R. v. *Sault Ste. Marie:* A Comment

While courts are often criticized for failing to contribute to the reform of the law the recent decision of the Supreme Court of Canada in *R.* v. *Sault Ste. Marie*[1] offers a good example of the constructive role they can play. In a landmark opinion Dickson J., speaking for the entire court, clarified the application of the *mens rea* doctrine to a broad range of criminal and quasi-criminal offences contained in both federal and provincial legislation. In brief, Dickson J. upheld the availability of a "due diligence" defence in strict liability situations. His decision is one that Canadian lawyers should take careful note of.

Briefly summarizing the facts, the city of Sault Ste. Marie entered into a refuse disposal arrangement under which the contracting company was to furnish a site, labour, material and equipment. The site selected by the company backed on a spring-fed creek, which became polluted as a result of landfill operations. This led to the company being convicted under subsection 32(1) of the *Ontario Water Resources Act,* which sets out as follows:

> 32(1) Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse is guilty of an offence and on summary conviction is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000 or to imprisonment for a term of not more than one year, or to both such fine and imprisonment.[2]

Efforts were also taken to prosecute the city, on the basis that it, as well, had "caused and permitted" the offensive pollution. Following a variety of dispositions in lower courts[3] the Supreme Court of Canada was asked to review the decision of the Ontario Court of Appeal holding that the charge required proof of *mens rea,* that there had been no evidence adduced at trial to show *mens rea* and that a new trial should be held.

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[1](1978), 3 C.R. (3d) 30.

[2]R.S.O. 1970, c. 332.

[3]The charge was dismissed by the court of first instance. On appeal *de novo* the city was convicted on the basis of subsection 32(1) being a strict liability offence. In the Divisional Court the charge was found to be void for duplicity and the conviction set aside. It was also held that the charge required proof of *mens rea.* The Court of Appeal held that the charge should not have been quashed on the ground of duplicity because there had been no challenge to the information at trial. It agreed, however, that *mens rea* was necessary. The Supreme Court of Canada also dealt with the duplicity point and concluded that the charge was not defective on this account.

Prior to outlining the basis upon which the Supreme Court of Canada reversed the Ontario Court of Appeal on the *mens rea* issue, a few general comments are in order. A major problem with holding that *mens rea* applies to offences such as the one under consideration is that it places a difficult burden on law enforcement officers to secure the necessary evidence to convince a court beyond reasonable doubt, or even on a balance of probabilities, that an accused had the necessary intent or knowledge to warrant a conviction. This is particularly so with respect to offences designed to enforce the regulation of industrial and other economic activities. Without a considerable investigative capacity, and the resources that this implies, the information necessary to enforce the law under a conventional criminal law model is often not available. And since these offences are usually regarded as less than "criminal" in the pure sense of the term, the legislative and judicial compromise has been to support a concept of strict liability under which liability will be imposed regardless of the intent or knowledge of the accused with respect to his actions. Mistake or ignorance of fact is no excuse when this doctrine is applied. Its justification lies in the need to protect broad social interests through expedient means; it represents "a shift of emphasis from the protection of individual interests to the protection of public and social interests".[4]

On the other hand, the argument against strict liability stresses that when a mental requirement is regarded as unnecessary, the door is opened to the conviction of persons who genuinely are innocent, in that they had no way to control the situation that gave rise to the charges brought against them. This is said to violate fundamental principles underlying penal liability.

The tension that necessarily flows from these conflicting outlooks has spawned a wealth of discussion in legal treatises and journals,[5] as well as in decided cases.[6] Various approaches have been suggested to reduce the unfairness of a traditional strict liability doctrine while retaining a measure of administrative efficiency in the enforcement of regulatory standards. A notable example is the recommendation of the Law Reform Commission of Canada that negligence should be the minimum standard of liability in regulatory offences.[7] While the Commission agrees that it is acceptable to convict a person of a regulatory offence without proof of intent or knowledge, it recommends that an

[4] *Supra*, footnote 1, at 42.

[5] Dickson J., cites literature from England, Australia and Canada in discussing this question.

[6] Among the numerous cases cited by Dickson J. is the New Brunswick case of *R.* v. *A. O. Pope Ltd.* (1972), 5 N.B.R. (2d) 719, in which Keirstead J., held that the offence of failing to provide properly fitted goggles contrary to the Industrial Safety Act was one of strict but not absolute liability, leaving it open to the accused to prove that the act was done without negligence or fault on his part.

[7] See, generally, *The Meaning of Guilt, Working Paper 2* of the Law Reform Commission of Canada (Ottawa, 1974); *Studies on Strict Liability*, Law Reform Commission of Canada (Ottawa, 1974); *Our Criminal Law*, Report of the Law Reform Commission of Canada (Ottawa, 1976) 22-3, 32-3.

accused should not be convicted if he can establish that he exercised due diligence to avoid the proscribed harm. He should always have the opportunity to relate sufficient of the circumstances of the violation to establish his innocence. The work of the Law Reform Commission, as well as innovative decisions in the lower courts of several provinces, were among the varied sources Dickson J. drew upon in *R.* v. *Sault Ste. Marie* in taking this important new direction in Canadian penal law.

What Dickson J. held was that the Crown need not establish *mens rea,* in the classic sense of intent or recklessness, in order to convict the City of Sault Ste. Marie under subsection 32(1) of the *Ontario Water Resources Act.* However, the mere establishing of the *actus reus* of pollution would not be sufficient to convict if the city could establish that it had exercised due diligence, i.e. that the pollution had not occurred owing to negligence on its part. The matter was sent back to the lower court to be retried on this basis.

To guide the lower court, Dickson J. enunciated the applicable principles. He found "compelling grounds" for the recognition of three categories of offences rather than the traditional two:

> 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. . . .
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> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.[8]

While the ascribing of offences to one of these three categories will involve "[t]he overall regulatory pattern adopted by the legislature, the importance of the penalty and the precision of the language used",[9] certain observations appear to be warranted. Clearly the presumption that *mens rea* applies in penal legislation will continue to prevail in relation to Criminal Code offences, as well as to federal and provincial offences that deliberately use such words as "wilfully", "with intent", "knowingly" or "intentionally". But the presumption will not apply with respect to other offences; conceivably, most provincial offences will

[8] *Supra,* footnote 1, at 53-4. In providing these guidelines Dickson J. was forced to explain two prior decisions of the Court that were argued in support of absolute liability, *R.* v. *Pierce Fisheries Ltd.*, [1971] S.C.R. 5, and *Hill* v. *R.*, [1975] 2 S.C.R. 402. Neither of these authorities was felt to stand in the way of a defence of reasonable care, establishing only that the Crown need not prove knowledge on the part of the accused.

[9] *Ibid.* at 54.

be treated as non-*mens rea* offences. In these cases, however, the defence of due diligence will be available unless the inference can clearly be drawn from the wording of the statute that the doctrine of absolute liability is to apply.[10] An example of the far reaching scope of the second of the categories identified by Dickson J. is his inclusion of "cause or permit" offences such as the one he had under consideration. While conceding that these words imply a certain mental dimension he considered that "the words 'cause' and 'permit' fit much better into an offence of strict liability than either full mens rea or absolute liability".[11] He added:

> Since s.32(1) creates a public welfare offence, without a clear indication that liability is absolute and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.[12]

What the impact of this decision will be in practical terms is not entirely clear. The argument has been made on several occasions that the recognition of a due diligence defence will not lead to a spate of acquittals because the existence of such a defence is a factor that is normally taken into account by enforcement officials when deciding whether or not to charge a person. Assuming this to be true in many cases, the major effect of Dickson J.'s judgment may be simply to transform such decisions from administrative into judicial ones, in the sense of providing the court with an opportunity to draw its own conclusions about whatever explanation may have been offered by an alleged violator to enforcement officials.

If *Sault Ste. Marie* is to have a significant impact on the enforcement of regulatory legislation and is to provide new ammunition for creative defence lawyers, it is most likely to be in cases involving corporate violations. Dickson J. did not, in his judgment, adequately deal with the problems of applying the due diligence defence in situations (such as the case under consideration) in which the accused is a corporate body. He summarily dismissed this aspect of the case by suggesting that "[t]he availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation itself."[13] His offhand reference to the House of Lords decision in *Tesco Supermarkets* v. *Nattrass*[14] betrayed the difficulties

[10]This will undoubtedly raise interesting new problems in the drafting and interpretation of legislative offences. For example, what is the effect of this ruling on offences in the *Combines Investigation Act*, R.S.C. 1974 c.C-23, in view of the fact that Parliament has allowed selective application of a statutory due diligence defence in recent amendments: S.C. 1974-5-6, c. 76.

[11]*Ibid.* at 56.

[12]*Ibid.*

[13]*Ibid.* at 58.

[14][1972] A.C. 153; [1971] All E.R. 127 (H.L.).

that may be involved in settling upon a proper basis for evaluating when a corporate accused should be held accountable for offences of negligence and who within the corporation should have the responsibility to exercise due diligence on its behalf.

Tesco adopted the conventional criminal law approach of looking to the director or manager who had actual control of the company's operations (the controlling mind and will of the company in the traditional anthropomorphic jargon of the courts). But it is questionable whether liability for regulatory offences (which Dickson J. suggested "might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application"[15]) should be tested by the same artificial measure as has been developed to test criminal culpability. Is it sufficient that a corporate accused merely establish that its controlling mind and will established a system of control that should have avoided the violation of the regulatory provision? The problem is that violations frequently occur despite control systems, and while negligence may be ascertainable at a given point within the system it may be virtually impossible to attribute negligence to senior management. As the Law Reform Commission of Canada has pointed out:

> The diffusion of responsibility within corporations having complex organizational structures makes it difficult to determine whether due diligence has in fact been exercised, particularly where there is evidence of an unsuccessful effort to set standards to avoid harm. Was the preventive action taken by those whom a court would regard as having primary responsibility for exercising due diligence? Perhaps the matter should have been dealt with at a higher level of the management structure. Where the standards effectively transmitted to those whose conduct caused the actual breach? Perhaps the man on the assembly line had not been informed of the procedures. Were the standards conscientiously enforced within the corporation? Perhaps there was a tacit understanding that sanctions would not be imposed by the employer on employees who failed to follow the procedures laid down.[16]

As a policy matter surely the corporation should bear the risk of a breakdown of its control system.

While there appears to be little indication from reported cases that enforcement difficulties have arisen under the several due diligence defences that presently exist under federal legislation,[17] the result in

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[15]*Supra*, footnote 1, at 34.

[16]*Criminal Responsibility for Group Action, Working Paper 16* of the Law Reform Commission of Canada (Ottawa, 1976) 25-6.

[17]See, *e.g.*, *R.* v. *Centre Datson Ltd.* (1976), 29 C.C.C. (2d) 78, in which the accused corporation was charged under the Weights and Measures Act, S.C. 1970-71-72, c.36 in respect of odometer tampering. The Act allowed an employer to escape conviction for the offence if it established that it had exercised "all due diligence to prevent its commission". In considering whether the president, acting as the directing will of the corporate employer, had exercised due diligence, Bennett J., concluded that the supervision of the wholesale aspect of the business had been delegated to F, who had apparently participated in an agreement to reduce the mileage shown on the odometer. No controls or limitations were placed on F, in view of which the court determined that the company had not exercised due diligence. The court proceeded on the basis that it was the president in this case who would have had to exercise due diligence on behalf of the company in order to establish the defence.

Tesco[18] suggests that the larger the corporation is, and the more centralized its management, the easier it may be to evade liability and the more difficult and costly it may become to enforce public welfare standards through regulatory offences. If governments are to continue to use these offences as a means of regulating corporate behaviour, adherence to the *Tesco* approach may place an unrealistic burden on officials seeking to enforce them. In practice there will likely be many situations in which it will be extremely difficult to obtain the necessary information to rebut the excuses that will inevitably be advanced by senior management of large corporations. Unless courts are prepared to relax their view of "who acts for the corporation" under the existing test,[19] a new test may be advisable to exclude due diligence as a defence where those to whom senior management has delegated supervisory responsibilities have failed to exercise reasonable care to ensure that a control system operates effectively.[20]

While this issue may not surface in the retrial of the municipal corporation of Sault Ste. Marie for polluting Cannon Creek, the issue of corporate due diligence is one that takes on new importance in view of Dickson J.'s broad application of the defence to most regulatory offences. These, after all, are the offences that are most frequently charged against corporations. In fairness, Dickson J., in *Sault Ste. Marie,* had neither the occasion nor the information to deal with this question in

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[18]In this case a large corporation owning several hundred supermarkets had instituted a system under which superior servants were instructed to supervise inferior servants to avoid acts that might lead to the commission of an offence. Due to the negligence of a store manager in supervising an employee products were sold at more than the advertised special price. In a questionable decision from a policy standpoint the corporation was held to have exercised due diligence despite the breakdown of the system at the managerial level by the person to whom supervisory responsibilities had been delegated. The result may, however, be peculiar to the wording of the due diligence defence in question, which allowed an accused to escape liability for the act or default of "another person", *i.e.* a person other than the company. If so, the *Tesco* approach may be of limited application in other cases.

[19]A case in which a court has expanded the doctrine of attribution by extending the "controlling mind and will" of the corporation to an employee acting in a supervisory capacity is *R.* v. *Waterloo Mercury Sales Ltd.* (1974), 49 D.L.R. (3d) 131 (Alta. Dist. Ct.). The accused corporation was convicted of fraud arising from the activities of its used car sales manager in turning back the odometer of used cars prior to sale. Legg J., at 137, found "that it was the policy of the accused corporation to delegate to him 'the sole active and directing will' of the corporation in all matters relating to the used car operation of the company, and as such he was its directing mind and will."

[20]For example, in *R.* v. *Centre Datson Ltd., supra,* footnote 17, one might speculate about the result had the president issued explicit guidelines to F, and had the offensive behaviour been that of a subordinate employee acting under F's supervision. Would the diligence of the president in issuing guidelines to F have been sufficient to acquit if it had been established that F had been negligent in supervising the employee in question? Note the test suggested by the Law Reform Commission of Canada in *Criminal Responsibility for Group Action, supra,* footnote 16, at 27 that "corporations should be allowed to show that all reasonable care to prevent an offence was taken by officers and employees to whom supervisory responsibilities were delegated". It may well be that such a test would have to be implemented by legislation. For a recent example of an attempt to incorporate such a test within a statutory provision see *Employment Standards Code,* Bill 76, 4th Session, 48th Legislature, New Brunswick, 27 Elizabeth II, 1978, s. 101: "Where an employer is prosecuted under this Act the act or omission of an employee shall be deemed to be the act or omission of the employer unless the employer establishes that the act or omission occured despite the fact the employer, and each employee exercising supervisory responsibilities on behalf of the employer, took all reasonable care to avoid it."

any depth and could not reasonably have been expected to consider the adequacy of the existing test for corporate responsibility. Hopefully, his endorsement of *Tesco* will not deter much needed reconsideration of this issue. The problem is one that bears watching in future cases.

In conclusion, while it is perhaps premature to gauge the impact of *R.* v. *Sault Ste. Marie* on the day to day activities of those whose responsibility it is to enforce regulatory legislation, from a lawyer's perspective the decision is one that is likely to be widely acclaimed on at least two counts: first, it offers sanctuary from the harshness and potential inequity of the doctrine of absolute liability; second, it reaffirms that despite the burgeoning activity of legislatures and law reform agencies, judicial law reform remains an active ingredient of our evolving legal system.[21] The Supreme Court of Canada has captured the momentum generated by a number of people and institutions over several years to formalize this much needed reform of Canadian penal law.

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[21]Note the approach taken by Dickson J. in the following paragraph, *supra*, footnote 1, at 53:

> It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that both the concept of absolute liability and the creation of a jural category of public welfare offences are the product of the judiciary and not of the legislature. The development to date of this defence, in the numerous decisions I have referred to of courts of this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.

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