

R. v. Pontes, [1995] 3 S.C.R. 44

Her Majesty The Queen

Appellant

v.

Patrick Pontes

Respondent

and

The Attorney General of Canada

Intervener

Indexed as: R. v. Pontes

File No.: 24020.

1995: February 28; 1995: September 21.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Fundamental justice -- Provincial motor vehicle offence -- Absolute or strict liability -- Accused charged with driving motor vehicle while prohibited -- Whether s. 94(1) of British Columbia Motor Vehicle Act, when read in conjunction with s. 92, creates absolute liability offence

which violates s. 7 of Canadian Charter of Rights and Freedoms -- Ignorance of the law -- Notice.

Criminal law -- Provincial motor vehicle offence -- Absolute or strict liability -- Accused charged with driving motor vehicle while prohibited -- Whether combined effect of ss. 94(1) and 92 of British Columbia Motor Vehicle Act creates absolute or strict liability offence.

The accused was charged with driving a motor vehicle at a time when he was prohibited from driving under s. 92 of the British Columbia *Motor Vehicle Act*, contrary to s. 94(1) of that Act. Section 92 provides that a person convicted of an offence under certain sections of the Act, including s. 94(1), is "automatically and without notice" prohibited from driving a motor vehicle for 12 months. Section 94(1) provides that a person who drives a motor vehicle on a highway while he is prohibited from driving under certain sections of the Act, including s. 92, commits an offence and is liable to a fine and to imprisonment. The accused was acquitted at trial. The trial judge found that s. 94(1), in combination with s. 92, created an absolute liability offence for which imprisonment was a penalty, thereby contravening s. 7 of the *Canadian Charter of Rights and Freedoms*. Pursuant to s. 52 of the *Constitution Act, 1982*, the reference to s. 92 in s. 94(1) was declared of no force or effect. The summary conviction appeal court and the Court of Appeal upheld the trial judge's decision.

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: The fundamental aspect of the offence created by ss. 94(1) and 92 of the *Motor Vehicle Act* is that a person convicted of the underlying offence is "automatically and without notice" prohibited from driving a motor vehicle. The words "automatically and without notice" in s. 92 go far towards establishing that this is an absolute liability offence. The removal in 1986 of s. 94(2), which provided that s. 94(1) was an absolute liability offence, does not change the offence into one of strict liability since the situation has not been altered in any significant manner. Furthermore, the defence of due diligence must be available to defend a strict liability offence. When, as a result of the wording of the section, the only possible defence an accused could put forward is his ignorance of the fact that his licence had been suspended by the provisions of the provincial statute, which constitutes a mistake of law and therefore is not available as a defence, an accused is denied the defence of due diligence. Here, because the prohibition on driving in s. 92 is automatic and without notice, s. 94(1) effectively prevents an accused who is unaware of the prohibition from raising that defence. In those circumstances, the offence ought to be characterized as one of absolute liability.

Nevertheless the absolute liability offence created by s. 94(1) and s. 92 does not contravene the *Charter*. This conclusion flows from the application of s. 4.1 and of s. 72(1) of the *British Columbia Offence Act*. These sections respectively indicate that, notwithstanding the provisions of any other Act, no person is liable to imprisonment for an absolute liability offence, and that the non-payment of a fine will not result in imprisonment. Thus, an accused convicted under ss. 94(1) and 92 faces no risk of imprisonment and there is, accordingly, no

violation of the right to life, liberty and security of the person under s. 7 of the *Charter*.

The legislature could convert the offence to one of strict liability by permitting the defence of due diligence to be raised. If there was any concern that those accused of the offence would defend on the basis that they had no knowledge of its effect, a provision requiring that notice be given of its consequences could be added.

In this case an order directing a new trial would ordinarily be the appropriate result. In the present circumstances, however, to direct a new trial would be unfair and unduly harsh to the accused, who has been brought before every level of court at the Crown's instigation. This appeal was lodged solely to determine whether the offence in question was one of absolute or strict liability. That question is now resolved and the appeal should be dismissed.

Per La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. (dissenting): The *Motor Vehicle Act* is public welfare or regulatory legislation. The impugned provisions are aimed at keeping bad drivers off the road; they are not prohibitions which are "criminal in the true sense". As a result, this offence is *prima facie* one of strict liability. Further, the legislature has not clearly indicated that the offence created by the combination of ss. 92 and 94(1) is one of absolute liability. The phrase "automatically and without notice" simply highlights that the 12-month statutory prohibition is to take effect immediately and by operation of law without any requirement that notice be given by the Superintendent of Motor Vehicles or received by a driver who is prohibited from driving under the statute.

An accused cannot seek solace in the failure to provide notice of the applicable statutory prohibition, since ignorance of the law is never an excuse for breaking the law. As well, the impugned provisions allow for the defences of reasonable mistake of fact and due diligence. Accordingly, the *prima facie* characterization of this public welfare legislation as being of strict liability is confirmed.

A strict liability offence requires the minimal mental element of negligence in order to ground a conviction. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent to take steps which a reasonable person would take. Since ignorance of the law is not an excuse for breaking the law, due diligence consists in taking steps to fulfil a duty imposed by law and not in the ascertainment of the existence of a statutory prohibition or its interpretation. Exceptionally, where knowledge that conduct is prohibited is itself part of the *mens rea*, the absence of knowledge provides a good defence.

Here, s. 92 creates the 12-month driving prohibition which is effective automatically and without notice upon conviction of one of the underlying offences. The factual element comprising the *actus reus* consists in the driving of a motor vehicle having previously been convicted of one of the underlying offences. Since there is no *mens rea* specified, it must be inferred from the *actus reus* and, because this is a regulatory offence, the *mens rea* consists in negligence in relation to any of the elements of the *actus reus*, but not in relation to the existence of this statutory prohibition or its interpretation, since that would be ignorance or mistake of law. Consequently, a person charged with driving while under a statutory prohibition can avoid conviction if he demonstrates, on the

preponderance of the evidence, that he made a reasonable mistake of fact as to the existence of his conviction, or that he exercised due diligence to ascertain whether he had been convicted of one of the underlying offences. Defences are available in relation to all the factual elements of the *actus reus*, and this adequately meets the minimal constitutional requirement of fault for a public welfare or regulatory offence such as driving while under a statutory prohibition. Sections 92 and 94(1) of the *Motor Vehicle Act* are therefore entirely consistent with s. 7 of our *Charter* without any further requirements.

Since the impugned provisions already allow for due diligence in relation to all the factual elements of the *actus reus*, the due diligence called for by the majority, presumably as a principle of fundamental justice under s. 7 of the *Charter*, to cure the alleged constitutional deficiency in the provisions is nothing less than due diligence in relation to the existence of a legislative prohibition pertaining to a regulated activity or its interpretation -- that is, a defence of ignorance of the law. Our system of laws, however, has long held as axiomatic that ignorance of the law is not an excuse for breaking the law. This cornerstone of our law remains secure even after the passage of the *Charter*, and there is no conflict between it and the principles of fundamental justice. To expand the defence of due diligence to comprehend a defence of ignorance of the law undercuts the mistake of law rule and will render many of our laws unenforceable; as a corollary, this Court's decision in *Molis* appears to be impliedly overturned without any explanation. Furthermore, the impugned prohibition is a regulatory offence incident to a licensed activity. A regulated actor is deemed to have voluntarily accepted the terms and conditions attaching to the privilege of participating in a regulated activity. As a result, he cannot be described as morally

innocent when he commits a regulatory offence. Finally, a legislature may choose, as a matter of policy, to provide a defence of ignorance of the law in relation to some, all or none of the statutory conditions of engaging in a regulated activity. Such a policy decision remains a matter over which the relevant representative body is entirely sovereign.

The provision of some form of notice of the law would convert the offence into one of full *mens rea*, since the accused would then be driving with actual subjective knowledge that he was prohibited under provincial legislation. Rather than an offence of full *mens rea*, the province chose a solution appropriately tailored to the regulatory context: an offence of strict liability. That solution adequately meets the exigencies of our *Charter* and is therefore a valid policy choice of full force and effect without any further requirement of notice.

Cases Cited

By Cory J.

Overruled in part: *R. v. MacDougall*, [1982] 2 S.C.R. 605; *R. v. Prue*; *R. v. Baril*, [1979] 2 S.C.R. 547; **applied:** *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299; **referred to:** *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *Molis v. The Queen*, [1980] 2 S.C.R. 356.

By Gonthier J. (dissenting)

R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299; *R. v. MacDougall*, [1982] 2 S.C.R. 605; *R. v. Prue*; *R. v. Baril*, [1979] 2 S.C.R. 547; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. Logan*, [1990] 2 S.C.R. 731; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *Molis v. The Queen*, [1980] 2 S.C.R. 356; *R. v. Docherty*, [1989] 2 S.C.R. 941; *R. v. Forster*, [1992] 1 S.C.R. 339; *R. v. Heywood* (1992), 77 C.C.C. (3d) 502; *R. v. Tremblay*, [1993] 2 S.C.R. 932; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, s. 7.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C., 1985, c. C-46, ss. 19, 220, 221, 236, 249(1)(a) [rep. & sub. c. 27 (1st Supp.), s. 36; repl. 1994, c. 44, s. 11], 253 [rep. & sub. c. 27 (1st Supp.), s. 36; rep. & sub. c. 32 (4th Supp.), s. 59], 254(5) [rep. & sub. c. 27 (1st Supp.), s. 36], 255 [*idem*; am. c. 1 (4th Supp.), s. 18 (Sch. I, item 7)], 259(4) [rep. & sub. c. 27 (1st Supp.), s. 36; am. c. 32 (4th Supp.), s. 62].

Highway Safety Code, R.S.Q., c. C-24.2, ss. 105 [repl. 1993, c. 42, s. 1], 106.1 [*idem*, s. 3], 550.1 [ad. *idem*, s. 28].

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 52, 53.

Motor Vehicle Act, R.S.B.C. 1979, c. 288, ss. 86(1) [rep. & sub. 1982, c. 36, s. 18; am. 1985, c. 77, s. 3], 88 [rep. & sub. 1982, c. 36, s. 19; am. 1985, c. 52, s. 56; am. 1987, c. 46, s. 6], 92 [rep. & sub. 1982, c. 36, s. 19; am. 1982, c. 73, s. 1; am. 1984, c. 30, ss. 52 and 53; am. 1985, c. 52, s. 60; am. 1985, c. 77, s. 4; am. 1986, c. 19, s. 4]; 94(1) [rep. & sub. 1982, c. 36, s. 19; am. 1984, c. 30, s. 57], (2) [rep. & sub. 1982, c. 36, s. 19; rep. 1986, c. 19, s. 5], 220.1(1) [en. 1982, c. 73, s. 2], 220.3(1) [*idem*].

Motor Vehicle Amendments Act, 1986, S.B.C. 1986, c. 19, s. 5.

Offence Act, R.S.B.C. 1979, c. 305, ss. 4.1 [en. 1990, c. 34, s. 10], 72(1) [am. 1989, c. 38, s. 32].

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APPEAL from a judgment of the British Columbia Court of Appeal (1994), 89 B.C.L.R. (2d) 271, 1 M.V.R. (3d) 87, 19 C.R.R. (2d) 281, 40 B.C.A.C. 73, 65 W.A.C. 73, affirming a judgment of Hood J. (1992), 37 M.V.R. (2d) 162, dismissing the Crown's appeal from a judgment of Cronin Prov. Ct. J. rendered June 14, 1991, acquitting the accused on a charge of driving a motor vehicle while prohibited. Appeal dismissed, La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting.

George H. Copley, for the appellant.

Terrence L. Robertson, Q.C., and *Andrea M. Finch*, for the respondent.

Bernard Laprade, for the intervener.

The judgment of Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ. was delivered by

- 1 CORY J. -- The sole issue to be resolved on this appeal is whether the combined effect of ss. 94(1) and 92 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, creates an offence of absolute liability or strict liability.

Factual Background

- 2 The respondent was charged with driving a motor vehicle in the city of Vancouver on August 3, 1990, at a time when he was prohibited from driving pursuant to s. 92 of the *Motor Vehicle Act*.

Relevant Statutory Provisions

- 3 Section 92 of the *Motor Vehicle Act* provides in part:

92. (1) For the purpose of this section, "convicted" includes the granting of an absolute or conditional discharge.

(2) A person who is convicted of

(a) an offence under section 88, 94, 220.1(1) or 220.3(1), or

(b) a motor vehicle related *Criminal Code* offence

is automatically and without notice prohibited from driving a motor vehicle for 12 months from the date of sentencing, the date that the passing of sentence is suspended, the date of being granted an absolute or conditional discharge. . . .

- 4 Prior to December 1985, s. 92 contained a third subsection which provided:

(3) Subsection (2) does not apply where neither the defendant nor his agent or counsel appear before the court at the time of conviction.

5 Section 94 of the *Motor Vehicle Act* provides in part:

94. (1) A person who drives a motor vehicle on a highway or industrial road while

- (a) he is prohibited from driving a motor vehicle under section 90, 91, 92 or 92.1 of this Act . . . or
- (b) his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 82 or 92 as it was before its repeal and replacement came into force . . .

commits an offence and is liable,

- (c) on a first conviction, to a fine of not less than \$300 and not more than \$2 000 and to imprisonment for not less than 7 days and not more than 6 months, and
- (d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than \$300 and not more than \$2 000 and to imprisonment for not less than 14 days and not more than one year.

6 Prior to 1987, s. 94 contained the following subsection:

(2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

7 Section 4.1 of the *Offence Act*, R.S.B.C. 1979, c. 305 (amended in 1990) provides:

4.1 Notwithstanding section 4 or the provisions of any other Act, no person is liable to imprisonment with respect to an absolute liability offence.

8 Further, s. 72(1) of the *Offence Act* provides that the failure to pay a fine will not result in a jail term:

72. (1) Subject to subsection (6), but notwithstanding any other provision of this Act, any other Act, regulation, municipal bylaw or order made by a justice, no justice shall, except under the *Small Claims Act*, order that a person be imprisoned by reason only that he defaults in paying a fine.

- 9 It should be noted that neither the provisions of s. 4.1 of the *Offence Act* nor the absence of any jail term for the non-payment of fines was argued in the courts below. Obviously, if the offence is one of absolute liability, but there is no risk of imprisonment, then the provision will not offend s. 7 of the *Canadian Charter of Rights and Freedoms*. Similarly, if the statutory provisions are found to create a strict liability offence, then by definition a defence of due diligence must be available to the accused and there will be no infraction of s. 7 of the *Charter*. The sole difference will be that if the offence is found to be one of strict liability, the possible sanction of a term of imprisonment may be retained.

Courts Below

Provincial Court

- 10 Cronin Prov. Ct. J. found that s. 94 of the *Motor Vehicle Act*, in combination with s. 92, created an absolute liability offence for which imprisonment was a penalty, with the result that the offence violated s. 7 of the *Charter*. He concluded that a person who was unaware of the fact that he had been prohibited from driving pursuant to s. 92 of the *Motor Vehicle Act* could still drive his motor vehicle, honestly believing that he was entitled to do so, yet if he was charged under s. 94 he would have no defence available to him. This, he held, would follow from the decision in *R. v. MacDougall*, [1982] 2 S.C.R. 605, which held that ignorance of the

fact that one's licence had been revoked or suspended was ignorance of the law and therefore did not constitute a defence.

- 11 Cronin Prov. Ct. J. found that the situation presented to him was the same as that which faced the Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. He declared that the reference to s. 92 in s. 94 of the *Motor Vehicle Act* should be declared inoperative pursuant to s. 52 of the *Constitution Act, 1982*. In light of his finding that the legislation was invalid, he found the accused not guilty.

Summary Conviction Appeal Court

- 12 In careful and extensive reasons, Hood J. upheld the decision of the trial judge: (1992), 37 M.V.R. (2d) 162. It was his opinion that in order to constitute a strict liability offence that conformed with s. 7 of the *Charter*, s. 94 of the *Motor Vehicle Act* had to provide for a minimum fault requirement of negligence. This required that the defence of due diligence or reasonable care be available to an accused. In his view, the question to be resolved in the case was whether the combination of ss. 94 and 92 of the *Motor Vehicle Act*, in reality, left this defence open to an accused.
- 13 It was his opinion that the decision in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, did not go so far as to require an accused to know that he had been prohibited from driving. On this point he wrote (at pp. 177-78):

While the essential ingredients of subjective mens rea, i.e., intent or knowledge of the wrongfulness of the act on the part of the accused (a positive state of mind) are not required, in my opinion knowledge of the essentials of the actus reus are required where the minimum fault

requirement is negligence; for it seems to me that like intention, negligence presupposes knowledge of the circumstances making up the actus reus. If the accused does not have knowledge of a particular event, it is difficult to see how he can carry out any duty imposed by that event. I find it difficult to see how it can be said that the defence of due diligence was open to the accused when he did not know of the fact that he was prohibited from driving, and therefore was unaware of the duty imposed on him by that prohibition. No care on his part could save him from conviction and imprisonment. Not knowing of the duty imposed on him by the law, he would not have done anything factually in discharge of that duty which could be later scrutinized on the issue of due diligence.

- 14 Hood J. emphasized that these words did not mean that ignorance of the law was a defence. He stated that the situation was quite different in the case at bar "which concerns knowledge of an essential element of the actus reus and involves some voluntariness or awareness on the part of the accused" (p. 178). It was his opinion that it did not matter if the lack of knowledge of the essential element also constituted ignorance of the law. He found that "[i]t is the lack of knowledge of the essential element of the actus reus which prevents the defence of due diligence from being available. This is not to say that ignorance of the law is a defence" (p. 178). On this question, he concluded that, in the alternative, if there was a conflict between the principle that ignorance of the law is no defence and the requirements of s. 7 of the *Charter*, then the *Charter* must prevail.
- 15 Hood J. distinguished the decision in *MacDougall*, *supra*, on the basis that in *MacDougall* the accused had general knowledge of the provisions of the Nova Scotia *Motor Vehicle Act* and therefore of the duties imposed upon him. Further, he observed that it did not appear that the defence raised in the case at bar, namely that because of the nature of the prohibition under s. 92, an accused charged under s. 94 simply would not have available to him a defence of due diligence, was argued in *MacDougall*.

- 16 Hood J. held that s. 94 of the Act, when read in combination with s. 92, created an absolute liability offence. He reached this conclusion by applying both the traditional approach to the classification of offences set out in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, and as well the constitutional approach outlined by this Court in *Re B.C. Motor Vehicle Act*, *supra*.
- 17 With regard to the traditional approach, he found that there had been no significant change in s. 94 with the invalidation of s. 94(2) following the *Re B.C. Motor Vehicle Act* decision. He observed that as things presently stood, an accused could still be convicted under that section whether or not he knew that he had been prohibited from driving. He found that the combined effect of ss. 92 and 94 was "to remove from the accused any opportunity to prove that his action in driving his motor vehicle while prohibited from doing so was due to an honest and reasonable mistake of fact, or that he acted without guilty intent" (p. 187). He concluded that the offence still remained one of absolute liability.
- 18 Applying the constitutional approach, he also concluded that the combination of ss. 94 and 92 offended the principles of fundamental justice and thus contravened s. 7 of the *Charter*. As a result of the enactment making the driving prohibition automatic and without notice, the legislation effectively withdrew from the accused any possible defence of due diligence. This defence of due diligence was required in order to make negligence offences comply with the requirements of s. 7. On this aspect he wrote (at p. 190):

In order for s. 94 to withstand *Charter* scrutiny it must require as an essential element a minimum mens rea or fault requirement of negligence and leave open or available to an accused at the least the

defence of due diligence. It would then conform to s. 7 of the *Charter* and the principle of fundamental justice. It does not do so.

...

[B]y making the prohibition automatic and without notice, the legislature effectively withdrew from the unknowing accused all possible defences of due diligence. As I have already said, an accused having no knowledge of the prohibition would have no knowledge of the duty imposed upon him. No care on his part could save him. He would never be in a position to show that he took all reasonable care to avoid breaching the statute. Generally, the situation is this. The accused has knowledge of the essential elements of the *actus reus*, the prohibited act, but does not know that it is illegal; for example, driving a motor vehicle in a certain manner or manufacturing certain chemicals. He bona fide believes that what he is doing is legal. He is mistaken. This is what is meant by ignorance of the law or mistake of law. It is no defence.

But here the situation is different. I am reasonably confident that the accused would know the law, i.e., that it is illegal for a person to drive his motor vehicle when he is prohibited from doing so. What he is ignorant of, or mistaken about, is the very fact that he has been prohibited from driving. His ignorance goes to an essential element of the *actus reus*; which must be a conscious or voluntary act on the part of the accused. Where the *actus reus* is the offence, and negligence must be the minimum fault, the defence of due diligence cannot be said to be open to the accused who has no knowledge of an essential element of the *actus reus*. This is so, in my opinion, even if it can be said that the lack of knowledge of the essential element of the *actus reus* at the same time constitutes ignorance of the law.

Court of Appeal

- 19 The Court of Appeal adopted the reasons of Hood J. and dismissed the appeal: (1994), 89 B.C.L.R. (2d) 271, 1 M.V.R. (3d) 87, 19 C.R.R. (2d) 281, 40 B.C.A.C. 73, 65 W.A.C. 73.

Analysis

Categories of Offences

- 20 It may be helpful to undertake a very brief review of the reasons of Dickson J. (as he then was) in *Sault Ste. Marie, supra*. In that case, he noted that there were three categories of offences. First, he referred to the traditional criminal law offence, which required proof of either an intent to commit the prohibited act or a reckless disregard for the consequences of committing that act. Second, at the opposite end of the scale was the absolute liability offence which did not permit of any explanation by the accused; the performance of the act alone was sufficient to establish culpability. Third, between these two categories was the offence of strict liability. In that category of offence, the accused could escape liability by demonstrating that he had exercised due diligence by taking all reasonable steps to avoid the commission of the prohibited act, or that he reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent.
- 21 Dickson J. described the offences in this manner (at pp. 1325-26):
1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable

steps to avoid the particular event. These offences may properly be called offences of strict liability. . . .

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault. [Emphasis added.]

22 He then went on to indicate how a distinction could be made between offences of strict liability and absolute liability and described the manner in which the various offences could be categorized (at p. 1326):

Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

23 Subsequent to this decision, the question arose as to what minimal intent should be required in light of the passage of s. 7 of the *Charter*. That section provides:

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

24 In *Re B.C. Motor Vehicle Act*, *supra*, Lamer J. (as he then was) found that absolute liability offences which provided for a term of imprisonment as a sanction contravened s. 7 of the *Charter*. At page 515 of that decision he wrote:

I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the *Charter* and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

- 25 This principle that provincial regulatory offences which provide for a sanction of imprisonment require a minimum mental state was again confirmed in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636. At page 652, Lamer J. wrote:

In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re B.C. Motor Vehicle Act*, 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 Ste. Marie*, *supra*, to a constitutionally required element. *Re B.C. Motor Vehicle Act* . . . 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. [Emphasis added.]

- 26 From the cases which followed the passage of the *Charter*, the following can be derived: first, generally speaking, an offence of absolute liability is not likely to offend s. 7 of the *Charter* unless a prison sanction is provided; secondly, an accused charged with an absolute liability offence cannot avoid liability by demonstrating that he exercised due diligence; thirdly, one of the prime bases for distinguishing a strict liability offence from an absolute liability offence is the availability of the defence of due diligence; fourthly, any provincial regulatory offence providing for a term of imprisonment must make a defence of due diligence available to the accused. I would leave open for future consideration the situation presented by an absolute liability offence punishable by fine with the

possibility of imprisonment for its non-payment in those circumstances where the legislation provides that the imposition and collection of any fine is subject to a means test.

Does Section 94, in Combination with Section 92, Create an Absolute Liability Offence?

- 27 There are, I believe, two methods of determining whether an offence is one of absolute liability. First, as suggested in *Sault Ste. Marie, supra*, regard may be had to the overall regulatory pattern adopted by the legislature, the subject matter of the legislation, the importance of the penalty and the precision of the language used.
- 28 Second, the availability of a due diligence defence must be considered. An absolute liability offence denies an accused the opportunity to put forward a defence of due diligence. Conversely, in order for an offence to be one of strict liability, the defence of due diligence must be available.
- 29 Considering first, the wording of the Act, it will be remembered that it provides that a person convicted of an underlying offence is "automatically and without notice" prohibited from driving a motor vehicle for 12 months from the date of sentencing. Section 94 provides that a person who drives a motor vehicle on the highway while he is prohibited from driving under s. 92 commits an offence and is liable:

- (c) on a first conviction, to a fine of not less than \$300 and not more than \$2 000 and to imprisonment for not less than 7 days and not more than 6 months, and
- (d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than \$300 and not more than \$2 000 and to imprisonment for not less than 14 days and not more than one year.

The fundamental aspect of the offence is that a person convicted of the underlying offence will be automatically and without notice prohibited from driving a motor vehicle. The words "automatically and without notice" go far towards establishing that this is indeed an absolute liability offence.

30 In *Re B.C. Motor Vehicle Act*, *supra*, it was found that s. 94, as it was then worded, created an absolute liability offence. At the time of that decision, s. 94 contained a subs. (2) which read:

(2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

That provision was found to contravene the *Charter* and was deleted from the Act in 1986. However, I am of the view that the removal of that subsection does not change the offence into one of strict liability. As all the judges in the courts below have found, the situation has not been changed in any significant manner by the deletion of that subsection. The deleted subsection did no more than emphasize and reiterate that this was an absolute liability offence. Yet, the same conclusion can be reached from a consideration of the remaining wording of s. 94. Section 94(1)(a) still refers to s. 92 which, in turn, provides that a driver will "automatically and without notice" be prohibited from driving for a period of

12 months. In effect, the combination of s. 92 and s. 94 provides for the conviction of the prohibited driver whether or not he knows that he is prohibited from driving.

- 31 Section 94 goes further. Because the prohibition to drive in s. 92 is automatic and without notice, s. 94 effectively prevents an accused who is unaware of the prohibition from raising a defence of due diligence. At this point, it may be helpful to explore the nature of the defence of due diligence and how and when it may be utilized.

Defence of Due Diligence

- 32 The decision in *Sault Ste. Marie, supra*, established that a person accused of a strict liability offence may avoid conviction by proving, on the balance of probabilities, either that he had an honest but mistaken belief in facts which, if true, would render the act innocent, or that he exercised all reasonable care to avoid committing the offence. That is to say, he did what a reasonable person would have done in the circumstances to avoid the occurrence of the prohibited act. In my view, if neither of these two facets of the defence of due diligence is available to an accused, the offence cannot be said to be one of strict liability. By definition, a strict liability offence requires that the defence of due diligence be available. Put another way, if the offence does not permit a due diligence defence, then it cannot be a strict liability offence.
- 33 In determining whether either facet of the defence of due diligence is available in this case, it is important to remember the well-established principle, incorporated in s. 19 of the *Criminal Code*, R.S.C., 1985, c. C-46, that a mistake of law is no

excuse. In other words, a mistake as to what the law is does not operate as a defence.

- 34 The application of this principle leads to the conclusion that an accused cannot put forward as a defence that he made diligent inquiries as to the legality of his actions or status. The submission of such a defence was specifically rejected in *Molis v. The Queen*, [1980] 2 S.C.R. 356. In that case, the accused was charged with trafficking in a drug restricted under the *Food and Drugs Act*. The drug which the accused had begun manufacturing had been unrestricted but later became restricted. At trial, the accused testified that he had exercised due diligence to ascertain the state of the law. This defence was rejected. At page 364 Lamer J. wrote:

It is clear to me that we are dealing here with an offence that is not to be considered as one of absolute liability and, hence, a defence of due diligence is available to an accused. But I hasten to add that the defence of due diligence that was referred to in *Sault Ste. Marie* is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation. [Emphasis added.]

- 35 These principles must be kept in mind in the assessment of the Crown's contention that the decision of this Court in *MacDougall, supra*, constitutes a complete answer to the characterization of the offence. In that case, following a conviction for failing to remain at the scene of an accident, the accused was prohibited from driving by the operation of s. 250(1) of the Nova Scotia *Motor Vehicle Act*. The accused subsequently drove while prohibited and was charged with that offence. At trial, he testified that he did not know of the prohibition. Ritchie J., on behalf of the Court, held that the offence was one of strict liability, but that the defence

of lack of knowledge of the prohibition was tantamount to a defence of ignorance of the law which, in light of the provision of s. 19 of the *Criminal Code*, could not provide a defence. Reliance is placed by the Crown upon this portion of the reasons of Ritchie J., found at p. 608:

I am in agreement with all of the judges in the courts below, including the dissenting judge in the Court of Appeal, in finding that as the offence here charged is one concerning the public welfare it was properly characterized as "an offence of strict liability" within the meaning of the classification stipulated by Mr. Justice Dickson (*supra*) and that a defence is accordingly available to the accused if he "reasonably believed in a mistaken set of facts which, if true, would render" his act in continuing to drive his motor vehicle without a licence, an innocent one. [Emphasis added.]

- 36 Two difficulties arise from the *MacDougall* decision. The first difficulty lies in its irreconcilability with the earlier decision of *R. v. Prue; R. v. Baril*, [1979] 2 S.C.R. 547. The second lies in the fact that *MacDougall* was rendered prior to the *Charter*, and that the jurisprudence on the minimal fault requirement has evolved since then.
- 37 In *Prue, supra*, the accused were convicted of an offence under the *Criminal Code*. As a result, their licences were automatically suspended under the provisions of the *B.C. Motor Vehicle Act*. They nonetheless drove their vehicles and were charged, not for a violation of the provincial statute under which the suspension was made, but rather under s. 238 of the *Criminal Code* which at the time read:

238. . . .

(3) Every one who drives a motor vehicle in Canada while he is disqualified or prohibited from driving a motor vehicle by reason of the legal suspension or cancellation, in any province, of his permit or licence . . . is guilty of

(a) an indictable offence and is liable to imprisonment for two years; or

(b) an offence punishable on summary conviction. [Emphasis added.]

38 Laskin C.J. stated that as a result of the inclusion of the offence in the *Criminal Code*, it was necessary to import *mens rea*. He then considered the submission of the Crown that ignorance of the suspension was ignorance of the law, not a mistake of fact, and therefore could not be put forward as a defence. He then stated at p. 552:

The effect, if this is a correct appraisal, is to make s. 238(3) an offence of absolute liability where the provincial suspension of a driving licence is automatic under the provincial enactment . . . , but not if the provincial suspension does not take effect without a requirement of notice. [Emphasis added.]

39 Laskin C.J. thus implied that an offence which was automatic and without notice constituted an absolute liability offence. However, he went on to find that ignorance of the suspension of a licence, in that case, was a mistake of fact.

40 With respect to the ignorance of the suspension, these reasons simply cannot be reconciled with *MacDougall, supra*. It cannot be that a mistake as to the law under the *Criminal Code* constitutes a mistake of fact, whereas a mistake as to the provisions of the provincial statute constitutes a mistake of law. As an alternative to his position that *MacDougall* should be overruled, the respondent contended that there is a basis for distinguishing the decisions since, in the *MacDougall* case, the evidence made it clear that the accused knew of the underlying conviction and,

more importantly, was aware in general terms of the provisions of the Nova Scotia Act. Yet, this is a very narrow distinction that I cannot accept.

41 Perhaps it could be said that the *Prue* decision was correct in the conclusion that where the provincial suspension is automatic and without notice, the offence of driving while disqualified is an offence of absolute liability, but incorrect in the conclusion that lack of knowledge of the suspension is a mistake of fact. On the other hand, it might be said that the *MacDougall* decision was correct in its conclusion that lack of knowledge of the suspension is a mistake of law. However, I am of the opinion that its characterization of the offence as one of strict liability cannot prevail under the *Charter*. This is the second difficulty raised by the *MacDougall* decision.

42 It must be remembered that the *MacDougall* decision was rendered prior to the *Charter*. It thus did not consider the constitutionally required minimal fault component outlined by this Court in cases such as *Re B.C. Motor Vehicle Act, supra*, and *Vaillancourt, supra*. The defence of due diligence must be available to defend a strict liability offence. If that defence is removed, the offence can no longer be classified as one of strict liability. When, as a result of the wording of the section, the only possible defence an accused can put forward is his ignorance of the fact that his licence had been suspended by the provisions of the provincial statute, which constitutes a mistake of law and therefore is not available as a defence, the accused is effectively denied the defence of due diligence. In those circumstances, the offence ought to be characterized as one of absolute liability.

- 43 It seems to be clear that the defence of due diligence is not available to an accused charged under ss. 92 and 94 of the B.C. *Motor Vehicle Act*. There are a number of examples which can illustrate this situation. First, take the situation of an accused charged with failure to give a sample of breath. After trial he is found guilty, fined and his licence suspended for 3 months. Apparently, in British Columbia, he would be given no notice of the automatic suspension of one year provided by the B.C. *Motor Vehicle Act*. Yet, he would be liable to conviction despite his honest and reasonable belief as a lay person that the total sentence imposed by the court was a fine and a suspension of his licence for a period of 3 months. Certainly, to most people "a court" is a court wherever it may be located and the sentence of that court is what is binding upon them. Even if an accused asked the court to confirm that this was the total extent of his sentence, this would not amount to a defence of due diligence since his error was as to the provisions of the B.C. *Motor Vehicle Act*, and this constitutes an error of law.
- 44 Similarly, if an accused is charged and convicted of impaired driving and sentenced to 6 months prohibition from driving, he would leave the court room believing that this sentence constituted the entire penalty. However, by virtue of s. 92 of the Act, he is also, without any notice to him, automatically prohibited from driving for a period of 12 months from the date of conviction. If he drives after 6 months have expired and is stopped by the police, he would be charged with "driving while prohibited", despite the fact that he honestly and reasonably believed that he was no longer prohibited from driving. He would not be able to put this forward as a defence since ignorance of the law cannot be invoked as a defence, even if he took steps at his original trial to confirm before the convicting

judge that this was the total extent of his penalty. Quite simply, the statute effectively deprives the accused of the defence of due diligence.

Significance of Notice

- 45 The legislature could readily convert this offence to one of strict liability by permitting the defence of due diligence to be raised. If there was any concern that those accused of the offence would defend on the basis that they had no knowledge of its effect, a provision requiring that notice be given of its consequences could be added. Notice could be given in many ways. The following are a few examples.
- 46 Upon the issuance or a renewal of a licence, notice could be given that upon conviction of the listed enumerated offences, there will be an automatic suspension of the licence for a 12-month period. Alternatively, notice of the consequences could be given with the serving of the summons or charge for the underlying offence. In still another manner, the notice could be given as a matter of course upon conviction for the underlying offence, and would thus form part of the record of the court proceedings. There is something so fundamentally fair about the giving of notice that I find it commendable. It must be remembered that regulatory offences number in the tens of thousands. There are federal regulations and provincial regulations that will vary in their terms and provisions from coast to coast. Surely it is not asking too much that the accused be given some form of notice.

Summary

47 In summary, it is my opinion that ss. 92 and 94 of the B.C. *Motor Vehicle Act* create an absolute liability offence since they effectively eliminate the defence of due diligence. Nevertheless, the absolute liability offence does not contravene the *Charter*. This conclusion flows from the application of s. 4.1 and of s. 72(1) of the *Offence Act*. These sections respectively indicate that, notwithstanding the provisions of any other Act, no person is liable to imprisonment for an absolute liability offence, and that the non-payment of a fine will not result in imprisonment. Thus, an accused convicted under ss. 92 and 94 of the B.C. *Motor Vehicle Act* faces no risk of imprisonment and there is, accordingly, no violation of the right to life, liberty and security of the person under s. 7 of the *Charter*.

Disposition

48 In my opinion, the offence created by ss. 92 and 94 of the B.C. *Motor Vehicle Act* is one of absolute liability. However, it is not constitutionally invalid since, by the operation of s. 4.1 of the *Offence Act*, there is no sanction of imprisonment attached to absolute liability offences.

49 In light of these reasons, an order directing a new trial would ordinarily be the appropriate result. Yet, the respondent has been brought before every level of court at the instigation of the Crown. This appeal was really brought to determine whether the offence in question was one of absolute or strict liability. Throughout, the Crown directed its submissions solely to this issue. That question is now

resolved. In these circumstances, to direct a new trial for Pontes would be unfair and unduly harsh. Consequently, the appeal is dismissed.

- 50 The constitutional question reads: "Does s. 94 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, when read in conjunction with s. 92 of that Act create an absolute liability offence which violates s. 7 of the *Canadian Charter of Rights and Freedoms*?" The answer to the question must be that the offence created by ss. 92 and 94 of B.C. *Motor Vehicle Act* is one of absolute liability. However, it is not constitutionally invalid since, by the operation of s. 4.1 of the *Offence Act*, there is no sanction of imprisonment attached to absolute liability offences.

The reasons of La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. were delivered by

- 51 GONTHIER J. (dissenting) -- The constitutional question raised by this appeal was stated by Lamer C.J. on September 8, 1994 as follows:

Does s. 94 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, when read in conjunction with s. 92 of that Act create an absolute liability offence which violates s. 7 of the *Canadian Charter of Rights and Freedoms*?

- 52 I have had the benefit of the reasons of my colleague Justice Cory. I respectfully disagree with his conclusion that the combined effect of ss. 92 and 94(1) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, is to create an offence of absolute liability. In my view, these provisions create an offence of strict liability where the fact of driving while prohibited by statute *prima facie* imports the offence, but where it is nevertheless possible for an accused to avoid conviction by

demonstrating that he reasonably believed that he had not been convicted of one of the underlying offences to which the 12-month statutory prohibition attaches, or that he exercised due diligence in seeking to acquire knowledge of the underlying conviction. As a result, the impugned provisions adequately provide for the constitutionally minimum *mens rea* of negligence in order to ground a conviction and thus imprisonment for the regulatory or public welfare offence of driving while prohibited by statute. I would therefore answer the constitutional question posed by Lamer C.J. in the negative, allow the appeal and order a new trial.

- 53 I also respectfully disagree with Cory J.'s position that the alleged constitutional deficiency in the impugned provisions can be cured by expanding the defence of due diligence. Since in my view the provisions already allow for due diligence in relation to all the factual elements of the *actus reus*, the due diligence which is called for, presumably as a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms*, is nothing less than due diligence in relation to the existence of a legislative prohibition pertaining to a regulated activity -- that is, due diligence is being expanded to comprehend a defence of ignorance of the law. But our system of laws has long held as axiomatic that ignorance of the law is not an excuse for breaking the law. This cornerstone of our law remains secure even after the passage of the *Charter*, and I see no conflict between it and the principles of fundamental justice. As well, a regulated actor is deemed to have voluntarily accepted the terms and conditions of engaging in a regulated activity. Parliament or a legislature may choose, as a matter of policy, to provide a defence of ignorance of the law in relation to some, all or none of the

statutory conditions of engaging in a regulated activity. Such a policy decision remains a matter over which the relevant representative body is entirely sovereign.

I. Facts and Relevant Legislation

54 Since my colleague Cory J. has helpfully summarized the relevant factual and legislative background and the decisions of the courts below, I need not repeat that discussion. I would only add that the record before this Court is silent as to the underlying offence of which the respondent was convicted and which then gave rise, by operation of law, to the 12-month driving prohibition. The record is also silent as to whether the respondent was aware that he was prohibited from driving by virtue of ss. 92 and 94(1). While these facts are not necessary to answer the constitutional question since this appeal involves a facial challenge to the constitutionality of the legislation, they are nevertheless relevant to the disposition of the respondent's case because, as detailed below, I find that this legislation is constitutionally valid without recourse to s. 4.1 of the *Offence Act*, R.S.B.C. 1979, c. 305.

55 It is also important to explore briefly why the legislature of British Columbia may have decided that the enacted 12-month prohibition should be effective without formal notice and instead, simply by operation of law. The most obvious explanation is that the underlying offences which give rise to the 12-month statutory prohibition are some of the most serious driving offences. They include:

1. Driving while prohibited by the Superintendent of Motor Vehicles or a police officer (s. 88 of the *Motor Vehicle Act*);

2. Driving while prohibited by court order or by operation of a law (s. 94 of the *Motor Vehicle Act*);
3. Driving with more than 80 milligrams of alcohol in 100 millilitres of blood (s. 220.1(1) of the *Motor Vehicle Act*);
4. Refusal to give a blood sample (s. 220.3(1) of the *Motor Vehicle Act*);
5. Motor vehicle related *Criminal Code* offences:
 - (a) causing death by criminal negligence (s. 220);
 - (b) causing bodily harm by criminal negligence (s. 221);
 - (c) manslaughter (s. 236);
 - (d) dangerous operation of motor vehicles (s. 249(1)(a));
 - (e) operating a motor vehicle while impaired (s. 253);
 - (f) failure to provide a breath sample (s. 254(5));
 - (g) impaired driving causing bodily harm or death (s. 255);

- (h) operating a motor vehicle while disqualified from doing so (s. 259(4)).

It is thus readily apparent that the Province decided that in order to protect the welfare of the public and keep some of the most dangerous drivers off the roads, a prohibition would be effective automatically by operation of law on conviction of one of these underlying offences. That the statutory prohibition is effective immediately without being subject to the vagaries incidental to the giving of notice only underscores the Province's seriousness of purpose. It is, after all, trying to protect the public from some criminally bad drivers, and it is indeed sobering to read the list of offences which they have targeted. And while it is perhaps true that the giving of formal notice of the law could have been consistent with this serious purpose, as I detail below the provision of such notice affects only the wisdom of the legislation, not its constitutionality.

II. Analysis

A. *The Sault Ste. Marie Scheme of Offences and the Constitutional Requirement of Fault*

56 Since Cory J. has also helpfully summarized the taxonomic scheme which this Court has developed to classify the various offences in Canadian law, I need not review that discussion in detail, save to offer a few observations to situate the analysis which follows.

57 In the seminal case of *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at pp. 1325-26, Dickson J. (as he then was) recognized that there are three

categories of offences in Canadian law rather than the traditional two, thus allowing strict liability to occupy a half-way house between full *mens rea* offences and those of absolute liability. He suggested that only offences which were "criminal in the true sense" would be subject to the presumption of full *mens rea*; that "[p]ublic welfare offences would *prima facie* be in the second category" of strict liability offences; and finally, that "[o]ffences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act" (p. 1326 (emphasis added)). The policy basis for this common law interpretative presumption against conviction without fault was and still is the obvious concern that the morally innocent should not be punished (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 652, and *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 659).

58 In order to determine whether a legislature has "made it clear" that the offence is of absolute liability, Dickson J. suggested that regard may be had to the following factors (at p. 1326):

The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

59 It is also important to remember that even assuming that the legislature has not clearly indicated that the offence is to be one of absolute liability, it is still necessary to determine the appropriate level of fault or *mens rea* for the offence in question. Where the legislature has not used language which clearly indicates the mental element of the offence, then the mental element must be judicially inferred from the *actus reus*, the prohibited act. For a regulatory or public welfare offence,

the appropriate inference is that there should be no conviction without negligence. For an offence which is criminal in the true sense, the appropriate inference is that there should be no conviction without some form of *mens rea*. The *Sault Ste. Marie* scheme is thus of fundamental importance in helping to determine the most appropriate degree of fault given the nature of the offence.

60 With the entrenchment of the *Charter*, the element of fault was raised from a common law interpretative presumption to a constitutional guaranty (*Vaillancourt, supra*, at p. 652, and *Nova Scotia Pharmaceutical Society, supra*, at p. 659). Differently put, the *Charter* now requires that the inferred *mens rea* also be minimally constitutionally sufficient given the nature of the offence. This Court has ruled that negligence in relation to the elements of the *actus reus* is the constitutionally minimum degree of fault for a public welfare or regulatory offence and where conviction allows for the possibility of imprisonment (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, and *Vaillancourt*, at p. 652). We have also held that subjective *mens rea* reflecting the particular nature of the offence may be constitutionally necessary for a very few crimes to which a special social stigma attaches or for which severe punishments are available (*Vaillancourt*, at p. 653). Examples of such special stigma crimes are murder and theft (*R. v. Martineau*, [1990] 2 S.C.R. 633, at p. 645, and *R. v. Logan*, [1990] 2 S.C.R. 731, at p. 744). However, for the vast majority of criminal offences, the *Charter* only requires that there be "an element of personal fault in regard to a culpable aspect of the *actus reus*, but not necessarily in regard to each and every element of the *actus reus*" (*R. v. DeSousa*, [1992] 2 S.C.R. 944, at p. 965 (Sopinka J. for the Court)).

B. *The Place of the British Columbia Motor Vehicle Act in the Sault Ste. Marie Scheme of Offences*

61 Where, then, do the impugned provisions of the British Columbia *Motor Vehicle Act* most appropriately fit in the *Sault Ste. Marie* tripartite scheme of offences? Here, the subject matter of the statute quite clearly suggests that this is public welfare or regulatory legislation. The impugned provisions are aimed at keeping bad drivers off the road; they are not prohibitions which are "criminal in the true sense". As a result, this offence is *prima facie* one of strict liability. I note, nevertheless, that such a public welfare purpose is consistent with both strict and absolute liability. Furthermore, considerations such as the overall regulatory pattern adopted by the legislature and the importance of the penalty do not offer much guidance in assessing whether the offence is of strict as opposed to absolute liability. These factors are generally of greater assistance in determining, when the legislature has not specified a mental element, whether the offence ought to be subject to the presumption of full *mens rea* or whether the offence is simply one of absolute liability.

62 The appellant, however, suggests that since the impugned provisions provide for a mandatory minimum period of imprisonment, this militates against considering them as creating an absolute liability offence, because this Court has already ruled in *Re B.C. Motor Vehicle Act, supra*, that absolute liability and imprisonment cannot be combined without running afoul of s. 7 of the *Charter*. But plainly this is circular reasoning. The impugned provisions predate this Court's ruling in *Re B.C. Motor Vehicle Act*, and the appellant's argument cannot be accepted unless the British Columbia legislature can be credited with prescience.

63 It is for these reasons that I believe that in this case the only factor listed by Dickson J. in *Sault Ste. Marie* which is of any assistance in determining whether the impugned provisions create an offence of absolute liability is the precision of the language used.

64 On this score, my colleague Cory J. suggests that the fact that the 12-month statutory prohibition attaches "automatically and without notice" goes "far towards establishing that this is indeed an absolute liability offence" (para. 29). He suggests that "[i]n effect, the combination of s. 92 and s. 94 provides for the conviction of the prohibited driver whether or not he knows that he is prohibited from driving" (para. 30). I agree that knowledge of the enacted prohibition is not an element of this offence. But as I elaborate below, this does not render the offence one of absolute liability.

65 In my view, the phrase "automatically and without notice" simply highlights that the 12-month statutory prohibition is to take effect immediately and by operation of law without any requirement that notice be given by the Superintendent of Motor Vehicles or received by a driver who is prohibited from driving under the statute. While the Act does contemplate notice from the Superintendent in certain circumstances, this is only if the prohibition is made by the Superintendent in the exercise of his or her discretionary authority. For example, s. 86(1) of the Act gives the Superintendent the authority to order a prohibition when he or she "considers it to be in the public interest", and then lists a number of criteria to be considered in exercising this discretion, including whether the person has "failed to comply with this Act or the regulations", because the person "has a driving record that in the opinion of the superintendent is

unsatisfactory", where the person's license has been suspended in another Canadian or American jurisdiction, or for any other cause "that relates to the use or operation of motor vehicles". Section 88(3) then lists the formal requirements for such notice. Finally, s. 88(1) states that it is an offence for a person to drive "knowing that he is prohibited" by the Superintendent, and specifies a mandatory prison term of not less than seven days and not more than six months on a first conviction.

66 If a person then drives while prohibited by the Superintendent under a discretionary order, it is open to the accused to argue that he did not receive notice of the prohibition, since that may be a reasonable mistake of fact. This point was made lucidly by Ritchie J. in dissent in *R. v. Prue*; *R. v. Baril*, [1979] 2 S.C.R. 547, at pp. 557-58:

It will be readily apparent that a wide difference exists between the case of a man who acts in ignorance of the provision for automatic suspension and is therefore acting under a mistake of law, and a man who resides in a province where the imposition of such a suspension can only be effected as the result of the intervention of some administrative act by the authorities. The latter situation is evidenced in jurisdictions where provision is made for the clerk of the court, the presiding magistrate or some other official giving notice to the accused of the suspension of his licence before that suspension can be effective. In the latter type of case when the requisite administrative step or steps have not been taken and the accused can show that he was therefore ignorant of the fact of his suspension, his ignorance is one of fact and not of law, and in this event it has been consistently held that he has a valid defence to the charge.

67 As I will explain more fully below, the respondent in this case cannot seek solace in the failure of the Superintendent or the court convicting him of the underlying offence to provide notice of the applicable statutory prohibition, since that prohibition was effected automatically and without notice, by operation of law. The ignorance which the respondent pleads that the legislature should have cured

with some form of notice is his ignorance of the law prohibiting his conduct. In this he cannot succeed because ignorance of the law is never an excuse for breaking the law.

68 It is my view, then, that the British Columbia legislature has not used language of sufficient precision to make it clear that the offence created by the combined effect of ss. 92 and 94 is to be of absolute liability. In this respect, the language in the impugned provisions falls far short of the express language employed in the now repealed s. 94(2) of the *Motor Vehicle Act*, which read:

94. ...

(2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension. [Emphasis added.]

Speaking for a majority of the Court on the constitutionality of this provision in *Re B.C. Motor Vehicle Act, supra*, Lamer J. (as he then was) stated at pp. 518-19:

No doubt s. 94(2) enacts in the clearest of terms an absolute liability offence, the conviction for which a person will be deprived of his or her liberty, and little more, if anything, need be added.

69 Notwithstanding this ruling, my colleague Cory J. suggests that s. 94(2) "did no more than emphasize and reiterate that this was an absolute liability offence" (para. 30). In other words, s. 94(1) created an absolute liability offence regardless of s. 94(2). This conclusion effectively equates "automatically and without notice" in s. 94(1) with "absolute liability" in s. 94(2). I have some difficulty with this conclusion. If the legislature of British Columbia was simply

emphasizing and reiterating in s. 94(2) the legal effect of s. 94(1), it is curious indeed that in obeying this Court's decision in *Re B.C. Motor Vehicle Act* on the unconstitutionality of combining absolute liability with the possibility of imprisonment, that same legislature would choose to repeal only s. 94(2) and not also s. 94(1) (*Motor Vehicle Amendments Act, 1986*, S.B.C. 1986, c. 19, s. 5, assented to June 17, 1986). With respect, Cory J.'s interpretation impliedly imputes to that sovereign body ignorance, indifference, or worse, possibly even contempt for this Court's ruling.

70 Of course, whether, as I believe, the legislature intended s. 94(1) to be a strict liability offence is not dispositive of this case. Whatever the legislative intention, the legal effect may nevertheless have been to create an offence of absolute liability. In the absence of clear words, such a possibility is entirely dependant upon whether an accused can escape liability by proving that he is not at fault, that is, whether he can still avail himself of the defences of due diligence or reasonable mistake of fact. I next consider whether the impugned provisions have eliminated these defences.

C. *Strict Liability Defences and the Principle that Ignorance of the Law Does Not Excuse*

71 This Court in *Sault Ste. Marie* stated that an offence could only be classified as being of strict liability if the defences of due diligence and reasonable mistake of fact are available to an accused. Dickson J. described (at p. 1326) these defences in defining strict liability offences as

[o]ffences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.

Dickson J. also observed that the due diligence defence is often spoken of "as being that of reasonable mistake of fact". He continued, at pp. 1314-15:

The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g. permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence. [Emphasis added.]

72 It is thus apparent that while the defences of reasonable mistake of fact and due diligence may operate differently in any given case, they are really just two aspects of the requirement that there be negligence as the constitutionally minimum fault before an accused can be imprisoned for a regulatory offence.

73 The content of the defences of due diligence and reasonable mistake of fact was further clarified by Lamer J. in *Molis v. The Queen*, [1980] 2 S.C.R. 356. That case concerned a charge of trafficking in a restricted drug contrary to s. 42(1) of the *Food and Drugs Act*, R.S.C. 1970, c. F-27. The accused had been

manufacturing a chemical which, when he began his manufacturing operation, was not listed in Schedule H of the Act as a restricted drug. The drug was, however, subsequently added by regulation to the list of prohibited substances, and the accused then charged with trafficking. The accused adduced evidence on *voir dire* that he had in fact been duly diligent in attempting to ascertain whether the chemical was on the list of prohibited substances, and before this Court he argued that *Sault Ste. Marie* entitled him to avoid conviction by invoking this defence. The Court unanimously upheld the conviction imposed at trial. In so doing, Lamer J. had this to say, at p. 364, about the availability of the defence of due diligence:

It is clear to me that we are dealing here with an offence that is not to be considered as one of absolute liability and, hence, a defence of due diligence is available to an accused. But I hasten to add that the defence of due diligence that was referred to in *Sault Ste. Marie* is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation. [Emphasis added.]

74 As Lamer J. rightly indicated, the defence of due diligence obviously does not extend to efforts to ascertain the existence of a statutory prohibition or its interpretation, since that would amount to a conflict with s. 19 of the *Criminal Code*, which codified the fundamental common law principle that ignorance of the law is no excuse for breaking the law. Section 19 reads:

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

75 This Court has nevertheless recognized that ignorance of a law may excuse, but only if the knowledge that one's actions are contrary to law is itself part of the *mens rea* of the offence. In *R. v. Docherty*, [1989] 2 S.C.R. 941, we

considered the *mens rea* for the offence of wilfully failing or refusing to comply with a probation order contrary to s. 666(1) of the *Criminal Code*. The probation order required the accused to "keep the peace and [to] be of good behaviour". The question before us was whether the commission of a criminal offence was sufficient to be in breach of this order regardless of the mental element required to sustain a conviction for the underlying offence. This Court unanimously found that the *mens rea* under s. 666(1) requires that the accused knew that his actions in breaching the order were contrary to law. Otherwise, ignorance that the underlying offence was unlawful may provide a good defence to a charge under s. 666(1) notwithstanding s. 19. Wilson J.'s careful reasoning in arriving at this conclusion is worth citing at length (at pp. 960-61):

Mewett and Manning in their text, *Criminal Law* (2nd ed. 1985) discuss at p. 320 what is meant by the maxim ignorance of the law is no excuse:

It is often said that ignorance of the law is no excuse and as a general maxim -- now incorporated in s. 19 of the Code -- it is a harmless cliché. It is more accurate, however, to say that knowledge that one's act is contrary to the law is not one of the elements of the requisite *mens rea* and hence a mistake as to what the law is does not operate as a defence. That is to say, this belief that an act is lawful, however much it might affect sentence, does not affect liability.

While I agree with the authors' general proposition I believe that where the commission of a criminal offence is relied on as the *actus reus* of the offence under s. 666(1) ..., knowledge that one's act is contrary to law ... is an element of the requisite *mens rea* of wilfully failing to comply with a probation order. I believe, in other words, that s. 666(1) constitutes an exception to the general rule expressed in s. 19 in a case where the commission of a criminal offence is relied on as the *actus reus* under the section. An accused cannot have wilfully breached his probation order through the commission of a criminal offence unless he knew that what he did constituted a criminal offence. However, the conviction is evidence of the *mens rea* under s. 666(1) only to the extent that wilfulness can be inferred from the *actus reus* as indicated above. Such *mens rea* must be proved and s. 19 of the *Criminal Code* does not preclude the respondent from relying on his honest belief that he was not doing anything wrong to negate its

presence. Where knowledge is itself a component of the requisite *mens rea*, the absence of knowledge provides a good defence. [Emphasis in original.]

76 This exception to the ignorance of the law rule has also been recognized in the United States, where it has been stated as the principle that "ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged" (W. R. LaFave and A. W. Scott, Jr., *Substantive Criminal Law* (1986), vol. 1, at p. 575). Another way of formulating this exception is simply to say that ignorance of the law is an excuse if Parliament or a legislature has provided that it is an excuse (LaFave and Scott, *supra*, at p. 585, footnote 55).

77 The fundamental principle that ignorance of the law is not an excuse for breaking the law was recently reaffirmed by Lamer C.J. in *R. v. Forster*, [1992] 1 S.C.R. 339. The essential facts for present purposes are as follows. A member of the Canadian Armed Forces tendered her resignation in writing to her Commander the day before she was obliged to begin a new posting. She did not report to that posting. She was charged with being absent without leave contrary to s. 90 of the *National Defence Act*, R.S.C., 1985, c. N-5, since s. 23 of the Act provided that a person's enrolment in the Armed Forces "binds the person to serve in the Canadian Forces until the person is, in accordance with regulations, lawfully released". Notwithstanding her resignation, the accused had not been lawfully released under s. 23. While the accused did not argue that her purported resignation was lawfully effective, she did claim that she honestly believed that she had resigned from the Forces and thus that she did not possess the requisite *mens rea* for the offence under s. 90 of being absent without leave. Speaking for the unanimous Court on this point, Lamer C.J. observed (at p. 346):

Even if we take the appellant's assertions about her beliefs at face value, she did not labour under any mistake about what she in fact did: she deliberately refrained from reporting to her new posting in Ottawa. Instead, she was mistaken about the legal consequences of her actions, because of her failure to understand that she was under a continuing legal obligation to report for duty notwithstanding her purported resignation by letter from the Forces. Thus, while she may not have intended to commit any offence under military law, this lack of intention flowed from her mistake as to the continuing legal obligation to report for duty which that regime imposed upon her until properly released....

It is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one's deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen*, [1980] 2 S.C.R. 356. This Court recently reaffirmed in *R. v. Docherty*, [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence. [Emphasis added.]

78 It is thus evident that the principle that ignorance of the law is not an excuse for breaking the law remains firmly rooted in Canadian law.

79 The above discussion can be summarized as follows. An offence of strict liability requires the minimal mental element of negligence in order to ground a conviction. Negligence consists in an unreasonable failure to know the facts which constitute the offence, or the failure to be duly diligent to take steps which a reasonable person would take. Since ignorance of the law is not an excuse for breaking the law, due diligence consists in taking steps to fulfil a duty imposed by law and not in the ascertainment of the existence of a statutory prohibition or its interpretation. Exceptionally, where knowledge that conduct is prohibited is itself part of the *mens rea*, the absence of knowledge provides a good defence.

80 Given this understanding of the relationship between the defence of due diligence and the principle that ignorance of the law is not an excuse for breaking the law, I now consider whether the impugned provisions provide for the constitutionally minimum fault of negligence required for a strict liability offence.

D. Application to the British Columbia Motor Vehicle Act

81 In my view, the impugned provisions do allow for the defences of reasonable mistake of fact and due diligence, and accordingly, the *prima facie* characterization of this public welfare legislation as being of strict liability is confirmed.

82 Section 92 creates the 12-month driving prohibition which is effective automatically and without notice upon conviction of one of the underlying offences. The factual element comprising the *actus reus* consists in the driving of a motor vehicle having previously been convicted of one of the underlying offences. Since there is no *mens rea* specified, it must be inferred from the *actus reus*. And because this is a regulatory offence, under *Sault Ste. Marie*, the *mens rea* consists in negligence in relation to any of the elements of the *actus reus*, but not in relation to the existence of this statutory prohibition or its interpretation, since that would be ignorance or mistake of law. Consequently, a person charged with driving while under a statutory prohibition can avoid conviction if he demonstrates, on the preponderance of the evidence, that he made a reasonable mistake of fact as to the existence of his conviction, or that he exercised due diligence to ascertain whether he had been convicted of one of the underlying offences.

83 This is not, I grant, the most extensive range of available defences, but it nevertheless amply satisfies what is constitutionally required. Defences are available in relation to all the factual elements of the *actus reus*, and this adequately meets the minimal constitutional requirement of fault for a public welfare or regulatory offence such as driving while under a statutory prohibition. Accordingly, ss. 92 and 94(1) of the *Motor Vehicle Act* are entirely consistent with s. 7 of our *Charter*.

84 It is interesting to observe that Southin J.A. in *R. v. Heywood* (1992), 77 C.C.C. (3d) 502 (B.C.C.A.), anticipated the characterization of the impugned offence as being of strict liability. She said, at pp. 522-23:

If Parliament were to enact that a person convicted of impaired driving should not thereafter drive a motor car or that a person convicted of robbing a bank should not thereafter enter a bank, in both cases on pain of imprisonment, would Parliament be enacting a crime of absolute liability?

...

[T]he *actus* is driving, having been earlier convicted of the named offence. The necessary intent would consist of the knowledge of the conviction and the conscious driving of the motor vehicle. In my opinion, Parliament, if it were to enact the crimes I have mentioned, would not be creating crimes of absolute liability.... There was a time in Canada when the possession of opium was lawful. When Parliament first made the possession of opium unlawful, it did not create a crime of absolute liability.

85 It is evident, then, that I disagree with Cory J.'s conclusion that a defence of due diligence is not available in relation to the impugned offence. Cory J. comes to this conclusion because he finds that the only defence effectively available to an accused who has been charged with driving while under a statutory prohibition is his ignorance of the fact that his license has been suspended by the

provisions of a provincial statute; but since this is mistake or ignorance of the law, it is not an available excuse. Furthermore, Cory J. suggests two examples to illustrate his claim that a due diligence defence is unavailable. In both examples, he suggests that an accused who is prohibited under a court order from driving for any period less than 12 months for having committed one of the underlying offences may be misled into believing that he is entitled to drive after the expiry of that prohibition, since he has had no notice of the continuing automatic prohibition effective by virtue of ss. 92 and 94(1). He suggests that such a person would be liable to conviction "despite his honest and reasonable belief as a lay person that the total sentence imposed by the court was a fine and a suspension of his licence for a period of" less than 12 months (at para. 43).

86 I agree that Cory J.'s examples are within the realm of possibility, and also that there may be a sense in which they can be considered as giving rise to some unfairness. But if this is so, it is an unfairness which our legal system has long countenanced in refusing to allow ignorance of the law to serve as a valid excuse. As a matter of principle, it is no more unfair to convict the accused in this case than it was in *Molis, supra*, for the trafficking of a substance he honestly and reasonably believed was not prohibited, or to disallow the accused in *Forster, supra*, from relying on her letter of resignation to demonstrate that she lacked the intent for being absent without leave.

87 Of course, this is not to say that ignorance of the law cannot be successfully pleaded as a factor in mitigation of sentence (C. Ruby, *Sentencing* (4th ed. 1994), at p. 196). In such a case, it may well be appropriate to sentence

an offender to the minimum fine of \$300 and to seven days' imprisonment under s. 92(1)(c) of the *Motor Vehicle Act*.

88 Finally, I note that the appellant raised the possibility that a driver whose license is suspended and who is prohibited from driving by operation of law may also be able to avail himself of the defence of "officially induced error". This defence was not raised here and has yet to be formally recognized by this Court, though it was referred to in *obiter* by Ritchie J. in *R. v. MacDougall*, [1982] 2 S.C.R. 605, at p. 613, by Lamer C.J. in *Forster, supra*, at p. 346, and by myself in dissent in *R. v. Tremblay*, [1993] 2 S.C.R. 932, at p. 947. (See also D. Stuart, *Canadian Criminal Law: A Treatise* (3rd ed. 1995), at pp. 312-21, and *Mewett & Manning on Criminal Law* (3rd ed. 1994), at pp. 382-84; and for a summary of the American position, see LaFave and Scott, *supra*, at pp. 591-95.) Assuming without deciding that such a defence would be available if an accused were misled by the Superintendent of Motor Vehicles or by some other official responsible for the administration of the *Motor Vehicle Act*, such a defence would not demonstrate absence of negligence in relation to the *actus reus* of driving while under a statutory prohibition, but rather would be an additional defence thereto, operating as an exception to the rule that ignorance of the law does not excuse. As a result, the potential availability of such a defence does not assist in the characterization of the impugned provisions as being of strict liability.

E. Consistency with Earlier Rulings of this Court

89 Before addressing Cory J.'s discussion on how the alleged constitutional defects in the impugned provisions can be cured, it is important to offer a few

words on the relationship between my finding that the impugned offence is of strict liability and this Court's rulings in the pre-*Charter* cases of *Prue, supra*, and *MacDougall, supra*.

90 First, in *Prue*, the accused were charged under the *Criminal Code* with driving while their licenses were suspended under provincial law. The provincial suspensions had been automatic under the *Motor Vehicle Act* of British Columbia, and the trial judge made findings of fact that neither accused knew that his license to drive had been suspended. The issue before the Court concerned whether the *Criminal Code* offence of driving while prohibited "by reason of the legal suspension or cancellation" of the accused's licenses to drive required proof of *mens rea*. The Crown had argued that the accused could not plead their ignorance of the automatic provincial suspension, since that would be ignorance of the law, an argument which was unavailable in light of s. 19 of the *Criminal Code*.

91 Speaking with the concurrence of three other justices, Laskin C.J. noted that the effect of this argument would make the offence "an offence of absolute liability where the provincial suspension of a driving licence is automatic under the provincial enactment (proof of such suspension being made), but not if the provincial suspension does not take effect without a requirement of notice" (p. 552). He stated that this would have the undesirable consequence of giving a *Criminal Code* offence a variable effect across the country contingent on the character of the relevant provincial legislation. He also observed that the very fact of inclusion in the *Criminal Code* ought to import a requirement of *mens rea* for the offence of driving while prohibited. Consequently, he found that for the purposes

of the *Criminal Code* ignorance of a suspension under provincial legislation was a mistake of fact, a position he thought to be unaffected by (at p. 553):

... whether the provincial legislation operates to make a suspension automatic or whether it arises only upon some notice or other action to be taken thereunder. For the purpose of the *Criminal Code*, whether there has been an effective suspension is simply a question of fact.

92 Ritchie J., dissenting with the concurrence of one other justice, did not accept this distinction between federal and provincial mistakes of law. He found that the *Criminal Code* offence of driving while prohibited was a strict liability offence with an available defence of due diligence. However, such a defence would not operate in relation to the fact of suspension since this took effect automatically by operation of provincial law rather than under the discretionary authority of the Superintendent of Motor Vehicles. Ritchie J. would have upheld the conviction because he found, at p. 559, that there was:

... no evidence that either of the respondents made any effort to determine whether their licences had been suspended or not and this is not a case involving ignorance of some regulation or technicality which might have been understandably unknown to the driving public and thus to the respondents.

93 Beetz J. also dissented. He stated that he did not believe it necessary to express an opinion on whether the offence was a *mens rea* offence or one of strict liability, but assuming it was a *mens rea* offence, the culpable intent could be "inferred from the nature of the act committed and cannot be negated by the accused's ignorance of the law" (p. 560). Interestingly, he then added, at p. 560, the following important comments:

Respondents had knowledge of the fact that caused the suspension of their licences, namely their convictions for offences as a result of which such suspension took place automatically, *ipso facto*. I agree with my brother Ritchie that their ignorance of this result was an ignorance of the law which is no excuse and cannot be considered as a defence.

94 It is important to note that since the *Criminal Code* offence did not expressly require that the accused drive with knowledge of the prohibition enacted under provincial law, that offence cannot come within the narrow exception to s. 19 recently recognized by this Court in *Docherty, supra*.

95 In the case of *MacDougall, supra*, the Court again considered the characterization of the offence of driving while under a statutory prohibition, this time under s. 258(2) of the *Nova Scotia Motor Vehicle Act*, R.S.N.S. 1967, c. 191, which read:

258. ...

(2) A person shall not drive a motor vehicle while his license or privilege of obtaining a license is cancelled or suspended under this Act.

The accused's driving privileges had been suspended by the provincial Registrar of Motor Vehicles after he had been convicted of a driving related criminal offence. The accused received notice of his license suspension. However, he appealed his conviction and a notice of re-instatement of his driving privileges was sent to him. His appeal was dismissed, and soon thereafter his lawyer advised him of this, a fact which Ritchie J. stated was "of particular importance in this case" (p. 609). The accused continued to drive, and was duly charged with driving while prohibited under provincial law. He only received notice by mail of the revocation

of his license as a result of losing his appeal on the evening of the day for which he was charged.

96 Unfortunately for the accused, s. 250(3) of the Act stipulated that a driver's license is automatically "revoked and shall remain revoked" if the appeal was "dismissed". Speaking for the unanimous Court, Ritchie J. stated, at p. 614, that "[i]t would be difficult to conceive of more clear or imperative language" than this. He observed that "[t]he failure to appreciate the legal duty imposed by that law is of no solace to the appellant".

97 It is important to recognize that in determining the appropriate *mens rea* under s. 258(2), Ritchie J. classified the statute as public welfare legislation within the *Sault Ste. Marie* scheme of offences. He accordingly noted that a defence was "available to the accused if he 'reasonably believed in a mistaken set of facts which, if true, would render' his act in continuing to drive his motor vehicle without a licence, an innocent one" (p. 608). It was in this context that Ritchie J. spoke of the "particular importance" of the fact that the accused knew that his appeal had been dismissed. Curiously, in concluding his reasons Ritchie J. also stated, at p. 615:

I am of the opinion that nothing in the foregoing reasons runs counter to the decision of the Court in *Prue* and *Baril*.

98 My colleague Cory J. finds two difficulties with this Court's decision in *MacDougall*, *supra*. First, Cory J. points to its inconsistency with *Prue*; and second, since it was decided prior to the *Charter*, it did not consider the

constitutionally required minimum fault component outlined by this Court in cases such as *Re B.C. Motor Vehicle Act* and *Vaillancourt, supra*.

99 On the first point, I agree that *MacDougall* is difficult to reconcile with the majority decision in *Prue*. But in my view, the dissent in *Prue* is better reasoned than the majority decision and more consonant with this Court's subsequent jurisprudence on mistake of law. It cannot be that ignorance of a provincial law is a mistake of fact for the purposes of applying federal law, but a mistake of law under provincial law. Furthermore, to the extent that there is inconsistency between these decisions, surely the later decision of *MacDougall* ought to govern. It was the judgment of the unanimous Court, including Laskin C.J., unlike *Prue* where the Court was divided.

100 On the second point, in my view *MacDougall* is completely consistent with this Court's jurisprudence on the constitutional requirement of fault. Ritchie J. considered *Sault Ste. Marie*, and was at pains to stress that the accused in *MacDougall* was entitled to the defence of due diligence for the strict liability offence of driving while prohibited by statute. He impliedly found, however, that since the accused knew that his appeal had been dismissed, he could not avail himself of the defence. Knowledge of the statutory prohibition was not itself part of the *mens rea*, since ignorance of the law is not an excuse. Consequently, Ritchie J. did indeed entertain the defence of due diligence for this regulatory offence, and this would have been sufficient to satisfy the constitutional requirement of fault mandated by s. 7 of the *Charter*.

101 As a result, my ruling in the case at bar is entirely consistent with *MacDougall*, which in turn is faithful to the constitutional requirement of fault.

F. Is the Defence of Ignorance of the Law a Constitutional Requirement?

102 Finally, my colleague Cory J. suggests that the alleged deficiency in the impugned provisions can be cured in two different ways. He first suggests that "[t]he legislature could readily convert this offence to one of strict liability by permitting the defence of due diligence to be raised" (para. 45). Second, he observes: "If there was any concern that those accused of the offence would defend on the basis that they had no knowledge of its effect, a provision requiring that notice be given of its consequences could be added" (para. 45). I take it that in this last passage Cory J. is referring to the legal effect and the legal consequences of being convicted of one of the underlying offences to which the 12-month prohibition attaches. With respect, I have a number of difficulties with these suggestions.

103 First, and most obviously, as I have already indicated the offence is one of strict liability with allowance made for the defences of due diligence and reasonable mistake of fact. It is open to an accused to avoid conviction by demonstrating that he reasonably believed that he had not been convicted of one of the underlying offences to which the 12-month statutory prohibition attaches, or that he exercised due diligence in seeking to acquire knowledge of the underlying conviction. The impugned provisions are therefore constitutional without any further requirements.

104 That being the case, any further content of the due diligence defence that might be constitutionally compelled but is absent in this legislation remains unclear. But one is entitled to ask: what should the British Columbia legislature have provided in the impugned legislation in order to have avoided violating the *Charter*? Inasmuch as I have explained that defences are available with respect to all the factual elements of the *actus reus*, by a process of elimination one is lead to conclude that any further requirement would encompass a defence in relation to the existence of the relevant statutory prohibition or its interpretation. In other words, there would be a constitutional requirement for the defence of due diligence to cover an accused's ignorance or mistake of the law. If that were the case, the conclusion must be that the ignorance of the law rule no longer applies in light of s. 7 of the *Charter*.

105 It goes without saying that such a suggestion completely undercuts the principle that ignorance of the law is not an excuse for breaking the law. If a defence of due diligence in relation to a statutory prohibition or its interpretation is now a principle of fundamental justice, and therefore also a constitutional obligation which Parliament or a legislature must discharge when it attaches a sanction of imprisonment, I fear that as currently worded many of our criminal and regulatory statutes will be all but impossible to enforce. In short, if a defence of due diligence now comprehends a defence of ignorance of the law, I can see no reason in principle why such a constitutional requirement would be limited to the circumstances of this case.

106 The second difficulty which I have with Cory J.'s suggestions as to how the alleged constitutional defect in this legislation can be remedied is therefore as

follows. I do not believe that the "principles of fundamental justice" under s. 7 of the *Charter* require that an accused who is charged with a regulatory offence be entitled to claim due diligence in relation to the existence of the relevant statutory prohibition or its interpretation -- that is, to avail himself of the defence of ignorance of the law. The defence of due diligence does not need to be expanded to meet the exigencies of the *Charter*. Indeed, to do so would eviscerate the ignorance of the law rule and render many of our laws unenforceable. To date, our Court has refused to find that ignorance of the law is an excuse for breaking the law. Nor have we ever held that ignorance of the law should be viewed differently in the regulatory and criminal contexts. I respectfully suggest we refrain from doing so henceforth.

107 I would add that if the defence of due diligence has been expanded in light of s. 7 of the *Charter* to comprehend a defence of ignorance of the law, then it also appears that this Court's ruling in *Molis, supra*, has been overturned. As already indicated, in *Molis*, Lamer J. stated unambiguously that the defence of due diligence refers to "due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation" (p. 364). To my mind, *Molis* should remain good law and is indistinguishable from the case at bar. It is no more necessary, as a principle of "fundamental justice", to allow the respondent to avail himself of his ignorance of a prohibition from driving by virtue of provincial legislation of general application, than it was to allow the accused drug traffickers in *Molis* to avail themselves of their ignorance that 3-4 methylenedioxy-N-methylamphetamine had been added as a prohibited substance to Schedule H of the *Food and Drugs Act*.

108

My third difficulty with Cory J.'s reasoning is that it appears to ignore the context of the present case. The impugned prohibition is a regulatory offence incident to a licensed activity. In such a context, unique considerations inform what is fair and when an accused can be considered as being at fault. Such considerations are commonly referred to as the "licensing argument" for the distinctive legal character of regulatory offences and for justifying their different treatment from "true crimes". The licensing argument postulates that since a regulated actor voluntarily chooses to enter the regulated field, that actor can be taken to have known of and accepted certain terms and conditions of entry. Indeed, in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 229-31, Cory J. offered a very helpful discussion of the licensing argument. He observed (at pp. 228-29):

The licensing argument is directed to [the] question of choice. Thus, while in the criminal context, the essential question to be determined is whether the accused has made the choice to act in the manner alleged in the indictment, the regulated defendant is, by virtue of the licensing argument, assumed to have made the choice to engage in the regulated activity. The question then becomes not whether the defendant chose to enter the regulated sphere but whether, having done so, the defendant has fulfilled the responsibilities attending that decision. Professor Richardson puts the position this way in "Strict Liability for Regulatory Crime: the Empirical Research," [1987] *Crim. L.R.* 295, at pp. 295-96:

...it can be argued that the strict liability regulatory offender is not a "blameless innocent". By indulging in the regulated activity she has voluntarily adopted the risks of regulatory infraction and her supposed "innocence" flows from the law's traditional tendency to view the criminal act "only in the context of its immediate past".

The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of that responsibility. Therefore, it is said, those who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost among these implied terms is an

undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care. [Emphasis added.]

109 In further explaining the reasons for the differential treatment of crimes and regulatory offences, Cory J. went on in *Wholesale Travel* to cite approvingly the following comments of K. R. Webb in "Regulatory Offences, the Mental Element and the *Charter*: Rough Road Ahead" (1989), 21 *Ottawa L. Rev.* 419, at p. 452:

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. [Emphasis in original.]

Webb later adds, at p. 476:

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.

110 Thus, as a necessary incident of being permitted by the state to engage in a regulated activity, the regulated actor voluntarily accepts the risks of regulatory infraction. In other words, such an actor is deemed to have accepted the terms and conditions attaching to the privilege of participating in the regulated activity. As a result, a regulatory actor cannot be described as morally innocent when he commits a regulatory offence. I think it is telling that Webb refers to the license to drive as a "good example" to illustrate the principles applicable to regulatory offences; I would go further, and say that it is the paradigmatic example of regulated activity.

111 It is trite to observe that a licensed driver is aware that the activity of driving is regulated, and also understands or ought to understand that there are regulations concerned with license revocation for driving offences. Indeed, this Court has expressly stated that "[m]erit point and driving license revocation schemes are prime examples" of laws that have generally been brought to the attention of the public; they have been "'digested' by society": *Nova Scotia Pharmaceutical Society, supra*, at p. 635.

112 As a result, when a licensed driver violates one of the conditions attaching to his license he should not be considered as being without fault simply because he was unaware of that condition. There is no fundamental right to drive a motor vehicle, any more than there is a fundamental right to own a gun or any other instrument of potential destruction. It is a privilege, a privilege which, sadly, is often abused with tragic repercussions. A legislature can provide for consequences which are to attach when this privilege is abused and stipulate standards of behaviour for continued licensing. There is therefore no injustice, far

less any fundamental injustice, if a court convicts an accused of a regulatory offence when the only defence offered is that he was unaware of a statutory condition attaching to the activity – that is, his ignorance of the law. This is, of course, all the more true when the condition is of a character which has been brought to the attention of the public and "digested" by society.

113 The licensing justification also underscores that Parliament or a legislature is faced with a policy choice in deciding whether to give notice to the regulated actor of a particular regulatory prohibition, or whether to allow such an actor to be considered "morally innocent" if he can demonstrate his ignorance of the relevant law. Our governing bodies may, in their wisdom, decide to provide such notice or such a defence; but they also may decide not to. But whatever they decide, a particular policy choice is not constitutionally compelled. To conclude otherwise would be to convert what is fundamentally a policy decision into a constitutionally mandated requirement.

114 To summarize, then, my concerns with respect to the first solution offered by Cory J.: first, the impugned provisions are constitutional without any further requirements; second, expanding the defence of due diligence to comprehend ignorance or mistake of law undercuts the mistake of law rule and will render many of our laws unenforceable; as a corollary, this Court's decision in *Molis* appears to be impliedly overturned without any explanation; third, the proffered solution ignores the regulatory context of the present case, which context justifies the imputation that the respondent accepted the terms and conditions incident to the privilege accorded to him in his license to drive; and finally, such a solution usurps what is fundamentally a policy decision -- whether to provide a

defence of ignorance of the law -- and converts it into a constitutionally mandated requirement.

115 The second suggestion which Cory J. makes is the provision of some form of notice of the law. He offers a number of examples to demonstrate how notice of the legal effect or legal consequences of being convicted of one of the underlying offences could readily be provided. Plainly, such notice would convert the offence into one of full *mens rea*, since the accused would then be driving with actual subjective knowledge that he was prohibited under provincial legislation. No doubt the province could have chosen this solution as a matter of policy. I readily acknowledge that in cases such as the one at bar notice is generally desirable. Indeed, several provinces already provide for notice where a license is revoked (see, for example, the Ontario *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 52 and 53, and the Quebec *Highway Safety Code*, R.S.Q., c. C-24.2, ss. 105, 106.1 and 550.1). However, the fact remains that the British Columbia legislature has not chosen this solution. Rather than an offence of full *mens rea*, the province instead chose a solution appropriately tailored to the regulatory context: an offence of strict liability. That solution adequately meets the exigencies of our *Charter*, and is therefore a valid policy choice of full force and effect without any further requirement of notice.

G. Conclusion

116 I therefore conclude that the impugned provisions create an offence of strict liability where the fact of driving while prohibited by statute *prima facie* imports the offence, but where it is nevertheless possible for an accused to avoid

conviction by demonstrating that he reasonably believed that he had not been convicted of one of the underlying offences to which the 12-month statutory prohibition attaches, or that he exercised due diligence in seeking to acquire knowledge of the underlying conviction.

III - Disposition

117 As a result, I would answer in the negative the following constitutional question posed by Lamer C.J.:

Does s. 94 of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, when read in conjunction with s. 92 of that Act create an absolute liability offence which violates s. 7 of the *Canadian Charter of Rights and Freedoms*?

118 I would allow the appeal and order a new trial, at which point the respondent can adduce evidence as to his exercise of due diligence or his reasonable mistake of fact with respect to any of the elements of the offence of driving while prohibited under this provincial statute.

Appeal dismissed, LA FOREST, L'HEUREUX-DUBÉ, GONTHIER and MCLACHLIN JJ. dissenting.

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