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Recent Developments in Criminal Law in Nova Scotia

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Jim Ortego* and M.R. Goode** Recent Developments in
Criminal Law in
Nova Scotia

I. Introduction

Judicial examination of the criminal process in Canada generally, and Nova Scotia in particular continues to grow. The consequent explosion of technical law, which some would regard as an implosion, places the academic writer on the horns of a dilemma when faced with the task of reviewing recent developments in the Nova Scotia criminal process. On the one hand, the writer may compress and omit detail in order to cover adequately developments in such widely disparate areas as murder and power to arrest. On the other hand, coverage may be sacrificed to detailed discussion of the law and its implications in a smaller number of selected areas. We have chosen the latter course.

We do not, however, intend to imply that the topics discussed hereunder were selected at random. We have chosen to focus on three areas of recent development which in our view, will significantly affect the future course of criminal law. They are the struggle to develop a rational sentencing policy, the right to counsel in breathalyzer cases, and ignorance of law as a mitigation, if not outright defence, to certain offences. We join, of course, many people in selecting sentencing law. It is a dynamic area of law currently undergoing reexamination all across the country.

The problem of a suspect's right to counsel where that suspect has been subject to a breath analysis demand has been the subject of much recent litigation in Nova Scotia, as elsewhere. Indeed, an appeal from Nova Scotia has recently resulted in a controversial decision of the Supreme Court as will be seen shortly. Moreover, this area is an example of the litigation explosion referred to above. Prior to the enactment of the *Canadian Bill of Rights* a right to counsel issue, in these circumstances, would not be litigated with even a marginal expectation of success. Insofar as the *Bill of Rights* opened new areas for the judicial examination of problems in the criminal process, the growth of legal aid made it more financially

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possible for the average accused to litigate such issues. Whether one approves or not, the results of this combination require exploration.

Finally, we have decided to deal with a case on the little litigated area of ignorance of law as mitigating culpability. This is a complex area of law which is certain to produce further litigation, if not clarity, in the foreseeable future.

II. Sentencing Developments

1. Introduction

We have witnessed in recent times a veritable explosion of litigation contesting sentencing principles and practices.¹ This is not surprising in the face of the continuing debate centering on the fundamental premises, such as can be identified,² of the criminal law itself.³ The sentencing question, as a microcosm of the criminal law "system"⁴ is an unusually contentious part of our law. For it combines, under a single legal issue, most of the great questions that plague the criminal law. These include, among others, the merits of the adversarial system as a method to achieve fairness,⁵ the wisdom (in the face of non-legal expertise in the area) of allowing the judiciary to decide social questions,⁶ the elasticity of evidentiary principles when applied to non-proof matters,⁷ and,

1. Examples include Nova Scotia where, during the five year period of 1965-1969 there were only 23 reported decisions in the criminal law area and only 3 of those dealt with sentencing. By contrast, volume 10 of the Nova Scotia Reports, second series, which covers approximately a four month recent period reports 20 criminal law decisions, 12 of them dealing with sentencing law.

2. See, for example, R. Silverman and J. Teevan, Jr., *Crime in Canadian Society* (Toronto: Butterworths, 1975) at 21-44; H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 1-148; and J. Hall, *General Principles of Criminal Law* (New York: Bobbs-Merrill, 1947) at 1-65.

3. The clearest statement of a possible Canadian approach to this question has come from the Law Reform Commission of Canada. See, for example, *The Principles of Sentencing and Dispositions* (Ottawa: Information Canada, 1974) at 1-6.

4. See, for an example of the continuing effort to systematize law, A. Rapoport, ed., *Game Theory as a Theory of Conflict Resolution* (Boston: D. Reidel, 1974).

5. See, for example, C. Hanly, "Psychopathology of the Trial Process" in M. Friedland, ed., *Courts and Trials* (Toronto: University of Toronto Press, 1975).

6. See, for example, the *Report of the Canadian Committee on Corrections* (Ottawa: Queen's Printer, 1969) at 212-215 and *Report of Joint Committee of the Senate and House of Commons on Capital Punishment* (Ottawa: Queen's Printer, 1956) at 18-19.

7. See, for examples, A. Doob, "Psychology Evidence" in M. Friedland, ed., *Courts and Trials*, *supra*, note 5 and *Parole in Canada, Report of the Standing*

ultimately, the utility of the criminal sanction itself.⁸

Nova Scotia courts, particularly the Appeal Division of the Supreme Court, have in recent months faced the increased number of sentencing cases that have arisen from the crystallization of these issues in specific cases. This note attempts to examine those decisions in the hope that a reasonable estimation of the current Nova Scotia position in sentencing law can be presented. Spatial limitations, of course, restrict the detailed part of this note to a discussion of the most fundamental developments. These are examined in the first part of the note, which is a more or less critical view of the basic role and practice of the Appeal Division in sentencing appeals involving indictable offences. Two offences, armed robbery and manslaughter, are given particular attention. The second part of the note will detail largely without critical comment recent developments in certain peripheral areas of sentencing, including the pre-sentence reports, the principles affecting consecutive sentencing, the importance of deterrence, and the identification of certain non-traditional factors that may properly be given weight in the sentencing decision.

2. *Sentencing Principles: Manslaughter and Armed Robbery Cases*

Section 614 of the *Criminal Code* allows the Appeal Division, when hearing an appeal as to a sentence in an indictable offence,⁹ to “consider the fitness of the sentence” and either “vary the sentence” within the prescribed limits or “dismiss the appeal.”¹⁰ In interpreting its obligations under this section the Appeal Division has developed three interrelated principles of law, each of which will be examined here. The three principles deal with the recognition of sentencing principles, the correct use of those principles, and the degree of variance from either of these that is required before the Court will intervene.

The last named principle, which will here be referred to as the “intervention principle” has been best stated by Macdonald J. A. in *R. v. Cormier*:¹¹

Senate Committee on Legal and Constitutional Affairs (Ottawa: Information Canada, 1974) at 61-86.

8. See, for examples, H. Packer, *The Limits of the Criminal Sanction*, *supra*, note 2 and J. Hall, *General Principles of the Criminal Law*, *supra*, note 2.

9. *The Criminal Code*, R.S.C. 1970, c. C-34, s. 614.

10. *Id.*

11. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687 at 694-5; 22 C.C.C. (2d) 235 at 241 (S.C., A.D.).

Thus it will be seen that this Court is required to consider the 'fitness of the sentence imposed', but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles, a sentence should be varied only if the Court is satisfied that it is clearly excessive or inadequate to the offence proved or to the record of the accused. . .

The intervention principle, therefore, does not enjoy an independent existence. It operates only in relation to at least one and in most cases both of the other issues: the principles of sentencing and their correct application. If error in either of these is sufficient to satisfy the degree of error requirement, then the intervention principle's application will result in a reversal of the lower court. If no error is found in either the statement of principles or their application, or if the error found is not of a sufficient degree then the intervention principle requires the Court to affirm the lower court decision on sentencing. The question becomes, therefore, what are the correct principles of sentencing and what rules govern their application?

It is almost axiomatic for Nova Scotia lawyers to say that the province's principles of sentencing are contained in the judgment of the late McKinnon C.J.N.S. in *R. v. Grady*:¹²

It has been a practice of this Court to give primary consideration to protection of the public, and then to consider whether this primary objective could best be attained by (a) deterrence, or (b) reformation and rehabilitation of the offender, or (c) both deterrence and rehabilitation.

Despite the widespread reference to these principles in Nova Scotia¹³ they should be read in conjunction with three other cases. In *Cormier*¹⁴ Macdonald J.A. speaking for the Court, found that the principles contained in *Grady* do not conflict with the sentencing principles of the Report of the Canadian Committee on Corrections (the Ouimet Report),¹⁵ and that the two of them should "henceforth go hand in hand."¹⁶ The principles referred to by the Court are:

12. *R. v. Grady* (1971), 5 N.S.R. (2d) 264 at 266 (S.C., A.D.).

13. P. O Hearn, "Nova Scotia's Principles of Sentencing and Types of Sentences Available" in J. Ortego, ed., *Sentencing Alternatives and Methods — Dalhousie Continuing Legal Education Series, No. 10*. (Halifax: Dalhousie University, 1975) at 5.

14. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687; 22 C.C.C. (2d) 235 (S.C., A.D.).

15. *Report of the Canadian Committee on Corrections*, *supra*, note 6.

16. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687 at 698; 22 C.C.C. (2d) 235 at 244 (S.C., A.D.).

The overall views of the Committee may be summed up as follows: segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account.¹⁷

The exact meaning to be attributed to the expression “go hand in hand” is unclear. In *R v. Osachie*,¹⁸ a case preceding *Cormier*, the Court had referred to the Ouimet Report principles without actually adopting them. Then in *R. v. Huskins*,¹⁹ a case decided after *Cormier*, the Court indicated that Ouimet Report’s principles should be “borne in mind”²⁰ by a sentencing Court. These were cases in which the application of both the *Grady* principles and the Ouimet Commission principles suffered no obvious friction. Given that this may not always be the case it is probably correct to assume that in Nova Scotia the broadly stated principles of the Ouimet Commission Report may be considered so long as their application does no damage to the integrity of the *Grady* principles. All of this should be read against the obvious fact, and one which has been recognized by the Appeal Division, that it is in the nature of sentencing principles that they retain sufficient elasticity to, when appropriate, change with the times.²¹

If the Appeal Division finds, in reviewing the sentencing principles of the lower court, that there was sufficient error in the statement of principles to amount to misdirection or non-direction, as those terms are used in the intervention principle, then the Appeal Division may intervene and vary the sentence. If, however, the Appeal Division is satisfied that the correct principles were applied, then it is obliged to consider that the principles were correctly applied in the particular circumstances of the case before it. *Grady*²² also contains the best statement of the Court’s practice in this regard:

It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to

17. *Report, supra*, note 15.

18. *R. v. Osachie* (1974), 6 N.S.R. (2d) 524; 24 C.R.N.S. 285 (S.C., A.D.).

19. *R. v. Huskins* (1974), 10 N.S.R. (2d) 553 (S.C., A.D.).

20. *Id.* at 558.

21. *R. v. Stuart* (1975), 11 N.S.R. (2d) 591; 24 C.C.C. (2d) 370 (S.C., A.D.).

22. *R. v. Grady* (1971), 5 N.S.R. (2d) 264 at 266-267 (S.C., A.D.).

secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing; the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons it may appear at times that lesser sentences are given for more serious offences and *vice versa*, but the court must consider each individual case on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.

Variance in sentencing is, therefore, an expected and defensible result. Using the intervention principle again the Court will intervene only if the sentence given below is "clearly excessive or inadequate to the offence proved or the record of the accused."²³

There is obviously a very delicate balance that must be struck here. The danger of requiring at the same time the utilization of uniform sentencing principles is that the courts will use what Macdonald J.A. has called the "cookie cutter"²⁴ approach with the unfortunate result that individualized sentencing will be sacrificed at the expense of uniformity. At the other end of the spectrum is the potential that individualized sentencing will result in such a diversity of sentences that some defendants will appear to have been unduly favoured and lower courts will be unable to locate the elusive thread of logic binding the decisions together, thus precipitating confusion and possibly chaos.

Two lines of cases, one dealing with armed robbery, and the other dealing with manslaughter, illustrate the Court's attempt to maintain the balance between, on one hand, the unacceptable alternative of completely uniform sentences and, on the other hand, the equally unacceptable alternative of indefensible diversities in sentencing. The remainder of this portion of the note will be devoted to a study of two lines of cases that illustrate this problem as well as the Appeal Division's application of the intervention principle in the light of the principles of sentencing. In the first series of cases, all dealing with armed robbery, the Court has moved toward a striking uniformity in sentencing, while in the other line of cases dealing with manslaughter, it has achieved remarkable diversity. It should be remarked at the outset that each carries the potential punishment of life imprisonment.²⁵

23. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687; 22 C.C.C. (2d) 235 (S.C., A.D.).

24. *R. v. Smith* (1975), 12 N.S.R. (2d) 289 at 300 (S.C., A.D.).

25. *The Criminal Code*, R.S.C. 1970, c. C-34, ss. 219, 303.

In *Huskins*,²⁶ the defendant had forced a man at gunpoint to hand over a payroll of over \$2,600 as it was being carried from a bank to a store. The trial court imposed a sentence of three years and made it concurrent with a separate three year penalty for theft. The Appeal Division, in a decision delivered by Macdonald J.A., affirmed the length of the sentence but made it consecutive with the other sentence. In the course of the opinion, he said:

. . . [I]am conscious of the fact that parliament has considered armed robbery to be so grave and serious an offence that it has prescribed that anyone found guilty thereof is liable to imprisonment for life. The general public must be protected from those who steal from them at gun point.

And later on the same page he added:

In cases of this kind, however, the Courts must not overlook or downplay the element of deterrence. The sentence in the present case must be of sufficient severity to hopefully deter the appellant from repeating such act and to also deter those who might be tempted to tread the same criminal path. On the other hand, the sentence should not be of such severity that by its very harshness it defeats the purpose of a custodial sentence. There must always be room in the sentencing process for the tempering of justice with mercy.²⁷

In *R. v. Bratsensis*²⁸ the Court increased the sentence of imprisonment from ninety days to three years in another armed robbery case. The defendant presented the Court with qualities that would be consistent with the minimum appropriate sentence. He was twenty-five years of age, married with two children, employed in the U.S. in business with his father, apparently of good character, and clear of any criminal record except for a minor offence in the U.S. some time earlier.

These two cases came to bear in *R. v. Brennan and Jensen*²⁹ in which the Appeal Division increased the two defendants' sentences of imprisonment from twenty-four months and eight months (followed by sixteen months probation) respectively to three years imprisonment for each of them. Mac Keigan C.J.N.S., speaking for the Court, said:

. . . [T]he courts have only in the most exceptional circumstances refrained from imposing a sentence of at least three years'

26. *R. v. Huskins* (1974), 10 N.S.R. (2d) 553 (S.C., A.D.).

27. *Id.* at 558.

28. (1974), 8 N.S.R. (2d) 298 (S.C., A.D.).

29. (1975), 11 N.S.R. (2d) 84; 23 C.C.C. (2d) 403 (S.C., A.D.).

imprisonment for armed robbery even where it is a first offence by a person of previously good character.^{29a}

The Court has not yet faced the “exceptional circumstances” that would justify a term of less than three years imprisonment for armed robbery. In *R. v. Jarrett*³⁰ the Court made it clear that this sentence was not appropriate in the case of a forty-eight year old man with a lengthy criminal record. The lower court, relying on *Brennan and Jensen*³¹, had sentenced the defendant to three years imprisonment (with credit for time served) and the Appeal Division increased the sentence to eight years imprisonment, finding that the three years sentence, which should be thought of as a minimum sentence for armed robbery, was not appropriate for this defendant because it failed to sufficiently emphasize deterrence.

In *R. v. Smith*³² the 17 year old defendant, who had a record of several convictions for *Criminal Code* violations, had been sentenced to five years imprisonment upon conviction for armed robbery. The Appeal Division in a decision delivered by Macdonald J.A., lowered the sentence to three years imprisonment, finding that the defendant was entitled to the customary minimum sentence, largely because of his age.

While the armed robbery cases have been moving toward a uniformity in sentencing, manslaughter decisions have gone exactly the other way. In three recent decisions the defendants received, in the final result, sentences of ten years imprisonment, five years imprisonment, and, most surprisingly, in one case sentence was suspended for two years and defendant placed on probation. It goes without saying, of course, that variations in sentence are necessary in any rational scheme of sentencing. But here the variations are so great that they tax, if not embarrass, the intellect. This becomes especially true when they are read against the Court’s minimum sentence principle for armed robbery and the similarity in the facts of the three cases.

Nor can it be discounted that the defendant who received the least punitive sentence; who suffered less penalty for killing a spouse than nearly all others suffer for theft of money (without harm to the victim); and who escaped the net of the general deterrence doctrine

29 a. *Id.* at 88; 23 C.C.C. at 407.

30. (1975), 12 N.S.R. (2d) 270 (S.C., A.D.).

31. *R. v. Brennan and Jensen* (1975), 11 N.S.R. (2d) 84; 23 C.C.C. (2d) 403 (S.C., A.D.).

32. (1975), 12 N.S.R. (2d) 289 (S.C., A.D.).

(which will be examined later) is a woman, while her less fortunate compatriots are men.

The three cases involved are *R. v. Cormier*,³³ *R. v. Renton*,³⁴ and *R. v. Wilson*.³⁵ In *Cormier* the defendant attended with her husband and three friends at a tavern on August 2, 1973. After a time at the tavern the group left there and congregated at defendant's home where, except for the defendant, they continued drinking. Eventually all of them left except for the deceased and a male friend. They were asked several times by telephone to join one of the departed guests, a next door neighbour, at her apartment. Finally, at about 2 a.m. in the morning they accepted the invitation. Mrs. Cormier followed her husband and his friend over to the apartment some minutes later. Apparently she brought the murder weapon, a knife, along with her. She was suspicious of her husband's relationship with the next door neighbour. When Mrs. Cormier arrived at the apartment she found the deceased sitting with the neighbour on a couch. A verbal struggle ensued in which the deceased apparently threatened Mrs. Cormier with physical assault, a threat he apparently had made and carried out in the past, and Mrs. Cormier apparently threatened her husband with the knife. Eventually they left the apartment and went home. Apparently the deceased attempted to kick Mrs. Cormier while on the way home. Some minutes later Mrs. Cormier emerged from her home, saying to a friend, "George, help me. I believe I killed him." By one stab of the knife the deceased's life had ended.

In sentencing the defendant for manslaughter the trial judge referred to the sentencing principles and said, among other things: "Protection of the public is a primary concern which I keep in mind."³⁶ The Court was satisfied, as was the trial court in each of these manslaughter cases, that the defendant would not again commit the offence. With respect to general deterrence the trial judge said:

There is the factor of deterrence of others; it is important that other people not get the idea that this is a light matter, that the taking of life is something which society has no interest in, and that the law and the judges don't regard it as serious.³⁷

33. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687; 22 C.C.C. (2d) 235 (S.C., A.D.).

34. *R. v. Renton* (1975), 11 N.S.R. (2d) 60 (S.C., A.D.).

35. *R. v. Wilson* (1974), 10 N.S.R. (2d) 629; 14 C.C.C. (2d) 258 (S.C., A.D.).

36. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687 at 690; 22 C.C.C. (2d) 235 at 238 (S.C., A.D.).

37. *Id.* at 691; 22 C.C.C. at 239.

Up to this point, of course, the judge was squarely within the *Grady*³⁸ rules. But he went on to say:

The one factor that I have kept in mind and have been concerned with since the jury brought in the verdict is the effect on your family.³⁹

He emphasized the importance of this factor again later on in the sentencing remarks:

So I will suspend the passing of sentence for a two year period and grant a probation order. And I do hope that you realize that I am doing this partly out of consideration of your children.⁴⁰

The Appeal Division, in considering the Crown's appeal of the sentence, upheld the lower court. The Crown argued that the trial court enunciated the correct principles of sentencing, but did not follow them. It argued that the lower court gave primary consideration to the defendant's family, not protection of the public. The Appeal Division "after reading and re-reading" the trial judge's remarks in their entirety, found that, indeed, the protection of the public was referred to as the overriding factor and the trial judge "did consider this factor in imposing the sentence."⁴¹

Having disposed of the principles problem the Court turned its attention to the second factor in the intervention principle, the adequacy of the sentence. The Court, through Macdonald J.A., found that s. 614, as interpreted by the Court, permits the Court to intervene in such cases only if the sentence is "clearly excessive or inadequate in relation to the offence proven or to the record of the accused." Later, after reference to an Ontario Court of Appeal decision, this standard changed slightly so that Macdonald J.A. was left with the following question: "Can it be said that the sentence in the present case is so manifestly inadequate as to be clearly erroneous?"⁴² He answered the question in the negative, referring to several factors. The first was the traditional first instance doctrine: the trial judge was closer to the scene, personally observed the defendants, and his opinion should not be easily tampered with. The second was that, even though the prior history of such cases was that they "almost invariably involve a form of imprisonment," there was precedent for the "rare case where there are exceptional

38. *Id.* at 691-692; 22 C.C.C. at 239-240.

39. *Id.* at 691; 22 C.C.C. at 239.

40. *Id.*

41. *Id.* at 694; 22 C.C.C. at 241.

42. *Id.* at 696; 22 C.C.C. at 242.

and mitigating circumstances justifying the suspension of sentence for manslaughter,” citing two unreported decisions. Finally, the Court agreed that the trial judge emphasized consideration for the defendant’s family, but the Court could not find, after considering all things, that “he ignored or failed to apply proper principles in favour solely of the respondent and her family.”⁴³ The decision ended with a traditional refrain that often accompanies decisions which stretch the limits of predictability: the *Grady* rules are intact; the decision is limited to the “manifestly inadequate” rule; there is no presumption of leniency in future cases; and the Ouimet Commission rules should “go hand-in-hand” with *Grady* in future.⁴⁴

Cormier was followed by *Renton*⁴⁵. Mr. Renton had, like Mrs. Cormier, killed his spouse during a drunken quarrel, except that the evidence was more substantial in his case that he was, or had recently been, drinking at the time of the offence. He, too, suspected his spouse of extramarital misconduct, except that in his case the grounds of his suspicion were open and obvious. In fact, just prior to her death, his wife taunted his sexual ability by comparing him with the other man, with the clear inference that the other man was a better man. He, too, killed his spouse by a single stab wound, and felt deeply remorseful afterwards. He tried artificial resuscitation to bring her back to life, ran for help, and was kneeling beside her talking to her in a low voice when the police arrived. He, like Mrs. Cormier, had no criminal record, and there was no suggestion that he was likely to commit the offence again. He did not fit the description Chief Justice MacKeigan was later to give of Mrs. Cormier as a “poor mother of seven children” who killed “in the middle of a drunken row with an abusive husband”.⁴⁶ He was, however, a 49 year old electrician, a veteran of the Royal Air Force, a veteran of the Second World War, and a father of three grown children. The jury sent him to the sentencing question with another thing in his favour which Mrs. Cormier did not have: a recommendation for mercy. On January 6, 1975, the Appeal Division (Macdonald J.A. dissenting) affirmed a sentence of ten years imprisonment for Mr. Renton.⁴⁷

43. *Id.* at 697; 22 C.C.C. at 243.

44. *Id.* at 697-698; 22 C.C.C. at 243-244.

45. *R. v. Renton* (1975), 11 N.S.R. (2d) 60 (S.C., A.D.).

46. *R. v. Morrison* (1975), 13 N.S.R. (2d) 98 at 102 (S.C., A.D.).

47. *R. v. Renton* (1975), 11 N.S.R. (2d) 60 (S.C., A.D.).

The trial judge had, despite *Grady*, identified four principles to be applied in sentencing: deterrence, reformation, retribution, and mercy. In speaking of the jury's recommendation for clemency, he said:

. . . there is the fact that a jury of his peers, 12 common-sensed men have in their good judgment recommended to me that I exercise clemency in this case. I am not going to overlook what the jury has said and what you have said.⁴⁸

Coffin J.A., speaking for himself and Cooper J.A., found that the trial judge did not act on any wrong principle:

As I have already indicated, the trial judge dealt specifically with principles of deterrence, reformation, retribution and mercy. I cannot find that in his discussion of these principles, he has done violence to the primary objective of protection of the public as enunciated by *Grady*, and the gaining of that objective by deterrence, reformation, and rehabilitation or both deterrence and rehabilitation.⁴⁹

Macdonald J.A., in dissent, found that the trial judge had placed an "undue emphasis on deterrence."⁵⁰ Interestingly, Coffin J. A. said at one point in his judgment:

In my view what the trial judge finally had in mind after addressing himself to all the elements which I have mentioned and to the arguments of counsel was the element of deterrence of others.⁵¹

Macdonald J.A. would have reduced the sentence to five years imprisonment and suggested that the emotional element, which so often surfaces in domestic deaths, ought to be a mitigating factor in such cases.⁵²

*Wilson*⁵³ completes the trilogy of the manslaughter cases illustrating the second problem of applying sentencing principles, the problem of wide diversity in sentencing. It was decided after *Cormier* but before *Renton*. Mr. Wilson was a 50 year old fireman with no criminal record except for two impaired driving violations. He was the father of seven children; five by a previous marriage and two by his common law marriage to the deceased. He apparently killed his wife by beating her to death during a struggle in which he

48. *Id.* at 67.

49. *Id.* at 74.

50. *Id.* at 80.

51. *Id.* at 67.

52. *Id.* at 79-80.

53. *R. v. Wilson* (1974), 10 N.S.R. (2d) 629 (S.C., A.D.).

had been attempting to persuade her to return to the matrimonial domicile. He had returned from work the evening before her death to find that neither she nor either of their two children was at home. He proceeded to pick up the four year old child from the day nursery and to look for the deceased and the two year old child. He was unsuccessful that evening and continued his search the following morning until he found her and the child in an apartment in the company of several people. He apparently told his wife to return home, partly because he felt the environment in the apartment was not proper for the young child. When she refused to do so, he physically forced her to accompany him home. There was evidence that he was particularly forceful in his physical handling of her on the way back to their apartment and that she steadfastly resisted his verbal requests to return home. The medical examiner later found the main cause of death to be hemorrhage from a liver laceration, which probably resulted from the beating.⁵⁴

Mr. Wilson pleaded guilty to manslaughter and was sentenced to ten years imprisonment. The Appeal Division, through Macdonald J.A., with Coffin J.A. dissenting, reduced the sentence to five years imprisonment. The trial judge had referred to four principles to be considered: deterrence, reformation or rehabilitation, retribution, and mercy. In speaking of retribution the trial court had said:

. . . not for one moment is there the matter of retribution uppermost in my mind, at least not that type of retribution that speaks of an eye for an eye or a tooth for a tooth. No, no, by no means. Rather, it is that society, the community at large, is anxious to express its repudiation of the crime committed, to establish and to assert the welfare of the community against any evil in its midst. Thus it seems to me that the infliction of punishment becomes a source of security to all and is elevated to a very important place when it is regarded not as an act of wrath or vengeance, [*sic*] but rather as an indispensable sacrifice to the common safety.⁵⁵

It is worth noting that the same language, almost *verbatim* appeared in the lower court judgment in *Renton*. Later, the *Wilson* lower court judge said:

What becomes uppermost then today, what becomes uppermost today is that the deterrence, the deterrence that the Court must keep in mind, in its awesome responsibility in matters of this kind

54. *Id.* at 644.

55. *Id.* at 645.

. . . awesome . . . a life has been taken. A life has been taken.⁵⁶

Macdonald J.A., speaking for himself and the Chief Justice, found that the use of the terms “retribution” and “punishment” were unnecessary and that:

A sentence adequate to deter others will be one which, quite apart from any other facts taken into account, will express society’s repudiation of the crime committed and which, by deterring others, will promote the common safety.⁵⁷

In the final analysis he found that the learned trial judge “had overemphasized the element of deterrence to others and undervalued the fact that in his opinion the appellant would not again commit an offence.”⁵⁸

Coffin J.A. dissented, specifically because he could not agree that the judge’s use of the words “retribution” and “punishment” were fatal, noting that the trial judge in *Grady* had used the term “retribution” and that the late McKinnon C.J.N.S., despite the precise language of the *Grady* rules, found that the lower court had not proceeded “on any wrong principle.”⁵⁹

These three manslaughter sentencing decisions provide a shocking example to the non-lawyer of the vagaries of the legal method. Each defendant was convicted of manslaughter, each killed in a moment of passion, each brought a reasonably good background to the court, and each one’s sentence was found to be consistent with the *Grady* principles. It should be emphasized that the point being made here is not that Mrs. Cormier was dealt with unfairly for indeed the final result in her case was probably correct. There is, to be sure, an air of incongruity about a case which speaks of “protection of the public” and releases the defendant back into the community and another that speaks of “mercy” and sends a similarly situated defendant to a federal penitentiary for ten years. But Mrs. Cormier’s children were still young and there was no evidence that she had, except for this aberration, been anything other than a good parent. One wonders, however, why the Appeal Division, in considering Mr. Wilson, whose disagreement with his wife arose because he believed she was mishandling their infant children, did not address itself to the separation their sentence was

56. *Id.*

57. *Id.*

58. *Id.* at 646.

59. *Id.* at 647.

causing between a father and his seven children. Finally, one is forced to ask: would the sentence in *Cormier* and *Renton* had been the same if these men had been the victims rather than the defendants?

3. Other Developments in Sentencing

(a). The Pre-Sentence Report

The pre-sentence report is being used with increasing frequency in Nova Scotia.⁶⁰ So are reports from individuals who do not enjoy official status as probation officers, but who are otherwise influencing the court's judgment. In *R. v. Cormier*, for example, an organization (*Unison*) assisted the court on the sentencing question by informing the court that it had located suitable living arrangements for Mrs. Cormier and her children.⁶¹ In *R. v. Craig*,⁶² both the trial court and the Appeal Division were clearly influenced in the sentencing decision by testimony from Mr. Martin Dolan, a man in charge of a rehabilitation project, about the rehabilitation potential of the defendant. Neither pre-sentence report nor testimony from other interested persons should be relied upon by the sentencing judge if they relate to the facts of the case. The Appeal Division made this clear in *R. v. Rudyk*:

I would here urge that a presentence be confined to its very necessary and salutary role of portraying the background, character and circumstances of the person convicted. It should not, however, contain the investigator's impressions of the facts relating to the offence charged, whether based on information received from the accused, the police, or other witnesses, and whether favourable or unfavourable to the accused. And if the report contains such information the trial judge should disregard it in considering sentence.⁶³

This principle was applied to testimony from other interested persons in *Craig*.⁶⁴

(b). Consecutive Sentences

In *R. v. Reddick*⁶⁵ Macdonald J.A. disagreed sharply with the

60. G. Hayes, "Adult Probation Services" in J. Ortego, ed., *Sentencing Alternatives and Methods — Dalhousie Continuing Legal Education Series, No. 10*, *supra*, note 13 at 39-44.

61. *R. v. Cormier* (1974), 9 N.S.R. (2d) 687 at 692 (S.C., A.D.).

62. *R. v. Craig* (1975), 11 N.S.R. (2d) 695 (S.C., A.D.).

63. *R. v. Rudyk* (1975), 11 N.S.R. (2d) 541 at 544-545 (S.C., A.D.).

64. *R. v. Craig* (1975), 11 N.S.R. (2d) 695 (S.C., A.D.).

65. *R. v. Reddick* (1974), 9 N.S.R. (2d) 425 (S.C., A.D.).

Chief Justice and Cooper J.A. over the meaning of the terms in s. 645(a) of the *Code*. Section 645 is the general, although not the only,⁶⁶ section of the *Code* permitting consecutive sentences and s. 645(a) speaks of consecutive sentencing being available for a defendant who “is convicted while under sentence for an offence.”⁶⁷ In *Reddick* the defendant was convicted of three separate offences at three separate trials on three separate dates. Sentencing for all three offences, however, took place on only one day at only one court session. Macdonald J.A. argued, therefore, that s. 645(a) was not available because, with respect to the two other offences, no sentence had been pronounced at the time of conviction. Nor did s. 645(c) apply because it dealt only with multiple convictions at one sitting of a court. The Chief Justice disagreed and argued that, in any case, s. 645 could not be so construed as to restrict the Court of Appeal’s power under s. 614 to vary a sentence “within the limits prescribed by law.”⁶⁸ In *R. v. Muise (No. 3)*⁶⁹ Macdonald J.A. agreed with the Chief Justice as a matter of precedent from *Reddick*, but referred to his statements in *Reddick*.

The more common problem is, of course, to determine the situations in which it is appropriate to make sentences consecutive when the defendant has, at one sitting, been convicted on multiple charges. The Appeal Division has moved in the same direction as other courts have by adopting the general rule that consecutive sentences are appropriate if the offences cannot be said to have arisen out of one continuous criminal act, but that, in any case, the totality of sentences imposed should be appropriate to all the circumstances.⁷⁰

(c). Things That Can Be Considered in Sentencing

In *R. v. DeCoste*⁷¹ the defendant, a nineteen year old male, had been sentenced to eighteen months imprisonment for an indecent

66. *The Criminal Code*, R.S.C. 1970, c. C-34, s. 137.

67. *Id.*, s. 645 (a).

68. *R. v. Reddick* (1974), 9 N.S.R. (2d) 425 at 426 (S.C., A.D.).

69. *R. v. Muise (No. 3)* (1975), 11 N.S.R. (2d) 216; 23 C.C.C. (2d) 440 (S.C., A.D.).

70. See, for example, *R. v. Veinot* (1975), 13 N.S.R. (2d) 116 (S.C., A.D.); *R. v. Phillips* (1975), 13 N.S.R. (2d) 121 (S.C., A.D.); *R. v. Huskins* (1974), 10 N.S.R. (2d) 553 (S.C., A.D.); *R. v. Reddick* (1974), 11 N.S.R. (2d) 1 (S.C., A.D.).

71. *R. v. DeCoste* (1974), 10 N.S.R. (2d) 94 (S.C., A.D.).

assault that consisted entirely of grabbing two girls by the breasts and releasing his grip when they began to protest. A pre-sentence report concluded that the “community would be best served by his receiving immediate and continuing psychiatric care.” The defendant’s psychiatric condition clearly influenced the Appeal Division to vary sentence to three months imprisonment with immediate psychiatric treatment, to be followed by a two year probationary period during which the defendant would be required to receive psychiatric care under the terms of the probation order. The psychological state of the defendant, as deduced from expert testimony, was also a mitigating factor in *R. v. Caldwell*⁷² in which the defendant, a twenty two year old father, was convicted of the brutal rape of a ten year old girl. The sentence was accompanied with a recommendation for psychiatric treatment. And in *R. v. Dobson*⁷³ the defendant was ordered, subject to approval by Adult Probation Services, to continue psychiatric treatment.

In *R. v. McGlone*⁷⁴ the defendant was charged with theft of property valued at less than \$200 from a taxi driver. The taxi driver testified that his money changer, containing \$6.48, was somehow emptied during a trip in which the defendant and another man were passengers. One of the items approved by the Appeal Division as a factor in approving a sentence of six months imprisonment for the defendant was “the need to protect taxi drivers who are especially vulnerable to offences such as this.” In *R. v. Rose*⁷⁵ the Appeal Division affirmed a sentence in which the sentencing judge had considered as a factor in the sentence “recent incidents of similar violence in the particular area.” The charge in that case was assault (by use of a knife) causing bodily harm and the defendant inflicted several knife wounds on the victim.

In *R. v. Evans*⁷⁶ the Appeal Division, through Macdonald J.A., with Cooper J.A. dissenting, ruled that if the operation of the *Parole Act* was to the effect that a defendant could, in effect, be twice punished for the single conviction before the Court then the Court may consider the effect of the *Parole Act* as a mitigating factor in favour of the defendant. In that case the defendant stood to serve an additional 433 days because of a parole forfeiture and the

72. *R. v. Caldwell* (1974), 10 N.S.R. (2d) 187 (S.C., A.D.).

73. *R. v. Dobson* (1975), 11 N.S.R. (2d) 81 (S.C., A.D.).

74. *R. v. McGlone* (1974), 10 N.S.R. (2d) 247 (S.C., A.D.).

75. *R. v. Rose* (1974), 9 N.S.R. (2d) 432 (S.C., A.D.).

76. *R. v. Evans* (1975), 11 N.S.R. (2d) 91; 24 C.C.C. (2d) 300 (S.C., A.D.).

Appeal Division reduced the trial court's sentence by three months, due in part to the operation of the *Parole Act*. *Evans* was followed on this point in *R. v. Jackson*,⁷⁷ but it did not result in a reduced sentence because, among other reasons, the trial judge had considered *Evans*.

(d). *Deterrence*

The concept of deterrence is the most frequently given reason for use of the intervention principle by the Appeal Division. It may be of two types. Particular deterrence refers to the defendant and general deterrence to the larger community. The principle, of course, is that a proper sentence takes into account whether or not both will be deterred by virtue of the sentence from doing what the defendant has just been convicted for doing. Reversible error occurs here not from failing to use deterrence as a principle, but from unduly or insufficiently emphasizing either particular or general deterrence.

Typical of the cases in this area is *R. v. Morrison*⁷⁸ in which the defendant "had been induced, persuaded and, indeed, forced by the constant pleas, importunities, unreasonable demands and naggings of his wife, reinforced by feigned illnesses, to try to support her in a fantastically extravagant way of life." The result of this was that defendant, a practicing barrister, eventually pleaded guilty to three charges of fraud and received a suspension of sentence for two years. The Appeal Division, disdaining the defendant's attempted analogy to *R. v. Cormier* and other cases, imposed two year concurrent sentences on each count, arguing that the sentence should "reflect a substantial element of deterrence to others." In cases dealing with narcotics,⁷⁹ and driving offences⁸⁰, the Appeal Division has intervened in favour of general deterrence and in each case increased the sentence given the defendant.

In matters of particular deterrence the Appeal Division has in the past more often reduced sentences than in cases in which the court's decision was based on general deterrence principles. In *R. v. Smith*,⁸¹ for example, the Appeal Division varied a five year sentence for armed robbery downward to the three year minimum

77. *R. v. Jackson* (1975), 11 N.S.R. (2d) 154; 23 C.C.C. (2d) 147 (S.C., A.D.).

78. *R. v. Morrison* (1975), 13 N.S.R. (2d) 98 at 102 (S.C., A.D.).

79. See, for example, *R. v. MacArthur* (1974), 9 N.S.R. (2d) 353 (S.C., A.D.).

80. See, for example, *R. v. McPhee* (1974), 9 N.S.R. (2d) 429 (S.C., A.D.),

81. *R. v. Smith* (1975), 12 N.S.R. (2d) 289 (S.C., A.D.).

standard, despite the criminal record of the defendant. The Appeal Division was particularly influenced by the youth of the defendant and his potential for reform. A contrary result obtained, of course, in *R. v. Jarrett*.⁸²

Sometimes the Appeal Division will increase or reduce a sentence because of the deterrence doctrine, but without specifying whether the lower court error related to general or particular deterrence. *R. v. Criyanovich*⁸³ is an example of this approach. The defendant, a nineteen year old male, had pleaded guilty to a charge of break and enter and received a sentence of two years imprisonment. His accomplice, a seventeen year old female, received a suspended sentence. The Appeal Division varied his sentence to six months imprisonment holding that "the trial judge unduly emphasized the element of deterrence."

Part of the problem in this area is that the mere consideration of deterrence, even if correctly done, is not necessarily reflected in the sentence. In each of the manslaughter cases referred to earlier there was no issue of particular deterrence because in each case the sentencing court was satisfied that the defendant would not again commit the same offence.

This entire question is further complicated by the kinship between particular deterrence, reformation, and rehabilitation, all of which are terms found in the *Grady* formula.

III. Breath Analysis Developments

1. Introduction

In *Brownridge v. The Queen*⁸⁴ the Supreme Court of Canada announced, in less than unequivocal terms,⁸⁵ that an accused who is

82. *R. v. Janett* (1975), 12 N.S.R. (2d) 270 (S.C., A.D.).

83. *R. v. Criyanovich* (1974), 10 N.S.R. (2d) 549 (S.C., A.D.). Other examples include *R. v. Scallion* (1974), 9 N.S.R. (2d) 538 (S.C., A.D.); *R. v. Reddick* (1974), 9 N.S.R. (2d) 425 (S.C., A.D.); *R. v. DeCoste* (1974), 10 N.S.R. (2d) 94 (S.C., A.D.); *R. v. Johnson* (1974), 10 N.S.R. (2d) 551 (S.C., A.D.); *R. v. Goo Goo* (1975), 13 N.S.R. (2d) 96 (S.C., A.D.).

84. [1972] S.C.R. 926; 28 D.L.R. (3d) 1; 7 C.C.C. (2d) 417; 18 C.R.N.S. 308.

85. See the discussion of *Brownridge* in S. Enticknap, Comment (1973), 37 Sask. L.R. 300-312; R. Tapper, *Brownridge v. The Queen: Enigma of Anathema?* (1973), 5 Man. L.J. 464. In addition, O Hearn J. commented in *R. v. Jones* (1972), 9 C.C.C. (2d) 5 at 8; 20 C.R.N.S. 58 at 61 (N.S. Cty. Ct.):

After reading the reasons, [in *Brownridge*] I had the irresistible impression, . . . of a bridge hand from which all trumps have vanished . . . I have found it extremely difficult, if not impossible, to pin down the dominant reasoning behind the judgment.

subject to a demand for a breath sample⁸⁶ has a right to retain and instruct counsel without delay before the law requires compliance with that demand.⁸⁷ Since *Brownridge* was decided, the courts of each province have been faced with a plethora of litigation attempting to define with exactness the scope and limits of the *Brownridge* right.⁸⁸ Nova Scotia has been no exception, and this comment will discuss some of the recent Nova Scotia decisions in light of the development of this area of law across Canada.

2. *The Right to Counsel and Substantive Aspects of the Bill of Rights*

(a). *Charge of Refusal, (s. 235): 'Reasonable Excuse'*

Because *Brownridge* itself concerned the effect upon a charge of failing, without reasonable excuse, to provide a breath sample,⁸⁹ of a breach of the right to counsel provision in the *Bill of Rights*,⁹⁰ the courts have had little difficulty in applying the *Brownridge* result to similar cases. Hence, in a case where an accused is denied the right to counsel, and refuses to give a breath sample as a result, the law is

86. Under *The Criminal Code*, R.S.C. 1970, c. C-34, s. 235(1).

87. The stage at which an accused is entitled to demand a lawyer has not been the subject of decision to the author's knowledge. The reported cases concern requests by the accused once he has reached the station to take the test. *Quaere* whether "without delay" may be construed to mean that an accused may refuse to go to the station until he telephones his lawyer.

88. The cases used for the purposes of this note were: *R. v. Jones*, (1972), 9 C.C.C. (2d) 5; 20 C.R.N.S. 58 (N.S. Cty. Ct.); *R. v. Morgan* (1972), 9 C.C.C. (2d) 502 (N.S. Cty. Ct.); *R. v. Drouin* (1973), 10 C.C.C. (2d) 18 (P.E.I. S.C.); *R. v. Sexton* (1973), 10 C.C.C. (2d) 131 (P.E.I. S.C.); *R. v. Levy* (1973), 11 C.C.C. (2d) 521; 21 C.R.N.S. 292 (N.S. Pro. Mag. Ct.); *R. v. Penner* [1973] 6 W.W.R. 94; 39 D.L.R. (3d) 246; 12 C.C.C. (2d) 468; 22 C.R.N.S. 35 (Man. C.A.); *R. v. Top* (1973), 13 C.C.C. (2d) 390 (Alta. S.C., T.D.); *R. v. Balkan*, [1973] 6 W.W.R. 617; 13 C.C.C. (2d) 482; 25 C.R.N.S. 109 (Alta. S.C., A.D.); *R. v. Bond* (1974), 6 N.S.R. (2d) 512; 14 C.C.C. (2d) 497; 24 C.R.N.S. 273 (S.C., A.D.); *R. v. Maksimchuk*, [1974] 2 W.W.R. 668; 43 D.L.R. (3d) 478; 15 C.C.C. (2d) 208 (Man. C.A.); *R. v. Doherty* (1974), 8 N.S.R. (2d) 172; 16 C.C.C. (2d) 494; 25 C.R.N.S. 289 (S.C., A.D.); *R. v. Porteous*, [1974] 4 W.W.R. 411 (Man. Pro. Ct.); *R. v. Peterson*, [1974] 4 W.W.R. 144; 16 C.C.C. (2d) 531 (Alta. S.C., A.D.); *R. v. Stasiuk* (1974), 25 C.R.N.S. 309 (Sask. D.C.); *R. v. Walkington*, [1974] 6 W.W.R. 117; 17 C.C.C. (2d) 553 (Sask. C.A.); *Hogan v. The Queen*, [1975] 2 S.C.R. 574; 9 N.S.R. (2d) 145; 18 C.C.C. (2d) 65; 26 C.R.N.S. 207; *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 (N.S. Cty. Ct.); *R. v. Irwin*, [1974] 5 W.W.R. 744; 18 C.C.C. (2d) 563; 28 C.R.N.S. 23 (Man. C.A.); *R. v. Jumaga*, [1974] 5 W.W.R. 580; 19 C.C.C. (2d) 286 (Man. C.A.); *R. v. MacDonald*, (1974), 10 N.S.R. (2d) 293; 22 C.C.C. (2d) 350 (S.C., A.D.); *R. v. Anderson* (1974), 19 C.C.C. (2d) 301 (Sask. C.A.).

89. *The Criminal Code*, R.S.C. 1970, c. C-34, s. 235(2).

90. *The Canadian Bill of Rights*, R.S.C. 1970, App. III, s.2(c) (ii).

clear that breach of the *Bill of Rights* affords a defence to a charge of refusal,⁹¹ absent special circumstances, although it is not clear as to why this is so.⁹² Broadly speaking, the judgment of Ritchie J. in *Brownridge* may be said to rest upon a holding that breach of the *Bill of Rights* constitutes a “reasonable excuse” for refusal in the terms of s. 235(2).⁹³ Laskin J. did not so hold,⁹⁴ preferring to base the acquittal of the accused upon the fact that the conviction was vitiated by operation of the *Bill of Rights* itself, because breach of the *Bill of Rights* was the foundation of the charge.⁹⁵

In *R. v. Morgan* the Nova Scotia Appeal Division explicitly adopted the point of view espoused by Ritchie J.,⁹⁶ but in the

91. See, for example, *R. v. Sexton* (1973), 10 C.C.C. (2d) 131 (P.E.I.S.C.) and *R. v. Morgan* (1972), 9 C.C.C. (2d) 502 (N.S. Cty. Ct.), both relatively uncluttered examples of the operation of the rule.

92. *Supra*, note 85, and the comments in *R. v. Balkan*, [1973] 6 W.W.R. 617 at 630; 13 C.C.C. (2d) 482 at 493; 25 C.R.N.S. 109 at 122 (Alta. S.C., A.D.); and *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 488 (N.S. Cty. Ct.).

93. *Brownridge v. The Queen*, [1972] S.C.R. 926 at 932; 28 D.L.R. (3d) 1 at 5-6; 7 C.C.C. (2d) 417 at 421; 18 C.R.N.S. 308 at 312.

. . . unless it is apparent that an accused person is not asserting his right to counsel *bona fide*, but is asserting such right for the purpose of delay or for some other improper reason, the denial of that right affords a “reasonable excuse” for failing to provide a sample of his breath as required by the section.

It is interesting to note that in *Hogan v. The Queen*, [1975] 2 S.C.R. 574 at 581-582; 9 N.S.R. (2d) 145 at 152-3; 18 C.C.C. (2d) 65 at 69-70; 26 C.R.N.S. 207 at 213-4, Ritchie J. adopted the approach of Laskin J. (*infra*, note 94) to reject the argument for the appellant. However, a number of courts construed the judgment of Ritchie J. in *Brownridge* as being based on “reasonable excuse”. See, for example, *R. v. Jones* (1972), 9 C.C.C. (2d) 5; 20 C.R.N.S. 58 (N.S. Cty. Ct.).

94. *Brownridge v. The Queen*, [1972] S.C.R. 926 at 950; 28 D.L.R. (3d) 1 at 18; 7 C.C.C. (2d) 417 at 434; 18 C.R.N.S. 308 at 326.

. . . I regard the phrase “without reasonable excuse” as adding a defence or a bar to successful prosecution which would not be available without these words . . . it would be strange, indeed, if the effect . . . of the Canadian Bill of Rights was vitiated by repeal of the words “without reasonable excuse”.

95. *Id.* at 955; 28 D.L.R. at 21-2; 7 C.C.C. at 437; 18 C.R.N.S. at 329.

. . . the failure of the police officer who demanded the breath sample . . . [to allow right to counsel] vitiated the conviction in this case. . . because the violation [of the *Bill of Rights*] in this case was the very basis upon which the accused was charged with an offence . . .

See the analysis of both judgments of Ritchie and Laskin JJ. by O Hearn J. in *R. v. Jones* (1972), 9 C.C.C. (2d) 5; 20 C.R.N.S. 58 (N.S. Cty. Ct.), and in *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 488 (N.S. Cty. Ct.).

96. (1972), 9 C.C.C. (2d) 502 (N.S. Cty. Ct.).

It is apparent therefore that in this jurisdiction the position taken by Laskin, J. . . . is not accepted.

subsequent case of *R. v. Doherty*, Macdonald J. A. equally explicitly adopted the point of view espoused by Laskin J., stating, on behalf of the Appeal Division:

I am of the opinion that even if the phrase “without reasonable excuse” did not exist in s. 235(2) of the *Criminal Code*, that s. 2 (c) (ii) of the *Canadian Bill of Rights* sets up a defence independent of such phrase. . . . a denial of this basic fundamental right affords a valid defence to a charge under s. 235 of the *Criminal Code* independent of the phrase “without reasonable excuse”.⁹⁷

Such a statement commits Macdonald J.A. to hold that, where the violation of the right to counsel is the basis of the charge against the accused, the *Bill of Rights* operates to prevent conviction. What then would be the result if an accused is asked to provide a breath sample, is denied access to counsel, and upon refusal is charged with obstructing a police officer in the execution of his duty?⁹⁸ Will the accused be acquitted because denial of counsel is the basis of the charge, or because the police officer is not in the execution of his duty?

A note of caution: the timing of a refusal may be determinative of conviction. In *R. v. MacDonald*, the accused refused to blow because he was unable to contact any available lawyer. Macdonald J.A. found it to be a significant factor against the accused that he abandoned his efforts to contact counsel *before* he refused the demand.⁹⁹ On the other hand in *R. v. Jumaga*, the Manitoba Court of Appeal upheld a conviction for refusal despite breach of the right to counsel, because the accused asked for a lawyer *after* he refused to blow. The court held by a majority that the offence of refusal was complete upon actual refusal without involving denial of counsel at all.¹⁰⁰ It is best, therefore, to ask for counsel and refuse to blow in that order, and if possible, simultaneously.

Citing *R. v. Goldsworthy* (1972), (unrep.) S.C. 00095 (N.S.S.C., A.D.). The Appeal Division, however, construed Laskin J. to mean that because of the *Bill of Rights*, the demand was not a “lawful demand”. (*Id.*) That is probably incorrect, because Laskin J. rejected just such an argument in *Hogan v. The Queen*, [1975] 2 S.C.R. 574 at 588; 9 N.S.R. (2d) 145 at 158; 18 C.C.C. (2d) 65 at 75; 26 C.R.N.S. 207 at 218.

97. (1974), 8 N.S.R. (2d) 172 at 178; 16 C.C.C. (2d) 494 at 499; 25 C.R.N.S. 289 at 294-5 (S.C., A.D.), citing Laskin J. in *Brownridge*, [1972] S.C.R. 926; 28 D.L.R. (3d) 1; 7 C.C.C. (2d) 417; 18 C.R.N.S. 308.

98. *The Criminal Code*, R.S.C. 1970, c.C-34, s. 18.

99. (1974), 10 N.S.R. (2d) 293 at 301-303; 22 C.C.C. (2d) 350 at 357-358 (S.C., A.D.).

100. [1974] 5 W.W.R. 580 at 592; 19 C.C.C. (2d) 286 at 298 (Man. C.A.).

(b). Charge of Driving Over 0.08, (s. 236): The Admissibility of Evidence

Between 1972 and 1974, the question of the admissibility of evidence obtained in derogation of the right to counsel arose for decision a number of times, prompted primarily by doubt as to the theoretical basis of *Brownridge* and hence as to the extent of its protection. Courts were almost unanimous in holding that the breathalyzer reading obtained after a lawful demand was admissible on a s. 236 charge, despite violation of the *Bill of Rights*.¹⁰¹

In *R. v. Hogan*,¹⁰² the Nova Scotia Appeal Division held that the breathalyzer reading of blood alcohol content was admissible evidence despite flagrant violation of the right to counsel,¹⁰³ and this opinion was subsequently affirmed by a majority of the Supreme Court of Canada.¹⁰⁴ In that case the accused was taken to a police station in furtherance of a lawful demand and while waiting there, he heard counsel arrive at the station and requested to see him. The accused asked to be permitted to consult his lawyer: the constable refused, and warned the accused that if he did not take the test, he would be charged with refusal. The accused provided a breath sample which registered at 0.230 and was charged with breach of s. 236.¹⁰⁵

Ritchie J., for the majority, held that the breathalyzer reading was relevant, cogent [and fatal] evidence, and was subject to no rule of exclusion.¹⁰⁶ Moreover:

Freedman C.J.M. strongly, and it is submitted correctly, dissented from this view.
101. See, for example, *R. v. Jones* (1972), 9 C.C.C. (2d) 5; 20 C.R.N.S. 58 (N.S. Cty. Ct.); *R. v. Morgan* (1972), 9 C.C.C. (2d) 502 (N.S. Cty. Ct.) (impaired driving: s. 234); *R. v. Top* (1973), 13 C.C.C. (2d) 390 (Alta. S.C., T.D.); *R. v. Peterson*, [1974] 4 W.W.R. 144; 16 C.C.C. (2d) 531 (Alta. S.C., A.D.); *R. v. Porteous*, [1974] 4 W.W.R. 411 (Man. Pro. Ct.). The authority primarily relied upon was *R. v. Steeves*, [1964] 1 C.C.C. 266; 42 D.L.R. (2d) 335; 49 M.P.R. 227; 42 C.R. 234 (N.S.S.C. *in banco*); *O'Connor v. The Queen*, [1966] S.C.R. 619; 57 D.L.R. (2d) 123; [1966] 4 C.C.C. 342; 48 C.R. 270. Nor are proceedings invalidated: *R. v. Steeves, id.*; *O'Connor v. The Queen, id.*; *R. v. Jones, id.*

102. *R. v. Hogan* (1972), 5 N.S.R. (2d) 73 (S.C., A.D.).

103. *Id.* at 76-77, applying *O'Connor v. The Queen*, [1966] S.C.R. 619; 57 D.L.R. (2d) 123; [1966] 4 C.C.C. 342; 48 C.R. 270.

104. *Hogan v. The Queen*, [1975] 2 S.C.R. 574; 9 N.S.R. (2d) 145; 18 C.C.C. (2d) 65; 26 C.R.N.S. 207.

105. *The Criminal Code*, R.S.C. 1970, c. C-34, s. 236: driving with an alcohol blood content of more than 0.08.

106. [1975] 2 S.C.R. 574 at 582; 9 N.S.R. (2d) 145 at 153-4; 18 C.C.C. (2d) 65 at 71; 26 C.R.N.S. 207 at 214.

. . . there is no causal connection between the denial of the right to counsel and the obtaining of the certificate of the breathalyzer test . . .¹⁰⁷ [??]

Laskin J., in dissent, argued that the effect of violation of the *Bill of Rights* in the case at bar was to render the provisions of s. 237, giving the Crown a special form of proof, inoperative specifically for the purposes of the particular case.¹⁰⁸ His Lordship added that, if the *Bill of Rights* was to be taken seriously, a rule of exclusion of evidence obtained in violation of its provisions should be adopted.¹⁰⁹

Much can, and will, be said on either side of the essentially ideological conflict within the Supreme Court revealed by this case. Suffice it here to note that, when combined with *Brownridge*, the majority decision places a premium on police impunity¹¹⁰ and provides the experienced criminal with an opportunity to avoid conviction, while offering no succour to the average citizen, who

The result of the breathalyzer test in the present case was not only relevant, it was in fact of itself the only evidence upon which the appellant could have been convicted . . . Even if this evidence had been improperly or illegally obtained, there were therefore no grounds for excluding it at common law.

Citing *R. v. Wray*, [1971] S.C.R. 272; 11 D.L.R. (3d) 673; [1970] 4 C.C.C. 1; 11 C.R.N.S. 235.

107. *Hogan v. The Queen*, [1975] 2 S.C.R. 574 at 581; 9 N.S.R. (2d) 145 at 152-3; 18 C.C.C. (2d) 65 at 70; 26 C.R.N.S. 207 at 213-4.

108. *Id.* at 590; 9 N.S.R. at 158-9; 18 C.C.C. at 76; 26 C.R.N.S. at 219-20.

The sanction in the present case would be to preclude use against a person of a special form of proof when it is obtained following a deliberate violation of a right of that person under the *Canadian Bill of Rights* . . . it cannot matter that resort to s. 237 is the only way in which proof can be made of the main element of the offence defined in s. 236.

However, *id.* at 598; 9 N.S.R. at 164; 18 C.C.C. at 82; 26 C.R.N.S. at 225, the accused could validly have been charged with impaired driving (s. 234).

109. *Id.* at 593-98; 9 N.S.R. at 160-4; 18 C.C.C. at 78-82; 26 C.R.N.S. at 221-5. In essence, His Lordship would adopt the American exclusionary rule on policy grounds, based upon the role of the courts in enforcing the guarantees of the *Bill of Rights* in the absence of statutory sanctions.

110. *Id.* at 589; 9 N.S.R. at 157-8; 17 C.C.C. at 75; 26 C.R.N.S. at 218-9 *per* Laskin J.

The question that arises, therefore, is whether the vindication of this right should depend only on the fortitude or resoluteness of an accused so as to give rise to a *Brownridge* situation, or whether there is not also an available sanction of a ruling of inadmissibility where the police authorities are able to overcome an accused's resistance . . .

generally has no knowledge of his legal rights and no legal provision designed to ensure that he be told.¹¹¹

(c). *Some Comments on Whether or Not The Right to Counsel Arises*

The right to counsel of Rights is only relevant if an accused has been “arrested or detained”.¹¹² The question thus arises: when an accused is subject to a demand under s. 235 and accompanies the police officer to the station in pursuance of that demand, is that accused thereby “arrested or detained”? Despite doubt as to the nature of the arrest concept,¹¹³ it seems clear that s. 235(1) does not confer a power of arrest,¹¹⁴ and hence the question becomes: is the accused thereby “detained”?

In *R. v. Jones*, O Hearn J. expressed doubt on the matter by way of *dictum*: but it was not necessary to decide the point and so he did not do so, merely noting that he was not satisfied that the accused had been *legally* detained by operation of the demand.¹¹⁵ He commented:

111. See comment by the *Report of the Canadian Committee on Corrections* (Ottawa: Queen’s Printer, 1969) at 148:

. . . there is no affirmative obligation on a police officer to advise a prisoner that he has a right to communicate with counsel if he wishes to do so.

Citing *R. v. De Clercq*, [1966] 2 C.C.C. 190 at 192 (Ont. C.A.).

112. *The Canadian Bill of Rights*, R.S.C. 1970, App. III, s. 2(c) (ii):

. . . no law of Canada shall be construed or applied so as to . . .

(c) deprive a person who has been *arrested* or *detained* . . .

(ii) of the right to retain and instruct counsel without delay . . . (emphasis added).

113. Contrast *R. v. Whitfield*, [1970] S.C.R. 46; 7 D.L.R. (3d) 97; [1970] 1 C.C.C. 129; 9 C.R.N.S. 59 with the concurring judgment of de Grandpré J. in *R. v. Biron* (1975), 59 D.L.R. (3d) 409; 4 N.R. 45; 23 C.C.C. (2d) 513; 30 C.R.N.S. 109 (S.C.C.).

114. See, for example, *R. v. Poitras* (1975), 29 C.R.N.S. 237 (Sask. C.A.) wherein it was held that an arresting officer must have reasonable and probable grounds to suspect an offence was being committed against s. 234 before he could lawfully give a demand under s. 235, and, therefore, that the power to *arrest* is limited to arrest under s. 234. See also *Brownridge v. The Queen*, [1972] S.C.R. 926 at 943-5; 28 D.L.R. (3d) 1 at 13-4; 7 C.C.C. (2d) 417 at 429-30; 18 C.R.N.S. 308 at 320-2, (Pigeon J., dissenting) and [1972] S.C.R. 926 at 945-6; 28 D.L.R. (3d) 1 at 15; 7 C.C.C. (2d) 417 at 431; 18 C.R.N.S. 308 at 322-3.

115. *R. v. Jones* (1972), 9 C.C.C. (2d) 5 at 13; 20 C.R.N.S. 58 at 66 (N.S. Cty. Ct.).

In theory of law, the suspect is free to refuse to accompany the officer and free also to refuse to give the requested sample, and the law provides an adequate sanction not dependent in any way on an arrest or detention of the suspect.¹¹⁶

In *R. v. MacDonald*, Macdonald J.A. came to a contrary conclusion, holding that as a matter of common sense, an accused is stopped by the police, and what happens thereafter is a "direct result of his being so stopped." Therefore the accused, once stopped, is detained.¹¹⁷ In *Hogan*, Laskin J. was of a similar opinion¹¹⁸, but Ritchie J., in his only reference to the point, noted:

. . . the initial demand to provide a sample of breath for analysis was legally made by the constable on the highway in accordance with s. 235(1) at a time when the accused was neither "arrested" nor "detained" . . .¹¹⁹

However, he did not apply the logical consequence of this finding to convict the appellant, but rather regarded the case as *damnum sine injuria*. If there was no "detention", then there was no *damnum* either, and so for Ritchie J.'s judgment to have any meaning, it must be assumed that the accused was "detained" some time later. The matter is, therefore, still shrouded in mystery.

One further question arises under this head. Is the right to counsel guaranteed by the *Bill of Rights* contingent upon a *need* for counsel to be present? Pigeon J., dissenting in *Brownridge*, clearly thought so:¹²⁰ but in the present law, the need for counsel's presence is not

I have assumed for the purpose of deciding the matter that the defendant was a person detained within the meaning of the *Canadian Bill of Rights*, s. 2, but I am far from satisfied that that was his position at law.

116. *Id.* at 11; 20 C.R.N.S. at 64. See also *id.* at 10-11; 20 C.R.N.S. at 64-5.

While the powers given to the police by the *Criminal Code* in this instance are certainly coercive in a psychological sense, the exercise of those powers does not necessarily result in an arrest or detainer in the legal sense.

117. *R. v. MacDonald* (1974), 10 N.S.R. (2d) 295 at 298-300; 22 C.C.C. (2d) 350 at 354-356 (S.C., A.D.).

118. [1975] 2 S.C.R. 574 at 587; 9 N.S.R. (2d) 145 at 157; 18 C.C.C. (2d) 65 at 74; 26 C.R.N.S. 207 at 218, *per* Laskin J.:

There is no doubt . . . that the accused was "detained". . . ; he risked prosecution under s. 235(2) if, without reasonable excuse, he refused the demand which involved accompanying the peace officer to fulfil it.

119. *Id.* at 581-2; 9 N.S.R. at 153; 18 C.C.C. at 70; 26 C.R.N.S. at 214.

120. [1972] S.C.R. 926 at 943; 28 D.L.R. (3d) 1 at 13; 7 C.C.C. (2d) 417 at 429; 18 C.R.N.S. 308 at 321:

relevant to a determination of whether or not a right to counsel exists. O Hearn J. has, however, twice drawn attention to the issue,¹²¹ commenting that the only question on which legal advice is needed is the question whether the suspect has a “reasonable excuse” for refusal.¹²² One may, however, go further than that. Absent special unusual circumstances, the only real enquiry can be as to the “detaining” officer’s reasonable and probable grounds for making the demand, especially since it has been held that the fact that the accused was not driving or in care or control, or the fact that the accused was not intoxicated, is not a “reasonable excuse” for refusal.¹²³ A danger exists that “reasonable excuse” and “right to counsel” may become self defeating, because the only reasonable excuse that many accused may be able to muster is the lack of adequate recognition of the right to counsel.

The legal situation of a person who, on request, accompanies a peace officer for the purpose of having a breath test taken is not different from that of a driver who is required to allow his brakes to be inspected or to proceed to a weighing machine . . . Motorists cannot reasonably expect to be allowed to seek legal advice before complying with such orders.

121. The former case was *R. v. Jones* (1972), 9 C.C.C. (2d) 5 at 10; 20 C.R.N.S. 58 at 63 (N.S. Cty. Ct.). The point raised by O Hearn J. is that *Brownridge* was decided before the case of *Curr v. The Queen*, [1972] S.C.R. 889; 26 D.L.R. (3d) 603; 7 C.C.C. (2d) 181; 18 C.R. N.S. 281, in which the Supreme Court held that the breathalyzer sections did not violate the self-incrimination provisions of the *Bill of Rights*, and hence eliminated one possible ground for discussion between client and counsel. Hence, His Lordship noted:

. . . that case [*Brownridge*] could turn out to be the only member of its species on the basis of this ratio.

Of course, it has not. Moreover, in *R. v. MacDonald* (1974), 10 N.S.R. (2d) 295 at 298; 22 C.C.C. (2d) 350 at 354 (S.C., A.D.), Macdonald J.A. specifically rejected this argument.

122. *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 490 (N.S. Cty. Ct.). It should also be noted that the question of *bona fides* is tied up with this point. Clearly, evidence that counsel and client had nothing to discuss is cogent evidence of an accused delaying for the sake of delay, and hence evidence of *mala fides* which will lead to conviction despite lack of adequate right to counsel. See, for example, *Brownridge*, [1972] S.C.R. 926 at 931, 933; 28 D.L.R. (3d) 1 at 5, 7; 7 C.C.C. (2d) 417 at 421, 423; 18 C.R.N.S. 308 at 312-3, 314-5 (*per Ritchie J.*).

123. Lack of care and control or driving is not a “reasonable excuse”: *R. v. Taraschuk* (1973), 12 C.C.C. (2d) 161 (Ont. C.A.); *R. v. Nicholls*, [1974] 1 W.W.R. 97; 14 C.C.C. (2d) 109 (Man. C.A.); *R. ex rel. Rayne v. Kirk*, [1974] 1 W.W.R. 752 (Sask. D. C.); *R. v. Robinson* (1974), 27 C.R.N.S. 350 (N.S. Cty. Ct.); *R. v. Nadeau* (1974), 8 N.B.R. (2d) 703 (C.A.). Total sobriety is not a “reasonable excuse”: *R. v. Lindsay*, [1974] 2 W.W.R. 757 (B.C.S.C.); *R. v. Bryden*, [1974] 5 W.W.R. 368; 19 C.C.C. (2d) 65 (Alta. S.C., T.D.).

3. *The Right to Counsel and Police Obligations*

In *R. v. Bond*,¹²⁴ the accused was given a breathalyzer demand at 11.47 p.m., and rang his counsel from the police station at 12.10 a.m. The accused spoke to his lawyer, and advised the police that he intended to await the arrival of his lawyer, who was driving a distance of 25-28 miles to reach the police station. The police refused to wait, and at 12.35 a.m. the accused gave a final refusal.¹²⁵ Cooper J.A., for the Appeal Division, convicted the accused of refusal, holding that the right to counsel had been sufficiently recognized by the allowance of a phone call, and that the police had no obligation to wait. His Lordship applied the following *dicta* from the judgment of Laskin J. in *Brownridge*:

I would not construe the right given by s. 2(c) (ii), when invoked by an accused upon whom a demand is made under s. 223(1) [s. 235(1)], as entitling him to insist on the personal attendance of his counsel if he can reach him by telephone.¹²⁶

It is submitted that this case should have been decided differently. Quite apart from the fact that Laskin J. expressed caution against the application of that paragraph,¹²⁷ other courts across Canada have not taken so strict a view of similar situations. In *R. v. Stasiuk*, Dielschneider J. convicted on a similar basis, but only in the absence of evidence as to the need for personal attendance:¹²⁸ in *R. v. Anderson*, Culliton C.J.S. based his decision on the fact that neither the lawyer in question nor the accused informed the police that the lawyer would attend in person.¹²⁹ Moreover, in *R. v.*

124. (1974), 6 N.S.R. (2d) 512; 14 C.C.C. (2d) 497; 24 C.R.N.S. 273 (S.C., A.D.).

125. There were other telephone calls. The accused first called a lawyer who refused to come to the station, and then called the lawyer who would come. After that call, the police phoned back and informed counsel that they would not wait because of the two hour period. The accused and counsel spoke again, and the accused refused because his lawyer told him to refuse.

126. [1974] S.C.R. 926 at 953; 28 D.L.R. (3d) 1 at 20; 7 C.C.C. (2d) 417 at 436; 18 C.R.N.S. 308 at 328, quoted in *Bond* (1974), 6 N.S.R. (2d) 512 at 517-8; 14 C.C.C. (2d) 497 at 501-2; 24 C.R. N.S. 273 at 278 (S.C., A.D.).

127. *Brownridge v. The Queen*, [1972] S.C.R. 926 at 953; 28 D.L.R. (3d) 1 at 20; 7 C.C.C. (2d) 417 at 436; 18 C.R.N.S. 308 at 328.

I refrain from enlarging on the matters mentioned in this paragraph of my reasons because it is better that this be done when particular cases call for it.

128. (1974), 25 C.R.N.S. 309 at 315 (Sask. D.C.).

129. (1974), 19 C.C.C. (2d) 301 at 303 (Sask. C.A.).

Balkan, a majority rejected the *Bond* point of view completely.¹³⁰

A more realistic view of the case where an accused wishes to wait upon the attendance of his lawyer would concentrate primarily upon the time involved. In *Bond*, the police could have waited until 1.45 a.m. before the time limit imposed by s. 237 ran out.¹³¹ The law presently states that an accused has the *right* to contact a lawyer, whether or not there is conflict between that right and the breathalyzer time limit;¹³² but in the case where an accused, having contacted counsel, wishes to wait upon the attendance of his lawyer at the police station, he should be allowed to do so, provided there is no conflict with the breathalyzer time limit.¹³³

R. v. MacDonald,¹³⁴ a recent case before the Nova Scotia Appeal Division, concerned the quite different problem of an accused who was given the facilities to contact counsel, but was unable to do so. Mr. MacDonald attempted, without success, to contact three lawyers, and then refused the demand. Macdonald J.A. held that the accused should be convicted because his *right* to counsel had not been infringed.¹³⁵ He held:

. . . I do not feel that in this country the police have any obligation to contact counsel on behalf of a detained or arrested person. . .¹³⁶

130. [1973] 6 W.W.R. 617; 13 C.C.C. (2d) 482; 25 C.R.N.S. 109 (Alta. S.C., A.D.). The dissenting judgment of McDermid J.A. rests upon a holding similar to *Bond*.

131. This may have been the case in *R. v. Stasiuk* (1974), 25 C.R.N.S. 309 (Sask. D.C.).

132. This is explicit in the judgment of Laskin J. in *Brownridge*, [1972] S.C.R. 926 at 954; 28 D.L.R. (3d) 1 at 21; 7 C.C.C. (2d) 417 at 437; 18 C.R.N.S. 308 at 328-9.

. . . I have no doubt that primacy must be given to the substantive protection accorded by the *Canadian Bill of Rights* rather than to the statutory rule of evidence embodied in s. 224A(c) (ii) [s. 237 (c) (ii)].

133. Hence, in *R. v. Balkan*, [1973] 6 W.W.R. 617 at 632; 13 C.C.C. (2d) 482 at 495; 25 C.R.N.S. 109 at 124 (Alta. S.C., A.D.), Prowse J.A. commented:

. . . even if the respondent had had one confidential call to his solicitor I see no reason why he should not be permitted thereafter to have a confidential interview, so long as the request for such interview is not made for any ulterior purpose, such as lack of good faith, or to create any unreasonable delay in the police investigation.

134. (1974), 10 N.S.R. (2d) 295; 22 C.C.C. (2d) 350 (S.C., A.D.).

135. Following the similar decision in *R. v. Drouin* (1973), 10 C.C.C. (2d) 18 (P.E.I.S.C.).

136. (1974), 10 N.S.R. (2d) 295 at 301; 22 C.C.C. (2d) 350 at 357 (S.C., A.D.).

. . . although the *right* to retain and instruct counsel was not abridged or infringed, the respondent was *unable* to exercise the right. . .¹³⁷

The decision was, no doubt, legally correct: but what of the “spirit of the law”? Was Mr. MacDonald in a different position from a man detained who is unable to contact counsel because he cannot speak English?

4. *The Right to Counsel and the Right to Privacy*

Development in the right to counsel area after *Brownridge* has also concentrated upon the question: if recognition of the right to retain and instruct counsel without delay is made by granting permission to an accused to speak to a lawyer, what facilities must be provided to ensure a full and proper exercise of that right? The answer of the courts has been to require that the police give an accused privacy in his consultation with counsel, and if the right to privacy is not adequately recognized, to acquit of refusal on the ground of “reasonable excuse” [or its *Bill of Rights* equivalent].

(a). *When Counsel Appears in Person*

In the period following the decision in *Brownridge*, the police began to recognize a right to contact counsel, but insisted upon the need to remain close by the accused during consultation, in order to ensure that the accused did nothing to affect the accuracy of the breathalyzer machine.¹³⁸ The courts have unanimously regarded the validity of this argument as entitling the police to keep a visual surveillance *only*, and have required that the police give an accused *oral privacy*.¹³⁹ In *R. v. Doherty*, Macdonald J.A. discussed the privacy requirement generally, stating:

137. *Id.* at 303; 22 C.C.C. (2d) at 358.

138. The interests of the police on this ground are discussed in *R. v. Levy* (1973), 11 C.C.C. (2d) 521 at 527; 21 C.R.N.S. 292 at 297 (N.S. Pro. Mag. Ct.); *R. v. Balkan*, [1973] 6 W.W.R. 617 at 620-1, 617-8, 631; 13 C.C.C. (2d) 482 at 485, 491, 494; 25 C.R.N.S. 109 at 113, 119-20, 123 (Alta. S.C., A.D.); *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 489 (N.S. Cty. Ct.).

139. The basis for oral privacy is two-fold. First, it is said that communication between counsel and client must be regarded as confidential and privileged: *R. v. Balkan*, [1973] 6 W.W.R. 617 at 631; 13 C.C.C. (2d) 482 at 494; 25 C.R.N.S. 109 at 123 (Alta. S.C., A.D.); *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 489 (N.S. Cty. Ct.). Secondly, it is said that without privacy, there could be no proper frank discussion between client and counsel: *R. v. Balkan, id.*; *R. v. Doherty, id.* at 491. Note also that in *R. v. Walkington*, [1974] 6 W.W.R. 117; 17 C.C.C. (2d) 553

. . . a detained person must be allowed to instruct his counsel outside the hearing of other persons — in other words, under circumstances that he can confer with and instruct his counsel without being overheard by anybody. This element of privacy may well be capable of accomplishment without the detained person being actually out of sight of those in authority.¹⁴⁰

In the subsequent retrial of Mr. Doherty,¹⁴¹ O Hearn J. added two important details to the general principle. First, he held that it is up to the police to arrange adequate facilities to ensure privacy.¹⁴² This holding, it is submitted, is in accordance with Laskin J.'s view of the primacy of the right to counsel.¹⁴³ Second, he held that the purpose of the right to privacy is to encourage frankness in communication between counsel and client. Therefore, the arrangements must permit conversation in a normal tone of voice without risk of being overheard.¹⁴⁴

It cannot be denied that the right to privacy will cause the police some trouble, particularly with respect to small police facilities beyond the cities. One may with justice wonder why the law imposes rigorous conditions on the exercise of the right to counsel, but makes no provision for the indigent who does not know his rights, or cannot contact a lawyer at all.

(b). *Over the Telephone*

The principles discussed above apply equally where an accused

(Sask. C.A.), it was held that because of conflict of interest, the accused has no right to *visual* privacy.

140. (1974), 18 C.C.C. (2d) 487 at 497 (N.S. Cty. Ct.). See generally, on the right to privacy: *R. v. Penner*, [1973] 6 W.W.R. 94; 39 D.L.R. (3d) 246; 12 C.C.C. (2d) 468; 22 C.R.N.S. 35 (Man. C.A.); *R. v. Balkan*, [1973] 6 W.W.R. 617; 13 C.C.C. (2d) 482; 25 C.R.N.S. 109 (Alta. S.C., A.D.).

141. *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 (N.S. Cty. Ct.).

142. *Id.* at 489:

. . . it is for the public authorities and the police to provide adequate accommodation for this particular purpose.

Id. at 491:

. . . the burden of providing adequate accommodation is on the public authority, not on the defendant.

143. See the quotation from Laskin J.'s judgment in *Brownridge* contained in note 132, *supra*.

144. *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 491 (N.S. Cty. Ct.):

. . . while it may be that the distance was physically adequate for a low-voiced conversation to be carried on . . . still I think there was a psychological difficulty here which affected the condition of sufficient privacy.

exercises his right to counsel by telephone.¹⁴⁵ Little need be added to these principles except to note the suggestion by O Hearn J. that the installation of a sound proof telephone booth at police stations would satisfy the privacy requirements of the law.¹⁴⁶

(c). *Waiver of the Right to Privacy*

The Nova Scotia courts have yet to pass upon the question whether an accused will be deemed to have waived his right to privacy if he does not request privacy. There is authority suggesting that lack of request amounts to waiver¹⁴⁷ but there is also authority to the contrary.¹⁴⁸ Neither side of the debate has yet considered the following *dictum* from the judgment of Laskin J. in *Hogan*:

I should note also that there was no contention of waiver by the accused of his right to counsel, assuming that would be an answer to an alleged breach of any of his rights as an individual under the *Canadian Bill of Rights*.¹⁴⁹

5. *Conclusion*

The post-*Brownridge* law on right to counsel has degenerated into a mass of petty, technical and often contradictory rules. Little consideration has been given to the reality of the problems with which s. 2(c) (ii) should deal: problems of access to counsel; of access to one's rights; and of self-incrimination. The recent case of *R. v. Bagnell*¹⁵⁰ serves as a further warning to police in the area of

145. See, for example, *R. v. Penner*, [1973] 6 W.W.R. 94; 39 D.L.R. (3d) 246; 12 C.C.C. (2d) 468; 22 C.R.N.S. 35 (Man. C.A.); *R. v. Maksimchuk*, [1974] 2 W.W.R. 668; 43 D.L.R. (3d) 478; 15 C.C.C. (2d) 208 (Man. C.A.); *R. v. Doherty* (1974), 8 N.S.R. (2d) 172; 16 C.C.C. (2d) 494; 25 C.R.N.S. 289 (S.C., A.D.); *R. v. Stasiuk* (1974), 25 C.R.N.S. 309 (Sask. D.C.); *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 (N.S. Cty. Ct.).

146. *R. v. Doherty* (1974), 18 C.C.C. (2d) 487 at 491 (N.S. Cty. Ct.).

147. *R. v. Stasiuk* (1974), 25 C.R.N.S. 309 (Sask. D.C.); *R. v. Irwin*, [1974] 5 W.W.R. 744; 18 C.C.C. (2d) 563; 28 C.R.N.S. 23 (Man. C.A.).

148. *R. v. Maksimchuk*, [1974] 2 W. W. R. 668; 43 D.L.R. (3d) 478; 15 C.C.C. (2d) 208 (Man. C.A.); *R. v. Balkan*, [1973] 6 W.W.R. 617 at 628-9; 13 C.C.C. (2d) 482 at 492; 25 C.R.N.S. 109 at 120-1 (Alta. S.C., A.D.);

. . . prejudice *must be inferred* . . . [emphasis added].

149. *Hogan v. The Queen*, [1975] 2 S.C.R. 574 at 589; 9 N.S.R. (2d) 145 at 158; 18 C.C.C. (2d) 65 at 76; 26 C.R.N.S. 207 at 219. However, there seems to be no reason why an accused cannot waive his right to counsel. See *R. v. Irwin*, [1974] 5 W.W.R. 744 at 748; 18 C.C.C. (2d) 563 at 567; 28 C.R.N.S. 23 at 28 (Man. C.A.).

150. (1975), 9 N.S.R. (2d) 351 (S.C., A.D.).

breathalyzer law. Mr. Bagnell, having been convicted of refusing the breathalyzer, went after the arresting officer with a loaded elephant gun. There is a message in that for us all.

IV. Ignorance of the Law as a Defence

1. The MacLean Case and its Result

Nova Scotia courts have dealt, in recent years, with a number of cases in which an accused has raised mistake or ignorance of law as a defence to a criminal charge.¹⁵¹ In general, the courts have been unresponsive to such a plea,¹⁵² relying upon variations of the ancient maxim *ignorantia juris non excusat*¹⁵³ and its equivalent in

151. *R. v. Ninos*, [1964] 1 C.C.C. 326; 48 M.P.R. 383 (N.S.S.C. *in banco*); *R. v. Pace* (1965), 48 D.L.R. (2d) 532; 50 M.P.R. 301; [1965] 3 C.C.C. 55 (N.S.S.C. *in banco*); *R. v. Jollimore* (1962), 46 M.P.R. 283; 131 C.C.C. 319 (*sub nom. R. ex rel. Ross v. Jollimore*); 36 C.R. 300 (N.S.S.C. *in banco*); *R. v. Villeneuve*, [1969] 1 C.C.C. 267; 2 C.R.N.S. 301 (*sub nom. R. ex rel. Whittemore v. Villeneuve*) (N.S. Cty. Ct.).

152. See generally G. Williams, *Criminal Law: The General Part* (2d ed. London: Stevens and Sons, 1961) at 287 ff.; *Kenny's Outlines of Criminal Law* (19th ed. Cambridge: University Press, 1966) at 60-2; Smith and Hogan, *Criminal Law* (2d ed. London: Butterworths, 1969) at 48-51; C. Howard, *Australian Criminal Law* (2d ed. Melbourne: The Law Book Co., 1970) at 370-4; Lafave and Scott, *Handbook on Criminal Law* (St. Paul: West Pub. Co., 1972) at 362 ff.; Model Penal Code, s. 2.04 Comment (Tent. Draft No. 4, 1955); and the authority referred to therein. In terms of authority in Canada, see *R. v. Brinkley* (1907), 14 O.L.R. 434; 12 C.C.C. 454 (C.A.); *Kokoliades v. Kennedy* (1911), 40 Que. S.C. 306; 13 Que. P.R. 20; 18 C.C.C. 495 (S.C.) [acquitted, but disapproved in *R. v. Campbell, infra*]; *R. v. Shymkovich*, [1954] S.C.R. 606; 110 C.C.C. 97; 19 C.R. 401; *R. ex rel. Irwin v. Dalley*, [1957] O.W.N. 123; 8 D.L.R. (2d) 179; 118 C.C.C. 116; 25 C.R. 269 (C.A.); *R. v. Campbell*, [1973] 2 W.W.R. 246; 10 C.C.C. (2d) 26 (Alta. D.C.). Examples of mistake or ignorance of law providing an excuse *via* statutory interpretation are: *R. ex rel. Courneyer v. Waters*, [1957] O.W.N. 269; 9 D.L.R. (2d) 649 (C.A.); *R. v. Austin* (1958), 24 W.W.R. 293; 120 C.C.C. 118; 27 C.R. 355 (B.C.C.A.); *R. v. Howson*, [1966] 2 O.R. 63; 55 D.L.R. (2d) 582; [1966] 3 C.C.C. 348; 47 C.R. 322 (C.A.); *R. v. De Marco* (1974), 13 C.C.C. (2d) 369 (Ont. C.A.).

153. See E. Keedy, *Ignorance and Mistake in the Criminal Law* (1908), 22 H.L.R. 75 at 76 n. 1:

The maxim appears in various wordings. *Ignorantia legis neminem excusat*: Lush, J. in *Reg. v. Mayor of Tewkesbury*, 3 Q.B. 629, 639. *Ignorantia eorum, quae quis scire tenetur, non excusat*: 1 Hale P.C. 42. *Ignorantia excusatur, non juris sed facti*: 2 Bouvier, Law Dict. 355. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*: 4 Bl. Com. 27. *Ignorantia juris hand excusat*. Cooper v. Phibbs, L. R. 2 H. L. 149, 170.

This may not be the academic esoterica it seems. See *infra*, note 172 ff.

the *Criminal Code*.¹⁵⁴ In *R. v. MacLean*,¹⁵⁵ however, O Hearn J. was faced with a situation in which:

. . . the voice of practical sense replies that, in fact, the accepted “penal” law contains many petty proscriptions of conduct which are not recognized by normal persons as having moral significance, and that when social harm becomes so diluted that it cannot thus be recognized, it is time in the sphere of positive criminal law to do justice in light of the facts.¹⁵⁶

Mr. MacLean was employed at the Halifax International Airport, and in October 1972 he was convicted of refusal to take a breathalyzer test¹⁵⁷, a conviction which resulted in the automatic revocation¹⁵⁸ of his driver’s license under provincial legislation.¹⁵⁹ The accused knew that his license had been revoked but, for employment purposes, he needed to drive at the airport itself.¹⁶⁰ In doubt as to the matter, the accused telephoned the office of the Registrar of Motor Vehicles and was told that the revocation of his driving license was of no consequence with respect to the airport, because one did not need a license to drive on Government property. All that was required was the permission of a superior. Shortly thereafter, while driving with permission, the accused was

154. R.S.C. 1970, c. C-34, s. 19:

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

In *R. v. Shymkovich*, [1954] S.C.R. 606 at 624; 110 C.C.C. 94 at 114; 19 C.R. 401 at 418, Locke J. commented:

I do not think the question to be determined is affected by [the then] section 22 of the *Criminal Code* stating that ignorance of the law is not an excuse for any offence committed, since the question to be determined is whether or not the respondent committed any offence.

155. (1974), 46 D.L.R. (3d) 564; 17 C.C.C. (2d) 84; 27 C.R.N.S. 31 (N.S. Cty. Ct.).

156. J. Hall, *Ignorance and Mistake in Criminal Law* (1957), 33 Ind. L.J. 1 at 39. See also *MacLean*, *id.* at 582-3; 17 C.C.C. at 102-3; 27 C.R.N.S. at 49-50.

157. R.S.C. 1970, c. C-34, s. 235(2).

158. The word “revocation” is used advisedly. An interesting recent Nova Scotia development is to be found in *R. v. Fraser* (1974), 8 N.S.R. (2d) 698; 18 C.C.C. (2d) 235 (S.C., A.D.) and *R. v. Knickle* (1974), 8 N.S.R. (2d) 265; 18 C.C.C. (2d) 341 (S.C., A.D.) in which it was held that a charge of driving while disqualified contrary to s. 238(3) of the *Code* by reason of *cancellation* of license is not supported by proof of *suspension* of right to secure a license (*Fraser*), nor by a Registrar’s certificate stating that an accused’s privilege of obtaining a license had been *revoked* (*Knickle*).

159. Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 250(2).

160. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 566; 17 C.C.C. (2d) 84 at 86; 27 C.R.N.S. 31 at 33 (N.S. Cty. Ct.). See also *infra*, note 162.

involved in a collision at the airport. He was subsequently charged under s. 238(3) of the *Criminal Code* with driving a motor vehicle in Canada while disqualified. At trial, the accused was acquitted, and the matter came before O Hearn J. on appeal by the Crown by way of trial *de novo*.

O Hearn J. began by considering the scope of s. 238(3) (a) and held that an accused cannot be convicted of an offence against that section unless the Crown can show that the accused was driving in a place where he is required by law to have a license to drive, and that the accused did not have a license because it had been suspended or cancelled.¹⁶¹ His Lordship held further that the Nova Scotia Motor Vehicle Act did not apply to require the accused to have a valid license at the airport, because the provisions of that Act required licenses to drive only on a highway, and the accused was driving, at the time of the collision, in an area not a highway.¹⁶² However, the Crown produced Federal Airport Vehicle Control Regulations which stated, *inter alia*:

No person shall operate a vehicle on an airport unless

(a) he holds all licenses and permits that he is, by the laws of the province and the municipality in which the airport is situated, required to hold in order to operate the vehicle in that province and municipality;¹⁶³

Prima facie therefore, the accused was required to hold a valid provincial driving license to drive at the airport; at the time of the

161. *Id.* at 571; 17 C.C.C. at 91; 27 C.R.N.S at 35, following *R. v. Spear Chief* (1963), 45 W.W.R. 161; 42 C.R. 78 (Alta. D.C.); limiting *R. v. Munro* (1960), 22 D.L.R. (2d) 443; 125 C.C.C. 317; 32 C.R. 9 (Man. C.A.); referring to *R. v. Irwin*, [1957] O.W.N. 506 (D.C.).

162. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 574, 577; 17 C.C.C. (2d) 84 at 94, 97; 27 C.R.N.S. 31 at 41, 44 (N.S. Cty. Ct.). As to the spatial limitation of the Motor Vehicle Act, R.S.N.S. 1967, c. 191, s. 59(3) and (4). O Hearn J. refused to follow *R. v. Denton* (1973), 4 N.S.R. (2d) 713 (Pro. Mag. Ct.). His Lordship noted the generality of the words "in this Province" in s. 59 (3) and s. 59(4) but limited these words by reference to the more restricted "on the highway[s]" in other sections. His Lordship further pointed out (*id.* at 573; 17 C.C.C. at 93; 27 C.R.N.S. at 40) that it would be an absurdity to apply the wider words so as to require a landowner driving solely on his own land to possess a license. As to whether or not the driveway in front of the airport was a "highway", His Lordship referred to the definition contained in s. 1(t) of the Act and followed *Brinton v. Sieniewicz* (1969), 1 N.S.R. 1965-69 18; 7 D.L.R. (3d) 545 (S.C., T.D.), to hold that it was not. His Lordship also discussed the power of the Federal Government to regulate traffic on Federal property (*id.* at 576-578; 17 C.C.C. at 96-98; 27 C.R.N.S. at 43-45).

163. Cited as Airport Vehicle Control Regulations, S.O.R./64-354.

collision he did not hold a valid provincial license; hence, absent any defences, he was guilty of an offence against s. 238(3). However, O Hearn J. went on to hold that the accused's plea that he believed he did not require a license constituted in the circumstances a legal excuse for breach of s. 238(3). His Lordship held that where an accused pleads ignorance or mistake of law with respect to delegated legislation, that plea will constitute an excuse to a crime charged, if and only if, the accused makes diligent and *bona fide* inquiry at an appropriate source with a view to ascertain and abide by the law, and acts in good faith reliance upon the results of that inquiry.¹⁶⁴

2. *The Nature of the Law: Avoiding s. 19 and the General Maxim*

It is important to emphasize, in any consideration of *MacLean*, that the accused was not charged with breach of the regulation, the existence of which was unknown to him. The accused was charged with violation of s. 238(3) of the *Criminal Code*, and hence the rubric of s. 19 applied directly to his case.¹⁶⁵ O Hearn J. refused to hold that s. 19 afforded a complete answer to the defence of the accused, stating:

. . . s. 19 is not absolute and cannot be applied without reserve to every situation where the essential mistake is one of law.¹⁶⁶

It is clear from the case law in Canada that s. 19 is qualified, perhaps *via* s. 7(3)¹⁶⁷, by a number of exceptions. O Hearn J.

164. Following *Long v. State (Delaware)* (1949), 44 Del. 262; 5 Terry 262; 65 A.2d 489. The formulation of the defence is my own.

165. Had the accused been charged with breach of provincial legislation or federal or provincial regulations, *quaere* whether s. 19 would have had any application. See P. Weiler, *The Supreme Court of Canada and the Doctrines of Mens Rea* (1971), 49 Can. B. Rev. 280 at 317. *Quaere* also whether the Summary Proceedings Act, S.N.S. 1972, c. 18, s. 5(1), incorporates s. 19 for the purposes of provincial offences in applying provisions of the *Criminal Code* applicable to summary conviction offences *mutatis mutandis* to provincial offences.

166. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 580; 17 C.C.C. (2d) 84 at 100; 27 C.R.N.S 31 at 47 (N.S. Cty. Ct.). See also His Lordship's judgment in *R. v. Villeneuve*, [1968] 1 C.C.C. 267 at 283; 2 C.R.N.S. 301 at 317 (*sub nom. R. ex rel. Whittemore v. Villeneuve*) (N.S. Cty. Ct.) where he analyzes the judgment of Rand J. in *R. v. Shymkovich*, [1954] S.C.R. 606; 110 C.C.C. 97; 19 C.R. 401.

167. This subsection continues common law defences, excuses and justifications to offences in Canada except in so far as they are altered by or are inconsistent with the *Criminal Code* or other federal Act. The question of the tension between s. 7(3) of the *Code* and other sections codifying previously common law defences is a question unexplored in Canada. Is s. 19 qualified by a common law gloss, or is it exclusive of common law as is s. 17; for example, compulsion? See *R. v. Carker*,

referred briefly to cases in which an accused charged with theft was permitted to rely upon a "claim or colour of right" arising from mistake or ignorance of law,¹⁶⁸ but that exception clearly had no application to the case at bar.¹⁶⁹ He then referred to two general principles from Glanville Williams' text, the second of which formed the starting point from which his excusing principle finally derived.¹⁷⁰ Glanville Williams stated:

Moreover, the principle of German jurisprudence could be adopted, that the defendant is required to have exerted his conscience properly, making enquiry as to the law where a conscientious person would have done so.¹⁷¹

[1967] S.C.R. 114; 60 W.W.R. 365; [1967] 2 C.C.C. 190; 2 C.R.N.S. 16; and the tantalizing comment by O Hearn J. in *Villeneuve*, [1968] 1 C.C.C. 267 at 279; 2 C.R. N.S. 301 at 313 (*sub nom. R. ex rel. Whittemore v. Villeneuve*) (N.S. Cty. Ct.).

168. This "exception" to the operation of the s. 19 maxim is to be found in cases concerning offences containing an explicit requirement that the accused not be acting under claim or colour of right. See, for example, the *Criminal Code*, R.S.C. 1970, c. C-34, s. 39(1); s. 42(2) (b); s. 42(3) (a), (b); s. 73(2), (3); s. 250(2); s. 283(1); s. 386; and *R. v. Howson*, [1966] 2 O.R. 63; 55 D.L.R. (2d) 582; [1966] 3 C.C.C. 348; 47 C.R. 322 (C.A.). There is an extensive discussion by Glanville Williams, *supra*, note 152 at 321 *ff.*

169. Some other "exceptions" to s.19 are indicated by Canadian law.

(a) Where the crime with which the accused is charged requires a "wilful", "corrupt" or "malicious" intent mistake or ignorance of law will negative that intent. See *R. v. Rees*, [1956] S.C.R. 640 at 648-649; 4 D.L.R. (2d) 406 at 412-413; 115 C.C.C. 1 at 8; 24 C.R. 1 at 8-9 (*per* Rand J. — Locke J. concurring); *R. v. Campbell*, [1973] 2 W.W.R. 246 at 250; 10 C.C.C. (2d) 26 at 31 (Alta. D.C.); and commentary by Glanville Williams, *supra*, note 152 at 317-320 ("Maliciously" and "wilfully") and at 320-321, ("knowingly") and Howard, *supra*, note 152 at 370 n. 29. There is considerable American authority on point, examples of which may be found by reference to Keedy, *supra*, note 153 at 89 n. 1; R. Perkins, *Ignorance and Mistake in Criminal Law* (1939), 88 U. Pa. L.R. 35 at 47-51; P. Ryu and H. Silving, *Error Juris: A Comparative Survey* (1957), 24 U. Chi. L.R. 421 at 438.

(b) There may be an "exception" where the accused relies upon a law which is later declared *ultra vires*: the Canadian example is *Kokoliades v. Kennedy* (1911), 40 Que. S.C. 306; 13 Que. P.R. 20; 18 C.C.C. 495, but disapproved in *R. v. Campbell, id.*. With their more virulent constitutional jurisprudence, there is considerable American authority and comment on point: see particularly L. Hall and S. Seligman, *Mistake of Law and Mens Rea* (1944), 8 U. Chi. L.R. 641 at 662 *ff.* There is some doubt expressed by Glanville Williams as to the validity of this exception: *supra*, note 152 at 302-3.

170. The first principle is to be found in *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 580; 17 C.C.C. (2d) 84 at 100; 27 C.R.N.S. 31 at 47 (N.S. Cty. Ct.). O Hearn J. does not give a precise reference, but see Glanville Williams, *supra*, note 152 at 292.

171. Glanville Williams, *supra*, note 152, quoted in *R. v. MacLean* (1974), 46

It should be noted that first, there is no restriction in this statement of the principle as to the *type* of law to which it applies, and second, that enquiry need only be made where a conscientious person would have done so.

The restriction of the application of this principle to subordinate legislation was based by O Hearn J. upon two separate considerations: theory and authority. The essence of the argument on theory rests upon a distinction between use of the word *lex* and use of the word *jus* in the Latin formulation of s. 19.¹⁷² If it is accepted that *lex* refers to “the positive command of the Prince or Legislature”¹⁷³ and *jus* to “the realm of legal right and obligation generally”¹⁷⁴ then one may also accept, with O Hearn J., that “*lex* becomes part of *jus* by promulgation and assimilation.”¹⁷⁵ Put another way, an essential difference between *lex* and *jus* lies in the concept of public knowledge of law: and thus public knowledge is a vital part of the *jus* referred to by *ignorantia juris non excusat*.¹⁷⁶ If the central concept is one of effective promulgation, a distinction may be drawn between statutes and regulations on the ground that the former are easier to find and more a part of public, private and official consciousness than the latter.¹⁷⁷ Thus both statutes and

D.L.R. (3d) 564 at 581; 17 C.C.C. (2d) 84 at 101; 27 C.R.N.S. 31 at 48 (N.S. Cty. Ct.).

172. See possible alternative formulations, *supra*, note 153 and *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 583-4; 17 C.C.C. (2d) 84 at 103-4; 27 C.R.N.S. 31 at 50-1 (N.S. Cty. Ct.):

It is true that on occasion the word *legis* has been substituted for *juris* and the maxim does apply to that kind of law, but only when the *lex* . . . has entered into the realm of *jus* . . .

173. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 583; 17 C.C.C. (2d) 84 at 103; 27 C.R.N.S. 31 at 50 (N.S. Cty. Ct.).

174. *Id.* at 584; 17 C.C.C. at 104; 27 C.R.N.S. at 51.

175. *Id.*

176. *Id.*:

Lex becomes part of *jus* by promulgation and assimilation . . . the need in justice to give publicity to an enactment as distinct from the common law, including other enactments of long standing, if the subject is to be required to conform himself to it.

177. *Id.* at 581; 17 C.C.C. at 101; 27 C.R.N.S. at 48:

His ignorance was of the existence of Regulations that, I must confess, are rather difficult to track down.

See also *id.* at 578-9, 582; 17 C.C.C. at 98-99, 103; 27 C.R.N.S. at 45-6, 50. That there is an automatic distinction between regulations and statutes on this basis was supported by Harrison J. in *R. v. Ross*, [1945] 3 D.L.R. 574; [1945] 1 W.W.R. 590; 84 C.C.C. 107 (B. C. Cty. Ct.) and the English authority cited *infra*, note 184

regulations are *lex* as soon as valid. The maxim refers to *jus*: statutes by nature are deemed to be *jus* as soon as *lex* but regulations, by nature, require effective promulgation to pass from *lex* to *jus*.

This theory does not depend upon considerations of morality and a distinction between *malum in se* and *malum prohibitum*¹⁷⁸ although the distinction may be *inherent* in any distinction drawn between statute and regulation. Avoidance of the test of subjective morality is commendable,¹⁷⁹ since much previous fruitless dispute has centred around the proposition that ignorance or mistake with respect to a law *malum in se* is no excuse, but ignorance or mistake with respect to a law *malum prohibitum* may excuse.¹⁸⁰ Now effective promulgation of a regulation is a basis for responsibility rather than its moral worth. In his focus upon promulgation, O Hearn J. could well have cited the following passage by Hall:

Opportunity to examine and study the laws is implied in democratic theory which would not be satisfied if conflicts were adjudicated according to laws inaccessible to public inquiry.¹⁸¹

ff., but denied in Comment, *Administrative Orders — Publication and Notice to Defendant — The Regulations Acts of Manitoba and Ontario* (1946), 24 Can. B. Rev. 149 at 150. With respect to other difficulties with the word “*juris*” see Hall, *supra*, note 156 at 40-42.

178. It is surprising that, apart from a chance reference to the point *via* quotation from Glanville Williams, *supra*, note 170, O Hearn J. does not mention the distinction, because much discussion has been concerned with the issue. See, for example, Hall, *supra*, note 156 at 35-6, citing Glaser, *Ignorantia juris dans le Droit Penal* (1931), Rev. Dr. Penal Et De Crim. Et Arch. Int. Med. Leg. 133; P. Brett, *Mistake of Law as a Criminal Defence* (1966), 5 Melb. U.L.R. 179 at 196 *ff.*, citing as an example *State ex rel. Williams v. Whitman* (1934), 156 So. 705. See also Ryu and Silving, *supra*, note 169 at 433 n. 70 and Note, *Developments in the Law: Criminal Conspiracy* (1959), 73 H.L.R. 920 at 963 *ff.*; *Re People v. Powell* (1875), 63 N.Y. 88, 13 N.Y.C.A. Rep. 412. However, in *Villeneuve*, [1968] 1 C.C.C. 267; 2 C.R.N.S. 301, O Hearn J. discussed the distinction at length, before finally rejecting it at 285; 2 C.R.N.S. at 319.

179. Thus: *R. v. Villeneuve*, [1968] 1 C.C.C. 267 at 285; 2 C.R.N.S. 301 at 319 (*sub nom. R. ex rel. Whittemore v. Villeneuve*) (N.S. Cty. Ct.):

Moral duties should not be identified with criminal duties.

G. Hughes, *Criminal Responsibility* (1964), 16 Stan. L.R. 470 at 481. See also Brett, *id.* Problems of particular difficulty arise where an accused commits a collateral mistake. For example, consider the case of the man who kills X because he thinks X is trespassing and that he had a legal right to kill a trespasser. Assuming that the accused has a legal right to kill a trespasser, what result if the *error juris* is as to whether X is trespassing? Murder is *malum in se*, but the mistake is *malum prohibitum*. See *Weston v. Commonwealth* (1885), 111 Pa. 251, 2 A. 191.

180. *Id.* See also *infra*, note 200.

181. Hall, *supra*, note 156 at 35 n. 143. This part of Hall’s general discussion of

Turning now to considerations of authority, it should be noted that the principal authority, from which most of the defence formulated by O Hearn J. is derived, *Long v. State*,¹⁸² was not a case concerned with vague and obscure regulations or orders, but with the crime of bigamy, and the principle enunciated in that case was not qualified by the type of law to which it applied.¹⁸³ Concentration upon the notion of promulgation, however, led O Hearn J. to a series of English cases concerned with ignorance or mistake with respect to regulations. Foremost among them was the case of *Johnson v. Sargant & Sons*,¹⁸⁴ a civil action relating to the cancellation of a contract for the sale of beans allegedly by an administrative Order dated on the exact day of performance, but only made public by newspaper announcement on the following day. The plaintiff could succeed only if the Order was operative *qua* the contract on the date of performance. Bailhache J. gave judgment for the defendants, holding that while statutes became effective at time of enactment, Orders required notice or promulgation before they became effective.¹⁸⁵

This judgment anticipated, or perhaps prompted, the enactment in England of a provision creating a statutory defence of ignorance

the "principle of legality", which is based not on a *need* to find knowledge of the law on which to found responsibility, but upon the *ethics* of a determination of responsibility absent such knowledge (*id.* at 21). Hence Hall would agree that promulgation should be a (partial?) determinant of culpability, but would not be prepared to agree that it is (*id.* at 40).

182. *Supra*, note 164.

183. The crime of bigamy has raised special problems in the area of mistake of law and fact. See Glanville Williams, *supra*, note 152 at 333 ff.; G. Paton, *Bigamy and Mens Rea* (1939), 17 Can. B. Rev. 94; *R. v. Thompson* (1905), 70 J.P. 6 (C.C.C.); *R. v. Sellars* (1905), 9 C.C.C. 153 (N.S. Cty. Ct.); *R. v. Brinkley* (1907), 14 O.L.R. 434; 12 C.C.C. 454 (C.A.); *R. v. Bleiler* (1912), 4 A.L.R. 320; 1 D.L.R. 878; 19 C.C.C. 249 (Alta. S.C. *in banco*); *R. v. Connatty* (1919), 83 J.P. 292 (C.C.C.); *R. v. Wheat*, [1921] 2 K.B. 119; 15 Cr. App. R. 134; *R. v. Carswell*, [1926] N.Z.L.R. 185 (C.A.); *Thomas v. The King* (1937-38), 59 C.L.R. 279; *R. v. Morgan* (1942), 78 C.C.C. 129 (N.S.C.A.); *Williams v. North Carolina* (1944), 325 U.S. 226; *State v. De Meo* (1955), 20 N. 3d 1; 118 A.2d 1 (N.J.S.C.); *People v. Vogel* (1956), 46 C.2d 798; 299 P.2d 850 (Calif. S.C.). O Hearn J. recognized, of course, that *Long* had no immediate application to *MacLean* (1974), 46 D.L.R. (3d) 564 at 586; 17 C.C.C. (2d) 84 at 106; 27 C.R.N.S. 31 at 53 (N.S. Cty. Ct.).

184. [1918] 1 K.B. 101 (D.C.); cited in *MacLean* (1974), 46 D.L.R. (3d) 564 at 583; 17 C.C.C. (2d) 84 at 103; 27 C.R.N.S. 31 at 50 (N.S. Cty. Ct.).

185. *Id.* at 583; 17 C.C.C. at 103; 27 C.R.N.S. at 50. The case and others which followed, have been the subject of some comment. See, for example, Glanville Williams, *supra*, note 152 at 295-6; C. Allen, *Statutory Instruments Today* (1955), 71 L.Q.R. 490 at 501-4.

of a statutory instrument if that instrument had not been issued by Her Majesty's Stationery Office, unless reasonable steps had been taken to bring the instrument to the notice of parties affected by it.¹⁸⁶ However, the common law principle in *Johnson v. Sargant & Sons* was followed in Canada in *R. v. Ross*¹⁸⁷ in which an accused was charged with unlawfully entering a closed district for the purpose of hunting without a permit, contrary to an order made by a Minister under statute.¹⁸⁸ Harrison J. noted that the order in question had not been publicized,¹⁸⁹ and acquitted the accused, applying the principle contained in *Johnson v. Sargant & Sons*.¹⁹⁰

Two general points arise from these cases which are of importance to the *MacLean* defence. First, it is evident that in referring to the notion of "promulgation", it is not intended to refer to the technical procedure whereby a proposal becomes validly enacted law (*lex*). Rather, "promulgation" refers to the process of public notice or assimilation whereby the valid law moves from the realm of *lex* to the realm of *jus*.¹⁹¹ Secondly, one must distinguish "direct" mistake or ignorance of law from "indirect" or "collateral" mistake or ignorance of law.¹⁹² Generally, the mistake or ignorance is "direct" if the accused is charged with a breach of the law concerning which he was mistaken, or of the existence of which he was ignorant. The mistake or ignorance is "collateral" if

186. The Statutory Instruments Act 1946 (1946), 9 & 10 Geo. 6, c. 36, s. 3(2). See also the Ontario *Regulations Act*, R.S.O. 1970, c. 410, ss. 2-5; the Nova Scotia *Regulations Act*, S.N.S. 1973, c. 15, ss. 3-6, (unproclaimed). The Federal *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, s. 11(2) was applicable in *MacLean*, but of no assistance because the regulations were published in the *Gazette*.

187. *Supra*, note 177.

188. *Forest Act*, R.S.B.C. 1936, c. 102, s. 119(1).

189. *R. v. Ross*, [1945] 3 D.L.R. 574 at 576; [1945] 1 W.W.R. 590 at 592; 84 C.C.C. 107 at 109 (B.C. Cty. Ct.):

There was no evidence adduced of promulgation of the said order, or to indicate any circumstances from which it might be inferred that it was probable or likely that the appellant or any of his companions would or could have had notice of such order, prior to their said meeting with the forest and game officials.

190. *Id.* at 577; [1945] 1 W.W.R. at 593; 84 C.C.C. at 110:

I think this view of the matter, without the necessity of further enlargement, is fairly in accord with the decisions rendered, respectively, in *Johnson v. Sargant & Sons*, . . . and *Brightman & Co. v. Tate*

191. Thus, for example, in *Ross*, *id.* at 576; [1945] 1 W.W.R. at 592; 84 C.C.C. at 109, Harrison J. speaks of a lack of "promulgation" although there was no doubt that the Order in question was valid (*lex*). See Allen, *supra*, note 186.

192. See generally Hall, *supra*, note 156 at 20; Brett, *supra*, note 178 at 186.

the accused knows the law with which he is charged, but responsibility on the basis of that law is contingent upon mistake or ignorance *qua* another law altogether. Mr. Ross was guilty of direct ignorance; Mr. MacLean was guilty of collateral mistake, because he knew it to be illegal to drive without a license, but he did not know of the existence of the law requiring him to possess a license.¹⁹³

Notwithstanding contrary authority,¹⁹⁴ the Privy Council has shown a willingness to accept a defence similar to or the same as that in *MacLean*. In *Lim Chin Aik v. The Queen*,¹⁹⁵ Lord Evershed stated:

It was said . . . that the order, once made, became part of the law of Singapore of which ignorance could provide no excuse . . . In their Lordship's opinion, even if the making of the order by the Minister be regarded as an exercise of the legislative as distinct from the executive or administrative function (as they do not concede), the maxim cannot apply to such a case as the present where it appears that there is . . . no provision, corresponding, for example, to that contained in s. 3(2) of the English Statutory Instruments Act, 1946 . . . or any other provision designed to enable a man by appropriate inquiry to find out what "the law" is.¹⁹⁶

193. Hence the relevance of *Johnson v. Sargant*, [1918] 1 K.B. 101 (D.C.), despite the fact that the case concerned an action in contract. The result should not have been different in that case had the plaintiff been charged with disobedience of the requisitioning Order. Mistake of civil law may thus be a very relevant consideration. See, for example, *supra*, notes 179 and 183.

194. Of course, the cases are many in which the court has simply applied a common law or statutory equivalent of the *error juris* maxim. Illustrative are the two cases considered in detail by Brett, *supra*, note 178 both of which concerned regulations: *Crichton v. Victorian Dairies Ltd.*, [1965] V.R. 49 (Vict. S.C., Full Ct.); *Surrey County Council v. Battersby*, [1965] 2 Q.B. 194; [1965] 2 W.L.R. 378; [1965] 1 All E.R. 273 (Q.B.D.). In the United States, see *Chaplin v. State* (1879), 7 Tex. App. 87 (ignorance of law no defence *re* an executive proclamation); *State v. Williams* (1892), 36 S.C. 493; 15 S.E. 554 (ignorance of law no defence *re* municipal legislation). See also *R. v. Slegg and Slegg Forest Products Ltd.* (1974), 17 C.C.C. (2d) 149 at 157 (B.C. Prov. Ct.) in which the court held:

It is no defence that the defendant used diligence to obtain legal advice and acted upon it. . .

195. [1963] A.C. 160; [1963] 2 W.L.R. 42; [1963] 1 All E.R. 223 (P.C.) (Singapore).

196. *Id.* at 171; [1963] 2 W.L.R. at 47; [1963] 1 All E.R. at 226-7. The quotation is *dicta*, the main question before their Lordships being whether or not proof of *mens rea* was required for conviction under the Ordinance. However, it is worth noting that:

It may perhaps be implied from this judgment that the existence or otherwise of a statutory provision relating to promulgation would be determinative of the existence of a defence of the kind outlined. However, it is suggested that with a multiplicity of delegated legislation such a position would be unwise, particularly since the provision and the defence only partially overlap. As in *MacLean*, an accused may still be misled: and the defence may have limited operation beyond the terms of a provision the same or similar in terms to the English enactment.¹⁹⁷

3. *The Relevance of Mens Rea*

Mistake or ignorance of law, when considered as a possible defence to a criminal charge, is generally relied upon to negate the *mens rea* required by the particular offence charged.¹⁹⁸ Thus, there is ample authority to suggest that mistake of law constituting a claim of colour of right, or as a defence to charges involving wilful, corrupt, or malicious behaviour, is a defence because the mistake

(a) Their Lordships appear to be prepared to distinguish between legislative and non-legislative acts as was done in *Ross* and *MacLean*.

(b) Their Lordships use the word "appropriate" to qualify the word "inquiry". The same word is used by O Hearn J. in *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 587; 17 C.C.C. (2d) 84 at 107; 27 C.R.N.S. 31 at 55 (N.S. Cty. Ct.). See *infra*, note 207.

(c) As to the reference to the English Statutory Instruments Act, see *supra*, note 186.

197. An interesting sidelight to *MacLean* is the reference by O Hearn J. in that case (*R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 582; 17 C.C.C. (2d) 84 at 102; 27 C.R.N.S. 31 at 49) to the concept of "due process" as it affects this question. In *Lambert v. California* (1957), 355 U.S. 225, a majority of the American Supreme Court struck down an obscure Los Angeles municipal ordinance requiring a convicted felon resident in Los Angeles for more than five days to register with the police, as violative of due process. The basis of the decision was apparently that to convict on the basis of passive conduct without adequate notice to an accused that such passive conduct violates a legal duty is contrary to due process. See G. Mueller, *On Common Law Mens Rea* (1958), 42 Minn. L.R. 1043; *U.S. v. Juzwiak* (1958), 258 F.2d 844 (Second Circuit); *Reyes v. U.S.* (1958), 258 F.2d 774 (Ninth Circuit).

198. See, for example, Brett, *supra*, note 178 at 191, citing as examples *R. v. Crespigny* (1795), 1 Esp. 280; 170 E.R. 357; *R. v. Allday* (1837), 8 C. & P. 136; 173 E.R. 431; *R. v. Dodsworth* (1837), 8 C. & P. 218; 173 E.R. 467. Most authority treats the point as axiomatic, but a clear example is *R. v. Bohman* (1975), 20 C.C.C. (2d) 117 at 125 (Ont. D.C.), in which a plea of mistake of law leading to lack of *mens rea* was rejected because the accused deliberately attracted prosecution to produce a test case, and hence had pre-existing *mens rea*.

negatives a particular *mens rea* required to constitute the crime.¹⁹⁹ This basis is accommodated in the theory founded upon the *malum in se* — *malum prohibitum* distinction under the theory that:

. . . the knowledge that the relevant conduct is legally forbidden is an essential element of its immorality.²⁰⁰

*Long v. State*²⁰¹ was predicated upon a finding by the court in that case that ignorance or mistake of law will not only negative the “specific intent” required by larceny or “wilful” offences, but will also negative a “general intent” or “*mens rea* as we commonly understand it”.²⁰² While in the former case, the lack of “specific intent” will lead to acquittal, in the latter, considerations of policy dictate a conviction notwithstanding lack of *mens rea*.²⁰³ The court then held that where the accused makes a *bona fide* and diligent effort to ascertain and abide by the law, and acts in accordance with his enquiries, the policy considerations underlying *ignorantia juris* are satisfied and the accused should be acquitted because of lack of *mens rea*.²⁰⁴

In *MacLean*, O Hearn J. pointed out that the offence with which the accused was charged (s. 238(3)) was an offence requiring *mens rea*,²⁰⁵ and therefore His Lordship could follow the *Long* reasoning consistently. But would the result have been different had the

199. These defences are detailed, *supra*, note 169.

200. Hall, *supra*, note 156 at 35. See also Keedy, *supra*, note 153 at 90-1. Brett, *supra*, note 178 at 196 n. 65, regards the two positions as incompatible.

201. *Supra*, note 164.

202. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 584; 17 C.C.C. (2d) 84 at 104; 27 C.R.N.S. 31 at 51 (N.S. Cty. Ct.) citing *Long v. State (Delaware)* (1949), 65 A.2d 489 at 497.

203. *Long v. State (Delaware)* (1949), 65 A.2d 489 at 497:

Thus, mistake of law is disallowed as a defence in spite of the fact that it may show an absence of the criminal mind. The reasons for disallowing it are practical considerations dictated by deterrent effects upon the administration and enforcement of the criminal law . . .

Citing Perkins, *supra*, note 169 at 41.

204. *Long v. State (Delaware)* (1949), 65 A.2d 489 at 498:

Any deterrent effects upon the administration of the criminal law which might result from allowing a mistake of [that] classification as a defence seem greatly outweighed by considerations which favor allowing it.

205. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 579; 17 C.C.C. (2d) 84 at 99; 27 C.R.N.S. 31 at 46 (N.S. Cty. Ct.) citing *R. v. Jollimore* (1962), (46 M.P.R. 283; 131 C.C.C. 319 (*sub nom. R. ex rel. Ross v. Jollimore*); 36 C.R. 300 (N.S.S.C. *in banco*); *R. v. Finn*, [1972] 3 O.R. 509; 8 C.C.C. (2d) 233 (C.A.); *R. v. Roliff*, [1973] 11 C.C.C. (2d) 10 (Ont. C.A.); *R. v. Ooms* (1973), 11 C.C.C. (2d) 69 (Sask. C.A.).

accused been charged with violation of the regulation of which he was ignorant? Presumably the court would have been forced to determine whether the regulation created a strict liability offence.

Two comments arise from this discussion. First, is the *MacLean* defence restricted to crimes requiring *mens rea*? If so, it will have very limited scope in cases of direct mistake or ignorance of regulations, since many regulations must be regarded as imposing strict liability particularly when regard is had to the Supreme Court of Canada's criterion for such offences, which rests in part upon whether or not the offence is serious and carries a criminal character or stigma.²⁰⁶ Secondly, in cases of *collateral* mistake or ignorance, it would presumably be open to the Crown to prosecute for violation of the regulation directly rather than pursue the collateral crime in some cases, and hence avoid the *MacLean* defence.

4. *The Source of Reliance*

The excusing principle formulated from *MacLean* requires an accused to inquire at an "appropriate" source. O'Hearn J. shed little light upon the meaning of this criterion, commenting:

. . . while there were other sources of information open to him, he went to the source that people ordinarily use to secure information about drivers' licenses and the requirements of licensing and in that sense the source was appropriate. In an objective sense it was not appropriate of course, but subjective ignorance of that fact is merely part of the communal ignorance of the law and things legal.²⁰⁷

This passage presents difficulty. On the one hand it is said that the source was "appropriate" because people would ordinarily use it, thus implying a degree of objectivity, but on the other hand it is said that the source in this case was not objectively "appropriate". The resolution of this apparent ambiguity is of no little importance

206. See, for example, *R. v. Pierce Fisheries Ltd.*, [1971] S.C.R. 5 at 17; 12 D.L.R. (3d) 591 at 600; 12 C.R.N.S. 272 at 281; [1970] 5 C.C.C. 193 at 201, *per* Ritchie J., who in holding that the regulations did not require *mens rea* noted:

I do not think that a new crime was added to our criminal law by making regulations [of this kind] . . . nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of these regulations.

The exception derives principally from *Sherras v. De Rutzen*, [1895] 1 Q.B. 918 (Q.B.D.).

207. *R. v. MacLean* (1974), 46 D.L.R. (3d) 564 at 587; 17 C.C.C. (2d) 84 at 107; 27 C.R.N.S. 31 at 54 (N.S. Cty. Ct.).

for the difference is between imposing responsibility for recklessness (subjectively “appropriate”) or for negligence (objectively “appropriate”). If the defence applies only to crimes requiring *mens rea*, it is submitted that the former is the more consistent course to adopt.

The concept of “appropriate” will mean that the character of the source will depend largely upon the type of law involved in the case. O Hearn J. has said that one may rely upon the advice of a government official, but does that official have to be of a certain status? What would have been the result had Mr. MacLean received the same advice from his lawyer? Hall has argued that one may not plead as a defence advice by counsel, for to allow such a defence would render such advice paramount to law.²⁰⁸ However, it is said, one may rely upon an official *responsible for the administration of an area of law*, within that area, since by power of discretion and interpretation, the official may be said to have *quasi-legislative power*.²⁰⁹ Yet in *Long v. State*, the advice upon which the accused relied was that of his lawyer.²¹⁰ One looks forward to further judicial utterance.

5. *The Quality of Ignorance and Mistake*

The fact that the accused must make inquiry will mean that the successful plea based on *MacLean* will be more correctly described as “mistake” than “ignorance”. In terms of a concept of responsibility based primarily on *mens rea*, this is surely as it should be: for should not the person who makes an effort to discover his

208. Hall, *supra*, note 156 at 23-4. See also the discussion by Perkins, *supra*, note 169 at 42-3; Hall and Seligman, *supra*, note 169 at 652-3. Specific case examples in the U.S. have used this rationale: *People v. McCalla* (1923), 63 Cal. App. 783; 22 P. 436 at 441; *Needham v. State* (1934), 32 P.2d 92 at 93 (Oklahoma). See also *Crichton v. Victorian Dairies*, [1965] V.R. 49 (Vict. S.C., Full Ct.).

209. Hall, *id.* at 24 and 26. Strong *dicta contra* are contained in *Howell v. Falmouth Boat Const. Co.*, [1951] A.C. 837 at 845, 849; [1951] 2 All E.R. 278 at 280-1, 284-5; [1951] 2 T.L.R. 151 at 155-6, 158 (H.L.). But see supporting authority discussed at length by Hall and Seligman, *id.* at 167-683, and the illustrative cases of: *R. v. Dodsworth* (1837), 8 C. & P. 218; 173 E.R. 467; *State v. Freeland* (1927), 318 Mo. 560; 300 S.W. 675; *People v. Ferguson* (1933), 134 Cal. App. 41; 24 P.2d 965; *People v. Settles* (1938), 29 C.A. 2d 781; 78 P. 2d 274. *Quaere* whether one may rely upon judicial decision: the matter is discussed by the commentators cited *supra*, but in *R. v. Campbell*, [1973] 2 W.W.R. 246; 10 C.C.C. (2d) 26 (Alta. D.C.) the reliance upon judicial decision overturned by subsequent appeal was no excuse.

210. *Long v. State (Delaware)* (1949), 65 A.2d 489.

legal duty be in a better position than he who is ignorant because of voluntary indifference?²¹¹ To reflect such a difference in sentence alone is an inadequate response,²¹² particularly where an accused measures up to the standard of “diligent and *bona fide*” inquiry. The meaning of “diligent” will, no doubt, vary from case to case, and will therefore be subject to judicial interpretation: but when read with “*bona fide*”, it must be held to impart a less than strictly objective standard.

6. Conclusion

The utility and commonsense of the presumption that every citizen knows the law has long been doubted.²¹³ With the modern proliferation of administrative control over every facet of everyday life, it has long since been divorced from reality, and a recognition of this fact by the law has long been overdue. The spirit of *R. v. MacLean* may live to force both government and civil service to organize and make known a path through the maze of an ever increasing amount of subordinate legislation.

211. To a degree, Hall, *supra*, note 156 at 38-9 disagrees, but his position is principally in accord with that in the text. As to the distinction between ignorance and mistake, see: Howard, *supra*, note 152 at 367-370; Hall, *id.*; Brett, *supra*, note 178 at 185-6.

212. Brett, *supra*, note 178 at 201:

. . . the circumstances should entitle the defendant to full exoneration as a matter of right, rather than to something less as a matter of grace.

213. The classic statement on point is that attributed to Maule J. in *Martindale v. Falkner* (1846), 2 C.B. 706 at 719; 135 E.R. 1124 at 1129:

There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so.