

Beyond a Reasonable Doubt: Does it Apply to Finding the Law as Well as the Facts?

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1. Introduction

About a year ago I published an article in the *Criminal Law Quarterly* in which I examined the concept of proof beyond a reasonable doubt in criminal trials.¹ I looked at its application to the proof of *facts*, historically, comparatively, and analytically. The standard of proof of facts — everyone agrees — plays a crucial role in the criminal process.

What role does reasonable doubt play with respect to determining the criminal *law*, particularly the scope of statutory provisions? I had never given serious thought to the issue. I knew, of course, that there is a rule of strict construction of criminal legislation — known in the United States as the Rule of Lenity — and assumed that the rule only applies if there is a tie, which is really a balance of probability test. In other words, the better argument wins, with the ultimate burden being on the Crown.² Many, if not most, readers probably assume this is the correct approach.

The standard for finding the criminal law, like the standard of proof of facts, is important, yet surprisingly little has been written about it in Canada,³ unlike in the United States, where there are many major articles.⁴ There are, of course, relatively brief discussions in

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1. Martin Friedland, 'Searching for Truth in the Criminal Justice System' (2014), 60 C.L.Q. 487.
2. See Gary Lawson, 'Proving the Law' (1992), 86 Northwestern University Law Review 859, at p. 890.
3. See Stephen Kloepper, 'The Status of Strict Construction in Canadian Criminal Law' (1983), 15 Ottawa Law Review 553; Eric Tucker, 'The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's' (1985), 35 University of Toronto Law Journal 113; and Ruth Sullivan,

Canadian texts dealing with statutory interpretation. In both jurisdictions, statutory interpretation constitutes the bulk of the work of the supreme courts. Former U.S. Justice John Paul Stevens, recently writing in the *New York Review of Books*, states: 'Now a substantial majority of the Supreme Court's caseload involves statutory construction.'⁵ The present article is restricted to an analysis of interpreting criminal laws.

There are many possible standards for finding the law, ranging from a balance of probability to beyond a reasonable doubt.⁶ Having now examined the issue, I conclude that for most alleged criminal conduct, the state should have to find the *law* as well as the facts beyond a reasonable doubt. Chief Justice James McRuer was right in stating for the Ontario Court of Appeal in a 1945 case, *R. v. Wright*: 'In this, as in all criminal cases, the onus is on the Crown to make out a case against the accused beyond a reasonable doubt in law as well as in fact.'⁷

'Interpreting the Criminal Code: How Neutral Can it Be?' (1989), 21 *Ottawa Law Review* 221.

4. See, for example, Livingston Hall, 'Strict or Liberal Construction of Penal Statutes' (1935), 48 *Harvard Law Review* 748; John Jeffries, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985), 71 *Virginia Law Review* 189; Robert Batey, 'Techniques of Strict Construction: The Supreme Court and the Gun Control Act of 1968' (1986), 13 *American Journal of Criminal Law* 123; Gary Lawson, 'Proving the Law' (1992), 86 *Northwestern University Law Review* 859; Dan Kahan, 'Lenity and Federal Common Law Crimes', [1994] *Supreme Court Review* 345; Andrew Goldsmith, 'The Void-for-Vagueness Doctrine in the Supreme Court, Revisited' (2003), 30 *American Journal of Criminal Law* 279; Zachary Price, 'The Rule of Lenity as a Rule of Structure' (2004), 72 *Fordham Law Review* 885; Notes, 'The New Rule of Lenity' (2006), 119 *Harvard Law Review* 2420; Peter Westen, 'Two Rules of Legality in Criminal Law' (2007), 26 *Law and Philosophy* 229; and Youngjae Lee, 'Reasonable Doubt and Moral Elements,' (forthcoming, 2015) 104 *Journal of Criminal Law and Criminology*.
5. 'Law Without History,' *New York Review of Books*, October 23, 2014, at p. 22.
6. Indeed, there is an even lower possible standard than balance of probability if there are, say, three possible interpretations and the test is 'the best argument wins.' This could bring the standard below 50%, which, however acceptable in politics, resulting in minority governments, should not be acceptable for interpreting criminal laws.
7. (1945), 85 C.C.C. 397, 1 C.R. 40, [1946] 3 D.L.R. 250 (Ont. C.A.). I will use such words as 'make out a case,' 'find,' and 'prove' interchangeably, even though lawyers do not usually refer to a ruling or holding on the law as 'proving' the law. Perhaps this is because there are some situations, such as finding foreign law, where the law has to be 'proven' by *testimony*, whereas domestic law can be determined by judicial notice. But there are facts that can be determined without testimony – by judicial notice or presumptions – which we still refer to as 'proof'. See also, Ronald Allen and Michael Pardo,

The *Wright* case is typical of the problems of interpretation that often arise in criminal cases. In that case, the accused was in an accident involving his motor cycle and was charged with failing to stop, render assistance, and give his name and address, contrary to the Canadian *Criminal Code*.⁸ He had in fact stopped and given assistance, but did not give his name and address. The issue was whether the words 'motor car' used in the section included a 'motor cycle'. The Court of Appeal held it did not, Justice McRuer stating: 'I do not think that plain men would understand that when the statute used the word "motor car" it meant to say "motor car or motor-cycle" nor do I think that the ordinary man in Canada, whose conduct it is sought to regulate by the provisions of the *Criminal Code*, can be taken to understand that Parliament meant the word "motor car" to apply to a "motorcycle."' "

Wright is similar to the opinion in the well-known American case of *McBoyle*,⁹ delivered in 1931 by Justice Oliver Wendell Holmes for the Supreme Court of the United States, where a federal statute prohibited the transportation of a stolen motor vehicle over state lines. *McBoyle* had transported a stolen airplane. Was this covered by the statute which defined 'motor vehicle' as including 'an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails'? Holmes J. held that it was not covered and reversed the conviction, stating:¹⁰

When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

Holmes did not articulate a specific standard. But, as we shall see below, many judges have.

'The Myth of the Law-Fact Distinction' (2003), 97 Northwestern University Law Review 1769, at p. 1770: 'By discarding the false notion that "law" and "fact" are fundamentally different, the haziness surrounding the distinction evaporates, and it becomes clear that functional considerations [such as determining who decides the issue and whether an appeal is possible] underlie the decision to label any given issue "legal" or "factual".' See also Timothy Endicott, 'Questions of Law' (1998), 114 Law Quarterly Review 292.

8. *Criminal Code*, R.S.C. 1985, c. C-46, s. 252 (*Criminal Code*).

9. *McBoyle v. United States*, 283 U.S. 25 (1931).

10. *Ibid.*, at p. 27. Would *McBoyle* be decided differently under the Harvard Law Review's 'preferable' approach that the rule of lenity apply 'only when an ambiguous criminal statute would otherwise criminalize innocent conduct'? See Notes, 'The New Rule of Lenity' (2006), 119 Harvard Law Review 2420, at p. 2441.

2. Why should there be a Rule of Strict Construction?

We want the criminal law to be certain, in fairness to citizens. As Glanville Williams stated in *Criminal Law: The General Part*: ‘The citizen must be able to ascertain beforehand how he stands with regard to the criminal law; otherwise to punish him for breach of that law is purposeless cruelty.’¹¹ Persons should be able to plan their lives knowing what is legal and what is illegal. As Holmes J. stated in the *McBoyle* case, above: ‘Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed.’¹²

For the same reason, legal systems do not like *ex-post facto* laws. Not only is there a presumption against such legislation,¹³ the *Canadian Charter of Rights and Freedoms* specifically prohibits such laws, stating in s. 11(g) that: ‘Any person charged with an offence has the right . . . not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law.’¹⁴ The interpretation of a law to cover conduct not clearly within a provision is the same — although normally not as blatant — as introducing a whole new provision.

Strict construction of penal statutes is also similar to the rule, to be discussed below, against vagueness in criminal legislation. In such cases, the courts not only discuss the unfairness of the lack of notice, but also the effect it may have on enforcement by the police and prosecutors. A vague law, such as in some earlier vagrancy provisions, does not give the police or prosecutors sufficient guidance in determining what conduct is illegal, thereby giving the

11. Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (Stevens, 1961), at p. 575, cited in *R. v. Levkovic*, [2013] 2 S.C.R. 204, 296 C.C.C. (3d) 457, 1 C.R. (7th) 223 (S.C.C.), at para. 33.

12. *McBoyle*, *supra*, footnote 9, at p. 27.

13. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (LexisNexis, 2008), at p. 669.

14. See Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, 5th ed. (Irwin Law, 2013), at pp. 315-16. Procedural changes, however, that are intended to apply retroactively do not come within the prohibition of s. 11(g): see *R. v. Bagri*, [2004] 2 S.C.R. 248, 184 C.C.C. (3d) 449, 21 C.R. (6th) 82 (S.C.C.). See also *R. v. Clarke*, [2014] 1 S.C.R. 612, 308 C.C.C. (3d) 299, 9 C.R. (7th) 251 (S.C.C.), a non-Charter case, where legislation taking away extra credit for time served awaiting trial was unanimously upheld by the Supreme Court because (at para. 1) ‘the legislation unequivocally states that it is to have retrospective effect.’

enforcers of the law too much discretion in arresting and charging citizens.

A rule of strict construction also serves — to some extent — as a counterweight to a government's law and order agenda. Tough penalties, minimum sentences, removal of parole, and harsh penal conditions apply today in both Canada and the United States, particularly in the United States. Marginalized groups in both countries suffer disproportionately under such an agenda. The judiciary can play a role in ensuring that criminal penalties are not expanded beyond the clear intention of the legislature.¹⁵ As we will see, the rule was introduced in the eighteenth century in England to counter a law and order agenda when the government removed the benefit of clergy from a large number of offences, resulting in more convictions for capital cases.

There are other concerns, to be discussed below, such as transferring too much offence-creating power from the legislature to the courts. The importance of this consideration will vary from jurisdiction to jurisdiction.

3. Should we look at Ambiguity or Certainty?

Sometimes Canadian courts talk of 'ambiguity' in interpreting legislation and sometimes they talk of 'certainty'. The two concepts are two sides of the same coin. There can be degrees of certainty in facts and in law. We usually do not — although we could — use the term ambiguity in relation to facts. Instead, we tend to use the idea of certainty. Similarly we do not usually refer to the certainty of law, although we could. Instead, we tend to use the word ambiguity. I think that using certainty helps to quantify more easily the degree of ambiguity that should be required in deciding whether the statute covers the conduct in question.

There are many Canadian judges who have used 'beyond a reasonable doubt' in relation to the law. We will only look at Supreme Court of Canada judges in this brief survey. Chief Justice John

15. See William Eskridge, 'Overriding Supreme Court Statutory Interpretation Decisions' (1991), 101 *Yale Law Journal* 331, at pp. 413-14: 'The Court can serve as the "conscience" of the nation's pluralism by bringing attention to interests that go unrepresented in Washington and values that are overlooked . . . To take the best example, the rule of lenity requires that the Court interpret ambiguous criminal prohibitions in favor of the accused and against the government . . . This rule serves the representation-reinforcing goal of protecting a relatively powerless group (people accused of committing crimes) and . . . injecting due process values of notice, fairness, and proportionality into the political process.'

Cartwright often did so. In the 1951 *Rowe* case, for example, he stated: ‘any doubt as to its meaning which remains after the application of the rules of construction must be resolved *in favorem vitae* [in favour of life].’¹⁶ Again, in a 1970 case, *Bélanger*,¹⁷ Cartwright C.J. cited McRuer C.J. in the *Wright* case and quoted with approval a passage from *Maxwell on Interpretation of Statutes*, which stated:¹⁸ ‘Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself.’ Justice John Sopinka also adopted this passage from Maxwell in *United Nurses of Alberta* (1992), stating: ‘the equivocal or ambiguous nature of the words [in the statute in question] leave a reasonable doubt with respect to this issue. The appellant is entitled to the benefit of this doubt.’¹⁹

Similarly, Justice Peter Cory cited Maxwell with approval in *Hasselwander*²⁰ in 1993, as had Justice Bertha Wilson in *Paré* in 1987, where she stated:²¹ ‘while the original justification for the doctrine has been substantially eroded, the seriousness of imposing criminal penalties of any sort demands that reasonable doubts be resolved in favour of the accused.’ One can question, however, whether the doctrine was in fact appropriately applied in the *Paré* case, where the accused had deliberately killed a child two minutes after indecently assaulting him. The *Criminal Code* made such a killing first-degree murder if the killing took place ‘while committing’ the assault; otherwise it would be second-degree murder. The Supreme Court unanimously held that the killing in the almost contemporaneous circumstances of this case was committed ‘while committing’ the assault.²²

16. *R. v. Rowe*, [1951] S.C.R. 713, 100 C.C.C. 97, 12 C.R. 148 (S.C.C.), at p. 725.

17. *R. v. Bélanger*, [1970] S.C.R. 567, [1970] 2 C.C.C. 206, 10 C.R.N.S. 373 (S.C.C.), at pp. 572-573.

18. *Maxwell on Interpretation of Statutes*, 7th ed. (Sweet and Maxwell, 1929), at p. 244.

19. *U.N.A. v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, 71 C.C.C. (3d) 225, 13 C.R. (4th) 1 (S.C.C.), at p. 950.

20. *R. v. Hasselwander*, [1993] 2 S.C.R. 398, 81 C.C.C. (3d) 471, 20 C.R. (4th) 277 (S.C.C.), at p. 411.

21. *R. v. Paré*, [1987] 2 S.C.R. 618, 38 C.C.C. (3d) 97, 60 C.R. (3d) 346 (S.C.C.), at p. 630.

22. The Supreme Court gave a similarly expansive meaning to the section by holding in *R. v. Russell*, [2001] 2 S.C.R. 804, 157 C.C.C. (3d) 1, 44 C.R. (5th) 231 (S.C.C.), that the person killed does not have to be the same person as the person that is sexually assaulted. It should be noted that Justice Wilson was part of a five-person court in *R. v. Stubar Investments Ltd.*, [1984] 1

Some Canadian academic writers also favour the reasonable doubt test. Don Stuart, for example, uses the language of reasonable doubt, stating: 'It is fundamental to give the accused the benefit of the reasonable doubt on the evidence. There seems to be every reason to give him the same benefit in respect of a doubtful proposition of law.'²³ Kent Roach would also appear to favour using a reasonable doubt test. In a discussion of what a court should do in a criminal case when the French and English versions differ, he rightly states that 'the court should select the more restrictive provision.' He then adds: 'Such an approach is consistent with the doctrine of the strict construction of the criminal law and its concerns that there be fair notice about criminal liability and that reasonable doubts be resolved in favour of the accused.'²⁴

Many, if not most, Canadian judges, however, use the language of 'ambiguity', rather than 'certainty'. Some use both. Chief Justice Bora Laskin, for example, in a 1980 case, *McLaughlin*,²⁵ referred to 'the general rule that in construing criminal statutes they should, where there is uncertainty or ambiguity of meaning, be construed in favour of rather than against an accused.' Laskin did not state what the degree of ambiguity or certainty should be before interpreting the legislation against the Crown, although he added that the accused 'must be brought fully within the statute.' Justice Brian Dickson also used the concept of ambiguity, but qualified it by stating in *Marcotte* in 1976:²⁶ 'It is unnecessary to emphasize the importance of clarity and certainty when freedom is at stake. No authority is needed for the proposition that if real ambiguities are found, or doubts of substance arise, in the construction and application of a statute affecting the liberty of a subject, then that statute should be applied in such a manner as to favour the person against whom it is sought to be enforced.'

S.C.R. 536, 10 D.L.R. (4th) 1, (*sub nom.* Stubar Investments Ltd. v. Minister of National Revenue) 53 N.R. 241 (S.C.C.), which had rejected using a rule of strict construction for taxing statutes, which had formerly been the practice.

23. Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed. (Carswell, 2014), at p. 41.

24. Kent Roach, *Criminal Law*, 5th ed. (Irwin Law, 2012), at p. 87, citing *R. v. Daoust*, [2004] 1 S.C.R. 217, 180 C.C.C. (3d) 449, 18 C.R. (6th) 57 (S.C.C.). Manning, Mewett and Sankoff, *Criminal Law*, 4th ed. (LexisNexis, 2009) do not discuss the concept of strict construction, although they have a section (pages 75-85) on the related concept of vagueness.

25. *R. v. McLaughlin* (1980), [1980] 2 S.C.R. 331, 53 C.C.C. (2d) 417, 18 C.R. (3d) 339 (S.C.C.), at p. 335.

26. *Marcotte v. Canada (Deputy Attorney General)* (1974), [1976] 1 S.C.R. 108, 19 C.C.C. (2d) 257, 51 D.L.R. (3d) 259 (S.C.C.), at p. 115.

Justice Antonio Lamer tended to use the language of ambiguity, qualifying it with the word ‘reasonable’. In *Paul*, in 1982, he stated:²⁷

The ordinary rules of interpretation would have us then look to discover Parliament’s purpose and give those words whatever meaning within reasonable limits that would best serve the object Parliament set out to attain. But when dealing with a penal statute the rule is that, if in construing a statute there appears any reasonable ambiguity, it be resolved by giving the statute the meaning most favourable to the persons liable to penalty.

In *Levkovic* in 2013, Justice Arthur Fish stated that ‘any ambiguity as to [an] element of the offence is resolved in favour of the accused.’²⁸

So, from this brief survey, there are many possibilities: ‘genuine ambiguity’, ‘true ambiguity’, ‘reasonable ambiguity’, ‘real ambiguity’, ‘any ambiguity’, or just plain ‘ambiguity.’

The United States Supreme Court also sometimes uses the concept of reasonable doubt and sometimes the word ambiguity,²⁹ often qualifying the word ambiguity. In *Muscarello v. U.S.* in 1998,³⁰ for example, Justice Stephen Breyer for the majority adopted the expression ‘grievous ambiguity or uncertainty,’ used in earlier cases,³¹ a standard which appears to favour the prosecution more than, say, ‘reasonable ambiguity’. In *Muscarello*, the court had to determine whether a federal statute enhancing a penalty to a *minimum* five-year sentence for a person who ‘uses or carries a firearm’ for certain offences — in this case, selling marijuana — was guilty if the gun was locked in the glove compartment of his car. Justice Breyer for the majority said the accused was carrying a gun and therefore upheld the minimum sentence, stating:³²

[The] petitioners and the dissent invoke the rule of lenity. The simple existence of some statutory ambiguity, however, is not sufficient to

27. *R. v. Paul*, [1982] 1 S.C.R. 621, 67 C.C.C. (2d) 97, 27 C.R. (3d) 193 (S.C.C.), at p. 633.

28. *R. v. Levkovic*, [2013] 2 S.C.R. 204, 296 C.C.C. (3d) 457, 1 C.R. (7th) 223 (S.C.C.), at para. 13.

29. See, for example, *Moskal v. U.S.*, 498 U.S. 103 (1990), at p. 107, *per* Justice Thurgood Marshall for the Court (quotation marks dropped): ‘We have repeatedly emphasized that the touchstone of the rule of lenity is statutory ambiguity.’ Reasonable doubt is also used by Marshall J. in the same case (at p. 108): ‘we have always reserved lenity for those situations in which a reasonable doubt persists about a statute’s intended scope . . .’

30. *Muscarello v. U.S.*, 524 U.S. 125 (1998).

31. Citing *Staples v. U.S.*, 511 U.S. 600 (1994), footnote 17, *per* *Chapman v. U.S.*, 500 U.S. 453 (1991), at p. 463, *per* Rehnquist C.J.

32. At pp. 138-39. For clarity, I have dropped all quotation marks and citations in the quote.

warrant application of that rule, for most statutes are ambiguous to some degree . . . The rule of lenity applies only if, after seizing everything from which aid can be derived . . . we can make no more than a guess as to what Congress intended . . . To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute . . . Certainly, our decision today is based on much more than a guess as to what Congress intended, and there is no grievous ambiguity here.

Justice Ruth Ginsburg for the minority held, however, that the interpretation of the relevant section in *Muscarello* 'is not decisively clear one way or the other' and, applying the rule of lenity, held that the minimum penalty could not be imposed. She also used the concept of ambiguity, stating:³³

The sharp division in the Court on the proper reading of the measure confirms, at the very least . . . that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant . . . Where text, structure, and history fail to establish that the Government's position is unambiguously correct — we apply the rule of lenity and resolve the ambiguity in the defendant's favor.

US Supreme Court Justice Antonin Scalia, who joined in Justice Ginsburg's dissent, rightly asks in a book he co-authored, *Reading Law: The Interpretation of Legal Texts*: 'How much ambiguousness constitutes an ambiguity?' and favours using the concept of reasonable doubt with respect to the rule of lenity, stating: 'The criterion we favor is this: whether, after all the legitimate tools of interpretation have been applied, "a reasonable doubt persists."'³⁴ It is interesting and somewhat surprising, that, as one legal commentator, Dan Kahan, noted in a 1994 article,³⁵ 'in the main, the Court's most conservative members, including Justices Scalia and Thomas, have been lenity's most vigorous defenders, and the Court's most liberal members, including Justice Stevens and the late Justice Marshall, its most forceful detractors.' One would have expected very conservative judges to tend to support the prosecutors' position.

As stated above, I think it is better to use the concept of certainty rather than ambiguity. Lawyers are used to degrees of certainty, not

33. At pp. 149-150. Again, I have dropped quotation marks and citations.

34. Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (West, 2012), at p. 299. See Notes, 'The New Rule of Lenity' (2006), 119 Harvard Law Review 2420, at p. 2435, which notes that Justice Scalia 'in most contexts applies the rule of lenity much more aggressively than the rest of the Court.'

35. Dan Kahan, 'Lenity and Federal Common Law Crimes,' [1994] Supreme Court Review 345, at p. 348.

degrees of ambiguity. It is true, as we have seen, that some adjectives can precede the word ambiguity, but usually the word is not qualified or quantified.

There are dozens and dozens of cases in the U.S. Supreme Court in the past few decades interpreting criminal statutes and deciding whether to impose the rule of lenity.³⁶ I do not have the space or the expertise to analyze these many cases. I will, however, discuss the very latest decision I have seen, *Yates v. United States*,³⁷ which was released on February 25, 2015 — while I was preparing this article. It shows how complex and surprisingly divisive these cases can be.

Yates was the captain of a commercial fishing vessel in the Gulf of Mexico. Federal agents found undersized red grouper in the boat and ordered the captain to keep those fish separate and return to port. While returning to shore, the captain ordered the crew to throw the undersized fish overboard. He was charged with destroying, concealing, and covering up undersized fish to impede a federal investigation in violation of 18 U.S.C. §1519. That section's origins was as a provision of the Sarbanes-Oxley Act of 2002, a law designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A person can be imprisoned for up to 20 years if he 'knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence' a federal investigation. Is a fish a 'tangible object'?

In *Yates*, as in *Muscarello v. U.S.*, above, Justice Ginsburg, for three other members of the court,³⁸ gave a narrow reading to the section, holding that a fish is not a tangible object within the meaning of the Act. She concluded that "'a tangible object" within §1519's compass is one used to record or preserve information' and a fish is not such an object. Even if they had not reached that conclusion, these four members of the court would have overturned the conviction under the rule of lenity, stating: 'if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object," as that term is used in §1519, we would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."³⁹

36. Notes, 'The New Rule of Lenity' (2006), 119 Harvard Law Review 2420 states (at p. 2428) that 'Between 1986 and 2005 . . . the Court decided forty-eight cases implicating the rule of lenity.'

37. *Yates v. U.S.*, 574 U.S. ____ (2015).

38. Chief Justice John Roberts, Justice Stephen Breyer and Justice Sonia Sotomayer. Justice Samuel Alito concurred in holding that the fish were not tangible objects, but did not discuss the rule of lenity.

39. *Yates v. U.S.*, *supra*, footnote 37, at p. ____.

Justice Elena Kagan dissented, along with three other justices, holding that fish are ‘tangible objects’ within the Act. Citing Dr. Seuss’s classic, *One Fish Two Fish Red Fish Blue Fish*, she states: ‘A fish is, of course, a discrete thing that possesses physical form . . . So the ordinary meaning of the term “tangible object” in §1519, as no one here disputes, covers fish (including too-small red grouper.)’⁴⁰ In spite of one’s initial reaction to Justice Kagan’s decision, there are, I should point out, respectable arguments in favour of her position that examine the legislative history of the section, which I will not pursue here.

Justice Kagan does not discuss the rule of lenity, except to note that ‘even in its most robust form, that rule only kicks in when, “after all legitimate tools of interpretation have been exhausted, “a reasonable doubt persists” regarding whether Congress has made the defendant’s conduct a federal crime.’” She cites for this description of the rule of lenity Justice Scalia’s dissent in the 2014 *Abramski v. U. S.* case the previous year, where he had stated in one of the many gun control decisions⁴¹ involving the rule of lenity heard by the Court: ‘the rule of lenity applies whenever, after all legitimate tools of interpretation have been exhausted, “a reasonable doubt persists” regarding whether Congress has made the defendant’s conduct a federal crime.’⁴² In *Yates*, Justice Scalia joined in Justice Kagan’s decision. I leave it to my American-trained colleagues to explain why Justice Scalia gave a broad interpretation to the section in *Yates* and a narrow one in *Abramski*. Was it because *Abramski* involved the control of firearms?

So eight of the nine members of the US Supreme Court in *Yates* — all except Justice Samuel Alito, who did not discuss the rule of lenity — did not reject a reasonable doubt standard for propositions of law. At least five members of the court, and perhaps more, accept the standard. Will this be the federal standard in future cases?⁴³ Perhaps. A number of state courts accept the reasonable doubt standard, particularly California and Massachusetts.⁴⁴ I suspect, however, that the United States Supreme Court will continue to struggle with the

40. *Ibid.*, at _____. Justices Scalia, Kennedy, and Thomas joined Justice Kagan’s dissent.

41. See generally, Robert Batey, ‘Techniques of Strict Construction: The Supreme Court and the Gun Control Act of 1968’ (1986), 13 American Journal of Criminal Law 123.

42. *Abramski v. U.S.*, 134 S.Ct. 2259 (U.S., 2014), at p. 2281.

43. I have examined U.S. Supreme Court cases from *Yates* up to the end of April 2015 and there are no further cases that mention the rule of lenity.

44. See Robert Batey, ‘Techniques of Strict Construction’ (1986), 13 American Journal of Criminal Law 123, at pp. 133-34.

proper standard of interpretation in cases where there is some ambiguity.

4. History of the Rule of Strict Construction

The rule of strict construction has had a long history in the common law world.⁴⁵ Blackstone stated in the mid-eighteenth century that ‘penal statutes must be construed strictly’ and gives as an example the interpretation of a statute that took away benefit of clergy from those stealing ‘horses,’ stating that ‘the judges conceived that this did not extend to him that should steal but one horse, and therefore procured a new act for that purpose the following year.’⁴⁶ Chief Justice Matthew Hale stated in his *Pleas of the Crown* that removal of the benefit of clergy ‘is only so far ousted, and only in such cases and as to such persons as are expressly comprised within such statutes, for *in favorem vitae* . . . such statutes are construed literally and strictly.’⁴⁷

Criminal law scholar Livingston Hall has convincingly shown that the withdrawal of the benefit of clergy from a large number of offences in the eighteenth century was responsible for the rise of the rule, which then became generally accepted by the English courts.⁴⁸ In 1787, for example, the judges at the Old Bailey stated:⁴⁹

In all cases . . . so highly penal as the present case is, it is certainly necessary not only to consider the intention of the Legislature, but to bring the offender within the words of the Act of Parliament itself . . . The Judges . . . are not to consider what the Legislature would have done in certain cases, but to look at the words they have used, and to construe them according to the meaning which it is most likely they entertained at the time the subject was under their consideration.

45. See generally, Stephen Klopfer, ‘The Status of Strict Construction in Canadian Criminal Law’ (1983), 15 *Ottawa Law Review* 553, at p. 555 et seq.

46. Blackstone, *Commentaries on the Laws of England*, volume 1, (Chicago, 1979), at p. 88.

47. Matthew Hale, *A History of the Pleas of the Crown*, 1st American ed., volume 2 (Philadelphia: Robert H Small, 1847), at p. 335. This is a restatement of the original 1678 text, Matthew Hale, *Pleas of the Crown: A Methodical Summary*, (London: Professional Books, 1972), at p. 230, which had stated “Consequently where any felony is made by a new [statute] clergy is to be allowed, unless expressly taken away.”

48. Livingston Hall, ‘Strict or Liberal Construction of Penal Statutes’ (1935), 48 *Harvard Law Review* 748, at pp. 749-51. For a discussion of benefit of clergy, see John Beattie, *Crime and the Courts in England 1660-1800* (1986), at pp. 141-146; Jerome Hall, *Theft, Law and Society*, 2nd ed. (Bobbs-Merrill, 1952).

49. *The King v. Hammond* (1787), 168 Eng. Reports 324, at p. 325.

The 1780s, as discussed in my earlier article,⁵⁰ is the very decade during which the concept of reasonable doubt of facts was established. One of the main reasons for the adoption of the reasonable doubt rule was the increasing use of lawyers in criminal proceedings in the 1780s. Why did the use of lawyers increase? Because of the American Revolution in 1776, transportation to the New World had stopped. In previous decades, perhaps two thirds of all convicts were transported to America. After transportation to America was terminated, hangings in England increased, as did imprisonment, primarily on hulks on the Thames, to work on dredging the river. There were also alternate transportation destinations, in particular to West Africa, where hundreds were sent and plans were in place to send thousands more. Convicts therefore ceased being transported to a new life in the New World, but were being sent to an uncertain fate — likely death — in West Africa. Transportation to Australia did not commence until 1787. So it is not surprising that the use of lawyers increased in the 1780s and that the rule of lenity was accepted by the courts.

The rule of lenity was first adopted by the United States Supreme Court in an 1820 case, *Wiltberger*, where the court dealt with the question whether a statute which had extended American criminal law jurisdiction over manslaughter to the ‘high seas’ applied to a homicide committed on a ship in a river in China.⁵¹ Chief Justice John Marshall held for the Court that the statute did not apply, stating that the rule of lenity is ‘perhaps not much less old than construction itself.’ He went on to say:⁵²

The rule that penal laws are to be construed strictly is . . . founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment.

Chief Justice Marshall’s statement that ‘it is the legislature, not the court, which is to define a crime and ordain its punishment’ was not the first time the court expressed such an opinion. In 1812, the court held that ‘certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction

50. Friedland, ‘Searching for Truth in the Criminal Justice System’, at pp. 501-506. Other examples of strict interpretation in this period can be found in James Oldham, ‘Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries’ (2011), 29 Law and History Review 181.

51. *U.S. v. Wiltberger*, 18 U.S. 76 (1820).

52. *Ibid.*, at p. 95.

of crimes against the state is not among those powers . . . all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.⁵³ This is a major reason why the conservative members of the Supreme Court favour the rule of lenity. As Dan Kahan states:⁵⁴ ‘Under this view, criminal lawmaking is the prerogative of Congress and Congress alone. Lenity promotes this conception of legislative supremacy not just by preventing courts from covertly undermining legislative decisions, but also by forcing Congress to shoulder the entire burden of criminal lawmaking, even when [Congress] prefers to cede some part of that task to courts.’ ‘The less the courts insist on precision,’ Scalia J. argues, ‘the less the legislatures will take the trouble to provide it.’⁵⁵

5. Codification of the Criminal Law

The issue of the proper standard for determining the criminal law has come up over the past centuries in various proposed criminal codes. The grandfather of codification in the criminal law world, Jeremy Bentham, was in favour of codification in order to limit the law-making role of judges. In the end, he never drafted a code and so did not reveal what type of a provision he would have provided. One can be reasonably sure, however, that his criminal code would have kept the judges from extending the criminal law through the common law process, which he called ‘bastard law,’⁵⁶ or by the interpretation of the law against the interests of the accused. To Bentham, the common law was *ex post facto* law: ‘It is the judges . . . that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it and then you beat him for it. This is the way you make laws for your dog and this is the way the judges make laws for you and me.’⁵⁷ He would have strongly supported a rule of strict construction.⁵⁸

53. *U.S. v. Hudson*, 11 U.S. 32 (1812). See John Jeffries, ‘Legality, Vagueness, and the Construction of Penal Statutes’ (1985), 71 *Virginia Law Review* 189, footnotes 9 and 10, which shows that common law offences were still used in state courts in the early years.

54. Dan Kahan, ‘Lenity and Federal Common Law Crimes,’ [1994] *Supreme Court Review* 345, at p. 350.

55. Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (West, 2012), at p. 303.

56. See Timothy Endicott, ‘Arbitrariness’ (2014), 27 *Canadian Journal of Law and Jurisprudence* 1, at pp. 5-6, discussing Bentham’s version of the rule of law.

57. Jeremy Bentham, *Collected Works*, volume V, (William Tait, 1843), at p. 235.

Some of Bentham's followers, however, did draft codes. Thomas Macaulay, with the help of others, drafted a code for India in 1837, which was enacted after the Indian Mutiny of 1858.⁵⁹ In their report on the proposed code, the Commissioners adopted a rule of strict construction, stating:⁶⁰ 'we think that the accused party ought always to have the advantage of a doubt on a point of law, if that doubt be entertained after mature consideration by the highest judicial authority, as well as a doubt on a matter of fact.' Such doubts should be communicated to the Law Commission and, if desirable, the code should be changed, in some cases by the sections of the code and in others by the introduction of illustrations 'such as may distinctly show in what sense the legislature intends the law to be understood.'⁶¹ 'In this manner,' they optimistically wrote, 'every successive edition of the Code will solve all the important questions as to the construction of the Code which have arisen since the appearance of the edition immediately preceding.' Unlike judicial expansions of the law, which normally operate prospectively and retrospectively, changes in the code would operate only prospectively.⁶²

Macaulay and the other commissioners noted in their report that they derived assistance from the Benthamite code prepared by Edward Livingston in 1824. Livingston's code for the state of Louisiana dealt with the question of interpretation by providing:⁶³ 'The distinction between a favourable and unfavourable construction of laws is abolished. All penal laws whatever are to be construed according to the plain import of their words, taken in their usual sense, in connection with the context, and with reference to the matter of which they treat.' But he did not abolish the rule of lenity

58. He did propose a 'rule of lenity', but that rule was in relation to imprisonment, which he argued should not be detrimental to health and life. See Gertrude Himmelfarb, *Victorian Minds: A Study of Intellectuals in Crisis and Ideologies in Transition* (Knopf, 1968), at p. 49.

59. Available Online. See François Lareau's website when Googling 'India Codes,' where Lareau provides a link to the Indian Code: *The Indian penal code (Act XLV of 1860) with notes, by W. Morgan, and A. G. Macpherson*, (G. C. Hay, 1863), online: <<http://www.lareau-law.ca/codification-India.html>>.

60. *Ibid.*, at p. xviii.

61. *Ibid.*, at p. xix.

62. See Martin Friedland, 'Prospective and Retrospective Judicial Lawmaking' (1974), 24 *University of Toronto Law Journal* 170.

63. Edward Livingston, *A system of Penal Law, Works* (1873), taken from page 1079 of my personal copy of Michael and Wechsler's criminal law casebook, which I used as a student: Jerome Michael and Herbert Wechsler, *Criminal Law and Its Administration* (Foundation Press, 1940).

because in a later section he provided: 'Courts are expressly prohibited from punishing any acts or omissions which are not forbidden by the plain import of the words of the law, under the pretence that they are within its spirit. It is better that acts of an evil tendency should for a time be done with impunity, than that courts should assume legislative powers . . .'

Another nineteenth century American code, drafted in the 1860s by David Dudley Field, formed the basis of a number of American state criminal codes. The New York State interpretation provision did not, however, provide for the rule of lenity, stating: 'The rule that a penal statute is to be strictly construed does not apply to this chapter or any of the provisions thereof, but all such provisions must be construed according to the fair import of their terms, to promote justice and effect the objects of the law.'⁶⁴

Similarly, the code drafted in England in the 1870s for the Colonial Office by R.S. Wright, later Justice Wright, did not contain a provision requiring strict construction. Wright did not trust the judiciary, particularly because of their anti-labour rulings, and attempted to be comprehensive in the various provisions and exact in the language used, including providing detailed definitions for key words and spelling out the *mens rea* required for each element of an offence. As a result, s. 8(ii) of Wright's code states: 'This Code shall not be construed strictly either as against Her Majesty or as against a person accused of any offence, but shall be construed amply and beneficially for giving effect to the purposes thereof.'⁶⁵

In contrast, James Fitzjames Stephen's Criminal Code, which as modified by the Commissioners' Code of 1880 became the law in Canada, Australia and many other countries, did not have a section on the subject, presumably leaving it to the judges to rely on the existing rules of interpretation.⁶⁶ England still does not have a general section in its *Interpretation Act* with respect to criminal legislation.⁶⁷

64. Michael and Wechsler, *ibid.*, at p. 1079.

65. Drafts of a Criminal Code and Code of Criminal Procedure for the Island of Jamaica, presented to Parliament by Command of Her Majesty, 9 August 1877, C 1893. The Code is not included in the Irish University Press' British Parliamentary Papers Series.

66. The two codes are compared in M.L. Friedland, 'R.S. Wright's Model Penal Code: A Forgotten Chapter in the History of the Criminal Law' (1981), 1 Oxford Journal of Legal Studies 307. It is somewhat strange that in my supposedly comprehensive analysis of Wright's code I did not mention his interpretation provision. As stated earlier, it was not until I started exploring the issue for this article that I gave much thought to the question of strict construction.

67. See Michael Zander, *The Law-Making Process*, 6th ed. (Cambridge, 2004), at p. 191, discussing an attempt to bring in such a provision in a draft criminal

Canada also does not have a general provision in the criminal code dealing with interpretation. The Law Reform Commission of Canada drafted such a provision in the 1980s, which combines the concept of a normal interpretation and a rule of strict interpretation where there is ambiguity. Section 1(3) of the proposed 1987 criminal code states, under the heading 'Interpretation':⁶⁸

- (a) The provisions of this Code shall be interpreted and applied according to the ordinary meaning of the words used read in the context of the Code.
- (b) Where a provision of this Code is unclear and is capable of more than one interpretation it shall be interpreted in favour of the accused.'

The commission had set out the principles for an interpretation section in its 1976 Report, *Towards a Codification of Canadian Criminal Law*, where it stated:⁶⁹

Finally and still with regard to rules of interpretation, it must be remembered that the interpretation of texts will vary according to the sector of criminal law involved and the purpose of the provision in question. Sections on offences or penalties must be interpreted strictly; those laying down rules of procedure may be given a broader interpretation; and finally those describing causes of irresponsibility should be liberally considered. The General Part of the Code should cover this point in its provisions governing interpretation.

The American Law Institute's Model Penal Code has the following s. 1.02(3):⁷⁰

The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved. The discretionary powers conferred by the Code shall be exercised in accordance with the criteria stated in the Code and, insofar as such criteria are not decisive, to further the general purposes stated in this Section.

This appears to some to eliminate the rule of lenity. Paul Robinson

code in 1985, which was then abandoned, according to Zander, 'presumably on the ground that there was no need for such a clause since the general rules of interpretation would apply.'

68. Law Reform Commission of Canada, *Report on Recodifying Criminal Law*, vol 1 (Ottawa: Department of Justice, 1986), at p. 12.

69. Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law*, (Ottawa: Department of Justice, 1976) section 3.71, at p. 55.

70. American Law Institute, *Model Penal Code* (1962).

and Michael Cahill in *Law Without Justice* state:⁷¹ ‘The Model Penal Code replaced the strict rule of lenity with a more evenhanded rule of “fair import” for interpreting the meaning of penal statutes, and about half the states have followed suit.’ But in the previous subsection,⁷² the code states that one of the purposes of the code is ‘to give fair warning of the nature of the conduct declared to constitute an offence.’ So the rule of lenity is still in the equation.

6. Interpretation Act

The search for the correct standard for determining propositions of criminal law has at times been clouded in Canada because of a section of the federal *Interpretation Act* that was first enacted by the United Province of Canada in 1849.⁷³ Clause 28 of s. 7 of the 1849 Act states:

Every . . . Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport be to direct the doing of any thing which the legislature deems to be for the public good, or to prevent or punish the doing of any thing which it deems contrary to the public good — and shall accordingly receive such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit.

The section, which looks at ‘the object of the Act’, is similar to the ‘purposive’ rule of statutory and Charter interpretation now used in Canada.⁷⁴ Was the 1849 section meant to oust the rule of strict construction in criminal matters? Not likely, because the very next

71. *Law Without Justice: Why Criminal Law Doesn't Give People What they Deserve* (Oxford, 2006) at p. 96. See also Andrew Tutt, ‘Interpretation Step Zero: A Limit on Methodology as “law”’ (2013), 122 *Yale Law Journal* 2055, at p. 2064: ‘twenty-four states have implemented the Model Penal Code’s interpretive rules. Yet, in all of these states, courts have regularly failed to apply the legislated interpretive rules.’

72. 1.02(1)(d). See the annotations by Marcus Dubber on the Model Penal Code site on the University of Toronto Faculty of Law website: <<http://www.law-lib.utoronto.ca/bclc/crimweb/web1/mpc/mpc.html#fn1>>. The final report of the National Commission on Reform of Federal Criminal Laws – Proposed New Federal Criminal Code (1971), section 102, calls for construction to achieve certain stated objectives, one of which is ‘to give fair warning of what is prohibited and of the consequences of violation.’ (As cited in Wayne LaFave, *Criminal Law*, 5th ed. (West, 2010), at p. 95.)

73. Interpretation Act, Statutes of the United Provinces, 1849, chapter 10.

74. See *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis, 2014), chapter 9; Sharpe and Roach, *The Charter of Rights and Freedoms*, *supra*, footnote 14, at pp. 52-55

clause, clause 29, states: 'Nothing in this section shall exclude the application to any Act, of any rule of construction applicable thereto, and not inconsistent with this section.' A rule of strict construction in criminal matters would therefore not be 'inconsistent' with the Act.

After Confederation, the Act was incorporated into the laws of Canada⁷⁵ and was enacted in Ontario⁷⁶ and other provinces. As far as I can determine, there was no earlier model — in or outside of Canada — for the United Province of Canada to draw on.⁷⁷ It seems to have been drafted by the newly elected reform government of Canada, which had just won the 1848 election, thereby ousting the long-ruling Tories, better known as the Family Compact.⁷⁸ Some commentators have not been aware of the origins of the section, thinking that it originated in New Zealand.⁷⁹

There was no discussion in the legislature concerning the Act,⁸⁰ but it is not difficult to work out why it was enacted. The reformers had a large number of important pieces of legislation they wanted enacted and did not want the judges to sabotage their work, particularly by invoking the then widely employed rule that a derogation from the common law should be strictly construed.⁸¹

One controversial piece of legislation passed in 1849 that was strongly opposed by the Family Compact — which I have previously written about⁸² — was the *University of Toronto Act*, which converted the Anglican King's College, with its large endowment, into the secular University of Toronto. The Chief Justice of Canada, Sir John Beverley Robinson, had been one of the founders of King's College, was opposed to its closure, and later became the first chancellor of the newly-established Trinity College, which replaced King's College as an Anglican university.

Other major pieces of legislation, which the Tories opposed,

75. Interpretation Act, Revised Statutes of Canada, 1886, chapter 1.

76. The Interpretation Act, Stat. Ont. 1868, chapter 1, section 39.

77. See Eric Tucker, 'The Gospel of Statutory Rules Requiring Liberal Interpretation According to *St. Peter*' (1985), 35 *University of Toronto Law Journal* 113, at p. 126.

78. Maurice Careless, *The Union of the Canadas* (McClelland and Stewart, 1967).

79. See the English and Scottish Law Commissions, *Report on the Interpretation of Statutes* (1969), at p. 20; Michael Zander, *The Law-Making Process*, 6th ed. (Cambridge, 2004), at p. 189.

80. See Eric Tucker, 'The Gospel of Statutory Rules' (1985), 35 *University of Toronto Law Journal* 113, at p. 127, footnote 64.

81. See William Popkin, *Statutes in Court: The History and Theory of Statutory Interpretation* (Duke, 1999), at p. 126.

82. Martin Friedland, *The University of Toronto: A History* (Toronto, 2002), at pp. 28-29.

included the first *Municipal Corporations Act*.⁸³ Another contentious Act passed in 1849 was an Act giving amnesty to persons in Upper Canada, such as William Lyon Mackenzie, who had participated in the 1837 rebellion in Upper Canada.⁸⁴ Perhaps of even greater significance was the passage of the Rebellion Losses Bill, which compensated Lower Canadians, including those supporting the rebels, whose property had been damaged in the Lower Canada rebellions of 1837-38.⁸⁵ This bill was sufficiently controversial that when Governor General Earl Grey assented to the Rebellion Losses bill — the very day that the *Interpretation Act* was given royal assent — there was a riot in Montreal and that evening the Canadian Parliament Buildings were burned down.⁸⁶ Talk about controversial bills.

Another bill enacted in 1849 established — for the first time in the United Province of Canada — a nine-member court of appeal.⁸⁷ Four of the members of the proposed court of appeal, called the court of error and appeal, were hard-line Tories,⁸⁸ including John Beverley Robinson, who had been part of the political and legal establishment for decades. The reformers had reason to fear the judges.

There was, in fact, no major criminal law legislation passed in that session⁸⁹ and so the interpretation of the criminal law was not the direct target of the *Interpretation Act*. The standard criminal law texts in the second half of the nineteenth century, such as *Taschereau's Criminal Code*, did not mention the idea that the *Interpretation Act* had affected the rule of strict construction.⁹⁰ Nor did the annotated

83. The so-called Baldwin Act, 1849. See J.H. Aitchison, 'The Municipal Corporations Act of 1849' (1949), 30 *Canadian Historical Review* 107.

84. See *Dictionary of Canadian Biography*, William Lyon Mackenzie; *Canadian Encyclopedia*, Amnesty Act 1849.

85. *Ibid.*, at p. 123 et seq.

86. The two bills received Royal Assent on April 25, 1849: see Eric Tucker, 'The Gospel of Statutory Rules' at p. 127, footnote 64. See also Maurice Careless, *The Union of the Canadas*, at pp. 125-26 for the burning of the Parliament Buildings; and *Canadian Encyclopedia*, 'Montréal Riots'.

87. Christopher Moore, *The Court of Appeal for Ontario: Defining the Right of Appeal, 1792-2013* (Toronto, 2014), at p. 18 et seq.

88. *Ibid.*, at p. 22. The others were James Buchanan Macaulay, Archibald McLean, and William Henry Draper. Robert Sympton Jameson, who retired in 1850, had worked closely with the Tory government as attorney general before he was appointed a judge in 1837 and served as a member of Canada's legislative council after he was a judge: see Moore, *The Court of Appeal* at 238-39 and the *Dictionary of Canadian Biography*.

89. There were several routine criminal statutes, such as one on arson and counterfeiting and another on fraudulent debtors.

90. Henri Taschereau, *The Criminal Code of the Dominion of Canada* (Carswell, 1893).

criminal codes in the first half of the twentieth century. The massive 1949 volume edited by Alan Harvey, *Tremeeear's Annotated Criminal Code of Canada*, also ignored the section, stating on the very first page: 'The ordinary rules of interpretation of statutes apply to the Code. It is of course a penal statute, and therefore to be strictly construed.'⁹¹ A number of cases are then cited, including a privy council case in 1872, *The Gauntlet*, where it is stated: 'No doubt all penal Statutes are to be construed strictly, that is to say, the Court must see that the thing charged as an offence is within the plain meaning of the words used, and must not strain the words on any notion that there has been a slip . . . that the thing is so clearly within the mischief that it must have been intended to be included and would have been included if thought of.'⁹² Another case cited is a 1913 Quebec Court of Appeal case which adopted the following statement from *Beal on Cardinal Rules of Legal Interpretation*:⁹³ 'Penal statutes should be construed strictly so that no cases shall be held to be reached by them but such as are within both the spirit and letter of such laws.'⁹⁴

In 1951, however, the Supreme Court of Canada held in *Robinson*⁹⁵ that the remedial section of the *Interpretation Act* ousted the rule of strict interpretation. Justice G  rald Fauteaux, for four members of the court, held that the section (renumbered as s. 15):⁹⁶

disposes of all discussion in the premises. This section, by force of section 2, extends and applies to the Criminal Code and the following words in section 15 'or to prevent or punish the doing of anything which it deems contrary to the public good' make it clear that its provisions embrace penal as well as civil statutory provisions in any Canadian statute except if there is inconsistency or a declaration of inapplicability.

Justice Charles Locke agreed, stating:⁹⁷ 'Section 15 appears to me to be substantially a restatement of the rules for the construction of statutes contained in the Resolutions of the Barons in *Heydon's Case* [decided in 1584]'.
[decided in 1584]'.

91. *Tremeeear's Annotated Criminal Code*, 5th ed. (Carswell, 1944), at p. 31.

92. *Dyke v. Elliott* (1872), L.R. 4 P.C. 184 (England P.C.), at p. 191, *per* James L.J.

93. Edward Beal, *Cardinal Rules of Legal Interpretation*, 2nd ed. (Stevens, 1908), at p. 443.

94. *R. v. Eaves* (1913), 21 C.C.C. 23, 9 D.L.R. 419, 23 B.R. 406, 1913 CarswellQue 89 (Que. K.B.).

95. *R. v. Robinson*, [1951] S.C.R. 522, 100 C.C.C. 1, 12 C.R. 101, 1951 CarswellBC 2 (S.C.C.).

96. *Ibid.*, at p. 529.

97. *Ibid.*, at p. 531.

Justice John Cartwright agreed with the result but did not discuss the *Interpretation Act*, stating that ‘if the words of an enactment which is relied upon as creating a new offence are ambiguous, the ambiguity must be resolved in favour of the liberty of the subject.’⁹⁸ He did not, however, find the words ambiguous, nor would we. Under the new habitual criminal legislation, the accused could be declared an habitual criminal if on three previous occasions he had ‘been convicted of an indictable offence for which he was liable to at least five years’ imprisonment.’ The accused had argued that this meant only those offences which had a *minimum* five year penalty — and there was only one such offence⁹⁹ — rather than offences where the accused *could* receive a five year penalty.

The *Robinson* case did not gain much traction. It was ignored by J.C. Martin in his 1955 annotations to the *Criminal Code*, except to cite Cartwright’s opinion.¹⁰⁰ It was also ignored by the Supreme Court of Canada in subsequent cases, such as *Winnipeg Film Society* (1964),¹⁰¹ where the issue was whether it was an offence under the Lord’s Day Act of Manitoba for a film society to charge a yearly fee and show films on a Sunday. In that case, the Court, which included Justice Fauteaux, the author of *Robinson*, held that it was not an offence. Justice Roland Ritchie stated for the Court:¹⁰²

The relevant rule governing the construction of penal statutes is well summarized in *Halsbury’s Laws of England*, 3rd ed., vol. 36 at p. 415: ‘It is a general rule that penal enactments are to be construed strictly and not extended beyond their clear meaning. At the present day, the rule means no more than that if, after the ordinary rules of construction have first been applied, as they must be, there remains any doubt or ambiguity, the person against whom the penalty is sought to be enforced is entitled to the benefit of the doubt.’

If the *Robinson* case decided that the rule of strict construction does not apply to criminal cases, it was wrongly decided. The *Interpretation Act* had not been argued in the British Columbia Court of Appeal in *Robinson* or in the Supreme Court of Canada factums of the parties.¹⁰³ No mention was made in the case of the

98. *Ibid.*, at p. 536.

99. Pierre-André Côté et al., *The Interpretation of Legislation in Canada*, 4th ed. (Thomson Reuters, 2011), at p. 508.

100. J.C. Martin, *Annotated Criminal Code* (Carswell, 1955).

101. *Winnipeg Film Society v. Webster*, [1964] S.C.R. 280, [1964] 3 C.C.C. 6, 44 D.L.R. (2d) 126 (S.C.C.).

102. *Ibid.*, at p. 286.

103. See Locke J.’s opinion in *R. v. Robinson*, [1951] S.C.R. 522, 100 C.C.C. 1, 12 C.R. 101 (S.C.C.), at p. 530.

section (then 29) quoted earlier, concerning rules of construction not being excluded. Perhaps this is because in one of the revisions of the statute, s. 29 had been moved to the beginning of the Act and likely had not been spotted by Justice Fauteaux. The case was decided before the judges had law clerks or research staff.

The section continued to be relied on, however, by some judges. *Robinson's* quiet death knell was in the Supreme Court of Canada in 1981 in the *Philips Electronics* case.¹⁰⁴ Justice Arthur Jessup in the Ontario Court of Appeal had relied on *Robinson* in his interpretation of a section of the federal *Combines Investigation Act*, but Justices Allan Goodman and Thomas Zuber disagreed, pointing out that the *Interpretation Act* had been changed since *Robinson*, now reading (section 11): 'Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.'¹⁰⁵ They also noted the section in the Act stating that 'Nothing in this Act excludes the application to an enactment of a rule of construction applicable thereto and not inconsistent with this Act.'¹⁰⁶ The Crown appealed as of right to the Supreme Court of Canada based on the dissent by Jessup J.A. and the Court dismissed the appeal, with oral reasons and without calling on the respondent, *Philips Electronics*. Chief Justice Bora Laskin stated for a strong Court that also included Jean Beetz, Julien Chouinard, Brian Dickson, Antonio Lamer, Ronald Martland, and William McIntyre: 'We do not need to hear you, [counsel for the accused]. We are all of the opinion that no reason has been shown to differ from the conclusion reached in the majority judgment of the Ontario Court of Appeal.'¹⁰⁷ Without directly stating so, *Robinson* had been overruled.¹⁰⁸ The following year,

104. *R. v. Philips Electronics Ltd.*, [1981] 2 S.C.R. 264, 62 C.C.C. (2d) 384, 126 D.L.R. (3d) 767 (S.C.C.). See Stephen Kloepfer, 'The Status of Strict Construction in Canadian Criminal Law,' (1983), 15 *Ottawa Law Review* 553, at p. 561 et seq.

105. *Interpretation Act*, 1967-68, c. 7. For similar earlier decisions by Jessup J.A., see Kloepfer, *ibid.*, at p. 563.

106. *R. v. Philips Electronics Ltd.* (1980), 55 C.C.C. (2d) 312, 116 D.L.R. (3d) 298, 30 O.R. (2d) 129 (Ont. C.A.), affirmed [1981] 2 S.C.R. 264, 62 C.C.C. (2d) 384, 126 D.L.R. (3d) 767 (S.C.C.).

107. The case is not widely known. *Philips* in the Supreme Court has been cited in only 13 cases according to CanLII.

108. But see Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra*, footnote 99, at p. 413, where he cites *Robinson* for the statement that 'the courts have tended towards neutral, if not benign interpretation' in penal matters.' See his discussion of *Robinson*, at pp. 507-11. He notes at p. 509 that the 'principle of strict construction of penal statutes is not totally set aside by the *Interpretation Act*. It has merely been accorded a subsidiary role,

Justice Lamer discussed the rule of strict construction in *R. v. Paul*,¹⁰⁹ but did not mention either *Robinson* or *Philips*.

But the apparent conflict continued. In *Hasselwander* (1993),¹¹⁰ the majority of the Supreme Court gave the firearms legislation a broad meaning, interpreting the words ‘prohibited weapon’ as including a weapon that was not capable of firing bullets in rapid succession with a single pressure on the trigger, but could easily be converted from a semi-automatic to an automatic weapon. Justice Peter Cory stated:¹¹¹ ‘The rule of strict construction of penal statutes appears to conflict with [the remedial provision] of the *Interpretation Act*.’ He would resolve the conflict, Cory J. went on to say, ‘by according the rule of strict construction of penal statutes a subsidiary role.’ It should be noted, however, that the case involved a forfeiture procedure, not a criminal charge, and, as we will see in a later section, such procedures may not call for the same burden of proof of the facts or the law.

We will return to *Hasselwander* later, where it will be argued that strict construction should not play a subsidiary role, but should be considered by the court along with a purposive interpretation, sometimes being of greater weight and sometimes of less weight, depending on the specific legislation under review.

7. Courts and Legislatures

One significant difference between the American and Canadian legal systems is that historically the separation of powers between the the legislature and the courts has not been as important in Canada as in the United States. It will be recalled that in *Wiltberger* in 1820 Chief Justice Marshall stated: ‘it is the legislature, not the court, which is to define a crime and ordain its punishment.’¹¹² But in Canada this has not been true for most of our history, although we have been moving in that direction since the middle of the twentieth century. The 1892 Criminal Code had permitted the creation of common-law offences, adopting James Fitzjames Stephen’s approach, rather than that of the Royal Commissioners, who had revised his code.¹¹³ Canada did

applicable when attempts at impartial interpretation suggested by s. 12 of the federal *Interpretation Act* and s. 41 of its Quebec counterpart still leave reasonable doubt as the meaning or scope of the enactment.’

109. [1982] 1 S.C.R. 621, 67 C.C.C. (2d) 97, 27 C.R. (3d) 193 (S.C.C.).

110. *R. v. Hasselwander*, [1993] 2 S.C.R. 398, 81 C.C.C. (3d) 471, 20 C.R. (4th) 277 (S.C.C.).

111. *Ibid.*, at p. 412.

112. *U.S. v. Wiltberger*, *supra*, footnote 51, at p. 95.

113. See M.L. Friedland, ‘R.S. Wright’s Model Criminal Code: A Forgotten

not, in fact, eliminate common-law offences until the revision of the code in 1953.¹¹⁴ The Supreme Court of Canada had, however, decided in *Frey v. Fedoruk* in 1950 that no more *additional* common-law offences should be developed and so rejected the creation of a new offence of being a peeping-tom.¹¹⁵ In the revision of the criminal code in 1953, the existing common-law offences were enacted as specific offences in the code.

Conspiracies could, however, still consist of conduct that was not a criminal offence. Section 61(3) of the 1953 code stated:

Every one who conspires with any one
(a) to effect an unlawful purpose, or
(b) to effect a lawful purpose by unlawful means,
is guilty of an indictable offence and is liable to imprisonment for two years.

This section, involving the potentially expansive words 'unlawful purpose' and 'unlawful means', was not repealed until 1985.¹¹⁶ Today, the *Criminal Code* provides that a criminal conspiracy has to be to commit an indictable or summary conviction offence.¹¹⁷

The different histories of the relationship between the courts and the legislatures in specific countries can affect the tolerance of the courts to transfer some of the law-making power from the legislature to the courts. American courts have generally been less willing to accept such a transfer than Canadian courts, while English courts have been more willing to do so. The House of Lords, for example, upheld a conviction for conspiracy to corrupt public morals in the well-known 1961 case of *Shaw v. Director of Public Prosecutions*,¹¹⁸ the so-called Ladies Directory Case. Lord Reid was the only dissent, stating that it was 'now established that the courts cannot create new offences by individuals' and added: 'Every argument against creating new offences by an individual appears to me to be equally valid against creating new offences by a combination of individuals.'¹¹⁹ The majority of the court held otherwise.

Chapter in the History of the Criminal Law' (1981), 1 Oxford Journal of Legal Studies 307, at pp. 326-7.

114. Alan Mewett, 'The Criminal Law, 1867-1967' (1967), 45 Canadian Bar Review 725, at pp. 726-730. The courts did, however, keep the common-law offence of contempt of court.

115. [1950] S.C.R. 517, 97 C.C.C. 1, 10 C.R. 26 (S.C.C.).

116. R.S.C. 1985, c. 27, s. 61(3).

117. *Criminal Code*, s. 465.

118. (1961), [1962] A.C. 220, [1961] 2 All E.R. 446, 45 Cr. App. R. 113 (U.K. H.L.).

119. *Ibid.*, at pp. 274-75.

In the United States, as we know, Congress is often at odds with the president and there are often party and other differences between the House of Representatives and the Senate, which in the case of individual pieces of legislation are worked out in a conference between the two Houses. Moreover, because of the quantity and complexity of legislation at the federal level, there is usually little time to discuss and debate legislation. There is also inherent difficulty in being exhaustive when legislating on such matters as fraudulent conduct or organized criminality. As a result, federal legislation is often less detailed than it might otherwise have been and has been subject to many compromises. Some members of the judiciary take these difficulties into account in deciding whether the legislation is impermissibly vague. Others, such as Justice Scalia, insist that Congress define clearly the precise scope of an offence.¹²⁰

These problems are less acute in Canada because the executive normally controls the House of Commons and the Canadian Senate is usually far less obstructive of the wishes of the government than the U.S. Senate can be. The political structure of the two countries has therefore affected the use of the void for vagueness doctrine.

8. Vagueness

The concept of 'vagueness,' as stated above, is closely related to the rule of strict construction.¹²¹ As Herbert Packer observed in his book, *The Limits of the Criminal Sanction*,¹²² the two doctrines, 'have an intimate connection and may most usefully be thought of as contiguous segments of the same spectrum.' If it is undesirable for a criminal statute to be ambiguous because it does not give fair

120. See generally, Dan Kahan, 'Lenity and Federal Common Law Crimes,' [1994] Supreme Court Review 345.

121. See generally, John Jeffries, 'Legality, Vagueness, and the Construction of Penal Statutes' (1985), 71 Virginia Law Review 189. Another concept, 'overbreadth,' is related to the concept of vagueness, but is different in that it deals with legislation that is unnecessarily broad to meet its objective. See *R. v. Demers*, [2004] 2 S.C.R. 489, 185 C.C.C. (3d) 257, 20 C.R. (6th) 241 (S.C.C.); *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, 320 C.C.C. (3d) 1, 17 C.R. (7th) 1 (S.C.C.), at paras. 46, 85-88; see also Peter Hogg, 'The Brilliant Career of Section 7 of the Charter' (2012), 58 Supreme Court Law Review 195, at pp. 201-204. Both vagueness and overbreadth are discussed in Hamish Stewart, *Fundamental Justice and the Charter of Rights and Freedoms* (Irwin Law, 2012), at p. 127 et seq.; and Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed. (Carswell, 2014), at p. 125 et seq.

122. Herbert Packer, *The Limits of the Criminal Sanction* (Stanford, 1968), at p. 93. See also Wayne LaFare, *Criminal Law*, 5th ed. (West, 2010), at p. 96: 'No doubt there is no exact borderline that can be drawn between a statute which is merely ambiguous and one which is unconstitutionally vague.'

warning to citizens, it is similarly wrong to permit vague statutes that do not tell the citizen what conduct he or she should avoid doing.

In *Reese* (1875), said to be the first void-for-vagueness case in the United States Supreme Court,¹²³ the Court stated:¹²⁴ 'A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution . . . Every man should be able to know with certainty when he is committing a crime.' There are many similar statements, such as the statement in the 1972 *Grayned* case,¹²⁵ that the laws should 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.' A widely-quoted judicial statement in a 1926 case, *Connally*, is that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'¹²⁶

In the United States, vagueness may be unconstitutional under the fifth amendment's due process clause, applicable to the federal government, or under the fourteenth amendment's due process clause applicable to the individual states. In Canada, vagueness may violate s. 7 of the Charter: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'¹²⁷

Vagueness can also arise under s. 1 of the Charter — after there has been a breach of the Charter — on the question whether the law can be upheld as a reasonable limit 'prescribed by law as can be demonstrably justified in a free and democratic society', particularly under the heading of 'minimal impairment.'¹²⁸ As

123. Andrew Goldsmith, 'The Void-for-Vagueness Doctrine in the Supreme Court, Revisited' (2003), 30 *American Journal of Criminal Law* 279, at p. 280.

124. *U.S. v. Reese*, 92 U.S. 214 (1875), at p. 219.

125. *Grayned v. Rockford (City)*, 408 U.S. 104 (1972), at p. 108.

126. *Connally v. General Construction Co.*, 269 U.S. 385 (1926), at p. 391.

127. See generally, Don Stuart, *Canadian Criminal Law: A Treatise*, 6th ed. (Carswell, 2011), at p. 27 et seq.

128. See *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.), at p. 137, where Dickson C.J. stated: 'The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the *Charter* supports this conclusion.'

Robert Sharpe and Kent Roach state with respect to section 1 in their text, *The Charter of Rights and Freedoms*:¹²⁹ 'Excessively vague laws that do not define powers in a precise manner do not provide effective limitations on the exercise of those powers.'

There have been many cases in the United States, at both the federal and state level,¹³⁰ where vagueness has caused the provision to be struck down, but far fewer in Canada.¹³¹ Vagueness is not necessarily undesirable.¹³² As stated above, the principal reason for the difference in the use of the concept of vagueness in the two countries is that in the United States it is said not to be the court's function to define the offence. This view is strongly held by Justice Antonin Scalia, who stated in a recent book:¹³³ 'a fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less the legislatures will take the trouble to provide it.'

There is another concern that is of growing importance, that is, the effect of vague statutes on the enforcement of the law. If a statute is vague, police and prosecutors have greater scope for arresting and prosecuting individuals, leaving it to the courts to determine later whether the conduct comes within the legislation. This is particularly so for offences under vagrancy-type laws, where the courts in both the United States¹³⁴ and Canada¹³⁵ have struck down or limited such legislation.

Canadian courts have, however, been reluctant to strike down legislation as unconstitutionally vague. In *Canada v. Pharmaceutical Society (Nova Scotia)*, 1992, Justice Charles Gonthier noted:¹³⁶

129. *The Charter of Rights and Freedoms*, *supra*, footnote 14, at p. 68 and, generally, *ibid.*, chapter 4.

130. See, for example, Charles Torcia, *Wharton's Criminal Law*, 15th ed. (Clark Boardman Callaghan, 1992) vol. 1, section 11.

131. See Sharpe and Roach, *The Charter of Rights and Freedoms*, *supra*, footnote 14, at p. 242 et seq.

132. Andrew Goldsmith, 'The Void-for-Vagueness Doctrine in the Supreme Court, Revisited' (2003), 30 *American Journal of Criminal Law* 279, at p. 285. See also Gillian Hadfield, 'Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law' (1994), 82 *California Law Review* 541.

133. Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts* (West, 2012), at p. 301.

134. See, e.g., *Papachristou v. Jacksonville (City)*, 405 U.S. 156 (1972); *Kolender v. Lawson*, 461 U.S. 352 (1983).

135. See *R. v. Heywood*, [1994] 3 S.C.R. 761, 94 C.C.C. (3d) 481, 34 C.R. (4th) 133 (S.C.C.).

136. (*sub nom.* *R. v. Nova Scotia Pharmaceutical Society*) [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 15 C.R. (4th) 1 (S.C.C.) at p. 636.

A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute. Such is the crux of the concern for limitation of enforcement discretion. When the power to decide whether a charge will lead to conviction or acquittal, normally the preserve of the judiciary, becomes fused with the power to prosecute because of the wording of the law, then a law will be unconstitutionally vague.

In both countries, a measure of vagueness is properly permitted. General language which requires judicial interpretation is a reasonable technique for drafting legislation. Law is, by its very nature, vague.¹³⁷ So, for example, anti-combines legislation that prohibits conduct that 'unduly' limits competition has been upheld in both jurisdictions.¹³⁸ Words like 'reasonable' are found throughout the *Criminal Code*.¹³⁹ Other phrases in Canadian cases, such as 'likely danger to health,' relating to abortion legislation, have not been found to be too vague.¹⁴⁰ Nor was it found to be too vague in a 1995 Supreme Court of Canada Case, *R. v. Canadian Pacific Ltd.*,¹⁴¹ interpreting a prohibition in the Ontario Environmental Protection Act against the pollution 'of the natural environment for any use that can be made of it'. Justice Gonthier stated for the Court:¹⁴² 'The use of broad and general terms in legislation may well be justified, and s. 7 does not prevent the legislature from placing primary reliance on the mediating role of the judiciary to determine whether those terms apply in particular fact situations . . . [The] standard of legal precision required by s. 7 will vary depending on the nature and subject matter of a particular legislative provision.'

And sometimes — in both countries, but particularly in Canada — vagueness is cured by judicially limiting or reading down the scope of the section.¹⁴³ Recent Canadian cases interpreting sections of the *Criminal Code* narrowly by 'reading down' the legislation include

137. See Timothy Endicott, 'Law is Necessarily Vague' (2001) 7 Legal Theory 379. See also Andrew Ashworth, *Principles of Criminal Law*, 6th ed. (Oxford, 2009), at p. 66.

138. *Canada v. Pharmaceutical Society (Nova Scotia)*, *supra*, footnote 136 and *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1 (1911).

139. The word 'reasonable' and 'reasonably' occur throughout the Canadian *Criminal Code*. There are, for example, over 40 such uses in the first 35 sections of the Code: words such as 'reasonable grounds', 'reasonably necessary', 'reasonable proof', 'reasonable dispatch', 'reasonable in the circumstances,' and 'reasonable efforts,' etc.

140. Beetz J. in *R. v. Morgentaler*, (*sub nom.* *R. v. Morgentaler* (No. 2)) [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1 (S.C.C.), at para. 106 et seq.

141. (*sub nom.* *Ontario v. Canadian Pacific Ltd.*) [1995] 2 S.C.R. 1031, 99 C.C.C. (3d) 97, 41 C.R. (4th) 147 (S.C.C.).

142. *Ibid.*, at para. 49.

Sharpe,¹⁴⁴ dealing with possession of child pornography; *Wakeling*,¹⁴⁵ relating to the disclosure of confidential information to foreign countries; *Khawaja*,¹⁴⁶ interpreting anti-terrorism legislation; *Levkovic*,¹⁴⁷ on when a fetus, born dead, can be considered a child which cannot be secretly disposed of; and *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*,¹⁴⁸ on when a parent can physically discipline a child. American courts appear less inclined to reshape overinclusive or otherwise unconstitutional laws by ‘reading down’ or ‘reading in’ language to limit the laws. They prefer to handle such cases through an exemption for the litigant,¹⁴⁹ a technique which is rarely used in Canada.¹⁵⁰

In *Canada v. Pharmaceutical Society (Nova Scotia)* (1992), Justice Gonthier stated: ‘This leads me to synthesize these remarks about vagueness. The substantive notice and limitation of enforcement discretion rationales point in the same direction: an unintelligible provision gives insufficient guidance for legal debate and is therefore unconstitutionally vague.’¹⁵¹ ‘Insufficient guidance for legal debate’ is not a very high hurdle for the government to get over and so it is not

143. See Sharpe and Roach, *The Charter of Rights and Freedoms*, *supra*, footnote 14, at pp. 421-22.

144. *R. v. Sharpe*, [2001] 1 S.C.R. 45, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72 (S.C.C.).

145. *United States of America v. Wakeling*, [2014] 3 S.C.R. 549, 318 C.C.C. (3d) 134, 15 C.R. (7th) 1 (S.C.C.). Three judges struck it down, three upheld it; and McLaughlin C.J.’s judgment narrowing the scope of the conduct therefore became the judgment of the court.

146. *R. v. Khawaja*, [2012] 3 S.C.R. 555, 290 C.C.C. (3d) 361, 97 C.R. (6th) 223 (S.C.C.).

147. *R. v. Levkovic*, [2013] 2 S.C.R. 204, 296 C.C.C. (3d) 457, 1 C.R. (7th) 223 (S.C.C.).

148. (*sub nom.* *Canadian Foundation for Children v. Canada*) [2004] 1 S.C.R. 76, 180 C.C.C. (3d) 353, 16 C.R. (6th) 203 (S.C.C.).

149. There is a good discussion of the American experience of remedies for unconstitutional legislation in chapter 14 of Kent Roach, *Constitutional Remedies in Canada*, 2nd ed. (Carswell, December 2013 version), who states at 14.90: ‘American courts have retained a preference for narrow forms of invalidation as opposed to facial declarations of invalidity. A typical remedy for unconstitutional legislation in the United States is to hold that it is invalid as applied to the litigant whose rights are violated. As Carol Rogerson has demonstrated, the American approach to invalidating unconstitutional laws is tied up with their constitutional requirement to decide actual cases and controversies and their narrow standing rules.’

150. See Sharpe and Roach, *The Charter of Rights and Freedoms*, *supra*, footnote 14, at p. 425: ‘The Supreme Court has been reluctant to use constitutional exemptions.’

151. *Supra*, footnote 136, at p. 638.

surprising that there have been very few cases where legislation has been struck down in Canada as being void-for-vagueness.

9. Rethinking Strict Interpretation of Criminal Statutes in Canada

The overruling of *Robinson*¹⁵² in 1982 by the Supreme Court of Canada's *Philips Electronics* decision¹⁵³ and the realization that s. 12 of the *Interpretation Act* relating to the remedial interpretation of all statutes was never meant to give the rule of strict interpretation a subsidiary role in the interpretation of criminal legislation should cause the Supreme Court of Canada to reconsider its approach to the interpretation of criminal statutes. The court should revert to the manner of interpretation used by Canadian courts for one hundred years before *Robinson*.

Philips was not cited by the Supreme Court in *Paré*¹⁵⁴ in the interpretation of the words 'while committing.' *Paré* and other cases dealing with the definition of first-degree murder¹⁵⁵ should, perhaps, be reconsidered, particularly in the light of proposed legislation taking away parole for certain offences.¹⁵⁶ One wonders whether Justice Bertha Wilson would have held that the conduct constituted first-degree murder if Canada had not abolished capital punishment about ten years earlier. In any event, these cases, dealing with otherwise extremely serious criminal conduct, should not determine how the courts interpret legislation which penalizes otherwise innocent conduct. Moreover, *Hasselwander*,¹⁵⁷ in which the Supreme Court gave 'the rule of strict construction of penal statutes a subsidiary role,' can be distinguished on the basis that the case was a civil case dealing with forfeiture.

The rule of strict construction, as stated above, is not inconsistent with the so-called 'modern principle of statutory interpretation,'¹⁵⁸

152. *R. v. Robinson*, *supra*, footnote 95.

153. *R. v. Philips Electronics Ltd.*, *supra*, footnote 104.

154. *R. v. Paré*, [1987] 2 S.C.R. 618, 38 C.C.C. (3d) 97, 60 C.R. (3d) 346 (S.C.C.).

155. See *R. v. Russell*, [2001] 2 S.C.R. 804, 157 C.C.C. (3d) 1, 44 C.R. (5th) 231 (S.C.C.).

156. See 'Ottawa to introduce life sentences without parole under new legislation,' *Globe and Mail*, March 4, 2015.

157. *R. v. Hasselwander*, *supra*, footnote 110. *Philips* was cited by Cory J., but only the Ontario Court of Appeal reasons and not on the point that it overruled *Robinson*.

158. See, for example, *R. v. Bagri*, *supra*, footnote 14, at paras. 34 and 35. See also David Dougherty J.A. in *R. v. B. (L.)* (2011), 270 C.C.C. (3d) 208, 82 C.R. (6th) 197, 274 O.A.C. 365 (Ont. C.A.), at para. 51, leave to appeal refused [2011] 4 S.C.R. x (note), 291 O.A.C. 398 (note), 428 N.R. 390 (note) (S.C.C.):

drawn from statutory draftsman Elmer Driedger's writing. In *Rizzo and Rizzo Shoes Ltd., Re*¹⁵⁹ in 1998, Justice Frank Iacobucci, for the Court, adopted the following passage from Driedger's text, *The Construction of Statutes*: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.' *Rizzo and Rizzo*, which cites the remedial provision, s. 10, in the Ontario *Interpretation Act*,¹⁶⁰ has been cited by courts more than 2,000 times.¹⁶¹ But it was not a criminal case. It was a civil proceeding under the *Bankruptcy Act* dealing with the distribution of assets.

The 'modern principle' can and should be used to interpret criminal laws, but it should be used alongside the rule of strict interpretation, not to its exclusion or by giving it a subsidiary role.

This 'purposive'¹⁶² approach looks at the object of the legislation. In doing so, it rightly may look at such sources as government reports, parliamentary debates, and committee hearings. It also examines both the English and French versions of the statute to help grasp the meaning of the section in question. Such investigations often lead to a determination that the statute under investigation is not ambiguous.¹⁶³ As long as that decision is made while considering the rule of strict interpretation, that is a fair result. But if strict interpretation is given a strictly subsidiary role, then it may be too easy to find that there is no ambiguity.

'Professor Driedger's "modern principle" has become the accepted approach to statutory interpretation.'

159. [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (S.C.C.), at para. 21.

160. See now s. 64 of the Ontario *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F.: 'An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.'

161. According to CanLII, as of May 11, 2015 it has been cited 2,485 times.

162. See, for example, *R. v. Hutchinson*, [2014] 1 S.C.R. 346, 308 C.C.C. (3d) 413, 8 C.R. (7th) 255 (S.C.C.), at para. 16 (the damaged condom case).

163. Another interpretive device used in Canada is to apply 'Charter values' to unclear legislation. In *R. v. Mabior*, [2012] 2 S.C.R. 584, 290 C.C.C. (3d) 32, 96 C.R. (6th) 1 (S.C.C.), at para. 44, Chief Justice McLachlin stated for a unanimous court: 'Courts must interpret legislation harmoniously with the constitutional norms enshrined in the Charter . . . Charter values are always relevant to the interpretation of a disputed provision of the *Criminal Code*.' As the 'Charter values' approach grows, as it is likely to do, there may be even fewer cases where the legislation will in the end be considered ambiguous. See also *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 212 D.L.R. (4th) 1, [2002] 5 W.W.R. 1 (S.C.C.); *R. v. Clarke*, [2014] 1 S.C.R. 612, 308 C.C.C. (3d) 299, 9 C.R. (7th) 251 (S.C.C.).

10. Regulatory Offences

To what extent should the rule of strict construction apply to so-called ‘regulatory offences’? In my view, there is no reason why strict construction should not apply to such offences. There is, however, a line of cases suggesting that it may not be applicable. A leading case is *Ontario (Ministry of Labour) v. Hamilton (City)*,¹⁶⁴ an Ontario Court of Appeal decision, involving a charge under the *Occupational Health and Safety Act* of Ontario. Justice Robert Sharpe states for the court:¹⁶⁵

The OHSA is a remedial public welfare statute intended to guarantee a minimum level of protection for the health and safety of workers Protective legislation designed to promote public health and safety is to be generously interpreted in a manner that is in keeping with the purposes and objectives of the legislative scheme. Narrow or technical interpretations that would interfere with or frustrate the attainment of the legislature’s public welfare objectives are to be avoided.

The decision has been followed in a number of cases.¹⁶⁶ Justice Sharpe cites the Ontario *Interpretation Act* provision which, like the federal Act, states that every Act ‘shall be deemed to be remedial . . . and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.’¹⁶⁷ But should this exclude the application of the rule of strict construction? I suggest not, just as it should not do so for criminal offences. Sharpe J.A. did not mention the rule of strict construction, but might have applied it if he had found the section to be ambiguous after interpreting the section using the modern rules of statutory interpretation. As discussed earlier, the concept of strict construction is not inconsistent

164. (2002), 58 O.R. (3d) 37, 155 O.A.C. 225, 2002 CarswellOnt 220 (Ont. C.A.), leave to appeal refused (2002), 172 O.A.C. 200 (note), 301 N.R. 392 (note), 2002 CarswellOnt 2837 (S.C.C.). See also Sharpe J.A.’s case of *R. v. Schmidt* (2014), 119 O.R. (3d) 145, 318 O.A.C. 53, 304 C.R.R. (2d) 126 (Ont. C.A.), at para. 23, relating to the Ontario *Health Protection Promotion Act*. See generally, Todd Archibald, Kenneth Jull, and Kent Roach, *Regulatory and Corporate Liability* (Canada Law Book, 2014), at para. 3:20.

165. *Ontario (Ministry of Labour) v. Hamilton (City)*, *ibid.*, at para. 16.

166. See, for example, the Ontario court of appeal cases of *R. v. Kennedy* (2009), (*sub nom.* Kennedy v. Leeds, Grenville and Lanark District Health Unit) 99 O.R. (3d) 215, 254 O.A.C. 133, 2009 CarswellOnt 5699 (Ont. C.A.), leave to appeal refused (2010), (*sub nom.* Kennedy v. Leeds, Grenville & Lanark District Health Unit) 271 O.A.C. 396 (note), 406 N.R. 400 (note), 2010 CarswellOnt 2235 (S.C.C.); and *R. v. Schmidt* (2014), 119 O.R. (3d) 145, 318 O.A.C. 53, 304 C.R.R. (2d) 126 (Ont. C.A.).

167. *Interpretation Act*, R.S.O. c. I.11, s. 10.

with giving the Act a 'fair, large and liberal construction.' So, if there is ambiguity, the accused should not be convicted. In the *Ontario (Ministry of Labour) v. Hamilton (City)* case, the court did not, in fact, find any ambiguity.

If there is ambiguity, the strict construction rule should apply. In a 2011 occupational health and safety case, *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.*,¹⁶⁸ the Ontario Court of Appeal, after citing the *Ontario (Ministry of Labour) v. Hamilton (City)* case, held that the regulations in that case were ambiguous and, without mentioning the strict construction rule, properly held in favour of the accused. The regulations required a signaller when backing up by 'the operator of a vehicle, mobile equipment, crane or similar material handling equipment.' The cab of a truck (without an attached trailer) was involved in an accident where there was no signaller. Justice Eleanore Cronk for the court held that the 'vehicle' involved had to fit the description 'material handling equipment' and set aside the conviction.

In *Merk*, a 2005 Supreme Court of Canada case under the Saskatchewan *Labour Standards Act*, Justice Ian Binnie for the court also appears to suggest that the rule of strict construction should not apply to regulatory offences.¹⁶⁹ The Saskatchewan Court of Appeal¹⁷⁰ had stated that 'the interpretation of a penal statute that is ambiguous must be resolved in a manner favourable to the accused person,' adopting a passage from the 1995 Supreme Court case of *McIntosh*.¹⁷¹ Binnie states: 'In my view, with respect, this approach is of limited value when interpreting a regulatory statute such as *The Labour Standards Act*. If it is concluded in all the relevant circumstances that the legislature intended a broad approach, that is the approach that will be adopted.'¹⁷² Binnie then goes on to quote the following passage from Ruth Sullivan's text, *Sullivan and Driedger on the Construction of Statutes*:¹⁷³

The rule [of strict construction] is difficult to reconcile with federal and

168. (2011), 107 O.R. (3d) 763, (*sub nom.* R. v. Sheehan's Truck Centre Inc.) 285 O.A.C. 50, 18 M.V.R. (6th) 190 (Ont. C.A.).

169. *Merk v. I.A.B.S.O.I., Local 771* (2005), [2005] 3 S.C.R. 425, 260 D.L.R. (4th) 385, [2006] 5 W.W.R. 114 (S.C.C.).

170. *Merk v. I.A.B.S.O.I., Local 771* (2003), 233 D.L.R. (4th) 61, [2004] 7 W.W.R. 290, 28 C.C.E.L. (3d) 179 (Sask. C.A.), at para. 25, reversed (2005), [2005] 3 S.C.R. 425, 260 D.L.R. (4th) 385, [2006] 5 W.W.R. 114 (S.C.C.).

171. *R. v. McIntosh*, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171 (S.C.C.), at p. 705.

172. *Merk*, *supra*, footnote 169, at para. 33.

173. Ruth Sullivan and Elmer Driedger, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Buttersworths, 2002), at p. 387.

provincial Interpretation Acts which provide that all legislation is to be deemed remedial and given a liberal and purposive interpretation. In the clearest possible language, this statutory directive requires doubts and ambiguities in penal legislation to be resolved in a manner that promotes the purpose of the legislation, regardless of the impact on accused persons.

This proposition, I suggest, goes too far. The impact on the accused should be considered in interpreting the legislation. Justice Marie Deschamps dissented, stating:¹⁷⁴ 'Reading in a broader definition of "lawful authority" [the words in question] goes against this Court's interpretative tradition and creates inconsistencies with the use of the term in other legislative contexts. Ultimately it is up to the legislature, as occurred in this case, to extend the scope of the statute through legislative amendment.' Like Justice Sharpe in the *Ontario (Ministry of Labour) v. Hamilton (City)* case, Justice Binnie did not find any ambiguity. But what if he had? And what if the penalty had been a term of imprisonment, rather than simply a monetary fine?¹⁷⁵ The accused was a trade union, which cannot go to jail. Should the courts disregard 'the impact on accused persons'?

It is not clear what is meant by a regulatory offence.¹⁷⁶ Is the *Highway Traffic Act* a regulatory statute? Perhaps, but surely strict interpretation should be applied in such cases. How about resale price maintenance? Again, surely strict interpretation should apply, because that was the very offence being considered in *Philips Electronics*, which overruled *Robinson*.

Should the possible penalty influence the *standard* for determining the law? The penalty does not change the standard of proof on matters of fact, but should it do so on matters of law? The extent of the penalty is at present taken into account in some areas of the criminal law. In the 1985 *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)* case,¹⁷⁷ for example, the Supreme Court held that under s. 7, the 'fundamental justice' section of the Charter, legislation that provides the possibility of jail — not actual jail in the individual case, but the *possibility* of jail in the abstract — could not be combined with absolute liability.¹⁷⁸

174. *Ibid.*, at para. 61.

175. The Saskatchewan *Labour Standards Act*, 1978 c. L-1, s. 85(1.1) does not provide for the possibility of jail and moreover states in s. 85(2) that 'the burden of proof shall be on a balance of probability.'

176. See generally, Todd Archibald, Kenneth Jull, and Kent Roach, *Regulatory and Corporate Liability* (Canada Law Book, 2014), at paras. 2:60 and 2:70.

177. (1985), [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289 (S.C.C.).

178. See also *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 67 C.C.C.

If there is a possibility of jail, then the reasonable doubt standard in determining the law should clearly be required as a matter of statutory construction or under the Charter. In a recent 2015 case, *R. v. Guindon*,¹⁷⁹ the Supreme Court of Canada stated¹⁸⁰ in dealing with whether an administrative penalty comes with s. 11 of the Charter (to be discussed in the following section of this article):

'Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed.'

But if there is only the possibility of a fine, should the standard be lower?¹⁸¹ It is possible that the Supreme Court of Canada will adopt such a mid-way position as a matter of statutory interpretation: that is, when there is no possibility of imprisonment then the standard for determining the law should be on a balance of probability. I would, however, argue for a higher standard: the same as applied in the specific case to matters of fact. It should be noted that the statute in *Merk* required that the Crown only had to prove the facts on a balance of probability,¹⁸² which could be used to distinguish *Merk* from most other regulatory offences.

One result of this analysis is that when a corporation — that cannot go to jail — and an individual — who can — are both charged under a regulatory scheme with wrongful conduct, the interpretation of the relevant section may differ in the two cases. But this is not a reason to reject a higher standard of finding the law for the individual. Because corporations can challenge legislation under the Charter in cases that deny constitutional rights to individuals, even though a corporation is not similarly affected,¹⁸³ differing standards will not normally result and the two standards for determining the law would

(3d) 193, 8 C.R. (4th) 145 (S.C.C.); *R. v. Ellis-Don Ltd.*, [1992] 1 S.C.R. 840, 71 C.C.C. (3d) 63, 71 C.C.C. (3d) 63 (note) (S.C.C.).

179. 2015 SCC 41, 387 D.L.R. (4th) 228, 2015 CarswellNat 3231 (S.C.C.).

180. *Per* Justices Rothstein and Cromwell for four members of the court, at para. 76.

181. The Supreme Court held in *C. (R.) v. McDougall*, (*sub nom.* F.H. v. McDougall) [2008] 3 S.C.R. 41, 61 C.R. (6th) 1, (*sub nom.* H. (F.) v. McDougall) 297 D.L.R. (4th) 193 (S.C.C.) that in civil cases there is only one standard for the finding of facts. Justice Marshall Rothstein stated (at para. 49) that 'there is only one standard of proof and that is proof on a balance of probabilities,' which means, he goes on to say, that it is 'more likely than not that an alleged event occurred.' This should not necessarily govern the quantum of proof in criminal cases on questions of law.

182. The Saskatchewan *Labour Standards Act*, 1978 c. L-1, states in s. 85(2) that 'the burden of proof shall be on a balance of probability.'

183. See *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 67 C.C.C. (3d)

be the same. If they do differ, it would be understandable to the ordinary person that corporations may be treated differently, particularly so if the legislation specifically separates the possible punishment for individuals and corporations,¹⁸⁴ or because of the possible differing effect of s. 1 of the Charter on individuals and corporations. This issue of differing standards has arisen in Charter cases, but it should be applicable to rules of statutory interpretation.

11. The Charter

It is not necessary to rely on the Charter to determine what the proper standard is for determining the law. That can be done by ordinary rules of interpretation. Still, the Charter may assist by determining the *minimum* standard for establishing the facts and the law.

The Charter requires proof beyond a reasonable doubt for matters of fact when a person is charged with an offence. Under the heading 'Proceedings in Criminal and Penal Matters,' s. 11 of the Charter states that 'Any person charged with an offence has the right . . . (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.'¹⁸⁵ In *Lifchus* in 1997, Justice Peter Cory stated for the Court that¹⁸⁶ 'it must be made clear to the jury that the standard of proof beyond a reasonable doubt is vitally important since it is inextricably linked to that basic premise which is fundamental to all criminal trials: the

193, 8 C.R. (4th) 145 (S.C.C.); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321 (S.C.C.).

184. See Lamer J. in *Wholesale Travel*, *ibid.*, at p. 181: 'However, this is not to say that if the same provisions were enacted so as to apply exclusively to corporations, a corporation would be entitled to raise the *Charter* arguments which have been raised in the case at bar.'

185. Much could be said about other aspects of the Charter in relation to burdens and standards of proof. I will leave that complicated field to my constitutional law colleagues. It does not directly affect the arguments advanced in this paper. In brief, the person alleging a breach of the Charter has the burden of showing a *prima facie* breach. See Sharpe and Roach, *The Charter of Rights and Freedoms*, *supra*, footnote 14, at p. 88. The onus then shifts to the body which is denying a breach. The standard in upholding the provision under s. 1 of the Charter, according to Sharpe and Roach, at p. 88, is a balance of probabilities. See also Stuart, *Charter Justice in Canadian Criminal Law*, *supra*, footnote 121, at pp. 55-56, citing *R. v. Collins*, [1987] 1 S.C.R. 265, 33 C.C.C. (3d) 1, 56 C.R. (3d) 193 (S.C.C.), which held that for at least the exclusion of evidence under s. 24(2) of the Charter, the onus is on the accused to prove a Charter violation on a balance of probability.

186. *R. v. Lifchus*, [1997] 3 S.C.R. 320, 118 C.C.C. (3d) 1, 9 C.R. (5th) 1 (S.C.C.), at para. 27.

presumption of innocence.’ Chief Justice Dickson had earlier stated for the court in the well-known *Oakes* case (1986):¹⁸⁷ ‘The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct.’ This language can apply to matters of law as well as fact. A person should be considered innocent unless the statute clearly covers the alleged conduct.

The presumption of innocence is a fundamental principle of justice that also comes within s. 7 of the Charter. A person should not be deprived of ‘life, liberty and security of the person . . . except in accordance with the principles of fundamental justice.’ If the presumption of innocence is applicable under ss. 11(d) or 7 of the Charter, then it is arguable that proof beyond a reasonable doubt should apply to the law as well as the facts.

I will not go through the many cases dealing with the question of when a person has been ‘charged with an offence’ under s. 11. Suffice it to say that it is very inclusive. In *Wigglesworth* in 1987, Justice Bertha Wilson stated for the Supreme Court:¹⁸⁸ ‘all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply . . . There can be no question that parking infractions are “offences” as that word is used in s. 11 of the Charter.’¹⁸⁹

The Supreme Court could therefore hold that whenever the offence comes under ss. 7 or 11 of the Charter, the determination of the law must be determined as a matter of constitutional law to be beyond a reasonable doubt. The language that the Court used in *Vaillancourt* in 1987 could be applied to finding the law in *all* cases coming within s. 11 of the Charter. Justice Lamer stated for the Court:¹⁹⁰

187. *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.), at p. 119.

188. *R. v. Wigglesworth* (1987), [1987] 2 S.C.R. 541, 37 C.C.C. (3d) 385, 60 C.R. (3d) 193 (S.C.C.), at p. 559.

189. Note that in *R. v. Richard*, [1996] 3 S.C.R. 525, 110 C.C.C. (3d) 385, 3 C.R. (5th) 1 (S.C.C.), at p. 532, LaForest J. stated for the Court that an accused person could waive the protection of section 11(d).

190. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 (S.C.C.), at p. 654. Questions of mixed fact and law would also be determined on a proof beyond reasonable doubt standard, as in the United States: see *U.S. v. Gaudin*, 515 U.S. 506 (1995), at pp. 522-523. Cf. Youngjae Lee, ‘Reasonable Doubt and Moral Elements,’ forthcoming 2015, 104 *Journal of Criminal Law and Criminology*, who suggests that the legal aspects of matters of mixed fact and law should be decided on a lower standard.

The presumption of innocence in s. 11(d) of the *Charter* requires at least that an accused be presumed innocent until his guilt has been proven beyond a reasonable doubt.¹⁹¹ This means that, before an accused can be convicted of an offence, the trier of fact must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence. These essential elements include not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the *Charter*. Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential elements infringes ss. 7 and 11(d).

What, it may be asked, can be a more 'essential element' than the law creating the offence? As Justice Lamer states, this could be a violation of s. 11(d) or s. 7 of the *Charter*. Some might think that the beyond a reasonable doubt standard is too high for very minor offences, but as with the application of reasonable doubt to the facts, the decision-maker would likely take into account the nature of the offence and the potential penalty in deciding whether a doubt about the law is reasonable. The reasonable doubt standard is, it seems, a flexible test.¹⁹²

There are, however, a number of situations involving the criminal law where the courts have held that s. 11 is not applicable. Section 11, for example, is not applicable to disciplinary proceedings¹⁹³ or to the imposition of solitary confinement.¹⁹⁴ Nor has it been extended to administrative penalties imposed under the *Customs Act*¹⁹⁵ or under the *Income Tax Act*¹⁹⁶ or in disciplinary proceedings by securities commissions. Even administrative penalties in the millions of dollars

191. Citing *R. v. Dubois* (1985), [1985] 2 S.C.R. 350, 22 C.C.C. (3d) 513, 48 C.R. (3d) 193 (S.C.C.) and *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1 (S.C.C.).

192. See Martin Friedland, 'Searching for Truth in the Criminal Justice System' (2014), 60 C.L.Q. 487, at p. 513.

193. *R. v. Wigglesworth*, *supra*, footnote 188, at p. 559. See also *Trumbley v. Metropolitan Toronto Police Force*, [1987] 2 S.C.R. 577, 37 C.C.C. (3d) 118, 45 D.L.R. (4th) 318 (S.C.C.); *Burnham v. Metropolitan Toronto Chief of Police*, [1987] 2 S.C.R. 572, (*sub nom.* *Burnham v. Ackroyd*) 37 C.C.C. (3d) 115, 45 D.L.R. (4th) 309 (S.C.C.).

194. *R. v. Shubley*, [1990] 1 S.C.R. 3, 52 C.C.C. (3d) 481, 74 C.R. (3d) 1 (S.C.C.).

195. *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737, 192 C.C.C. (3d) 129, 24 C.R. (6th) 207 (S.C.C.). Martineau was a unanimous seven-member Court.

196. *R. v. Guindon*, *supra*, footnote 179. Four members of a seven-member Court held that the penalty of about half a million dollars under s. 163.2 of the Act did not come under s. 11 of the *Charter*, stating at para. 88 that the penalty assessed 'does not impose a true penal consequence – the magnitude reflects the objective of deterring conduct of the type she engaged in.' Three other members of the Court dismissed the appeal on the ground that proper notice of a constitutional question had not been given.

do not turn such proceeds into criminal or penal proceedings such that s.11 of the Charter applies.¹⁹⁷

Similarly, forfeiture of property obtained by crime is not subject to the safeguards under s. 11 of the Charter. The Federal Court of Appeal held¹⁹⁸ in 2008 that the federal *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* was not subject to s. 11 of the Charter. The court stated:¹⁹⁹ ‘The appellant is not an accused. He is not charged with any criminal, quasi-criminal or regulatory offence. The fact that his conduct may result in criminal prosecutions does not mean that the forfeiture procedure set out in the Act can be characterized as a penal proceeding.’ The Supreme Court of Canada in *Chatterjee*²⁰⁰ reached the same conclusion with respect to the Ontario *Civil Remedies Act, 2001* — permitting the province to enact such legislation and inferentially holding that it did not come under the protection of the Charter.

And there are other cases involving the criminal law that do not come within s. 11 of the Charter, such as hearings before the parole board²⁰¹ and applications to obtain DNA samples.²⁰² In the latter case, *Rodgers*, the Supreme Court of Canada held that obtaining a convict’s DNA before he was released was not a punishment that came within s. 11 of the Charter. Justice Louise Charron stated for the majority that this was not part of the sentencing process:²⁰³ ‘As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing.’

197. *Rowan, Re* (2012), 350 D.L.R. (4th) 157, 110 O.R. (3d) 492, (*sub nom.* Rowan v. Ontario Securities Commission) 290 O.A.C. 159 (Ont. C.A.), at paras. 51-55. See also *Lavallee v. Alberta (Securities Commission)* (2010), 317 D.L.R. (4th) 373, [2010] 8 W.W.R. 38, 474 A.R. 295 (Alta. C.A.), leave to appeal refused (2010), 510 A.R. 398 (note), 410 N.R. 382 (note), 527 W.A.C. 398 (note) (S.C.C.).

198. *Tourki v. Canada (Minister of Public Safety & Emergency Preparedness)* (2007), 223 C.C.C. (3d) 267, 284 D.L.R. (4th) 356, 367 N.R. 148 (F.C.A.).

199. *Ibid.*, at para. 43.

200. *Ontario (Attorney General) v. Chatterjee*, [2009] 1 S.C.R. 624, 242 C.C.C. (3d) 129, 65 C.R. (6th) 1 (S.C.C.), upholding the Ontario Court of Appeal decision, which held that the Charter did not apply. The Supreme Court concentrated on the division of powers question.

201. *Ramon Fernandez v. Canada (Attorney General)*, [2012] 4 F.C.R. 411, 387 F.T.R. 37 (Eng.), 2011 CarswellNat 1363 (F.C.).

202. *R. v. Rodgers*, [2006] 1 S.C.R. 554, (*sub nom.* R. v. Jackpine) 207 C.C.C. (3d) 225, 37 C.R. (6th) 1 (S.C.C.).

203. *Ibid.*, at para. 63.

In these cases, a balance of probability standard is used for matters of fact. Should that standard also apply to the interpretation of law? Perhaps, but, again, it would be preferable that a higher standard be used. Although these may not be criminal proceedings or have penal consequences, they do involve the possibility of serious consequences to the defendant. 'Beyond a reasonable doubt' may be too high a standard, but something like 'clear and convincing' should be used for determining the law and not simply that the better argument wins. These are not pure civil cases, as was *McDougall*,²⁰⁴ where wrongful conduct was alleged and the Supreme Court stated that the balance of probability test should be used, but are closer to real criminal cases. So, more than a balance of probabilities should be required in interpreting legislation in the administrative penalty cases.

12. How Widely Should the Rule of Strict Construction Apply in Criminal Matters?

As suggested above, strict construction, resulting in a very high standard for determining the law, may not be appropriate for interpreting all aspects of the criminal law. Perhaps the standard for proving the law should be related to the standard for proving the facts.

Just as strict construction and determining the law beyond a reasonable doubt should apply to all the elements of the offence, strict construction should apply to the interpretation of legislation relating to defences where the burden of proof is on the Crown to *disprove* beyond a reasonable doubt the facts that might result in a defence. Defences that come into this category include self defence, provocation, duress, consent, and necessity.²⁰⁵ Most of these defences are set out in separate provisions in the code, but they could, such as the defence of consent to an assault, be set out in the sections creating the offences.²⁰⁶ Why should interpretation in such cases differ from the standard for interpreting the section of the code setting out the elements of the offence? To the accused, a narrow

204. *C. (R.) v. McDougall*, *supra*, footnote 181.

205. There is also an issue about whether strict construction should apply to changes in judicial interpretation that are to the accused's disadvantage. See Ashworth, *Principles of Criminal Law*, 6th ed. (Oxford, 2009), at pp. 61-62. It seems to me that accused persons should not be able to rely on earlier interpretations of cases by any court, except perhaps a decision by the Supreme Court of Canada. Reasonable reliance can be dealt with by sentencing and in appropriate cases by making the decision prospective only.

206. *Criminal Code*, s. 265.

interpretation of a defence can result in a conviction in the same way as can a wide interpretation of an ingredient of the offence.

Should the same rule of construction apply for statutory defences such as insanity, where the onus of proving insanity on a balance of probability is on the *accused*?²⁰⁷ Shifting the onus also applies to other defences, such as automatism²⁰⁸ and drunkenness,²⁰⁹ where the factual burden of proof is also on the accused.²¹⁰ In the 1990 Supreme Court of Canada case of *R. v. Chaulk*,²¹¹ the issue was whether the ambiguous phrase ‘knowing [the act] was wrong’ in s. 16(1) of the *Criminal Code*²¹² means ‘legally wrong’ or whether it should be given a broader meaning. The Supreme Court did not restrict the defence to ‘legally wrong,’ but in doing so the Court did not invoke the rule of strict construction, just as in *R. v. Schwartz*,²¹³ the case it overruled, strict construction was not mentioned. And one can see the same approach taken by the Court in interpreting the phrase ‘disease of the mind.’²¹⁴ Although it is possible that the Supreme Court would apply a balance of probability test to matters of law in these cases, it is suggested that because the *actus reus* of the offence has to be proved beyond a reasonable doubt, so should the interpretation of the law.

207. *Criminal Code*, s. 16 (2) and (3).

208. See *R. v. Stone*, [1999] 2 S.C.R. 290, 134 C.C.C. (3d) 353, 24 C.R. (5th) 1 (S.C.C.). The burden of proof is also on the accused in entrapment cases: see *R. v. Mack* (1988), [1988] 2 S.C.R. 903, 44 C.C.C. (3d) 513, 67 C.R. (3d) 1 (S.C.C.).

209. *R. v. Daviault*, [1994] 3 S.C.R. 63, 93 C.C.C. (3d) 21, 33 C.R. (4th) 165 (S.C.C.).

210. See Roach, *Criminal Law*, *supra*, footnote 24, at p. 323.

211. [1990] 3 S.C.R. 1303, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1 (S.C.C.), overruling *R. v. Schwartz* (1976), [1977] 1 S.C.R. 673, 29 C.C.C. (2d) 1, 34 C.R.N.S. 138 (S.C.C.).

212. Section 16(1) is a codification of the M’Naghten test for the insanity defence: ‘No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.’

213. (1976), [1977] 1 S.C.R. 673, 29 C.C.C. (2d) 1, 34 C.R.N.S. 138 (S.C.C.).

214. See *R. v. Bouchard-Lebrun*, [2011] 3 S.C.R. 575, 275 C.C.C. (3d) 145, 89 C.R. (6th) 1 (S.C.C.), in which LeBel J. stated for the Court at para. 60 that the interpretation of disease of the mind ‘is thus flexible enough to apply to any mental condition that, according to medical science in its current or future state, is indicative of a disorder that impairs the human mind or its functioning, and the recognition of which is compatible with the policy considerations that underlie the defence provided for in s. 16 *Cr. C.*’ See also *R. v. Cooper* (1979), [1980] 1 S.C.R. 1149, 51 C.C.C. (2d) 129, 13 C.R. (3d) 97 (S.C.C.), interpreting ‘disease of the mind’ and ‘appreciating the nature and quality of the act’. A similar result can be seen in *R. v. Oommen*, [1994] 2 S.C.R. 507, 91 C.C.C. (3d) 8, 30 C.R. (4th) 195 (S.C.C.).

The shifting of the burden is permitted by the courts under the Charter in these cases because the information concerning the defence is within the knowledge and control of the accused. The overall burden of the offence is on the Crown to prove guilt beyond a reasonable doubt.

Should the rule apply to statutory defences, such as limitation periods,²¹⁵ age,²¹⁶ double jeopardy, or territorial jurisdiction,²¹⁷ which bar the court from finding the accused guilty? In the case of territorial jurisdiction, as previously noted, the very first United States Supreme Court case dealing with the rule of lenity, *Wiltberger*,²¹⁸ applied the rule of lenity to a defence of lack of territorial jurisdiction in the trial of an accused for murder outside the United States. Similarly, the rule of lenity has been applied to double jeopardy cases by American courts.²¹⁹ In the 1957 case of *Prince v. U.S.*, Chief Justice Earl Warren referred to the 'policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history.'²²⁰ The Supreme Court of Canada has taken the same approach in the double jeopardy cases, such as *Riddle*²²¹ and *Paul*,²²² although in the latter case the Supreme Court held that the statute was not ambiguous.

A further issue relates to sections of the *Criminal Code* dealing with matters of procedure. It is difficult to say how the rule of strict construction should apply to such provisions. The related rule against *ex post facto* legislation does not normally apply to

215. *Criminal Code*, s. 786.

216. *Criminal Code*, s. 13.

217. *Criminal Code*, s. 6 (2).

218. *U.S. v. Wiltberger*, 18 U.S. 76 (1820).

219. See George Thomas, *Double Jeopardy: The History, the Law* (New York University Press, 1998), at p. 153: 'The Court has long applied a rule of lenity in double jeopardy cases.' See also Thomas, 'A Unified Theory of Multiple Punishments' (1985), 46 *University of Pittsburgh Law Review* 1, at pp. 15-22 and pp. 37-44. I have not explored how far the rule of lenity has been applied in the United States beyond the multiple punishment cases.

220. 352 U.S. 322 (1957), at p. 322.

221. *R. v. Riddle* (1979), [1980] 1 S.C.R. 380, 48 C.C.C. (2d) 365, 100 D.L.R. (3d) 577 (S.C.C.), at p. 390, *per* Dickson J.: 'That being so, it would take language other than that found in ss. 534 to 537 to manifest an intent on the part of Parliament to take away such defence. The *Code* does not contain all the criminal law and Part XXIV does not contain all of the law relating to summary convictions. No authority is needed for the proposition that common law rights are not to be held to be taken away or affected by statute unless such an intent is made manifest by clear language or necessary implication.'

222. *R. v. Paul*, [1982] 1 S.C.R. 621, 67 C.C.C. (2d) 97, 27 C.R. (3d) 193 (S.C.C.).

procedural matters.²²³ And we saw in the previous section of this article that the federal *Proceeds of Crime Act*, the Ontario *Civil Remedies Act*, and obtaining DNA samples from prisoners are not considered punishments such that s. 11(d) of the Charter applies. But that does not mean that they would not come under s. 7 of the Charter or be subject to the rule of strict construction of penal statutes.

In the 1980 case of *Chabot*,²²⁴ Dickson J. in effect applied strict interpretation to a procedural provision in the *Criminal Code*, stating for the Court on a question relating to a committal for trial on a related charge: 'Had Parliament wished to confer on a magistrate the power to commit an accused for any offence disclosed by the evidence, it could easily have done so in clear terms.' On the other hand, in the 1999 case of *CanadianOxy Chemicals*,²²⁵ in 1999, Justice Jack Major, for the Court, rejected a strict construction argument in a case involving a search warrant against a company for an offence under the federal *Fisheries Act*, stating:²²⁶

[I]n our opinion, this section is neither ambiguous, nor the type of penal provisions to which the rule should apply. Instead, s. 487 should be given a liberal and purposive interpretation; *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12 . . . While s. 487(1) is part of the *Criminal Code*, and may occasion significant invasions of privacy, the public interest requires prompt and thorough investigation of potential offences. It is with respect to that interest that *all* relevant information and evidence should be located and preserved as soon as possible.

It should be noted that the accused in the *CanadianOxy Chemicals* case was a corporation that cannot go to jail.

It may be that the fact situations dealing with the criminal process are so varied and complex that no overall rule is possible or desirable and that the standard for determining the law should depend on the type of offence, the facts, the procedure in question, whether the accused is a person or a corporation, and many other factors. Further, the standard of proof of procedural matters is not always on the Crown. Moreover, much of the law of procedure, including parts of the law of evidence, has been constitutionalized under the Charter, which also complicates matters.

A pre-Charter Supreme Court of Canada search and seizure case,

223. See *R. v. Bagri*, *supra*, footnote 14; *R. v. Clarke*, [2014] 1 S.C.R. 612, 308 C.C.C. (3d) 299, 9 C.R. (7th) 251 (S.C.C.).

224. *R. v. Chabot*, [1980] 2 S.C.R. 985, 55 C.C.C. (2d) 385, 18 C.R. (3d) 258 (Eng.) (S.C.C.), at p. 1008.

225. *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, 133 C.C.C. (3d) 426, 23 C.R. (5th) 259 (S.C.C.).

226. Paragraphs 18 and 19.

Jaegli Enterprises Ltd. v. Ankenman,²²⁷ applied a rule of strict construction to a criminal code provision authorizing warrants for the seizure of firearms. Justice Roland Ritchie for the Court held that the section of the Code permitting a seizure did not include the power to search a dwelling for the weapon. Ritchie J. stated:²²⁸ ‘any statutory provision authorizing police officers to invade the property of others without invitation or permission would be an encroachment on the common law rights of the property owner and in case of any ambiguity would be subject to a strict construction in favour of the common law rights of the owner.’

The courts in Canada, however, rarely refer to the rule of strict construction when discussing procedural provisions.²²⁹ None of the many relatively recent Supreme Court cases dealing with bail, for example, use the language of strict construction.²³⁰ Those cases appear to interpret the statutory provisions in the *Criminal Code* on a balance of probability in the light of Charter provisions. This is consistent with the Law Reform Commission of Canada’s view, set

227. [1981] 2 S.C.R. 2, 124 D.L.R. (3d) 415, 40 N.R. 4 (S.C.C.).

228. *Ibid.*, at p. 10. For an analysis of *Colet*, see Steve Coughlan and Glen Luther, *Detention and Arrest* (Irwin Law, 2010), at pp. 12-13, who point out that from their analysis of subsequent cases ‘it seems clear that the intent is to limit it to circumstances involving trespass on real property and that it may now not be correct to describe the case as involving any general statutory interpretation advice involving police powers.’ The interpretation of police powers, in their view, remains an outstanding issue. They state (at p. 10): ‘Of course, as elsewhere in the criminal law, the issue is whether such powers should be read restrictively in accord with the purported principle of “strict construction” or whether the primary issue is one of legislative purpose.’

229. Indexes in current Canadian books that were examined dealing with bail, search and seizure, and criminal procedure in general do not have index entries on strict construction, although one can very occasionally find a passing reference to strict construction. In James Fontana and David Keeshan, *The Law of Search and Seizure in Canada*, 8th ed. (LexisNexis, 2010), at p. 53, for example, there is the statement, without citing authority: ‘The words of the Code are subject to strict construction, however, and goods may be seized only to be brought before the justice as soon as may reasonably be done.’ See also on the following page, *I.M.P. Group Ltd. v. Canada (Attorney General)* (1981), 58 C.C.C. (2d) 510, 89 A.P.R. 181, 46 N.S.R. (2d) 181 (N.S. C.A.). The only Supreme Court of Canada case that they refer to on this issue (on p. 54) is *Jaegli Enterprises Ltd. v. Ankenman*, discussed above.

230. See *R. v. St-Cloud* (2015), 321 C.C.C. (3d) 307, 19 C.R. (7th) 223, 384 D.L.R. (4th) 676 (S.C.C.); *R. v. Hall*, [2002] 3 S.C.R. 309, 167 C.C.C. (3d) 449, 4 C.R. (6th) 197 (S.C.C.); *R. v. Pearson*, [1992] 3 S.C.R. 665, 77 C.C.C. (3d) 124, 17 C.R. (4th) 1 (S.C.C.); and *R. v. Morales*, [1992] 3 S.C.R. 711, 77 C.C.C. (3d) 91, 17 C.R. (4th) 74 (S.C.C.).

out earlier, that rules of procedure 'may be given a broader interpretation' than provisions relating to offences or penalties.²³¹

So, it seems, no *general* rule concerning the degree of certainty can be stated for the interpretation of criminal legislation on procedural matters. The interpretation of legislation involving the criminal process may, in some cases, require certainty beyond a reasonable doubt; in other cases, proof on a balance of probability, and in still others, certainty somewhere between those two standards. But the interpretation of legislation on criminal offences and defences and bars to prosecution should require the beyond reasonable doubt standard.

13. Conclusion

The rule of strict construction in the interpretation of criminal statutes relating to offences and punishment should continue to be alive and well in Canada. It has been an essential rule in common-law countries for centuries. The Supreme Court of Canada case of *Robinson*²³² in 1951, which had rejected the rule because of the section of the Interpretation Act which provided that all statutes were 'deemed remedial', was, in effect, overruled in 1982 by the Supreme Court in *Philips*.²³³

Section 12 of the *Interpretation Act*, which provides that 'Every enactment is deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects' can live with a rule of strict construction. Indeed, s. 3(3) of the Act states: 'Nothing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act.'

As discussed above, the Law Reform Commission of Canada draft provision on interpreting its proposed 1987 criminal code set out a section which rightly accepted both concepts. It provided (section 1(3)):

- (a) The provisions of this Code shall be interpreted and applied according to the ordinary meaning of the words used read in the context of the Code.
- (b) Where a provision of this Code is unclear and is capable of more

231. Law Reform Commission Report, *Towards a Codification of Canadian Criminal Law*, (Ottawa: Department of Justice, 1976) section 3.71, at p. 55.

232. *R. v. Robinson*, *supra*, footnote 95.

233. *R. v. Philips Electronics Ltd.*, *supra*, footnote 104.

than one interpretation it shall be interpreted in favour of the accused.

A similar approach, as a matter of statutory interpretation, should be taken for all regulatory offences, particularly when there is the possibility of imprisonment.

It is also possible to arrive at this result through ss. 7 and 11 of the Charter. A rule of strict construction of penal provisions could be considered a principle of 'fundamental justice' under s. 7, just as 'vagueness' can come under s. 7. And it could come under the word 'offence' in s. 11 and 'the presumption of innocence' in cl. (d). But it is not necessary to use the Charter. Ordinary rules of construction can bring about this result.

My overall conclusion is that reasonable doubt should be applied to finding the law in all cases where beyond a reasonable doubt applies to the facts. The prosecutor should have to show beyond a reasonable doubt that the enactment covers the accused's conduct, just as the prosecutor has to prove the conduct beyond a reasonable doubt. The concept of reasonable doubt is well known to the law and is reasonably flexible, allowing a range of interpretations according to the type of offense.

The use of reasonable doubt is preferable to that of 'ambiguity.' Many judges, including judges of the Supreme Court, have used the concept of reasonable doubt in connection with the law. It should be formally adopted by the Supreme Court of Canada. As Chief Justice McRuer stated for the Ontario Court of Appeal in a 1945 case, *R. v. Wright*: 'In this, as in all criminal cases, the onus is on the Crown to make out a case against the accused beyond a reasonable doubt in law as well as in fact.'²³⁴

234. (1945), 85 C.C.C. 397, 1 C.R. 40, [1946] 3 D.L.R. 250 (Ont. C.A.).