Osgoode Hall Law Journal

Volume 5, Number 1 (April 1967)

Article 7

Regina v. MacDonald and Mt. Pleasant (B.C. 177) Branch of Royal Canadian Legion, (1966) S.C.R. 3, 47 C.R. 37

Colin C. Coolican

on the basis that Parliament occupies the field and then interpret s. 221 (4) as strictly as the court deems necessary.

DAVID M. BEATTY.*

CRIMINAL LAW

Regina v. MacDonald and Mt. Pleasant (B.C. 177) Branch of Royal Canadian Legion, [1966] S.C.R. 3; 47 C.R. 37.

CRIMINAL LAW—COMMON GAMING HOUSE—EXEMPTION FOR BONA FIDE SOCIAL CLUB UNDER S. 168(2) (*a*).

The Supreme Court of Canada[1] was recently faced with an instance of contemporary morality—bingo games and the social club exemption to keeping a common gaming house. The court dealt with the issue in a rather narrow and summary fashion,[2] and seemed to go beyond even the Victorian attitudes which originally fostered such legislation.

The respondents were charged under s. 176 of the Criminal Code with keeping a common gaming house; they were convicted by the magistrate but acquitted on appeal to the British Columbia Court of Appeal.[3] Leave to appeal to the Supreme Court was granted on the issue of the nature of the exemption contained in s. 168(2) (*a*) of the Criminal Code.

The relevant parts of the section read:

> 168(2) A place is not a common gaming house . . .
> (*a*) While it is occupied and used by an incorporated *bona fide* social club or branch thereto if
> (i) the whole or any portion of the bets on or proceeds from games played therein is not directly or indirectly paid to the keeper thereof, and
> (ii) no fee in excess of ten cents an hour or fifty cents a day is charged to persons for the right or privilege of participating in the games played therein.

The facts were not in dispute. Branch 177, of which MacDonald was Secretary-Manager, is an incorporated branch of the Royal Canadian Legion. The branch occupied three floors of a building, two floors being used only by Legion members. The first floor was used for bingo games, twice a day, six days a week. The daily paid attendance at these games averaged 1,800 persons.

Any person who wished to play bingo was admitted, without restriction, upon payment of a fifty cent fee. However, in order to

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1 [1966] S.C.R. 3. Present were Taschereau, C.J. and Fauteux, Martland, Judson and Hall J.J. The judgment was delivered by Judson, J. for the court.

2 A three and a quarter page judgment citing no cases.

3 Unreported. No. 531/64. Oral judgment of Norris, J.A. for court. Present Nouss, Bull, and Sullivan, JJ.A.

participate in the prize money, a payment of a further fifty cents was required. Although it was possible to play bingo without this further payment and without therefore the right to participate in the prize money, no one ever did. Branch 177 retained only the fifty cent admission fee; all other monies received were returned on the same day as prizes for lucky participants.

The Supreme Court found the respondents guilty of keeping a common gaming house. Branch 177 was held not to fall under the social club exemption of s. 168(2) (a) because

(i) the court did not consider it to be a *bona fide* social club,
(ii) the proceeds from games played were paid to the keeper,
(iii) a fee of more than fifty cents a day was levied against persons playing, and
(iv) the persons playing were not "persons" allowed by the social club exemption.

(1) *Definition of Bona Fides*

It was held that the premises were not being used as a *bona fide* social club, because the premises were open to the public without discrimination and were in daily use as a centre of public gambling. It was unnecessary to inquire into the objects of the Canadian Legion or of its incorporated Branch, because the use of these premises on such a widespread scale was said to contradict any possible inference of use as a *bona fide* social club.

However, in considering who are persons who may play, the court held that "persons" are those who play bingo in premises while used by a social club in a *bona fide* manner.

Because of the circular relationship between issues one and four, this problem of *bona fides* will be discussed in detail later under the general question of who are "persons" who may play.

(2) *Proceeds Paid to the Keeper*

The court, interpreting s.168(2) (a) (i), held that the whole or any portion of the bets or proceeds from the game were directly or indirectly paid to the keeper. Subsection 2 was formerly part of s. 226 of the old Criminal Code.[4] Under that section a conviction was quashed by the Supreme Court of Canada in *Bampton v. R.*[5] The charge was in respect of a club interested in assisting certain team sports, but also providing tables for poker, for which each member paid into the club's funds ten cents for each half-hour of play. In the words of Duff, J., (as he then was):[6]

> My mind is clear upon this point, namely that the payment of this fee is not a payment 'of the whole or any portion of stakes or bets, or other proceeds at or from the games' . . . I think we are justified in saying that . . . . it (the word 'proceeds') . . . is limited to the proceeds of a gambling or betting game as such, and proceeds similar in character to bets and stakes . . . The section is aimed, I think, at the participation by the owner of the place where the game is carried on, in the profits or other proceeds accruing to the members from the game itself.

The court in *MacDonald* did not refer to its previous decision in *Bampton;* in fact the court in *MacDonald* referred to no cases what-

4 R.S.C. 1937, c. 36.
5 (1932) 58 C.C.C. 289; [1932] S.C.R. 626.
6 [1932] S.C.R. 626, 628.

soever. Applying Duff J.'s interpretation of "proceeds" to the further fifty cents fee paid to participate in the prize money in *MacDonald,* there is no violation of this particular requirement because all of this money was redistributed as prizes. Nor would the admission charge be caught under this definition.

In the *Bampton* decision, Anglin, J. quotes with specific approval[7] the statement of Beck, J.A. in *R. v. Cherry and Long.*[8]

> This clause refers only to a payment made to the keeper out of one or all of the 'pots' under a rule or regulation, agreement or understanding exacted by the keeper that such a payment shall be made.

These cases admittedly considered s. 226(1)(ii) of the old Code, and their present authority may not be clear in view of the enactment of section 168(2)(a)(i) in 1938. However, it is submitted that since these cases are conceived with the interpretation of the words "the whole or any portion of the stakes or proceeds at or from the game", they should have been referred to by the court in *MacDonald.* If they had been referred to it is difficult to see how the decision on this ground could stand.

The court determined the issue of payment here not on the ultimate disposition of the money but on the simple fact of payment to the keeper. Although all monies were paid directly to the keeper, it retained only the admission fees and distributed all of the further fifty cent fee on the same day in the form of prizes. This further fee was paid to the keeper only as an expedient. The language of the subsection suggests a more tenable explanation would be that the money must not only be paid to, but also retained by the keeper to infringe this requirement. The ultimate disposition of the proceeds should be the relevant and crucial determination.

The court refused to consider the separate nature of the two different fifty cent charges. It is submitted that the charge for admission should be considered under s. 168(2)(*a*)(ii) (fifty cents per day), while the additional charge for prizes should only be considered under s. 168(2)(*a*)(i) (proceeds paid to keeper).

(3) *A charge in excess of fifty cents per day*

The court found that more than fifty cents per day was charged to persons for the right to participate in the game. The court insists that it is impossible to break down what they paid into charge for admission and a further separate charge for the right to participate in the prize money. Just why this is impossible, the court does not indicate. With respect, it would seem that this is not impossible on a reasonable interpretation of subsection 2(a)(ii). The additional fifty cents was optional; the further payment was only for participation in the prize money. One could *play* the game only by paying the fifty cent admission charge. Thus, only fifty cents a day was charged "for the right of participating in games played therein."[9] The fact that everyone paid the additional fifty cents ought not to prejudice the

7 [1932] S.C.R. 626, 633.
8 (1924) 42 C.C.C. 137, at 141.
9 As per Criminal Code, 1953-54, S.C., c. 51, s. 168(2)(*a*)(ii).

court against the respondents. The question should not be whether the separate charges are only made for the purpose of paying lip service to the Code, but rather: did the charges considered separately satisfy the requirements of the Code?

Because the Code deals with them separately, the admission charge being regulated by s. 168(2)(*a*)(ii), and participation in proceeds by s. 168(2)(*a*)(i), it should be clear there are two separate requirements. If each separate charge satisfies its particular requirements, then this should be sufficient.

Of course this interpretation would allow gambling in a club where one pays fifty cents for entrance and then may gamble for any amount, provided the keeper does not get a "rake-off". However, nothing in this subsection, on a normal reading, precludes this. Nor should the courts construct a contrary interpretation. Criminal Code provisions are construed narrowly so that men, with some degree of certainty, may order their affairs, based on an ordinary and literal reading of the Code. As long as the Code requires a social club to be *bona fide* (in keeping with the submissions below under that head) in order to permit gambling on its premises, then the court need not fear this result. It seems that the court considered the charges together here because of policy considerations. Whatever these may be, the court neither alludes to there being any policy nor declares what this policy is.

(4) *Who are "persons" who may play under Subsection 2(a)(ii)?*

It was held in *MacDonald* that *"persons"* in this context meant persons who play bingo on the premises while used by a social club in a *bona fide* manner in keeping with the objects for which it was incorporated. The Supreme Court thus overruled the British Columbia Court of Appeal[10] who had held that "persons" here means "persons in general".

The British Columbia Court had held that to restrict the meaning of the word *"persons"* would be contrary to the intention of Parliament. Intention is to be gathered from the words of the legislation and there is nothing in this section to show the word *"persons"* was not to have its ordinary meaning as found in the dictionaries or in the interpretation section of the Code. The British Columbia Court found support for accepting the ordinary meaning from the use of the word "persons" in other parts of s. 168, where clearly the ordinary meaning must be applied.

The Supreme Court would limit "persons" to persons on premises while being used by a social club in a *bona fide* manner. But the use of the premises for bingo on such a widespread scale was said to contradict any possible inference of *bona fides*. The court does not make it clear whether widespread use refers to the number of games played or to the fact that the public at large were invited to play. The court should go beyond the facts of frequent use and being open to the public to determine whether the club was acting in a *bona fide* manner or not. The court should consider whether the acts complained

[10] Unreported. B.C.C.A. No. 531/64.

of are within the objects for which the club was incorporated. The frequency of games is really only one factor, and should not preclude consideration of other factors, such as the objects of the Legion, and whether the admission fees collected by the Legion go towards fulfilling these objects.

It has been recently held in *R. v. Pon Chung et al*[11] that a social club does not lose its *bona fide* status simply because all objects of its charter are not carried out or because it is operated for gain. The fact non-members may enter and participate without challenge did not, by itself, in that case, deprive such a club of its status. Thus, the approach taken by the magistrate to the problem of *bona fides* seems more logical and realistic than that employed by the Supreme Court in *MacDonald.*

Beyond mere Statutory Interpretation

The Supreme Court in *MacDonald* refused to inquire into the question of *bona fides* because of the widespread scale of the games. The decision seems to reflect certain unexpressed notions of public policy.

Section 168(2)(a), in its ordinary meaning, does not use language restricting the social club exemption to occasional use. Subsection 2(b) does refer to frequency of operation, but only with respect to the exemption for charitable institutions, and this is neither material nor at issue here. By narrowly interpreting the exemption as they did, the court has, in fact, added a new requirement to the criteria for exemption from the common gaming house.

In interpreting the section as they did, the court has made more strict a law to which the public is unsympathetic and one which is not being effectively enforced now. Bingo games seem to be growing in popularity; more important, public acceptance of these games is also expanding. It is not suggested that unpopular laws should necessarily be revoked, but it seems that narrowing the social club exemption in relation to bingo games is out of tune with present attitudes towards gambling. The interpretation here is now so narrow as to distort the section itself.

One wonders what the intention of Parliament was in this area. There is no judicial discussion of legislative intent in any of the cases reported under this section. Presumably, Parliament considered gambling a social evil and decided to restrict it in order to protect the individual and society from its due consequences. However, it is significant that Parliament did not make gambling *per se* a crime, but restricted the circumstances within which it will be permitted.[12] Section 168, in effect, restores those rights taken away by the general prohibition in section 176, if certain conditions are complied with.

The British Royal Commission on Betting, Lotteries, and Gaming,[13] in examining the admittedly more liberal British gaming laws, considered that the object of such legislation should be to interfere

[11] [1965] 1 O.R. 583; [1965] 2 C.C.C. 381 (Magistrates' Court). [1966] 1 O.R. 379 (Ont. C.A.).

[12] Criminal Code, 1953-54 S.C., c. 51, s. 176.

[13] 1949-51 Cmd. 8190, para. 186.

as little as possible with individual liberty to take part in various forms of gambling, but to impose such restrictions as are desirable and practicable to discourage or prevent excess. This is far too enlightened to have been the Canadian Parliament's intention in this area. But just what was that intention? At the very least, the court should have discussed what *they* imagined Parliament's intention to be.

Possible Policy considerations underlying Judgment

What are the unmentioned policy considerations which may be influencing the court's decision here? Possibly the court feared that bingo will fall into the hands of professional gamblers. But does this fear justify the consideration of a *bona fide* social club, if it operates within the restriction of s. 168(2)(a)? It is submitted that the requirements of *bona fides* should be determined not by frequency of use, but in relation to the objects and whether these objects are carried out. To eliminate professional bingo game operators seeking to profit by the social club exemption, the court could go beyond a consideration of the objects and determine if the proceeds were actually spent in pursuit of several of those objects.

Perhaps the court feels that bingo games are morally degrading and that they will corrupt anyone who participates. It is true that bingo is the outcome of a wager determined by chance alone without exercise of skill on part of bettor and as such is clearly a form of gambling,[14] albeit an unsophisticated one. However, there do not appear to be any great social evils that are promulgated by bingo playing. If this fear of moral corruption is influencing the court, let them so declare it.

Conclusion

It would appear that the court exceeded its authority in determining the issue under the guide lines of s. 168. It is for the Legislature to expand or restrict the s. 168 exemption and to control gambling. The courts' function here is to interpret the legislation; in this case the Supreme Court has gone beyond mere interpretation and has in effect substantially changed the Legislature's enactment.

Recommended Legislative Changes Relating to Bingo

(1) The limits of the permissible fee to be charged by a *bona fide* social club should be raised. This would rectify a considerable number of infringements and engender new respect for the law. The present limitation on the amount of the fee[16] was introduced in the Code in 1938.[17] Prior to that time, a *bona fide* (members) club might lawfully charge such a fee as appeared to them to be proper. It is time to re-assess the amount of the maximum allowable in terms of a realistic figure for the late 1960's.

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[14] Criminal Code, 1953-54 S.C., c. 51, s. 168(1)(*f*).

[15] A.-G.'s Committee on Law Relating to Gambling. Tabled in Legislature Nov. 23/61. Chairman J. D. Morton.

[16] Criminal Code, 1953-54 S.C., c. 51, s. 168(2)(*a*)(i) and (ii).

[17] 1938, c. 44, s. 12.

(2) It is clear that a large number of bingo games are held which do not fall within the statutory exemption. These attract considerable public support. The law should be amended so as to permit a licensing system to be set up under which permits may be granted for the operation of a limited number of such games for specified purposes under statutory controls. Such controls could involve the giving of price limits and submission of audited accounts to a licensing body.

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Regina v. Carker.

CRIMINAL LAW—WILFUL DAMAGE—DURESS.

> Only a hypocritical society would condemn a defendant for yielding to force that the rest of its members would have been unable to resist.[1]

These words become particularly appropriate in light of the Supreme Court of Canada's decision in *R. v. Carker*,[2] where an accused's plea of duress was not accepted as a defence to a finding of wilful damage to public property.[3] The words emphasize the broad range of prohibited conduct which our courts consider punishable despite the presence of extenuating circumstances; and they embody an underlying concept of justice which has never apparently been incorporated in our law. In an area where previous judicial scrutiny has been negligible,[4] and despite the evolution of various alternative approaches to the problem,[5] it is disturbing in this case that the Supreme Court, without the slightest deference to the origins of the legislation, should so narrowly confine the language of the Criminal Code, as was done here.

I

The accused in *R. v. Carker* was a penitentiary inmate who had damaged the plumbing fixtures in his cell during a protest disturbance. Initially, the accused had refrained from taking part in the agitation.

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1 64 COLUM. L. REV. 1469 at 1506.

2 *R. v. Carker*, unreported decision of Supreme Court of Canada. The judgment, pronounced on December 19, 1966, was written by Ritchie J.

3 Criminal Code, 1953-54 S.C., c. 51, s. 372(3).

4 Reference to the absence of decided law or discussion concerning duress is probably the most common remark made about the topic: See Edwards, J. Ll. J., *Compulsion, Coercion, and Criminal Responsibility*, 14 MOD. L.R. 297, at 297. In Canada, the limited range of the very few decisions on duress indicates the same: *Dunbar v. The King*, (1936) 67 C.C.C. 20 (S.C.C.); *Rex v. Farduto*, 10 D.L.R. 669 (Que. K.B.—Appellate Division).

5 A discussion of legislation in 20 of the U.S. States gives some idea of the variations that might be used in interpreting or amending our own legislation: MODEL PENAL CODE § 2.09, (AMERICAN LAW INSTITUTE), (Tent. Draft No. 10). Other Commonwealth Codes are also discussed in HOWARD, C., AUSTRALIAN CRIMINAL LAW at 365-66.

However, during the demonstrations, other prisoners threatened the accused's physical well-being if he did not join them by breaking up the furnishings in his own cell. Shouting in unison from their separate cells, the other prisoners warned that unless he participated in the disturbance he would be kicked in the head, his arm would be broken and he would get a knife in the back at the first opportunity.

At trial the accused admitted the damage he had done to the plumbing fixtures. However, he argued for acquittal on two counts. First, his conduct did not fall within the definition of "wilful" in s. 371(1) of the Criminal Code;[6] alternatively, he acted under compulsion[7] and was therefore entitled to be excused under the provisions of s. 17 of the Criminal Code,[8] or the common law defence of "duress". The trial judge dismissed both of the accused's arguments, defining "wilfully" as no more than a man's intending the natural and probable consequences of his voluntary acts,[9] and limiting the defence of duress to the language of s. 17, which he said did not include the type of threats the accused proposed to bring forth in evidence.[10]

The British Columbia Court of Appeal,[11] MacLean, J.A. dissenting, reversed the decision of the lower court. The majority of the court, as shall be discussed, narrowed the definition of "wilful" and extended the circumstances in which s. 17 might apply, although never to the extent that a separate common law defence of duress was recognized. The Supreme Court of Canada, apparently unimpressed with the majority's reasoning in the Court of Appeal, restored the conviction. Ritchie J., delivering the judgment, agreed with both lower courts in suggesting duress had been codified and exhaustively defined in s. 17. However, in reference to the accused's plea under s. 17, he adopted the logic of the trial court:

> . . . although these threats were "immediate" in the sense that they were continuous, they were not threats of "immediate death" or "immediate grievous bodily harm" and none of the persons who delivered them was present in the cell with the [accused] when the offence was committed.[12]

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[6] Criminal Code, 1953-54 S.C., c. 51, s. 371(1): Everyone who causes the occurrence of an event by doing an act or omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

[7] The words compulsion and coercion are sometimes used to describe duress. To a certain extent they are interchangeable, although they more appropriately describe various forms of duress. See EDWARDS, *supra*, footnote 4 at 297.

[8] Criminal Code, 1953-54 S.C., c. 51, s. 17: A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to a conspiracy or association whereby he is subject to compulsion, but this section does not apply where the offence that is committed is treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

[9] (1966) 56 W.W.R. 65, at 73.

[10] At trial, a *voir dire* was held to determine the admissibility of evidence which the accused proposed to introduce to prove he acted under duress. The trial judge decided the evidence was inadmissible.

[11] *Supra*, footnote 9.

[12] *Supra*, footnote 2.

On this basis the court refused to admit evidence tendered by the accused to establish duress. Finally, the Supreme Court rejected the accused's contention that his conduct was not "wilful" within the meaning of s. 371(1), saying:

> . . . there is no suggestion in the evidence tendered for the defence that the accused did not know that what he was doing would probably cause damage.[13]

II

Before dealing with duress and the interpretation of s. 17, consideration should be given to the offence itself and the crucial element of wilfulness. In each court a different meaning is attributed to "wilful" in s. 371(1), although not always with different results.[14] And yet, the Supreme Court did not consider it necessary to elaborate on the issue beyond what was said above.[15] This leaves several pertinent questions unanswered. Does "wilful" as defined in s. 371(1) extend or alter the meaning that courts ordinarily[16] give the word?[17] If so, is there any significance in the offence of damage to public property, or any of the other offences under Part IX of the Criminal Code, which would warrant a peculiar interpretation of "wilful"?[18] What does "reckless" mean? Is it an additional requirement necessary to prove wilfulness, or a separate alternative to knowledge of "probable damage"?

In the *Carker* decision the Supreme Court's interpretation of "wilful" has substantially reduced the mental ingredient of *mens rea* necessary to convict the accused in this case. Presumably the conduct of any individual with normal mental capacity will fall within the court's definition of "wilfully", regardless of his intention. Criminal responsibility, based solely on the accused's carrying out the *actus reus*, is well recognized in principle, but less frequently applied. A court, tending toward such liability by minimizing the element of *mens rea*, should not approach the matter casually.

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13 *Ibid.*

14 At trial and in the Supreme Court of Canada the accused was said to have been guilty of damage to public property. However, the reasoning of the two courts seems to differ slightly. In the lower court, where "wilful" is interpreted as a man's intending the natural and probable consequences of his act, one could suggest that this is no more than a presumption of the accused's intention (*R. v. Steane*, [1947] 1 All E.R. 813), which might easily be rebutted. The Supreme Court, on the other hand, would seem to have established nothing more than a requirement of *mens rea* by its interpretation of "wilful". In fact, the trial judge allowed evidence in an attempt to establish an absence of "wilfulness", whereas the Supreme Court would not have heard it.

15 *Supra*, footnote 2.

16 The word "wilfully" is ordinarily used in the criminal sense to designate bad motive or purpose or evil intention (*Rex v. Goodman*, 99 C.C.C. 366). That is, not merely to commit an act voluntarily, but to commit it purposely with an evil intention (*ex parte O'Shaughnessy*, 8 C.C.C. 136). See also: *Rex v. Griffin*, 63 C.C.C. 286 (N.B.C.A.).

17 MARTIN'S CRIMINAL CODE 1955 at 70: For the purposes of Part IX it (wilful) is defined in s. 371(1). It is submitted, however, that this definition gives it no specialized meaning, but rather that it codifies those principles of criminal responsibility to which reference has been made.

18 Under s. 371(1), "wilfully", as defined therein, is to apply to all the offences in ss. 372-390, i.e. Part IX of the Criminal Code.

The British Columbia Court of Appeal considered that s. 371(1) involved a more stringent requirement of *mens rea*. Here, the court defined "wilfully" as an act done by the accused "deliberately, as a free agent, and in the exercise of his own will".[19] This interpretation of wilfully narrows the range of conduct covered by s. 371(1), and adopts a meaning that is more in line with the traditional concept of the guilty mind. However, it includes language such as "free agent" that is not entirely familiar to the criminal vocabularly,[20] and gives rise to the problem of knowing just how far it is to be extended. In *R. v. McHugh*,[21] cited by the court, the ordinary meaning of "wilfully" is said to be extended by s. 371(1), but in defining the limits of this extension it is stipulated that the accused must be acting as a free agent.[22] This qualification had previously been adopted in *Rex v. Goodman*,[23] another case involving an offence under Part IX but which was not mentioned by the court. In neither of these cases does it become clear whether the accused must simply be a free agent in the physical sense, or whether the courts would have been prepared to extend this requirement to his mental condition as well. This might be a possibility, although a rather unlikely explanation in light of the common usage of the term free agent.

The Court of Appeal seems bent on interpreting "wilfully" as far as possible in its ordinary sense.[24] For example, emphasis on the "deliberateness" of the accused's conduct, and his ability to be the master of his own will indicate a certain pre-occupation with the accused's purpose and determination. The problem with such an interpretation is that it involves considerable strain on the language in s. 371(1). It is difficult to see how purpose or motive can play any part in whether or not conduct is "wilful", when the only requirement seems to be that the accused know his activity will probably cause damage.

One further point should be mentioned before leaving this aspect of the case—the effect of "reckless" in the language of s. 371(1). The Supreme Court made no reference to it in their discussion of s. 371(1), making it difficult to assess the relevance of recklessness in defining what constitutes wilful conduct. Possibly it is of no significance at all, or the court would have considered it necessary to mention it in their judgment.

However, this latter conclusion seems unlikely, and it becomes necessary to discover what meaning has been adopted for the word "reckless". It is quite possible that the Supreme Court regarded recklessness as an alternative to having knowledge that certain conduct would probably cause damage. To prove that an individual's conduct is "wilful", it simply becomes a matter of establishing either

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19 *Supra*, footnote 9 at 73.

20 Norris, J.A., in giving the Court of Appeal's interpretation of s. 371(1) cites one of two civil cases that are generally relied upon to support this propostion—*In re Young v. Hartson's Contract*, (1886) 31 Ch. D. 168. The other case is *Anderson & Eddy v. C.N.R.*, (1917) 35 D.L.R. 480.

21 1966 1 C.C.C. 170 (N.S.S.C.—Appellate Division).

22 *Ibid.*, at 178.

23 99 C.C.C. 366 (B.C.C.A.), at 372.

24 *Supra*, footnote 16.

of these conditions, but not both.[25] In effect, such an interpretation of "reckless" involves the substitution of the disjunctive "or" for the "and" which precedes the stipulation in s. 371(1) that the conduct be reckless. This interpretation would seem the most likely in light of the decision in *R. v. Carker.*

On the other hand, the element of "being reckless" may be one of two essential ingredients in the definition of "wilful" conduct,[26] and one which should have been established before the accused was convicted in the *Carker* decision. The problem in such an interpretation of s. 371(1) is to decide what is meant by "being reckless". One is again faced with language that is not familiar in a criminal context, and it is difficult to know how rigid a standard should be applied in determining whether conduct is reckless. However, under any such standard, it would seem unlikely that the accused's conduct in *R. v. Carker* could be considered reckless.

III

Attention until now has been focused upon the court's interpretation of the offence with which the accused was charged. However, the decision in *R. v. Carker*[27] is probably more significant for the manner in which it dealt with the accused's plea of duress, and it is this aspect of the case that will now be looked at more carefully.

The concept of duress, before being dealt with as the interpretation of s. 17 and its application to the circumstances in the *Carker* decision, should first be examined in terms of its basic components. In practice duress assumes varied combinations of these different components, and in each case the result is different. For example, there is no doubt that actual or threatened compulsion, when it cannot be avoided, is the basis of duress. But is this compulsion restricted to threats of physical violence? What is meant by a continuing threat?[28] What must be the extent of the threatening? Another element of duress is the accused's reaction to the threats and the fear which he experiences. However, is the accused's fear of the threats being carried out to be assessed on a subjective or objective standard? If the latter, to what extent will an individual's abnormal characteristics be taken into account?

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[25] This would seem to be the suggestion in *Rex v. McHugh,* [1966] 1 C.C.C. 170, where Bisset J., at page 178 says ". . . the section (371(1)) does not restrict the meaning of 'wilful' but extends it to include reckless acts as well as acts done with a bad motive . . ." See also *R. v. Corliss,* (1957) 120 C.C.C. 341.

[26] *R. v. Entwhistle,* 47 C.C.C. 121, at 122: ". . . the damage was caused by the act of the defendant which he knew would probably cause it, being reckless whether such event happened or not." Also, *Rex v. Kozak,* 88 C.C.C. 350 (B.C.C.A.) where the court refused to find a misdirection to the jury even if there had been a failure to explain the extended meaning of s. 371(1) (at that time s. 509), since the element of recklessness was not present.

[27] *Supra,* footnote 2.

[28] *Subramaniam v. Public Prosecutor,* 1956 1 W.L.R. 965; *R. v. Carker, supra,* footnote 2.

The consequences or effects of a plea of duress have been disputed on the grounds of whether it constitutes a defence or an excuse.[29] For the purposes of Canadian law the problem would seem to remain unresolved, if indeed it has been recognized at all, because in the *Carker* decision the Supreme Court made no more than passing reference to "common law rules and principles respecting 'duress' as an excuse or defence".[30] In the same way one should decide whether duress, once established, negates *mens rea* and the exercise of an individual's will,[31] or whether it is a defence superimposed upon the whole concept of criminal liability and separate from motive, will, or purpose.[32]

In *R. v. Carker*, the Supreme Court seem to neglect or be unaware of the existence of many of these issues. As has been mentioned, the court felt that "the common law rules and principles respecting 'duress' "[33] had been completely supplanted or replaced by s. 17, to the extent that no defence remained to the accused under s. 7 of the Criminal Code. Thus, if the questions that have been posed concerning the general concept of duress are to be answered, they need only be dealt with in terms of the language in and legislative intention of s. 17.

Looking at the court's interpretation of s. 17, one is immediately struck by the narrow scope attributed to the legislation and the conclusive meaning given individual words and phrases. "Threats of immediate death or grievous bodily harm" is whittled down to include only the most imminent danger. For example, the court considers it "inconceivable" that such threats could have resulted while the prisoners were locked in their separate cells. One can also draw from the court's remarks, although it is nowhere stated specifically in the decision, that "present" within the meaning of s. 17 must involve more than being confined to a locked cell.

Such an interpretation of s. 17 seems unnecessary in light of information recorded in the Court of Appeal decision,[34] but not mentioned in the Supreme Court. As previously described, evidence was brought of the threats made to the accused during the rioting. However, there would also have been evidence adduced to support a plea of duress, had it been allowed, to the effect that such threats had been carried out in the past in other prisons, and of a particular incident along these lines in the very prison in which the accused was incarcerated. Surely circumstances such as these must weigh upon a court's analysis of what constitutes immediate death or griev-

29 In *R. v. Bourne*, (1952) 36 Cr. App. Rep. 125, the court considered the common law defence of duress was no more than a prayer to be excused from punishment. This opinion was rejected in 69 L.Q.R. 226 by Professor J. Ll. J. Edwards. See also *R. v. Steane*, [1947] 1 All E.R. 813, at 816.

30 *Supra*, footnote 2.

31 *R. v. Bourne, supra*, footnote 29, at 128.

32 Dr. Glanville Williams adopts this latter approach suggesting it is "better to regard duress as a defence standing altogether outside the definition of will and act." WILLIAMS G., CRIMINAL LAW (2nd ed.) at 751.

33 *Supra*, footnote 2.

34 *Supra*, footnote 9, at 67.

ous bodily harm. How "immediate" in terms of a time element must the danger be? Suppose there was a real likelihood that following the rioting the prisoners would be filed into new quarters, or temporarily locked up together, thus allowing the threats to be carried out on the accused before he could disclose his danger to officials. Does this not involve sufficient immediacy?

No doubt the court was confronted with legislation that on its face appears straightforward, although it is perhaps susceptible to various interpretations. However, the legislation was originally designed around fundamental principles of criminal justice, and, in view of the paucity of Canadian law in the area,[35] the court might have been well advised to consider these before adopting so rigid an interpretation of the language. The Canadian criminal statute was developed from two sources[36]—the English Draft Code of 1879 and Stephens Digest of the English Criminal Code. S. 17, in particular, of the present Code is in almost the exact terms of Article 23 of the Draft Code, and for this reason the recommendations and comments of the Commissioners in the report on their Draft Code become most interesting.

The Commissioners dealt with duress in conjunction with all circumstances that amount to a justification or excuse for doing that which would otherwise be a crime.[37] Duress, in their language, involved a man's right to preserve his own life and limb, and in Article 23 they defined duress in terms which they felt represented the existing law, or what they felt that law should be.[38] There is no discussion in the Report of what is meant by immediate death or grievous bodily harm, but one is struck in reading the examples of duress in previous cases,[39] cited in the Commissioners' comments, with the broad range such threats were thought to cover. More important, however, is the Commissioners' consideration of necessity as a justification, or defence, for which no provision was made in the Draft Code. They were not prepared to suggest it might never be a defence, saying:

> ". . . we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."[40]

This might well have been good therapy to apply in the interpretation of s. 17, particularly in light of the rather unusual circumstances that surrounded the *Carker* case.

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35 Section 17 of the Criminal Code has been reviewed in only a few Canadian decisions: *The King v. Faruto*, 1912) 10 D.L.R. 669 (Que. C.A.), *Dunbar v. The King*, (1936) 67 C.C.C. 20 (S.C.C.). In none of these are the courts involved with the actual language of section 17, as here, and the cases are of negligible assistance in determining the issues in *R. v. Carker*.

36 *Rex v. Martin*, [1933] 1 D.L.R. 434 (Man. C.A.), at 459; *Rex v. Farduto, supra*, footnote 4, at 672.

37 REPORT OF THE ROYAL COMMISSION APPOINTED TO CONSIDER THE LAW RELATING TO INDICTABLE OFFENCES, C-2345 (1879), at 10.

38 *Ibid.*, at 43.

39 In particular, *McGrowther's* case, Foster 13, 168 E.R. 8.

40 *Supra*, footnote 37, at 44.

It is interesting that the Commissioners, in trying to define the circumstances which would justify conduct that is ordinarily criminal, confirmed their faith in the "sense and justice" which underlie the principles of the common law.[41] There can be little doubt that in those countries where criminal activity is governed by a code the defence of duress has generally been restricted,[42] but just how far such qualifications are to extend is another question.[43]

Perhaps this can best be answered by looking at the course which the common law has followed in defining duress, as it was presumably these principles of the common law that the Commissioners held in such high esteem. Several cases deal at length with the various aspects of duress at common law,[44] but for our purposes *A.-G. v. Whelan*[45] is the most important. Here, a bank robber had taken his loot to the home of the accused, where he threatened the accused with murder or other serious consequences if the stolen goods were not kept by the accused and nobody informed of their whereabouts. The robber then departed, and was later apprehended. However, in the interval the accused made no attempt to return the property or contact the proper authorities, claiming that he continued to fear possible reprisals by the robber if he made any move in that direction. In upholding the instructions to the jury[46] and quashing the conviction, the court stipulated that the threats be of immediate death or serious personal violence and held that in this case "the finding of the jury meant to imply that the coercion was present when the act, otherwise criminal, was committed . . ."[47]

It would be difficult to distinguish the plight of the accused in the *Whelan* decision from that of the accused in the *Carker* decision. However, the verdicts are different. How far did the Commissioners, in drafting Article 23, mean to alter the common law? Even the language used in *A.-G. v. Whelan* to define duress corresponds almost exactly to the wording of the Draft Code and our s. 17, and suggests the Supreme Court might have adopted another meaning for the words. If *A.-G. v. Whelan* represents the "sense and justice" of the common law, why is it that our s. 17 should be interpreted with so little attention to the principles of such a decision?

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41 *Supra*, footnote 37, at 10.

42 See WILLIAMS, G., CRIMINAL LAW (2nd ed.) at 245-6; HOWARD C., AUSTRALIAN CRIMINAL LAW.

43 *Supra*, footnote 37, at 10: ". . . we do not think it desirable that, if a particular combination of circumstances arises of so unusual a character that the law has never been decided with reference to it, there should be any risk of a Code being so framed as to deprive an accused person of a defence to which the common law entitles him . . ."

44 Probably the two most significant decisions in this respect are: *R. v. Bourne*, (1952) 36 Cr. App. Rep. 125; *R. v. Steane*, [1947] 1 All E.R. 813. Other cases are: *R. v. Dudley & Stephens*, 14 Q.B.D. 273; *R. v. Tyler*, 8 C. & P. 616; *R. v. Crutchley*, 5 C. & P. 133; *R. v. Stratton*, 21 How St. Tr. 1045; *MacGrowther's* case, Fost. 13.

45 [1934] Ir. R. 518 (Court of Criminal Appeal).

46 The language used in these instructions was: "In receiving the money did the accused act under threat of immediate death or immediate serious violence?"

47 *Supra*, footnote 45, at 526.

Finally, before leaving the Supreme Court's interpretation of duress in s. 17 it might be wise to consider the Court of Appeal's solution. Norris, J.A. took as his focal point the accused's belief in whether or not the threats would be carried out.[48] In trying to determine whether such fear existed in the accused's mind the additional requirements of s. 17, such as type of threats necessary and the presence of the person making them, would be applied in varying degrees of rigidity. Although this analysis of the legislation does not answer all the questions that were originally proposed concerning the general concept of duress, it would seem to correspond much more closely than the Supreme Court's interpretation of s. 17 to the common law approach and to fundamental principles of criminal responsibility.

IV

Following the *Carker* decision, courts will be tied down to a very narrow path in applying the defense of duress. The Supreme Court has insisted upon a most restrictive interpretation of the language of s. 17, and would seem to have prevented any future extension of the concept of duress by refusing to recognize its existence outside the terms of the Criminal Code. This is the more unfortunate in view of the Supreme Court's less rigid approach in a similar, although entirely separate, area of the Code—the defence of insanity.

In *More v. Queen*,[49] a murderer, suffering from depressive psychosis which impaired his ability to make decisions in a normal kind of way, did not plead insanity. However, the accused did bring evidence of his peculiar mental state, and the court had to decide whether this impairment of the accused's ability to reason or decide, notwithstanding his sanity by the standards of s. 16,[50] would provide a defence to the charge that the killing was "planned and deliberate". The majority of the court[51] held that it was a good defence. They contended that the decision as to whether the accused's conduct is his deliberate act involves "an inquiry as to the thinking of the accused at the moment of acting".[52] Such an inquiry would include consideration, in this case, of the accused's abnormal mental attitude. The majority insisted that this in no way effected the interpretation or application of s. 16. However, Fauteux J., in the dissenting judgment, disagreed with the majority's treatment of "planning and deliberation" and s. 16. Referring to the latter, he said it was "all embracing with respect to the question of insanity in criminal matters".[53] Recognizing that the irrationality of the accused's planning or deliberation might suggest "a degree of mental irresponsibility legally apt to relieve from legal responsibility",[54] Fauteux J. qualified

48 *Supra*, footnote 9, at 74.
49 [1963] S.C.R. 522.
50 Criminal Code, 1953-54 S.C., c. 51, s. 16.
51 Cartwright, Abbott, Judson, Ritchie, and Hall JJ.
52 *Supra*, footnote 49, at 534.
53 *Ibid.*, at 531.
54 *Ibid.*

this by saying that impairment of mental capacity short of insanity was not a defence to the crime charged, nor would it ever be until it fell within the language of s. 16.

In applying the reasoning of the court in the *More* case to the defence of duress, one must be aware that the concept of duress can be approached either as a negation of the *mens rea* necessary to constitute an offence or as a defence superimposed upon the structure of criminal conduct. In the latter case it simply becomes necessary to bring the accused's conduct within stipulated conditions of threats and fear to allow a successful plea. The problem of which explanation is the more satisfactory approach to duress has been mentioned already,[55] without coming to a conclusion. Nor is it intended that the answer should be provided here. Rather, each approach will be discussed in light of *More*.

If one adopts the idea that duress negates *mens rea*, and in this way eliminates criminal liability for particular conduct,[56] the majority decision in *More* provides an interesting analogy. There, the accused's inability to arrive at a decision in an ordinary and rational manner was considered relevant in deciding whether he had the requisite *mens rea* to commit the offence, despite the fact that the accused's irrational conduct could not be brought within section 16. In *Carker*, surely evidence that might indicate the accused was not acting "wilfully", but rather under compulsion, should be admissible as going to the *mens rea* required by s. 371(1), despite the fact that it is not properly admissible under s. 17?

On the other hand, if one accepts the proposition that duress as a defence stands outside and apart from the ingredients of criminal responsibility,[57] the dissenting judgment of Fauteux J. in *More* is probably more significant. There it is suggested that the majority has in effect recognized a defence of insanity that exists outside the language of s. 16. Applied to duress, this would allow the recognition of circumstances outside s. 17 that amount to duress. A court, without offending the language of s. 17, could accept as a defence circumstances which at common law would be recognized as duress, but which did not comply with the standards of s. 17. This, surely, was the situation in *R. v. Carker*.

V

In conclusion, one can do no more than mourn the Supreme Court's refusal to give to the language of s. 17 a broader and more flexible meaning. Duress would now seem to be shackled by requirements that involve the most obvious but less likely forms of compulsion, without recognizing the more subtle forces by which men are compelled to betray their own will. The solution, at this stage, would seem to be new legislation which not only recognizes the more

55 *Infra.*
56 *A.-G. v. Whelan, supra,* footnote 45. *R. v. Bourne, supra,* footnote 44.
57 *Supra,* footnote 32.