt* and *Oakes*, subsection 11(d) requires that the prosecutor prove *all* essential elements beyond a reasonable doubt for criminal as well as regulatory offences. With the due diligence defence, even if the accused was not successful in establishing on a balance of probabilities that a reasonable person standard had been met, he or she might nevertheless raise a reasonable doubt that due diligence had been exercised and thus, according to Dickson C.J.C. on his reading of subsection 11(d), be presumed innocent. In short, the requirement that the accused establish a defence of due diligence *on the balance of probabilities* sets too high a standard for the purposes of subsection 11(d).

According to Lamer J., in *Vaillancourt*, it does not matter that an essential element is judicially imposed, rather than imposed by legislation:

> [E]ssential 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).[172]

Moreover, Lamer J. went on to note that even where the Crown does not have to prove an essential element (as is the case with strict liability offences, where the Crown does not initially have to prove negligence), subsection 11(d) is brought into play.[173]

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[171] *Supra*, note 1 at 343.

[172] *Supra*, note 1 at 135.

[173] The judgments of McIntyre J. in *Holmes*, *supra*, note 1 and *Schwartz*, *supra*, note 1, stand for the proposition that some erosion of the s. 11(d) rule may be permitted for certain excuses (*Holmes*), or for proof of facts which are characterized as other than essential elements of the offence (*Schwartz*). However, it is submitted that neither of these situations are relevant to the situation of strict liability offences and due diligence defences, where the element of negligence is essential to the nature of the offence.

In short, on the basis of Supreme Court decisions to date, while a strict liability offence with a due diligence defence meets the accepted minimum mental element for deprivations of liberty in accordance with the principles of fundamental justice pursuant to section 7, it would nevertheless appear to be an infringement of the specific subsection 11(d) requirement that a person charged with an offence has the right to be presumed innocent until proven guilty.

(c) *Section 1*

Even though, by the above reasoning, it would appear that strict liability offences with imprisonment are in violation of section 11(d), it is still possible that these offences could be salvaged as a reasonable and demonstrably justified limit on *Charter* rights under section 1. For this to occur, it would be necessary for the Crown to establish on the balance of probabilities all the elements of the test set out by Dickson C.J.C. in *Oakes*.

According to *Oakes*, there are two criteria which must be satisfied. First, the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.[174] At a minimum, objects must be "pressing and substantial" in a free and democratic society. Given that strict liability offences are attached to almost every imaginable regulatory context, it will not be possible here to examine all the possible regulatory objectives which strict offences serve. However, a number of general observations can be made.

On the basis of an examination of the available Supreme Court decisions applying the *Oakes* test in the context of subsection 11(d), establishing that an objective is "pressing and substantial" has not been a significant stumbling block to a successful section 1 claim. The cases to date on this point have all concerned provisions associated with criminal offences — for example, narcotics (*Oakes*), gun control (*Schwartz*), housebreaking (*Holmes*), and drunken driving (*Whyte*). In all cases, this preliminary "sufficient importance" objective hurdle was met by the Crown. In the final analysis, the one common element to all these cases is that the objective of the impugned provisions was better protection of the physical safety of citizens. This would be true with many regulatory offence contexts as well, such as motor vehicle legislation, health and workplace safety statutes, pollution control and liquor control. On the other hand, it is possible that making the case for a "pressing and substantial" concern might be more difficult where there is no obvious protection of citizens or the environment involved, as is the case with purely economic regulations.

Assuming that a sufficiently significant objective can be established, the Crown must then satisfy the second criterion: it must demonstrate that the means chosen are reasonable and demonstrably

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[174] *Supra*, note 1 at 348.

justified. In *Oakes* a three component proportionality test to be applied is outlined.[175] The initial component is described as follows:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.[176]

In applying this test in *Whyte*, Dickson C.J.C. referred to the necessity of the Crown establishing a rational connection between "the proved fact and the fact to be presumed".[177] The due diligence defence creates a presumption that the person who committed the *actus reus* of a strict liability offence did not meet the minimal mental standard of exercising reasonable care required by such offences. Is this arbitrary, unfair or irrational?

On this point, the decision of Dickson J. (as he then was) in *Sault Ste Marie* is instructive. The due diligence defence was found to be a fair, appropriate and rational approach to negligence situations. Thus, for example, Dickson J. stated as follows:

> In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.[178]

In *Whyte*, Dickson C.J.C. concluded that there is "every reason to believe that the person in the driver's seat [the proved fact] has the care or control of the vehicle [the presumed fact]".[179] Dickson C.J.C. concluded that there was no necessary rational connection between the basic fact of possession of narcotics and the presumed fact of trafficking, because in cases of possession of small amounts of narcotics, for example, it would be irrational to infer intent to traffic.[180] This type of reasoning could be applied to defeat the due diligence defence, because there may be situations where, for example, an accused has done everything a reasonable person would do and yet there would still be an inference that negligence has taken place.

In two lower court cases where judges were considering reverse onus provisions attached to non-*Criminal Code mens rea* offences, the reverse onus provisions failed to pass the rational connection test. In

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[175] *Ibid.*
[176] *Ibid.*
[177] *Supra*, note 1 at 112.
[178] *Supra*, note 4 at 373.
[179] *Supra*, note 1 at 112.
[180] *Supra*, note 1 at 350.

R. v. *Ireco Canada II Inc.*,[181] the Ontario Court of Appeal held that there were no grounds for a legitimate inference that goods in possession of the accused (the proved fact) were unlawfully imported (the presumed fact) and therefore, the provision failed the rational connection test.[182] In *Alston*,[183] the British Columbia Court of Appeal was considering a provision which stipulated that, in proceedings concerning an offence of driving a motor vehicle knowing that one's licence is suspended, evidence of a superintendent's certificate stating that the accused's licence is suspended is proof of the accused's knowledge of suspension unless the accused could prove otherwise. The Court held that, because there was no explicit requirement that the superintendent notify the motorist of the suspension, there was no rational connection between the proved fact and the presumed fact.[184]

Although the situation is clearly different where strict liability offences are involved, it is arguable that there is a direct and self-evident relation between the fact of an offence of negligence taking place and the presumption that reasonable care must not have been exercised. Unlike the *Oakes*, *Ireco* and *Alston* cases, there is no full *mens rea* element in strict liability offences. Instead, as with the offence under consideration in the *Whyte* decision, the mental element is a much less obvious state. The Supreme Court of Canada unanimously emphasized how unusual and minimal the "care or control" mental element was for the offence in question; the existence of this minimum mental element was crucial to its conclusions that the presumption was reasonable and justifiable under section 1.[185] Given the equally ambiguous nature of the mental element in strict liability offences, and following the reasons adopted by Dickson J. in *Sault Ste Marie*, as well as in *Whyte*, the connection between the proven fact (that is, the negligence offence taking place) and the presumed fact (that is, lack of reasonable care) is arguably both reasonable and fair. With strict liability offences which are part of a regulatory regime requiring regulatees to know the standards to be met, and be capable of meeting them (for example, as preconditions to granting a licence), it is reasonable to assume that upon proof of the *actus reus* of the offence, there must have been a lack of reasonable care, unless the accused can establish otherwise. In light of this analysis, it is suggested that the courts have a sound basis for reaching the conclusion that strict liability offences meet the rational connection test.

Assuming that this hurdle can be overcome, the second component of the three-part proportionality inquiry must then take place. In this second phase, the court must determine whether the impugned measure

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[181] *Supra*, note 2.
[182] *Ibid.* at 490-91.
[183] *Supra*, note 2.
[184] *Ibid.* at 566.
[185] *Whyte*, *supra*, note 1 at 115-16.

impairs the right or freedom as little as possible. In *Whyte*, Chief Justice Dickson found this to be the most crucial and difficult aspect of the section 1 analysis, and it is suggested that the same is likely to be true with respect to the due diligence defence. The focus of attention is on what measure impairs the right as little as *possible*. The word "possible", at first blush, would appear to compel the court to accept *any* other alternative which impairs the right or freedom to a lesser extent. It is submitted, however, that the results of this interpretation are too extreme for that to be intended.

Instead, there must be some connotation of practicability imported into the inquiry, for the Chief Justice's analysis in *Whyte* to make any sense. In *Whyte*, as with strict liability offences, the alternative, which is less violative of rights and freedoms, is to require that the accused raise only a reasonable doubt that due diligence has been exercised, rather than establish due diligence on the balance of probabilities. It is evident from a reading of this decision that Dickson C.J.C. was torn between his desire to leave the presumption of innocence intact and inviolate, and his recognition that the interests of society required an exception to this principle.[186] The Chief Justice reviewed the legislative history of the drinking and driving offences, finding that a compromise was necessary to avoid absolute liability offences on the one extreme and full *mens rea* offences on the other.[187] In the end, it appears that the one fact which swayed Dickson C.J.C. in favour of a balance of probabilities standard was the statement of the trial Judge that, were it not for the existence of the balance of probabilities presumption in that case, the trial Judge would have been compelled to find that a reasonable doubt existed. Thus the accused would have been acquitted in spite of being found slumped over the wheel with the lights on, keys in the ignition and engine warm.[188] Under these circumstances, an acquittal was clearly an unacceptable proposition for the Supreme Court.

To this author's knowledge, only one case has applied the proportionality test as seen in *Whyte*. In *Ireco*,[189] the Ontario Court of Appeal concluded that a *mens rea* offence with a provision stating "without lawful excuse, the proof of which shall be on the accused",[190] created a balance of probabilities burden on the accused. Given the alternative of imposing a mere evidentiary burden of raising a reasonable doubt on the accused, the excuse provision failed the second component of the *Oakes* test, because it did not impair as little as possible the protected right.[191] The Ontario Court of Appeal concluded

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[186] *Ibid.* at 112.
[187] *Ibid.* at 112-15.
[188] *Ibid.* at 115-16.
[189] *Supra*, note 2.
[190] *Customs Act*, R.S.C. 1970, c. C-40, s. 205.1. (*Act* repealed by S.C. 1986, c.1, s. 212(3)).
[191] *Supra*, note 2 at 500.

that the unusual factors at play in the *Whyte* decision were not evident in the case at bar.[192]

In contrast to the *Ireco* case, it is submitted that the unusual factors in *Whyte* do come into play with respect to strict liability offences with due diligence defences. Similar to the offence under consideration in *Whyte*, there is a long legislative and judicial history behind the development of the strict liability offence, as legislators and courts attempted to balance fairness and justice to the accused with the need for a practical and effective sanction against negligent conduct. If the accused were required only to raise a reasonable doubt as to the existence of due diligence, then in the absence of Crown proof beyond a reasonable doubt that due diligence had not been exercised, the accused would be acquitted. *Sault Ste Marie* clearly indicated the possibility in most circumstances of the Crown proving the mental element. The result would be, in effect, to take away the ability of government to impose the negligence standard in regulated contexts. For all these reasons, it is submitted that courts have a sound basis for concluding that strict liability offences with the due diligence defence meet the "as little as possible" second component of the proportionality test.

The third aspect of the *Oakes* test requires that there be "proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of 'sufficient importance'".[193] For the purposes of understanding how this test operates in practice, it is again instructive to review how it was applied in *Whyte*. The Chief Justice found that the reverse onus provision requiring the accused to prove on a balance of probabilities that he or she did not have care or control of the car passed this final test. Dickson C.J.C. said as follows:

> The threat to public safety posed by drinking and driving has been established . . ..While s. 237(1)(a) [the impugned measure] does infringe the right guaranteed by s. 11(d). . .it does so in the context of a statutory setting which makes it impracticable to require the Crown to prove an intention to drive. The reverse onus provision, in effect, affords a defence to an accused which could not otherwise be made available.[194]

Arguments along similar lines could be made with respect to strict liability offences; as in *Whyte*, the dangers caused by negligent behaviour in relation to pollution, workplace safety, consumer product safety, and so on, can be readily established. While the due diligence defence infringes on subsection 11(d), it does so in a context where it is impracticable to require the Crown to prove negligent conduct.

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[192] *Ibid.*

[193] *Supra*, note 1 at 348 [emphasis in original].

[194] *Whyte, supra*, note 1 at 116.

2. *Strict Liability without Imprisonment*

If, following the above outlined reasoning, the courts should decide that strict liability offences with imprisonment can withstand *Charter* challenges, then it would appear self-evident that there should be no obstacles preventing strict liability offences with no potential of imprisonment from surviving *Charter* scrutiny. However, in the event that strict liability offences with imprisonment are struck down as inconsistent with the *Charter* and not justifiable under section 1, then the question which must be considered is whether strict liability offences without the potential of imprisonment would fare any better. Of course, if *absolute* liability offences with penalties short of imprisonment survive *Charter* challenges, the creation of strict liability offences with penalties short of imprisonment may not be considered necessary by some legislators.

Before commencing this analysis, certain assumptions which flow from the preceding discussion should be made explicit. First, it is assumed that, following the line of reasoning described above, strict liability offences without imprisonment can survive section 7 challenges in the same manner that strict liability offences with imprisonment can. It is also assumed that, following the reasoning set out earlier, the due diligence defence would be equally in violation of subsection 11(d), regardless of whether imprisonment is available as a punishment or not. This means that the only possible opportunity for different treatment between strict liability offences with and without imprisonment would be with respect to whether the offence, though in violation of subsection 11(d), could be justified through section 1 as a reasonable measure in a free and democratic society.

On this question, it is submitted that for strict liability offences without imprisonment to be treated any more favourably under section 1 than those with imprisonment, it is necessary that the *Oakes* test not be applied exactly as originally prescribed. The reader will recall that in *Oakes*, Dickson C.J.C. set out a two-pronged test. First, the objective underlying use of the measure must be considered of pressing and substantial concern. Then, the measure was required to meet the three-part proportionality test. The pressing and substantial concern test is not likely to present any insurmountable problems for strict liability offences, at least not for those attached to regimes concerned with the protection of humans and the environment.

The application of the proportionality test is more problematic. As originally described in *Oakes*, it required the following: first, that there be a rational connection between the proven facts and the presumed fact; second, that the measure should offend the protected right or freedom as little as possible; and third, that there be proportionality between the effects of the measures and the objective. In theory, it is readily apparent that only the third component of the test directly takes into consideration the penalty factor (that is, imprisonment or just fines and forfeitures). Thus, if the tests are applied

sequentially as set out, the significance of penalties attached to offences only becomes an issue if the offence survives the first and second components of the proportionality test (the measure lacking a "rational connection" or impairing rights "as little as possible").

However, if the *Oakes* tests are not applied in the prescribed order there is greater latitude for recognition of the penalty factor earlier in the proportionality analysis. Dickson C.J.C. did not himself apply the *Oakes* tests exactly as he set them out. In *Oakes*, the Chief Justice found that the reverse onus provision under consideration in that decision failed to meet the rational connection component of the proportionality test. Although the gravity of the punishment is *prima facie* not germane to the rational connection test, Dickson C.J.C. went on to say that, *in light of the serious consequences of a conviction* (that is, life imprisonment) he was further supported in his conclusion that the reverse onus provision in question failed the rational connection test.[195] This suggests that the gravity of the penalty, while not strictly relevant to the rational connection and "as little as possible" tests, might still play a role in a judge's decision on these points. Should courts choose to apply the proportionality tests in this manner to strict liability offences without imprisonment, it is possible that the comparatively trivial penalties attached to such offences might be a factor in persuading courts to allow the balance of probability standard to survive the first two components of the proportionality tests. Should courts apply the three-part test in this manner, however, it will become apparent that the gravity of punishment is a factor to be considered at *each* stage in the three-part test, and not just the third, as the *Oakes* test actually prescribes.

3. *Strict Liability Offences and Corporations*

The Supreme Court decision in *Irwin Toy*[196] stands for the proposition that section 7 protections are intended to safeguard natural persons and not corporations. This would appear to mean that absolute liability offences directed solely at corporations will survive *Charter* challenges. In light of this, the necessity for legislators to create strict liability offences which apply to corporations may be limited. In addition, in *Motor Vehicle*, the Court's interpretation of sections 8 to 14 as specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, when read in conjunction with the *Irwin Toy* decision, could mean that corporations may not be able to rely on section 11 protections.[197] Some

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[195] *Supra*, note 1 at 350.

[196] *Supra*, note 1.

[197] The position that corporations may not be entitled to rely on s. 11 protections is supported by the majority decision in *Re PPG Industries Can. Ltd and A.G. Can.* (1983), 3 C.C.C. (3d) 97, 42 B.C.L.R. 334 (C.A.) [hereinafter *PPG Industries* cited to C.C.C.]. It was held by the majority that s. 11(f) applied only to natural persons because corporations cannot be subject to the penalty of imprisonment.

judges and commentators, however, have held that section 11 does apply to corporations, but only as far as is appropriate.[198] Courts could find a due diligence defence not reasonable and justifiable under section 1 as it pertains to natural persons, but sustainable as it applies to corporations. Such an outcome would be in line with Lamer J.'s comment in *Motor Vehicle* that the Court would be willing to consider such an argument — provisions violative of *Charter* rights with respect to humans may nevertheless be approved as they apply to artificial entities.

As was discussed previously with respect to absolute liability offences and corporate accused, courts will accept arguments that a provision is violative of their *Charter* rights even though the penalty involved, such as imprisonment, could not apply to them. If the corporate accused are successful in persuading the courts that that provision is in violation of the *Charter*, they are entitled to benefit from decisions striking down inconsistent provisions. This suggests the need for separate offences for corporate and natural persons, a topic which is discussed in more detail below, under the heading *Suggested Legislative Response*.

D. Courts "Curing" Offences

It is conceivable that, in addition to the current situation where absolute liability offences with the potential of imprisonment have been found to be in violation of the *Charter*, the courts will also find the following in violation:

(i) absolute liability offences with penalties less than imprisonment; and/or

(ii) strict liability offences with imprisonment; and/or

(iii) strict liability offences without imprisonment; and/or

(iv) absolute or strict liability offences with respect to individuals but not corporations.

The question arises as to how the courts will treat those aspects or applications of the impugned provisions which are not in violation of

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[198] *E.g.*, the dissenting judgment in *ibid.* . at 108. *See also* J. Atrens, THE CHARTER AND CRIMINAL PROCEDURE: THE APPLICATION OF SECTIONS 7 AND 11 (Toronto: Butterworths, 1989) at 3-8; para. 3.19 states as follows:

> There is, it is submitted, no valid reason to exclude artificial persons from these opening words [*i.e.* "Any person"]. The protection of rights and freedoms of this country would be seriously flawed if the legal vehicles natural persons use to conduct much of the economic and other affairs of this nation were denied all the rights of s. 11.

the *Charter*. Clearly, the ability of courts to "read down", "strike out" or alter offending portions will vary tremendously depending upon the wording of the particular offence in question. At a general level, however, the words of caution expressed by several courts are worth noting. In *Hunter* v. *Southam*[199] Dickson J. (as he then was) considered submissions that the courts should step in to remedy defects in legislation ruled unconstitutional under the *Charter*. His response was as follows:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.[200]

Similarly, in *Metro News*,[201] Martin J.A. concluded that it was not open to the courts "to rewrite the statute" so that it applied to only a specific set of actors (for example, corporations and not individuals).[202]

The doctrine of constitutional exemption is another judicial curing technique which has been used. Courts have applied this doctrine in cases where a provision is not on its face contrary to the *Charter*; in fact it would be valid and operative in the majority of cases, but would be in violation of the *Charter* in certain limited circumstances.[203] The exemption doctrine has been used where disastrous consequences would arise should the section be struck down completely, and legislative amendments would be impractical.[204] Emerging from this discussion is evidence of a general reluctance by the courts to add any words directly to legislation, though they will strike out offensive words or phrases. Courts may even infer the existence of certain protections in certain situations. Cases demonstrating some of these propositions are briefly discussed below.

Judicial curing of offensive absolute liability provisions seems to be a relatively simple process in some cases. Thus, for example, in *Cancoil*,[205] the Ontario Court of Appeal considered an offence which did not have available to it a specific defence of due diligence. Lacourcière J.A., speaking for the Court, concluded:

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[199] [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97 [hereinafter *Southam* cited to S.C.R.].

[200] *Ibid.* at 169.

[201] *Supra*, note 2.

[202] *Ibid.* at 336.

[203] *See, e.g., Seaboyer, supra*, note 2 at 67-69, *per* Grange J.A. *See also Edwards Books, supra*, note 1 at 437, *per* Dickson C.J.C.

[204] *Seaboyer, ibid.* at 68. Given that legislative amendments such as separate offences for individuals and corporations, or separate offences with and without imprisonment, are practicable, it might be difficult to justify use of the constitutional exemption approach with respect to some offenders and not others or to use it only for penalties short of imprisonment.

[205] *Supra*, note 2.

> To avoid a violation of s. 7 of the Charter, s. 14(1)(a) [an offence excluded from a provision which authorized a due diligence defence (s. 16(2))] must be treated as creating a strict liability offence. The defence of due diligence was available to the respondents.[206]

This type of reasoning puts *Charter* "muscle" behind the *Sault Ste Marie* presumption that regulatory offences are strict rather than absolute in nature and encourages judicial action to "cure" absolute liability offences in violation of the *Charter*. Along the same lines, in *Maidment*,[207] Jones J.A. of the Nova Scotia Supreme Court Appeal Division concluded in a dissenting judgment that an offence of absolute liability was offensive to the *Charter* and so read in a defence of due diligence.[208] In *Westfair*,[209] the Saskatchewan Court of Queen's Bench struck out limitations inconsistent with a common law due diligence defence.

Should the due diligence defence be challenged successfully, it is not clear how courts would treat the impugned provisions. In *Ireco*,[210] the Ontario Court of Appeal struck down a reverse onus provision that required the accused to prove a lawful excuse under the *Customs Act*.[211] In *Alston*,[212] which involved a *mens rea* motor vehicle offence with a modified strict liability style defence, the British Columbia Court of Appeal held that the defence was inconsistent with subsection 11(d), not justifiable under section 1, and therefore was of no force or effect.

In summary, it appears that courts will be willing to strike out words, phrases, or provisions held to be inconsistent with the *Charter*, and will read in defences in certain circumstances, but will not add any new words or phrases directly to offences in order to cure them of *Charter* defects.

E. Impact on Regulatory Enforcement and Possible Responses

Because the courts could choose to decide on the constitutionality of the variety of absolute and strict liability offences currently in place in a number of ways, the consequential impact on regulatory enforcement is difficult to predict. What follows, then, is a cursory examination of possible regulatory enforcement impacts based upon the most likely court dispositions, and some suggested responses.

First, with respect to absolute liability offences, the analysis undertaken in this article suggests that such offences with imprisonment

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206 *Ibid.* at 195.
207 *Supra*, note 2.
208 *Ibid.* at 520.
209 *Supra*, note 2.
210 *Supra*, note 2.
211 R.S.C. 1970, c. C-40, repealed by S.C. 1986, c.1, s. 212(3).
212 *Supra*, note 2.

or probation as penalties, regardless of how remote the potential of these penalties might be, are not likely to survive *Charter* challenges unless they are part of a regime dealing with exceptional emergency conditions such as war or disaster.

If absolute liability offences with penalties such as fines, forfeitures and licence suspensions survive *Charter* challenges, then all of the administrative expediency advantages will remain. By this it is meant that it will not be necessary for administrators to prepare evidence for each file sufficient to refute a due diligence defence or prove negligence, as the case might be. On the other hand, even if absolute liability offences without imprisonment survive the *Charter*, their deterrent effect may be minimal.

However, if this were the case and absolute liability offences without imprisonment were treated with impunity by certain accused, this need not handcuff the imaginative and tenacious prosecutor. An example to illustrate this point emerges from the enforcement of sewage by-laws in Toronto. Officials with the Municipality of Toronto were experiencing a great deal of difficulty with certain metal plate manufacturers who had been convicted time and again for violations of the sewage by-laws but had not significantly altered their behaviour.[213] The offences in these by-laws were explicitly referred to as being absolute liability in nature, and could attract a maximum fine of $2,000. There was no possibility of imprisonment.[214]

Following forty convictions against one metal plater for violations of the sewage by-laws, the Court granted a prohibition order under section 326 of the *Municipal Act*[215] against the corporation.[216] Further violations occurred with respect to offences prohibited by the order and eventually Metro Toronto was successful in proceedings for contempt of court against both the corporation and its president. The president was sentenced to six months' imprisonment. Proceedings for contempt were characterized as criminal in nature, requiring proof of knowledge of the prohibition order.[217] The Court held that the accused was the corporation, for all intents and purposes, that he knew of the order, knew of the inadequacy of the pollution controls at his plant, and deliberately failed to prevent further violations and therefore had not purged the contempt.[218]

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[213] *See, e.g.*, discussion of enforcement exploits of Metro Toronto officials in *R.* v. *B.E.S.T. Plating Shoppe Ltd* (1986), 59 O.R. (2d) 145, 1 C.E.L.R. (N.S.) 85 (H.C.), *aff'd in part* (1987), 1 C.E.L.R. (N.S.) 145 (C.A.); *R.* v. *Jetco Manufacturing Ltd* (1987), 57 O.R. (2d) 776, 1 C.E.L.R. (N.S.) 243 (C.A.); *Metro Toronto Municipality* v. *Siapas* (1988), 3 C.E.L.R. (N.S.) 122 (Ont. S.C.) [hereinafter *Siapas*].

[214] *Municipality of Metropolitan Toronto By-law No. 148-83*, s. 12, regulates the discharge of sewage and land drainage in the metropolitan area.

[215] R.S.O. 1980, c. 302.

[216] Description derived from *Siapas*, *supra*, note 213.

[217] *Ibid.* at 150.

[218] *Ibid.* at 144-45.

Thus, although absolute liability offences without imprisonment available as a penalty might not by themselves be sufficient to deter some persons, the potential of court orders prohibiting certain conduct, followed by contempt proceedings for violations of those orders may serve to address the situation of the recalcitrant offender. Metro Toronto officials had to use a somewhat circuitous route, involving first a conviction under the by-laws, then an application for a prohibition order under the *Municipal Act*, further convictions under the by-laws, and finally contempt proceedings. Legislative amendments could simplify this procedure.

If only absolute liability offences for corporations survive *Charter* challenges, this could still be of considerable use to regulators. Because corporations are the principal actor in many regulated contexts, the existence of absolute liability offences directed at corporations provides regulators with a simple and expedient enforcement technique; it is simple in the sense that the only issue to be addressed by all parties concerned is whether or not the *actus reus* has taken place. The expediency of such offences flows from the fact that regulators need not concern themselves with collecting evidence sufficient to refute a due diligence defence, as with strict liability offences, or intent, as with *mens rea* offences. It is submitted that the existence of absolute liability offences in a regulatory field signals to corporate regulatees that a particular behaviour will not be tolerated, regardless of the circumstances. The effect is as if to say, "The rules in this regulated sphere are harsh — if you want to engage in this activity, you should recognize that certain behaviours are forbidden, without excuse. If you cannot abide by these rules, do not engage in this regulated activity." Such absolute requirements may "scare off" those corporate regulatees unprepared to accept such stringent standards. A good example is transportation of dangerous goods. If an absolute liability offence states that certain goods must not be transported without a bill of lading, on pain of penalty, then this indicates that, if there is no bill of lading, no transportation should take place. The legislatures in this instance are undeniably taking a harsh stand; they wish to forbid completely an activity which is not conducive to safe road conditions. In circumstances such as these, absolute liability offences with significant financial penalties directed at corporations could greatly aid regulators in their enforcement activities.

If strict liability offences do survive the *Charter*, it will be possible to impose a negligence standard on regulatees. The success of regulatory regimes depends on this ability to impose the standard of reasonable care. If strict liability offences with due diligence defences and imprisonment fall, but those with no imprisonment survive, there may be some regulatees who will treat the fines, forfeitures and/or licence suspensions as mere slaps on the wrist. However, if fines, forfeitures and/or licence suspensions are sufficiently onerous, it will be a significant deterrent to many regulatees. In addition, as with the absolute liability offences attached to sewage by-laws discussed above,

the contempt of court option would still be available in many circumstances as a method of imposing imprisonment for recalcitrant offenders.

It is possible that the due diligence defence will be found to be in violation of subsection 11(d) and not justifiable under section 1, because the alternative of raising due diligence on a reasonable doubt is available. This "new" negligence offence could be problematic for administrators and, in turn, for society. Such a conclusion would effectively force prosecutors to prove a lack of reasonable care whenever an accused raises a reasonable doubt as to the possibility of due diligence. This burden may be impossible for the prosecutors to meet in many cases. Certainly Dickson J. in *Sault Ste Marie* seemed to think so; that is why he arrived at the conclusion that the accused should have the opportunity to *establish* due diligence to escape convictions. Improved information requirements imposed on regulatees may be of some assistance to administrators preparing a case for trial. It is submitted, however, that such requirements are not likely to be sufficient to refute due diligence where the accused need merely raise a reasonable doubt as to its existence.

Some might argue that in practice there is no workable distinction between an offence which requires the accused to prove due diligence on the balance of probabilities to avoid conviction, and one that permits the accused to raise a reasonable doubt as to the existence of due diligence. Trial judges will find a way to convict those whom they feel are guilty of negligence, the argument would go, and they will acquit those whom they feel have exercised due diligence, regardless of burdens of proof. This type of reasoning certainly contradicts the statement of the trial Judge in *Whyte*, who contended that in the absence of a balance of probability presumption, he would have found reasonable doubt as to whether the accused had "care and control" of a motor vehicle.[219] The "there is no difference in practice anyway" argument also fails to recognize the different quantity and quality of evidence which administrators would be forced to provide to prosecutors in preparation for a case. If an evidential rather than a persuasive burden is adopted, merely raising a reasonable doubt as to the existence of due diligence would then shift the burden of proof to the prosecutors to *prove negligence*. Prior to any case reaching the prosecution stage, administrators would be under an obligation to collect all the evidence necessary to prove negligence. In effect, prosecutors would be more likely to turn down a request from administrators for a prosecution unless proof of negligence could be established. Given the difficulty in accumulating such information, it is not unlikely that there would be a chilling effect on use of the prosecution mechanism. Once it became noticeable that less cases were reaching the courts, it is possible that regulatees would receive the signal that, in most circumstances, the offence of negligence was not enforceable.

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[219] As described by Dickson C.J.C. in that case, *supra*, note 1 at 115-16.

The only other possibility open to administrators is the *mens rea* regulatory offence. Perhaps courts will allow an evidentiary burden to be placed on the accused, so that convictions will follow on proof of the *actus reus*, unless the accused raises reasonable doubt as to lack of intent. Even if this possibility is allowed, prosecutors would in many cases be forced to prove intent, a task more daunting than proving negligence. Nevertheless, government would only be able to impose regulatory standards to deter intentional misconduct, not negligent misconduct. It would seem plainly evident that such a scenario would be a nightmare for administrators, and in turn for society.

F. Suggested Legislative Responses

1. *Reforms to Regulatory Offences*

To reiterate a point made earlier with respect to the impact of *Charter* challenges on regulatory offence enforcement, courts can choose to decide on the constitutionality of the variety of absolute and strict liability offences currently in place in a number of ways. Because of this, the legislative response must be at one and the same time flexible and yet also prepared for the worst. Briefly, some options are reviewed below.

As discussed earlier, on the basis of an analysis of *Motor Vehicle* and subsequent decisions, it appears that absolute liability offences with any potential of imprisonment (including probation) will be found unconstitutional unless they are attached to regimes designed to respond to emergencies, natural disasters and the like. Although courts seem willing to strike out offensive words or phrases, legislators could amend existing legislation to omit the problematic wording (for example, provisions barring the accused from establishing a due diligence defence, and the penalty of imprisonment). The clear advantage of legislatures taking the initiative to remove the offending wording on their own is that this will give them control over the form and substance of the amended offence; it will also give administrators, prosecutors, the regulatees and the public an accurate indication of how legislatures intended the offences to operate in practice. Thus, for example, although it may be unnecessary for the legislatures to include due diligence defences expressly (because, assuming such offences survive *Charter* challenges, courts will read such defences into the legislation if they are missing), explicitly including them provides the courts and everyone else with clear evidence as to how the legislatures characterize the offence.

Legislators should seriously consider adding separate absolute liability offences for corporations, because there are some indications that such offences may withstand *Charter* challenges where similar offences directed at individuals would not. As well, courts may have difficulty "reading down" existing absolute liability offences so that they apply only to corporations.

With respect to strict liability offences, on the basis of the analysis given, it is suggested that separate, specialized strict liability offences should be used, whenever possible, including:

(i) strict liability offences directed at individuals with imprisonment available as a penalty;

(ii) strict liability offences directed at individuals without imprisonment available as a penalty; and

(iii) strict liability offences directed at corporations.

The advantage of specialized offences of this nature is that, should the courts find one type of offence in violation of the *Charter* and unsalvageable by section 1, then the others are not necessarily affected.

The potential utility of contempt of court proceedings as an adjunct to absolute or strict liability offences has been demonstrated above in the section entitled *Impact on Regulatory Enforcement and Possible Responses*. The contempt proceedings route would be particularly useful should absolute and/or strict liability offences with imprisonment be struck down as incompatible with the *Charter*. The ability of administrators to invoke contempt proceedings could be facilitated in the following manner: each existing regulatory regime could be amended to authorize courts specifically to prohibit by order the continuance or repetition of offences under that legislation. In addition, a new *mens rea* offence could be added which would make repetitions of absolute and strict liability offences an offence in its own right, punishable by imprisonment.[220]

In effect, what is needed is a more sophisticated, hierarchical system of offences. Minor technical violations could be the subject of an offence with low or no *mens rea* (for example, absolute liability) with small fines. Contraventions of regulatory legislation which could cause serious harm could be deserving of strict liability offences with heavy pecuniary penalties. Repeat violations could be treated by a separate *mens rea* offence as discussed above. Different offences for corporations, corporate executives, and employees could be included. In this way, regulatory sanctions would more closely reflect the different behaviours and actors which may be involved in a particular regulatory context. Some regimes have already moved a considerable distance towards such sophisticated sanctioning approaches of this

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[220] Along this vein but in a slightly more elaborate form, a number of commentators have advocated that a new offence, "reactive non-compliance", be created for corporations whereby, for example, evidence of a conviction for a regulatory offence is itself sufficient to establish *mens rea*. *See* discussion in D. Hanna, *supra*, note 87 at 473-74. There would seem to be no reason why this type of *mens rea* offence need be limited in scope to the corporate sector.

type.[221] Others remain woefully primitive.[222] The *Charter* could be the catalyst for sweeping reforms for all fields of regulatory activity.

The one legislative response which will be of value, regardless of the outcomes to *Charter* challenges, is the improvement in information requirements on regulatees. As discussed earlier, more information about the regulatee will assist the administrators and the prosecutors in assessing whether due diligence or intent is or is not evident. These reporting and monitoring requirements will take on particular significance if strict liability offences as we now know them are struck down and replaced by offences where, in order to avoid conviction, due diligence need only be raised on a reasonable doubt standard.

One final possible legislative response must be mentioned. In theory, legislators could invoke the notwithstanding clause to maintain an offence provision otherwise contrary to the *Charter*. At present, it would appear that resort to such a measure would be rare. However, if all other measures fail, and the health and safety of citizens are directly in peril, the notwithstanding clause may be the last option open to legislators.

2. *The Civil Penalty Alternative*

In the face of anticipated challenges to all manner of regulatory offences, the alternative of civil penalty regimes may appear to some to be an attractive and viable alternative. At the federal level, civil penalties already form an integral component of the enforcement arsenal used in the income tax,[223] customs[224] and aeronautics[225] contexts, and provisions exist authorizing their use in other federal regulatory contexts.[226] What then, are these civil sanctions? Do they possess enforcement advantages over regulatory offences? What are their limitations? Are they less susceptible to *Charter* challenges than strict and absolute liability offences? A thorough analysis of these issues is beyond the scope of this article. Only a brief overview will be provided here.

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[221] *See, e.g., Canadian Environmental Protection Act*, S.C. 1988, c. 22, *especially* ss. 111-137 [hereinafter *C.E.P.A.*].

[222] *See, e.g.*, s. 48 of the *Environmental Protection Act*, S.N.S. 1973, c. 6, which is the only offence provision for the entire *Act*.

[223] *Income Tax Act*, R.S.C. 1952, c. 148, *as am.* S.C. 1970-71-72, c. 63 and subsequent amendments. In particular *see* s. 150 (requirement to file a return for income) coupled with ss. 161-63, s. 227 and s. 235 as described in E.C. Harris, *Civil Penalties Under the Income Tax Act* in INCOME TAX ENFORCEMENT, COMPLIANCE AND ADMINISTRATION (Toronto: Canadian Tax Foundation, 1988) at 9:1-9:24.

[224] *Customs Act*, S.C. 1986, c. 1, ss. 110, 117, 124, 129, 130.

[225] *Aeronautics Act*, R.S.C. 1985 (1st Supp.), c. 33, *especially* ss. 7.6-8.3.

[226] *C.E.P.A.*, S.C. 1988, c. 22, s. 134.

Briefly, the term "civil penalties" is used here to denote either a monetary sanction, a licence revocation/suspension or a forfeiture of property which is imposed by administrators outside of the ordinary courts. Civil penalties may be imposed upon a finding of intentional or negligent misconduct, or simply on the basis of the *actus reus*.[227] The sanctions are generally quite modest, which is in keeping with the general philosophy that civil penalties are more in the nature of restitution than deterrence.[228] However, civil proceedings can lead to the imposition of significant monetary fines. In the environmental context, for example, a civil penalty regime intended to recover costs for damage measured (for example, loss of tourist business, amenities and natural resources), or for profit made as a result of engaging in illegal activity, and as compensation for clean up costs could total many millions of dollars.

To give an example of one regulatory context where civil penalties have been introduced, in 1986 the federal Department of Transport instituted a system of administratively imposed monetary penalties for minor aeronautics safety violations.[229] The maximum penalty for any contravention is $1,000.[230] Where the Minister believes on reasonable grounds that a person has contravened a designated provision, notice of the allegation is served on that person.[231] The notice may also prescribe penalties for the contraventions. If a person served with a notice of contravention pays the penalties assessed, then no further proceedings shall take place.[232] People who decide to dispute the Minister's decision to assess a penalty against them or who fail to pay the penalties assessed within the allotted period will have the decisions reviewed by a member of the independent Civil Aviation Tribunal.[233] The penalty system has been described as "a quick and inexpensive method of enforcing minor or technical regulations which permits people to acknowledge their guilt without the necessity of a court appearance".[234] The *Aeronautics Act* stipulates that the Tribunal must afford a person who is alleged to have contravened a designated provision "a full opportunity consistent with procedural fairness and

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[227] *See, e.g.*, Harris, *supra*, note 223 for a description of the variety of behaviours which attract sanctions in the income tax context.

[228] Along the same lines the Supreme Court has recently drawn a distinction between sanctions which are "regulatory" or "protective" and those which are "punitive". *See Brosseau* v. *Alberta Securities Commission* (1989), 57 D.L.R. (4th) 458 (*sub nom. Barry* v. *Alberta Securities Commission*), 93 N.R. 1 (S.C.C.).

[229] *See generally*, discussion of the aeronautics administrative penalty system in the *Regulatory Impact Analysis Statement*, C. Gaz. 1989.11.1686, which accompanied an amendment to the *Air Regulations* and *Air Navigation Orders*.

[230] *Aeronautics Act*, R.S.C. 1985 (1st Supp.), c. 33, s. 7.6(1)(b).

[231] S. 7.7(1).

[232] S. 7.8(1).

[233] Ss. 7.8(2)-7.9.

[234] *Regulatory Impact Analysis Statement*, *supra*, note 229.

natural justice to present evidence and make representations" in relation to the alleged contravention.[235] The burden of proving a contravention is on the Minister;[236] presumably it is the normal civil standard of proof on the balance of probabilities rather than beyond a reasonable doubt. Although it is too early to assess properly how the system works in practice, some preliminary data are available. In the first year of operation, the Department of Transport assessed about 125 penalties worth $33,000, and in 88 percent of those cases, offenders elected to pay the penalties without resorting to the review process. In April, 1989, an expanded set of offences was designated for use in the system.[237]

The main advantage of civil penalty systems, when compared with regulatory offences prosecuted through the regular courts, would appear to be their expeditiousness and low cost. The fact that our criminal courts are severely overloaded is generally well accepted.[238] In contrast to regular court judges, review tribunal members represent independent arbiters who are particularly knowledgeable in the field concerned. There is less emphasis on legality and more on informality.[239] Although use of civil penalties is fairly rare in Canada, in the United States, similar approaches are employed in many contexts, assessing millions of dollars in penalties per year.[240]

Are civil penalty offences any less, or more, susceptible to *Charter* challenges than regulatory offences? It is suggested that, in so far as civil penalties could deprive persons of their life, liberty or security, they are as subject to the principles of fundamental justice as are regulatory offences.[241] In fact, the analysis given earlier with respect

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[235] *Ibid.* at 1688; *Aeronautics Act*, R.S.C. 1985 (1st Supp.), c. 33, s. 7.9(4).

[236] S. 7.9(5).

[237] *Regulatory Impact Analysis Statement*, *supra*, note 229.

[238] *See, e.g.*, Canada, Department of Justice, CRIMINAL LAW IN CANADIAN SOCIETY (Ottawa: Supply and Services Canada, 1982).

[239] *E.g.*, *Aeronautics Act*, R.S.C. 1985 (1st Supp.), c. 33, s. 37(1) states that the Civil Aviation Tribunal "is not bound by any legal or technical rules of evidence in conducting any matter that comes before it. . .and all such matters shall be dealt with. . .as informally and expeditiously as the circumstances and considerations of fairness and natural justice permit." Hearings are open to the public, unless the Tribunal is satisfied that such a hearing would not be in the public interest (s. 37(3)). The Tribunal may not receive evidence that would be inadmissible in a court by reason of any privilege under the law of evidence (s. 37(5)). Written reasons for decisions are provided upon request (s. 37(6)). Proceedings before the Tribunal are recorded (s. 37(8)).

[240] *See, e.g.*, H. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies* in REPORT PREPARED BY THE COMMITTEE ON COMPLIANCE AND ENFORCEMENT OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES (Washington: Admin. Conf. of the U.S., 1972). Description of moneys paid and cases heard at 2ff.

[241] This is in accordance with Wilson J.'s comments in *Wigglesworth*, *supra*, note 1 at 400, that less serious offences which are not criminal or quasi-criminal in nature shoud be "subject to the more flexible criteria of 'fundamental justice' in s. 7."

to *Charter* challenges of absolute and strict liability offences without imprisonment available as penalties is arguably equally applicable to civil penalty offences. Thus, if the Supreme Court of Canada finds that regulatory offences with only monetary penalties, licence suspensions and forfeitures can withstand section 7 challenges, so too should it find civil penalties in consonance with section 7.

The applicability of section 11 protections (specifically the subsection 11(d) presumption of innocence) to civil penalty regimes is slightly more problematic. On the surface, there would appear to be no reason for different treatment: section 11 specifically applies to "any person charged with an offence"; civil penalty offences would appear to be no less offences than are regulatory or criminal versions. The leading decision on this point is *Wigglesworth*.[242] In this case, Mme Justice Wilson held that section 11 applies to public offences involving punitive sanctions — that is, criminal, quasi-criminal and regulatory offences, federal or provincial. According to Wilson J., offences must have a "true penal consequence";[243] it is "preferable to restrict s. 11 to the most serious offences known to our law, *i.e.*, criminal and penal matters and to leave other 'offences' subject to the more flexible criteria of 'fundamental justice' in s. 7".[244] One could argue that since section 11 has been held to apply to a parking ticket,[245] then so too should it apply to civil penalty offences where the penalty could be considerably more substantial. However, two clear distinctions between parking tickets and civil penalty offences are the fact that civil penalties are not imposed by the regular courts, and that the civil balance of probability standard of proof is in place.

While Wilson J. indicates that offences imposed as part of a criminal or quasi-criminal proceeding, even if the consequences are trivial, must be subject to section 11,[246] she is less clear on public welfare offences imposed outside the ordinary courts. On the one hand, Wilson J. stipulates that: "if a particular matter is of a public nature, intended to promote public order and welfare within a sphere of activity, then that matter is a kind of matter which falls within s. 11".[247] She distinguishes these public offences from private, domestic or disciplinary matters which are "regulatory, protective or corrective" and are primarily intended to maintain discipline within a limited private sphere of activity.[248]

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[242] *Ibid.*

[243] *Ibid.*

[244] *Ibid.*

[245] *Re McCutcheon and City of Toronto* (1983), 41 O.R. (2d) 652, 147 D.L.R. (3d) 193 (Ont. H.C.), approved by Wilson J. in *Wigglesworth*, *ibid.* at 400-01.

[246] *Wigglesworth*, *ibid.* at 400.

[247] *Ibid.* at 401.

[248] *Ibid.*

Mme Justice Wilson was also of the opinion that proceedings regarding fitness to obtain public licences, and disqualifications associated with such a scheme, are not the sort of offence proceedings within the meaning of the word in section 11.[249] Following this, she makes the observation that, "[p]roceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of 'offence' proceedings to which s. 11 is applicable."[250] On its face, this seems to describe accurately regimes such as the *Aeronautics Act* administrative penalty system. However, Wilson J. allows for the possibility that even private proceedings may be subject to section 11 protections if the proceedings could lead to the imposition of "true penal consequences".[251] She defines such consequences as imprisonment or a fine which, by its magnitude, would appear to be imposed in order to address wrongs done to society.[252] The characterization of a fine as penal by the mere fact of its magnitude is problematic. As was discussed *supra*, civil penalties for environmental damage, clean up costs incurred and profit made as a result of the polluting activity can be extremely large, yet essentially remedial and not punitive in nature. Following *Wigglesworth*, such a regime is likely to be considered subject to full protection. Hence, a balance of probability proof standard, or a due diligence defence may not be acceptable when used in such a civil regime. In the final analysis, the penal consequences may be the determinative factor for whether section 11 protections apply, regardless of the nature of the proceedings.

Applying the *Wigglesworth* reasoning to administrative penalty regimes such as the *Aeronautics Act* system, it would appear that in spite of the characterization of the offences as public welfare, the fact that the proceedings are administrative and the penalties modest may mean that courts will find that the section 11 package of protections do not apply. However, in *Oakes*, Chief Justice Dickson held that the presumption of innocence, although expressly required by subsection 11(d), is part of the general protection of life, liberty and security of the person contained in section 7.[253] This leads back to the question of whether fines, licence suspensions, forfeitures and the like, when invoked pursuant to a civil process, amount to deprivations of "liberty and security of the person" so as to attract the fundamental justice protections. The significance of the procedures and the "stigma" associated with the criminal courts when compared with civil penalty tribunals is an issue which has not yet been squarely addressed by the courts.

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[249] *Ibid.*
[250] *Ibid.*
[251] *Ibid.* at 401-02.
[252] *Ibid.*
[253] *Supra*, note 1 at 333.

One lower court decision has considered the *Charter* application of sections 7 and 11(d) to a "quasi"- administratively imposed sanctions system. In *Grant* v. *British Columbia*,[254] the procedures in question authorized an administrator in certain circumstances to prohibit persons from driving if alleged minor traffic violations were not disputed.[255] The British Columbia Supreme Court held that this system violates the presumption of innocence because the effect of an undisputed violation is clearly to treat the violation as having been committed.[256] Nevertheless, the Court held that the system was reasonable and justifiable under section 1,[257] given the intolerable burden which would be placed on the court system in its absence,[258] and given the numerous safeguards which the system provided for those who wished to challenge an allegation that a violation had taken place.[259]

Synthesizing the *Wigglesworth* and *Grant* decisions, the short answer may be that, while civil penalties are imposed by administrators, they may still be subject to the *Charter* protections under sections 7 and 11. Section 1 may come to the rescue of some regimes, particularly those utilizing modest penalties. Failing a section 1 rescue, administrative tribunals and procedures may be forced to impose penalties in a manner in consonance with the presumption of innocence. However, it is not clear whether the advantages of expeditiousness could be maintained while at the same time affording the full protections.

IV. Conclusions

In a 1933 article entitled *Public Welfare Offences*, Francis B. Sayre made the following observation:

> All criminal law is a compromise between two fundamentally conflicting interests — that of the public which demands restraint of all who injure

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[254] *Supra*, note 141.

[255] *Ibid.* at 225. The violations were B.C. *Motor Vehicle Act* offences. If an accused wished to dispute an allegation, he or she could do so before a provincial court judge, as with any other provincial regulatory offence. It is in this sense that the system is described as "quasi"-administratively imposed. It should also be noted that the B.C. Supreme Court felt compelled to follow an earlier B.C. Court of Appeal decision [*R.* v. *Robson* (1985), 45 C.R. (3d) 68, 19 C.C.C. (3d) 137], which had held that the right to drive, once granted, is a protected liberty under s. 7 of the *Charter*.

[256] *Grant*, *ibid.* at 226.

[257] *Ibid.* at 227.

[258] *Ibid.* at 229.

[259] *Ibid.* at 229-30. In particular, the Court acknowledged that "[t]he presumption of innocence is fully preserved if the driver decides to dispute the allegation. If the driver does not dispute the allegation there are numerous safeguards."

> or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference.[260]

Although Sayre did not here distinguish between criminal and regulatory laws, the fundamental conflict of interests to which he refers is perhaps no more clearly demonstrated than with respect to regulatory offences, where the desire on the part of society for an effective way of imposing a reasonable standard of care on regulatees conflicts with the desire to protect the individual's rights as far as possible. There can be no doubt that, with the introduction of the *Charter*, it is the rights of the individual — particularly the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, and the right to be presumed innocent until proven guilty beyond a reasonable doubt — which are to receive pre-eminent protection over those of society.

It is understandable that absolute liability offences which have the potential of imprisonment would be found to be in violation of section 7 of the *Charter*, and not be salvageable through section 1. In fact, the courts and legislatures had already reached the conclusion that such offences were repugnant to notions of justice even before the *Charter* came into force, and legislators had reduced their use in favour of the more fair strict liability offence, with its due diligence defence available to the accused.

The position taken in this article is that an offence of objective negligence (that is, the strict liability offence), while a departure from the preferable full *mens rea* model, is nevertheless in consonance with the principles of fundamental justice as set out in section 7 when it is part of a regulatory regime. The fact that a strict liability offence is a component in a larger regulatory system justifies the assumption that as a pre-condition to engaging in regulated activity, regulatees have been made aware of the standards which they must meet, and accept that should their conduct fall below these standards, they may be subject to penalties pursuant to procedures which reflect their special position as regulatees. In a number of recent decisions, the Supreme Court of Canada has indicated its willingness to accept the objective negligence standard as the minimum mental element for section 7 purposes, when embodied in a regulatory offence.

It also seems clear, however, that the due diligence defence will be considered to be in violation of the subsection 11(d) presumption of innocence. The question to be answered then is whether the due diligence defence can be rescued through section 1. Unfortunately, the way the Supreme Court has developed criteria for the application of section 1, they may inadvertently have prevented judges from finding the due diligence defence to be reasonable and justifiable. The word "inadvertently" is deliberately used here because it is apparent from a

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[260] *Supra*, note 45 at 68.

reading of its most recent decisions that the Court has always considered that there is a place for the strict liability alternative with its due diligence defence—so much so that the Justices allude favourably to its existence in these decisions as better alternatives to some of the measures they were having to consider in those cases.

Therein lies the problem. The test for reasonable and justifiable limits under section 1 has been developed not with strict liability offences in mind, but instead with the absolute liability and criminal offences under consideration in cases decided by the Supreme Court to date. It appears that what has developed is a set of criteria which not only is stringent enough to result in the rejection of the provisions in question in those cases, but also so stringent that strict offences as we now know them may not be able to meet all aspects of the criteria. In particular, the requirements that there be a "rational connection" between proven and presumed fact, and that the measures infringe "as little as possible" may defeat the due diligence defence.

The alternative of having the accused raise the existence of a due diligence defence on a reasonable doubt could be considered by the courts to be a measure less offensive to *Charter*-protected rights and freedoms, and thus preferable to the current approach where the accused must prove due diligence on the balance of probabilities. The difficulty here is that, while undoubtedly the alternative method infringes *Charter* rights to a lesser extent, there is also a good likelihood that it will defeat the objective of creating the offence as well, because of the difficulty prosecutors would experience refuting a due diligence defence raised by a reasonable doubt. This was explicitly recognized in *Sault Ste Marie* and it is submitted that that is why the Court chose to shift the burden of proof to the accused.

However, this scenario may not materialize. In *Whyte*, Chief Justice Dickson recognized a balance of probabilities defence in spite of the existence of the mere reasonable doubt alternative. The Chief Justice did so, it is submitted, by tacitly recognizing a new component of the "least as possible" test. In essence, he took into account the *unenforceability* of the offence if the mere reasonable doubt alternative were adopted. Thus, he recognized that alternative measures must not only be less violative of *Charter* protected rights and freedoms, but also be *practicable*. For strict liability offences to survive *Charter* challenges, it is necessary that the courts seize upon this tacitly recognized factor in *Whyte* and apply it to the strict liability offence within the due diligence defence context. On the basis of the reasoning of *Whyte*, those strict liability offences used to enforce standards which protect the health and safety of Canadians are the most likely to be salvaged pursuant to section 1.

Although Supreme Court decisions indicate that absolute liability offences with imprisonment will rarely survive *Charter* challenges, there seems a good likelihood that absolute offences with penalties short of imprisonment will withstand *Charter* challenges. It has been demonstrated in this article that the lack of availability of imprisonment

as a penalty option can be at least partially compensated through contempt of court proceedings. The use of this contempt of court approach to "regain" the option of imprisonment could be facilitated by legislative amendments discussed in this paper.

The article also suggests that legislators establish different offences for corporations and individuals. Analysis of the recent decisions reveals that corporations will rarely be afforded the full range of *Charter* protections provided to natural persons. In light of this, it may be possible to sanction corporations more expeditiously than individuals. Thus, for example, the Supreme Court of Canada appears prepared to approve of absolute liability offences for corporations even if such offences directed at persons are deemed constitutionally unacceptable. Given the prevalence of the corporate form in regulatory contexts, specialized corporate regulatory offences could prove to be an expeditious and effective method of gaining compliance from these actors.

A number of broad conclusions emerge from the foregoing analysis. It is obvious that the *Charter* has forced a fundamental rethinking about the way the state uses coercion to achieve societal goals. The *Charter* has enshrined a set of principles for the state-imposition of penalties. Natural persons possess greater legal protections than artificial entities. The imposition of the penalty of imprisonment is permitted under more rigourous conditions than impositions of mere pecuniary penalties; proof of subjective intent is generally necessary where there is potential for imprisonment. The lesser mental element of objective negligence may suffice where the offence is part of a regulatory regime protecting the health and safety of persons, and where use of the subjective mental element would defeat the objectives of the legislation. The burden of proof shall generally rest with the prosecution, except where the imposition of such a burden would defeat objectives sufficiently important to override those of the accused, such as the health and welfare of the public.

These principles, when applied consistently to all offences regardless of what they are called or what piece of legislation in which they are included, should lead to the articulation of a more rational and sophisticated hierarchy of offences than is currently in place — specialized offences for corporations and for individuals; specific penalties for specific types of conduct; specialized triers of fact for specialized types of offences. In many respects, this new rationalization represents the culmination of a movement away from a monolithic approach to offences which took hold in the nineteenth century. The Supreme Court of Canada is in the pivotal position to orchestrate this new rationalization. If it maintains a sensitive and flexible approach to the conflicting values at stake, the road for regulatory offences, while under construction now, will be ready for tomorrow.