NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Hweld*, 2020 NSCA 36

Date: 20200415
Docket: CAC 483124
Registry: Halifax

Between:

Lesianu Zewdie Hweld

Appellant

v.

Her Majesty the Queen

Respondent

Judge:	The Honourable Justice Duncan R. Beveridge
Appeal Heard:	November 29, 2019, in Halifax, Nova Scotia
Subject:	Essential elements of regulatory offences; burden of proof
Summary:	The appellant was charged under s. 106F of the *MVA* with failing to pull over into the adjacent lane as he approached a stopped police car with its emergency lights engaged. He testified he could not move into the adjacent lane because of other traffic. The police officer said the lane was clear. The adjudicator had a reasonable doubt based on the appellant's evidence and acquitted. The Summary Conviction Appeal Court (SCAC) concluded that the unavailability of the adjacent lane was not an essential element of the offence, but operated as an exception or defence, and therefore s. 794(2) of the *Criminal Code* required the appellant to establish the unavailability of the lane on a balance of probabilities. It ordered a new trial.
Issues:	Did the SCAC correctly identify the elements of the s. 106F *MVA* offence?

Result: Leave to appeal granted, the appeal allowed and the appellant's acquittal reinstated. All regulatory and criminal offences are found in statutory instruments. The *actus reus* of every offence is made up of the external circumstances and consequences found in the legislative provision that defines the offence. Hence, the determination of the essential elements of an offence in Canada is quintessentially one of statutory interpretation. There is nothing in s. 106F that suggests that the normal burden of proof does not apply to the defined external circumstances found in that section. The fact that s. 106F is a strict liability offence is not relevant to whether s. 794(2) of the *Criminal Code* placed a persuasive burden on the appellant. The SCAC erred in law to conclude otherwise.

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Respondent

Judges:	Beveridge, Oland and Bryson, JJ.A.
Appeal Heard:	November 29, 2019, in Halifax, Nova Scotia
Held:	Leave granted, the appeal allowed and the acquittal reinstated, per reasons for judgment of Beveridge, J.A.; Oland and Bryson, JJ.A. concurring
Counsel:	Lesianu Hweld, appellant in person James Janson, for the respondent

INTRODUCTION

[1] The appellant said he approached a parked police car at approximately 60 km per hour, but could not pull into the adjacent lane because of other traffic. The police officer testified the other lane was available and issued him a ticket for a violation of what is sometimes known as the pull over and slow down law.

[2] The adjudicator concluded he had a reasonable doubt and acquitted the appellant. The respondent appealed to the Summary Conviction Appeal Court (SCAC). It advanced various grounds of appeal in the SCAC. One of the grounds was that the adjudicator erred in law in requiring the prosecution to prove beyond a reasonable doubt the unavailability of the adjacent lane.

[3] The SCAC concluded that the unavailability of the adjacent lane was not an essential element of the offence, but operated as an exception or defence to the charges. Hence, s. 794(2) of the *Criminal Code* required the defendant to establish on a balance of probabilities that the other lane was not available. It allowed the appeal and ordered a new trial.

[4] With respect, I do not agree. I would grant leave to appeal, allow the appeal and reinstate the acquittal.

SUMMARY OF THE PROCEEDINGS BELOW

The trial

[5] A Summary Offence Information charged the appellant that on July 6, 2017, he "Did unlawfully commit the offence of driving in lane occupied by emergency vehicle that is stopped and exhibiting flashing light when other lane available", contrary to s. 106F(1)(A) of the *Motor Vehicle Act*.

[6] Typical of traffic violations, the proceedings were short and uncomplicated. There were just two witnesses, Cst. Sykes and the appellant, at the April 12, 2018 trial. The only common ground between them was that on July 6, 2017, Cst. Sykes had stopped a vehicle on Highway 102, a four lane thoroughfare, and the emergency lights on his police vehicle were engaged.

[7] Cst. Sykes testified that he saw the appellant's vehicle approaching. It did not slow down and the other lane, which I will call the fast lane, was empty. The

appellant said he slowed down and could not pull into the fast lane because of heavy traffic. In fact, he insisted that he never even passed the police vehicle.

[8] At the end of submissions, the adjudicator reserved his decision to review the record. On May 10, 2018, he delivered an oral decision. The adjudicator set out the details of the two different accounts. He then said:

> The real question I think to be addressed in terms of the evidence in relation to this case is whether or not the defendant, in fact, had the other lane available. I have the officer's testimony indicating that he was able to give chase to the vehicle and that he was able to enter the highway without difficulty and in the course of doing so he noted that there were no other vehicles in the passing lane or the lane that would have been taken by Mr. Hweld as he was driving.
>
> Mr. Hweld, on the other hand, indicates that there were other vehicles in that lane and that it was not safe for him to have pulled over into the other lane.

[9] The adjudicator reasoned that if he accepted the officer's testimony and rejected the defendant's evidence, he would be entitled to find in favour of the prosecution. But if he accepted Mr. Hweld's testimony and rejected the officer's evidence, he could find in favour of the defendant on the basis that the other lane was unavailable. Further, even if he did not accept the defendant's evidence, but still had a reasonable doubt about his guilt, he would find in favour of the defendant.

[10] After setting out reasons that caused him to question the reliability of the officer's observations about the availability of the fast lane, the adjudicator concluded as follows:

> Looking at the evidence as a whole, if I conclude that there is at least reasonable doubt as to whether or not the defendant, Mr. Hweld, had the other lane available to him, I am to resolve that reasonable doubt in favour of the defendant.
>
> In the circumstances of the matter I am left, after hearing the evidence of the Crown, and left after hearing the evidence of the defendant, left with some reasonable doubt as to whether or not the other lane was, in fact, available on the date and time in question and I find the defendant not guilty.

The SCAC

[11] The Crown's arguments before the SCAC deviated somewhat from those set out in its Notice of Appeal. The formal grounds were that:

1. The Adjudicator erred in law. The decision was unreasonable and was not supported by the evidence.
2. The Adjudicator erred in law by not properly applying the principles set forth in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 to the evidence before the Court.
3. The Adjudicator misapplied the applicable burdens of proof, including by instructing himself that he must be satisfied beyond a reasonable doubt as to the guilt or innocence of the accused.
4. Such further or other grounds as counsel my advise and this Honourable Court may allow.

[12] During the appeal, the Crown added the suggestion that the adjudicator erred in law by his failure to make a finding on the credibility of the witnesses or to otherwise resolve the evidentiary conflict.

[13] The Honourable Justice Peter P. Rosinski sat as the SCAC. He heard the appeal on November 13, 2018 and released his written decision on November 16, 2018 (2018 NSSC 288).

[14] The SCAC judge concluded that the burden was on the defendant to establish the unavailability of another traffic lane. In other words, the Crown need not establish the unavailability beyond a reasonable doubt as an element of the offence.

[15] The SCAC judge quoted s. 106F of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, as amended. For convenience, I will repeat it:

> **Lane use when passing emergency vehicle**
>
> 106F (1) The driver of a vehicle that is approaching an emergency vehicle, that is stopped and exhibiting a flashing light, shall not
>
> (a) drive in a traffic lane occupied, or partly occupied, by the emergency vehicle; or
>
> (b) drive in the traffic lane closest to the emergency vehicle and not occupied, or partly occupied, by the emergency vehicle, if there is another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely.
>
> (2) Where the traffic on a highway is divided into separate roadways by a median, this Section only applies to a vehicle being driven on the same roadway as the emergency vehicle is stopped on or beside.

[16] He determined that the essential elements of the offence did not include the existence of "another traffic lane, for traffic moving in the same direction as the vehicle and further away from the emergency vehicle, into which the vehicle can move safely". The SCAC judge reached this conclusion, not by an analysis of the wording of the section, but by reliance on *R. v. Davidson*, 2011 NSSC 55, which in turn piggybacked on *R. v. D.M.H.* (1991), 109 N.S.R. (2d) 322 (NSCA). I will discuss these cases in more detail later.

[17] For now, it is sufficient to observe that in *R. v. D.M.H.*, the charge was igniting a fire within 1000 feet of a forest without a burning permit; in *R. v. Davidson*, the charge was failing to stop at a yellow light. The SCAC judge said he found the analysis in *R. v. Davidson* applicable. After quoting from that case, he concluded:

> [18] In similar fashion, I conclude that the essential elements of the offence in Section 106F that must be proven by the Crown beyond a reasonable doubt are:
>
> 1. Driver of a "vehicle";
> 2. Approaching an "emergency vehicle" that is stopped and exhibiting a flashing light;
> 3. Drive [past the emergency vehicle] in a traffic lane occupied, or partly occupied, by the emergency vehicle; *or* drive in the traffic lane closest to the emergency vehicle and not occupied, or partly occupied by the emergency vehicle.
>
> [19] I conclude that Section 106F is a strict liability offence. The words "if there is another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely" contained in s. 106F (1) of the *Motor Vehicle Act*, function as an exception or defence to the offence of driving in a traffic lane occupied, or partly occupied by an emergency vehicle, or driving in a traffic lane closest to an emergency vehicle and not occupied, or partly occupied by the emergency vehicle.

[18] The appellant has been self-represented throughout these proceedings. He seeks leave to appeal and suggests the adjudicator made no legal error about the burden of proof. The respondent opposes leave, and insists the SCAC committed no legal error.

ISSUES

[19] I would restate the issues as follows:

1. Should leave to appeal be granted pursuant to s. 839(1) of the *Criminal Code*?
2. Did the SCAC Justice correctly identify the elements of the offence set out in s. 106F of the *Motor Vehicle Act*?

ANALYSIS

Leave to appeal

[20] In opposition to leave, the respondent argued that the authorities say that access to a second appeal is limited. In support, it cited *R. v. Pottie*, 2013 NSCA 68 where Farrar J.A., for the Court, wrote:

> [21] The Crown, in its factum, has accurately summarized the principles that have emerged from the case law to guide provincial appellate courts when deciding whether to grant leave to appeal from a SCAC decision. They are:
>
> > 1. Leave to appeal should be granted sparingly. A second appeal in summary conviction cases should be the exception and not the rule. [see *R. R.* at ¶25 and ¶37; *R. v. Chatur*, 2012 BCCA 163 at ¶18; *R. v. Paterson*, 2009 ONCA 331 at ¶1]
> >
> > 2. Leave to appeal should be limited to those cases in which the appellant can demonstrate exceptional circumstances that justify a further appeal. [see *R.R.*, ¶27; *R. v. Dickson*, 2012 MBCA 2, ¶14; *R. v. M. (R.W.)*, 2011 MBCA 74, ¶32]
> >
> > 3. Appeals involving well-settled areas of law will not raise issues that have significance to the administration of justice beyond a particular case. [see *R. v. Zaky*, 2010 ABCA 95 at ¶10; *R. v. Im*, 2009 ONCA 101 at ¶17; *R. v. Hengeveld*, 2010 ONCA 60 at ¶5; *R.R* at ¶31]
> >
> > 4. If the appeal does not raise an issue significant to the administration of justice, an appeal that is merely "arguable" on its merits should not be granted leave to appeal. Leave to appeal should only be granted where there appears to be a clear error by the SCAC. [see *M. (R.W.)* at ¶37; *R.R.* at ¶32] …

[21] These are well-established principles and oft applied (see: *R. v. R.E.M.*, 2011 NSCA 8; *R. v. McIntosh*, 2018 NSCA 39; *R. v. Anand*, 2020 NSCA 12).

[22] At the outset of the hearing, the Court provided to the parties a number of cases that seem to suggest a more nuanced approach may be appropriate where it is the defendant who wishes to pursue his first appeal—that is, it is not the appellant's second appeal (*R. v. MacKay*, 2012 ONCA 671; *R. v. O'Meara*, 2012

ONCA 420; *R. v. Mok*, 2015 ONCA 608; *R. v. Lam*, 2016 ONCA 850; *R. v. Fryza*, 2012 MBCA 47; *R. v. Steuart*, 2014 MBCA 7).

[23] The respondent filed further submissions. It agreed it is not Mr. Hweld's second appeal and this could be a factor to be considered by the Court, but should not be the determining factor.

[24] I agree with the comments of MacPherson J.A., for the Court, in *R. v. MacKay, supra*, where he concluded that if it is the appellant's first appeal, it is an important contextual factor to be considered on the question of leave to appeal:

> [20] The leading case on this issue is *R. v. R. (R.)* (2008), 90 O.R. (3d) 641, [2008] O.J. No. 2468, 2008 ONCA 497. The starting point for the analysis, as stated by Doherty J.A., at para. 27, [page567] is that in the summary conviction appeal context, "[a]ccess to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal". Doherty J.A. went on to say, at para. 37, that leave to appeal should be granted in two categories of cases: (1) those with an arguable question of law that is significant to the general administration of justice; and (2) those where the summary conviction appeal judge seems to have made a clear error of law, even if the error may not have significance to the administration of justice.
>
> [21] The appellant submits that this case is different from *R. (R.)*, and indeed most proposed appeals from decisions by summary conviction appeal judges, in that this will not be his second appeal since he was acquitted at trial. I agree with this submission; it is, in my view, an important contextual factor within which to address the two-part *R. (R.)* test.

[25] The respondent argues that notwithstanding the fact it is Mr. Hweld's first appeal, leave should not be granted because: there is no clear error of law as the application of the reverse onus in s. 794(2) of the *Criminal Code* is well settled; the issue is not significant to the administration of justice because s. 794(2) was repealed by Parliament, effective December 13, 2018 (S.C. 2018, c. 79, s. 68); and, despite that repeal, the burden would remain on the appellant to establish the defence of due diligence because of *R. v. Sault Ste. Marie,* [1978] 2 S.C.R. 1299.

[26] With respect, I am unable to agree. In my view, s. 794(2) did not apply; the error by the SCAC is clear; and, the principles about the fault requirement set out in *R. v. Sault Ste. Marie* are, in these circumstances, irrelevant to the question of what the prosecution was required to prove. I would grant leave to appeal.

The elements of the offence

[27] Not surprisingly, the question of what are the essential elements of an offence is a question of law alone (see: *R. v. King*, [1962] S.C.R. 746; *R. v. Boudreault*, 2012 SCC 56 at para. 8). On such an issue, we owe no deference to the SCAC.

[28] What are the elements of an offence in Canada? The question is essentially one of statutory interpretation, guided at times by presumptions about fault and constitutional norms. This is the product of the fact that, with the exception of contempt, all criminal and regulatory offences are found in legislation.

[29] All offences have two components: *actus reus* and *mens rea.* Both of these Latin terms are technical; they both are accurate and all-encompassing terms. To establish liability, both must be present at the same time. This is found in the old, now seldom cited, but still vibrant Latin expression "*actus non facit reum nisi mens sit rea.*" Loosely translated, it means "the act does not make a person guilty unless the mind is guilty" (*Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham, ON: LexisNexis, 2015) at p. 149).

[30] The *actus reus* of an offence simply denotes all of the external circumstances and consequences specified in the law that are needed to exist in order to be caught by the legislated prohibition. Professor Glanville Williams in his seminal work, *Criminal Law (The General Part)*, 2nd ed (London, England: Stevens & Sons Ltd, 1961) explains the term as follows:

> When we use the technical term *actus reus*, we include all the external circumstances and consequences specified in the rule of law as constituting the forbidden situation. It will be observed that *reus* does not signify that the act itself creates criminal responsibility, for that neglects the requirement of *mens rea*. *Reus* must be taken as simply a technical way of indicating that the situation specified in the *actus reus* is one that, given any necessary mental element, is forbidden by law. In other words, *actus reus* means the whole definition of the crime with the exception of the mental element—and it even includes a mental element in so far as that is contained in the definition of an act. The meaning of *actus reus* follows inevitably from the proposition that all the constituents of a crime are either *actus reus* or *mens rea*.
>
> p. 18

[31] I will comment later on the appropriate *mens rea* or fault element for the offence set out in s. 106F of the *MVA*.

[32] As briefly mentioned above, the *actus reus*, or external circumstances and consequences that make up the forbidden conduct, is quintessentially an issue of statutory interpretation. *Kenny's Outlines of Criminal Law*, 18th ed (Cambridge: University Press, 1962) by J. W. C. Turner makes this clear:

> A. *ACTUS REUS* IN STATUTORY OFFENCES
>
> § 30. In deciding what matter is prohibited by statute little difficulty need be found, since the ordinary rules of interpretation of statutes are of course to be applied; it has been judicially laid down that a penal enactment is to be construed, like any other instrument, according to the fair common-sense meaning of the language used; and the court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument.
>
> The fundamental rule is that the words of the statute make the law, that they are to be taken in their ordinary meaning as given in the standard dictionaries, and that so long as that meaning is plain it must be accepted as representing the intention of the legislature, and cannot be varied by any evidence that the legislature meant otherwise.
>
> pp. 40-41

[33] A more modern expression of this can be found in *Criminal Law*, 3rd ed (Toronto, ON: Irwin Law Inc, 2004) by Professor Kent Roach:

> In order to obtain a conviction for a criminal act or a regulatory offence, the Crown must always prove beyond a reasonable doubt that the accused committed the prohibited act (*actus reus*). The *actus reus* is only one element of a criminal offence, and it must in theory coincide with the fault element, or *mens rea*, that is required for the crime.
>
> …
>
> The prohibited act, or *actus reus*, of an offence is a matter of statutory interpretation. Since 1953, section 9 of the *Criminal Code* has provided that no person shall be convicted of an offence at common law (judge-made law) except contempt of court. To be convicted of a criminal or regulatory offence in Canada, a person must do something that is prohibited by a valid statute or regulation. This requirement accords with the ideal that one should not be punished except in accordance with fixed, predetermined law.
>
> pp. 73-4

See also: *R. v. Beatty*, 2008 SCC 5 per Charron J., for the majority at paras. 43 and 45.

[34] In Canada, courts are guided by the modern principle of statutory interpretation: 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 (see *Re Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *R. v. Anand, supra*.).

[35] So what are the external circumstances and consequences set out in s. 106F that define the *actus reus*? They are found in the language of that section. Leaving aside issues of proof of jurisdiction and identity of the defendant, the Crown must establish:

- the defendant drove a vehicle;
- the defendant's vehicle approached a stopped emergency vehicle;
- the stopped emergency vehicle exhibited a flashing light;
- the defendant drove in a traffic lane occupied or partly occupied by the stopped emergency vehicle;

  OR

- the defendant drove in the traffic lane closest to the stopped emergency vehicle;
- there was another traffic lane for traffic moving in the same direction;
- the other traffic lane was further away from the emergency vehicle;
- the defendant's vehicle could have moved safely into that lane.

[36] The language of s. 106F is not a model of clarity. But in the circumstances of this case, it does not pose difficult issues of statutory interpretation.

[37] Nonetheless, the SCAC judge transposed one of the external circumstances that define the offence "if there is another traffic lane for traffic moving in the same direction into which the defendant's vehicle can move safely", into the equivalent of an exception or defence to the offence. With respect, this amounts to legal error.

[38] There is nothing in the statutory wording that suggests the normal burden of proof would not apply to proof of the defined external circumstances, or *actus reus*, of the offence. The SCAC judge simply declared it to operate as an exception or defence, which by operation of s. 794(2) of the *Criminal Code*, placed the burden of proof on the defence.

[39] The SCAC judge's rationale appears to hinge on his labelling of the offence as one of strict liability. He reasoned:

> [19] I conclude that Section 106F is a strict liability offence. The words "if there is another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle, into which the vehicle can move safely" contained in s. 106F (1) of the *Motor Vehicle Act*, function as an exception or defence to the offence of driving in a traffic lane occupied, or partly occupied by an emergency vehicle, or driving in a traffic lane closest to an emergency vehicle and not occupied, or partly occupied by the emergency vehicle.
>
> [20] Once the Crown has proved the essential elements of the offence, it is open to a defendant to prove on a balance of probabilities, that it is more likely than not that, although there was another traffic lane, for traffic moving in the same direction as the vehicle and further from the emergency vehicle available, the circumstances were not such that the defendant's vehicle could have moved safely into that lane.

[40] The SCAC judge is correct—s. 106F is a strict liability offence. No one has ever suggested otherwise. If it were an absolute liability offence, it may be open to a constitutional challenge as offending s. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* since there is a possibility of imprisonment, subject to being saved by s. 1 of the *Charter* (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Wholesale Travel Group Inc*., [1991] 3 S.C.R. 154).

[41] But merely because it is properly classified as a strict liability offence carries with it no consequences beyond this: once the Crown proves beyond a reasonable doubt the *actus reus* of the offence, it is possible for a defendant to escape conviction by proving on a balance of probabilities that they took all reasonable care to avoid commission of the offence (*R. v. Sault Ste. Marie*).

[42] In other words, contrary to the normal presumption that a defendant must commit the *actus reus* accompanied by a guilty mind (the *mens rea*), conviction follows on proof of the *actus reus* unless the defendant can establish their due diligence to avoid commission of the offence.

Situations where the onus is reversed

[43] Historically, the common law and legislation have countenanced a persuasive burden on a defendant, but only in limited circumstances, and usually only for regulatory offences that proscribe an act save in specified circumstances by persons with certain qualifications, licence or permission (see: *R. v. Staviss*, [1943] N.S.J. No. 1 (N.S.S.C. *en banc*); *R. v. Edwards*, [1975] 1 Q.B. 27; *R. v. Stacey* (1990), 82 Nfld. & P.E.I.R. 164; *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. (3d) 539 (Ont.C.A.); *R. v. Hunt*, [1987] A.C. 352; *R. v. D.M.H.* (1991), 109 N.S.R. (2d) 322 (C.A.).

[44] In *R. v. Lee's Poultry, supra*, the defendant was charged with a provincial offence of operating a plant without a licence. The Crown's case did not include any evidence the defendant did not have a licence. Instead, it relied on the Ontario provincial equivalent to s. 794(2) of the *Criminal Code*, that:

> The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption, or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[45] The trial judge convicted, because the defendant had failed to establish that it had a licence. The SCAC of Ontario found that the reverse onus provision contravened the *Canadian Charter of Rights and Freedoms* and acquitted the defendant. The Crown appealed. The Ontario Court of Appeal concluded that the SCAC was wrong to find the provision was unconstitutional, but dismissed the appeal on other grounds.

[46] Brooke J.A., for the Court, referred to the history of reverse onus provisions (p. 542):

> It is a fundamental rule of criminal law that the accused is presumed to be innocent until his or her guilt is proved beyond a reasonable doubt and, as such, the onus is on the Crown to prove each element of the offence to the degree required. At common law an exception developed to this fundamental rule for a class of offences created by regulatory legislation. Often such legislation created offences by banning specified activities **but excepted persons who had authority of the regulatory body to do the acts banned**. That exception is expressed in the terms of s. 48(3) of the *Provincial Offences Act*. It is also found, for example, in s. 730 of Part XXIV of the *Criminal Code* which applies to

> summary conviction offences. Both sections have their origin in Canada in s. 852 of the *Criminal Code*, 1892 and the common law.
>
> [Emphasis added]

[47] It is of course key to be able to distinguish between what amounts to an essential element of the offence charged and an exception, exemption, proviso, excuse or qualification prescribed by law that might operate in favour of the defendant. Brooke J.A. quoted with approval the comments of Lawton L.J. in *R. v. Edwards*:

> In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. **Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.**
>
> [Emphasis added]

[48] In Nova Scotia, the potential to place the burden of proof on a defendant for summary conviction offences and regulatory offences rests principally on s. 794 of the *Criminal Code*. It provides as follows:

> 794 (1) No exception, exemption, proviso, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information.
>
> (2) The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

[49] This provision only applies to summary conviction offences under the *Criminal Code*. However, s. 7 of the *Summary Proceedings Act*, R.S.N.S. 1989, c. 450 adopts the procedural and substantive summary conviction provisions to all provincial proceedings:

> **Summary conviction provisions of Criminal Code**
>
> 7(1) Except where and to the extent that it is otherwise specially enacted, the provisions of the *Criminal Code* (Canada), except section 734.2, as amended or re-enacted from time to time, applicable to offences punishable on summary conviction, whether those provisions are procedural or substantive and including provisions which impose additional penalties and liabilities, apply, *mutatis mutandis*, to every proceeding under this Act.

[50] There is nothing in the language of s. 106F that suggests the burden is on the defendant to establish an exemption, exception, proviso, excuse or qualification. This is not at all like the situation considered in in *R. v. Goleski*, 2014 BCCA 80, aff'd 2015 SCC 6.

[51] In that case, the trial judge convicted the accused of failing or refusing, without reasonable excuse, to comply with a breathalyzer demand, contrary to s. 254(5) of the *Criminal Code*. The British Columbia SCAC reversed on the basis that the burden was on the Crown to establish beyond a reasonable doubt the existence of a reasonable excuse. The British Columbia Court of Appeal allowed the appeal and reinstated the conviction.

[52] The parties agreed that s. 794(2) applied to a s. 254(5) charge. In other words, "reasonable excuse" in s. 254(5) is an "excuse" within the meaning of s. 794(2). But the question remained: who bore the burden under s. 794(2)?

[53] Frankel J.A., writing for the unanimous Court, relied on well-established authority that confirmed the elements of the offence the Crown must prove are: a proper demand; a failure or refusal to provide the required breath sample; and, an intention to fail or refuse to provide the required sample (paras. 71-72).

[54] There was no constitutional challenge to s. 794(2). The only issue in *Goleski* was the proper interpretation of that section. The initial words of s. 794(2) places the burden on the defendant, but then refers to the Crown not having a burden, except by way of rebuttal, to disprove an excuse. Frankel J.A. thoroughly canvassed the legislative history of s. 794(2) of the *Criminal Code*. He concluded that given the history of s. 794(2), the addition of the phrase about a burden in rebuttal did not displace the long-established persuasive burden on a defendant to establish an exception, exemption, proviso, or excuse.

[55] Hence, s. 794(2) placed the burden on the respondent to establish on a balance of probabilities the factual foundation for his asserted reasonable excuse.

[56] Section 106F contains no suggestion of an excuse or exemption for otherwise unlawful conduct. It creates a duty, and an offence for failing to comply with that duty only if there is: (a) another lane available for traffic moving in the same direction; (b) the lane is further away from the emergency vehicle; and, (c) the driver can safely move into it safely. I can see no justification for interpreting these external circumstances as anything other than elements of the offence.

[57] Where Courts have placed the burden on a defendant, it is where the conduct is prohibited except where it has been otherwise authorized (see for example: *R. v. Edwards, supra*; *R. v. D.M.H., supra; R. v. Staviss, supra*; *R. v. Lee's Poultry, supra*; *R. v. T.G.*, (1998), 165 N.S.R. (2d) 265, leave ref'ed [1998] S.C.C.A. No. 130).

[58] In *Edwards*, the defendant leased premises. Someone smashed his windows. He complained to the police. The police set up surveillance for three days between 8 p.m. and 4 a.m. They observed 323 people enter the defendant's premises, mostly late at night, after the public houses had all closed. A few days later, shortly after midnight, the police entered the premises with a warrant. The defendant was not there. Present were 70 people, most drinking beer in the basement, fitted up as a bar.

[59] The defendant was charged with selling intoxicating liquor by retail without holding a licence authorizing such sales under the *Licencing Act 1964*. At trial he had no counsel. He did not testify, but offered an unsworn statement that suggested he was not in occupation of the premises. After conviction, he appealed on the basis that prosecution had access to the register of licences and could have offered evidence on whether the defendant had a licence or not.

[60] Lawton L.J., for the Court, dismissed the appeal. After a thorough canvass of the common law and English legislation about provisos and exemptions, he concluded:

> In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes with specified qualifications or with the licence or permission of specified, authorities. Whenever the prosecution

> seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.
>
> pp. 39-40

[61] In *R. v. D.M.H., supra*, the respondent was acquitted at trial. The charge was that he ignited a fire within the woods or within 1,000 feet of the woods during the fire season without a burning permit, contrary to s. 23(3) of the *Forests Act*. The trial judge acquitted because the Crown tendered no evidence that the respondent did not have a burning permit. The trial judge found s. 794 only relevant to pleading and not to the burden of establishing the absence of a permit.

[62] Hart J.A., for the Court, emphatically disagreed:

> [6] In our opinion, s. 794(2) clearly relieves the Crown of the burden of negativing the exception herein and is merely an extension of the common law principle developed over the years in relation to regulatory offences prohibiting acts by persons other than those authorized by law. See the cases of *R. v. Soderberg* (1965), 49 D.L.R. (2d) 665; *R. v. Lee's Poultry Ltd.* 17 C.C.C. (3d) 539; *R. v. Edwards*, [1975] 1 Q.B. 27.
>
> [7] Furthermore, this rule applies to a prosecution under s. 23 of the *Forests Act*. Section 6(1) of the *Young Persons Summary Proceedings Act* R.S.N.S., c. 509, adopts the *Summary Proceedings Act* R.S.N.S., c. 450, which incorporates by reference all the provisions of the *Criminal Code* of Canada in prosecutions against young persons relating to provincial statues. Thus s. 794 of the *Criminal Code* applies.
>
> [8] The failure to have a burning permit is not an element of the offence charged against the respondent but an exception or exemption which, if proven by the respondent, could justify his acquittal. See *R. v. Staviss* 79 C.C.C. 105 and *R. v. McInnis et al.* 54 N.S.R. (2d) 62.

[63] Similarly, in *R. v. Staviss, supra*, the respondent had been acquitted of selling tires at a price higher than scheduled without a permit. The Nova Scotia Supreme Court, *en banc*, reversed. The prosecution had no burden to establish the respondent did not have a permit. Graham J., for the Court, reasoned:

> 8 It is, then, unnecessary to consider what the law was before s. 717 [now, s. 794] was enacted; but, at all events, it may be noted that the statute puts exceptions and provisos in the same category. It does not give directions for determining whether such words, as are questioned here, are an exception which does not need to be

> proved by the Crown, or are part of the description of the offence and therefore an essential element of it, which must be proved by the Crown.
>
> 9 That being so, it falls to the Court to decide what the function and effect of these words--phrased in the form of an exception--really are; and for that end, it must decide what the substance of the offence is.
>
> 10 Each case must of necessity be decided on its own circumstances. There are cases, though I think not many, where words phrased in the form of an exception are really of the essence or substance of the offence. For instance, the words "without her consent" are an essential element in a charge of rape, because they describe the crime as an act done forcibly or fraudulently, which is of the essence of the crime.
>
> 11 In the present case, the substance of the offence is plainly selling or offering for sale tires at prices higher than those shown in Schedule F. of s. 17. Anyone, who sells in breach of the order, except one with a permit, is guilty. It would strain the intended function and reasonable effect of the words "without a permit &c." to hold that they were descriptive of the offence of selling or that they help to constitute that offence.
>
> 12 On principle, then, the burden was not on the prosecution to prove the exception. This conclusion is in accord with *R. v. Daniels* [1942], 1 D.L.R. 199, 77 Can. C.C. 76, in which case the Supreme Court of Alberta held that the words "save and except under the authority of a license from the Minister had and obtained or other lawful authority" in a section of the *Opium and Narcotic Drug Act* need not be alleged or proved by the Crown. The words of the exception in the present case have the same function and effect as the words "save and except &c."

[64] In *R. v. T.G., supra*, the appellant had been convicted of unlawful possession of liquor, contrary to s. 78(2) of the *Liquor Control Act*, R.S.N.S. 1989, c. 260. Various sections of that *Act* placed the burden on anyone charged to prove they did not commit the offence. The trial judge did not rely on those provisions. Instead, he relied on the combination of s. 794 of the *Criminal Code* and s. 78(2) of the *Liquor Control Act* (*LCA*), which made all possession of liquor unlawful except as authorized by the Act or the regulations.

[65] The appellant challenged the constitutional validity of the various sections of the *LCA* that reversed the onus and s. 794 of the *Criminal Code*. Chipman J.A., for the Court, declined to address the constitutional validity of the impugned *LCA* provisions. With respect to s. 794, he was prepared to assume that it infringes ss. 7 or 11(d) of the *Canadian Charter of Rights and Freedoms*, but is saved from constitutional invalidity as a reasonable limit prescribed by law within the meaning of s. 1 of the *Charter*.

[66] As a result, because all possession is made illegal by s. 78(2) of the *LCA* except as authorized by the *Act* or regulations, s. 794 of the *Code*, in the absence of evidence from the defendant, supported the appellant's conviction.

[67] Under the *MVA*, drivers are permitted to drive in the lanes duly marked for vehicular traffic. The speed limits are posted. Section 106E changes the permitted rate of speed by making it an offence for a person to drive past an emergency vehicle that is stopped on the roadway or adjacent shoulder and exhibiting a flashing light at a speed in excess of the speed limit or sixty kilometers an hour, whichever is less.

[68] Section 106F makes it an offence to drive in a traffic lane occupied or partly occupied by an emergency vehicle if there is another traffic lane for traffic moving in the same direction and further away from the emergency vehicle into which the vehicle can move safely. None of these requirements amount to an exception, exemption, proviso, excuse or qualification from a general prohibition. If they are not established, the duty does not exist, and no offence has been committed.

[69] The SCAC judge cited *R. v. Davidson, supra*, in support of his conclusion that the burden was on the appellant, which in turn, had relied on *R. v. D.M.H.*, discussed above. In *Davidson*, the adjudicator acquitted the respondent of failing to stop at an amber light (s. 93(2)(c) of the *MVA*). Section 93(2)(c) directs that all traffic facing a yellow or amber light shall stop before entering an intersection at the place marked or the nearest side of the crosswalk but not past the signal unless the stop cannot be made in safety.

[70] The adjudicator acquitted because he had a reasonable doubt about what a reasonable person would have done in the circumstances. The SCAC concluded that the adjudicator had erred in law, and that "unless the stop cannot be made in safety" operates as an exception under s. 794(2) of the *Code* in the same manner as not having a burning permit in *R. v. D.M.H.*

[71] In the absence of submissions as to the correctness of the result in *Davidson* with respect to a different *MVA* provision, I decline to comment further on the analysis and result in that case.

[72] For all of these reasons, s. 794(2), a provision not even argued at trial, had no application. The onus remained on the prosecution to prove beyond a reasonable doubt all of the essential elements of the s. 106F offence. The adjudicator had a reasonable doubt based on the appellant's evidence.

[73] The respondent cites *R. v. Sault Ste. Marie* for the proposition that despite the repeal of s. 794(2) of the *Criminal Code*, the burden was on the appellant to establish the existence and availability of safe access to the adjacent lane as a due diligence defence. With respect, reliance on *Sault Ste. Marie* reflects a misunderstanding of what that case stands for, and the repeal of s. 794(2) is irrelevant to the proper disposition of this appeal. I will explain.

[74] The common law recognized a distinction between true crimes and conduct that is prohibited in the public interest. True crimes require the prosecution to prove subjective *mens rea* such as intent, knowledge, recklessness or wilful blindness. On the other hand, regulatory offences created in the interests of health, convenience, safety or general public welfare do not attract a common law presumption of *mens rea* as an essential element.

[75] The appropriate *mens rea* or fault element for regulatory offences is what was clarified by *Sault Ste. Marie*. Dickson, J., as he then was, wrote for the full Court. He recognized that regulatory offences fell into two categories—offences of absolute liability, and strict liability offences. For both, the prosecution need not prove the existence of *mens rea*.

[76] Liability for absolute liability offences is made out when the prosecution proves beyond a reasonable doubt that the defendant committed the offence; the defendant cannot escape liability by any demonstration of lack of fault.

[77] Liability for strict liability offences can be avoided by the defendant to prove that they took all reasonable care to avoid the commission of the offence. Justice Dickson explained:

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> > 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> >
> > 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts

> which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

[78] Some legislative provisions spell out a defence of due diligence (see for example, *R. v. Wholesale Travel Group Inc*., *supra*). For the most part, courts are left to determine as a matter of statutory interpretation if a particular regulatory offence is one of strict or absolute liability. The task is aided by the direction from *Sault Ste. Marie* that regulatory offences *prima facie* fall into the strict liability bin. This presumption was later reaffirmed in *Lévis v. Tétreault*, 2006 SCC 12, at paras. 16-19 (see also: *R. v. Raham*, 2010 ONCA 206).

[79] The respondent agrees that the s. 106F offence is one of strict liability. It is an appropriate concession. But it does not help the respondent. It must still prove beyond a reasonable doubt the *actus reus* of the offence. I have earlier set out the external circumstances of the offence that make up the *actus reus*.

[80] Once the prosecution proves the *actus reus*, it would then be open to the defendant to establish on a balance of probabilities that his conduct was caused by the negligence of someone else, a mechanical failure, or some other circumstance he could not have reasonably foreseen. In other words, he used all reasonable care to avoid the commission of the offence. Even for mere provincial regulatory offences, the defence of due diligence must always be open to an accused who risks imprisonment upon conviction (see: *R. v. Beatty*, *supra* at para. 26).

[81] Lastly, I will comment briefly on the repeal of s. 794(2) of the *Criminal Code*. As noted earlier, the repeal became effective December 13, 2018. What is the significance of the repeal?

[82] If s. 794(2) legitimately placed the burden on the appellant at his April 12, 2018 trial, its subsequent repeal is irrelevant to whether the adjudicator erred in not placing the burden of proof on the appellant. Absent a successful constitutional challenge, it was the law at the time of his original trial.

[83] Legislative provisions that reverse the onus of proof have been the subject of constitutional challenges. I need not canvass them. There was no constitutional challenge here.

[84] No case has found s. 794(2) to be unconstitutional[1]. That does not mean there has not been vigorous criticism of s. 794(2) and other reverse onus provisions (see, for example, the call for repeal of s. 794(2) in "An Unfair and Costly Burden: Assessing the Impact of Section 794(2) of the Criminal Code on the Criminal Justice System" (2017), 42: 2 *Queen's L.J.* 1).

[85] Apparently coincidentally, Parliament acted. On June 6, 2017, the Minister of Justice introduced Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act. There is no specific discussion in Hansard about s. 794(2) by the Minister of Justice or her designate, just the general reference to the need to remove obsolete and unconstitutional provisions.

[86] The Legislative Summary from the Library of Parliament gives the following background to Bill C-51:

> There are three aspects to Bill C‑51. First, the bill amends the *Criminal Code* (Code) to modify or repeal provisions that have been ruled unconstitutional by the courts or that raise risks of being contrary to the provisions of the *Canadian Charter of Rights and Freedoms* (Charter). It also amends or repeals Code provisions that could be considered obsolete and/or redundant.
>
> Second, Bill C‑51 amends provisions in the Code relating to sexual offences. In particular, it sets out a procedure for determining the admissibility and use of the complainant's records when they are in the possession of the accused.
>
> Finally, Bill C‑51 amends the *Department of Justice Act* to require that the Minister of Justice table a statement of a bill's potential effects on the rights and freedoms guaranteed by the Charter for every government bill introduced in either House of Parliament.
>
> This Legislative Summary provides general background information on all three aspects. It also provides specific information on the substantive changes reflected in each of these parts, rather than examining every provision.

[87] The Legislative Summary merely identifies clause 68 of Bill 51 as repealing s. 794(2):

> Other reverse onus provisions that are either being amended or repealed include the following:

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[1] As observed above at para. 65, this Court in *R. v. T.G.*, *supra*, assumed that s. 794(2) infringed the *Charter* but was saved from constitutional invalidity as a reasonable limit prescribed by law within the meaning of s. 1 of the *Charter*.

> …
>
> Clause 68 of Bill C‑51 repeals section 794(2)of the Code. Section 794(1) of the Code provides that an exemption under which an accused may have a defence need not be negatived or referred to in an information charging that accused. Section 794(2) places the onus of proving the applicability of the exculpatory proviso on the accused; the prosecutor need not prove that the exculpatory proviso does not operate in favour of the accused, whether or not it is set out in the information.

[88] The repeal could potentially be relevant to the question of an appropriate remedy if we were inclined to agree with the SCAC judge that s. 794(2) properly placed the burden on the appellant. That is because at a new trial, that provision would not be available to the prosecution.

[89] The respondent has advanced no argument that in the absence of s. 794(2) the burden would be on the appellant at a theoretical new trial by any mechanism or rule of law (other than its flawed suggestion that *Sault Ste. Marie* places the burden on the appellant).

[90] At any new trial that might be held, the doctrine of issue estoppel would preclude the Crown from re-litigating the finding it was not safe for the appellant to move into the adjacent lane.

[91] This is because if a factual issue has been decided in favour of an accused at a previous trial, the Crown is precluded from leading evidence at a subsequent trial to prove the contrary (*R. v. Mahalingan*, 2008 SCC 63 at para. 23; *R. v. Catton*, 2015 ONCA 13 at para. 26). This principle applies not only where there are two trials involving different charges, but also applies to decline to order a new trial where issue estoppel precludes conviction (*R. v. Catton*, *supra* at para. 27).

[92] In *R. v. Mahalingan*, the Supreme Court of Canada dealt with the application of issue estoppel in the criminal context. McLachlin, C.J.C., writing for the majority, explained:

> [31] [...] [I]ssue estoppel in Canadian criminal law operates to prevent the Crown from relitigating an issue that has been determined in the accused's favour in a prior criminal proceeding, whether on the basis of a positive finding or reasonable doubt.
>
> [...]
>
> [39] [...] [I]t is clear that fairness to the accused requires that an accused should not be called upon to answer allegations of law or fact already resolved in his or

> her favour by a judicial determination on the merits. [...] The state has the right to charge an accused and to prove the facts at a trial of the charge. **If a judge or jury conclusively decides a fact in favour of the accused, including via a finding of a reasonable doubt on an issue, then the accused should not be required in a subsequent proceeding to answer the same allegation. To require, in effect, a second defence to the issue would be to violate the fundamental function of res judicata.**
>
> [Emphasis added]

[93] McLachlin, C.J.C., laid out the requirements of issue estoppel as follows:

> [49] The requirements of issue estoppel, whether in civil or criminal law, are: (i) that the same question has been decided; (ii) that the judicial decision which is said to create the estoppel was final; and (iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies: *Angle v. Minister of National Revenue*, 1974 CanLII 168 (SCC), [1975] 2 S.C.R. 248, at p. 254, per Dickson J. (as he then was), adopting a statement by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd.*, [1967] 1 A.C. 853 (H.L.), at p. 935.

[94] With respect to the second criteria, McLachlin, C.J.C. explained:

> [55] [...] Findings on particular issues at trial are final, unless overturned on appeal. This applies equally in civil trials and criminal proceedings. There is no concern on this court with "lack of fit" with criminal law principles.

[95] The adjudicator's finding of reasonable doubt in the appellant's favour at his April 12, 2018 trial was not overturned on appeal. It is final. It would not be open to the Crown to relitigate this issue.

SUMMARY AND CONCLUSION

[96] The adjudicator concluded that he had a reasonable doubt whether the appellant could have safely moved into the fast lane. He acquitted the appellant of failing to pull over in the presence of a stopped emergency vehicle exhibiting emergency lights, contrary to s. 106F of the *MVA*.

[97] The SCAC judge concluded that s. 794(2) of the *Criminal Code* required the appellant to satisfy the adjudicator on a balance of probabilities that there was not another lane into which he could move safely. The SCAC judge reasoned that this aspect of the offence was not part of the essential elements, but only acted as an exception or defence.

[98] The SCAC judge erred in law. The prosecution must always prove beyond a reasonable doubt the *actus reus* of any offence. The *actus reus* is made up of the external circumstances and consequences set out in the legislative provision that defines the offence.

[99] The determination of the essential elements of an offence is a pure question of law that is resolved by statutory interpretation. There is nothing in s. 106F of the *MVA* to suggest any of the external circumstances defined by that section operate as an exemption, exception, proviso, excuse or qualification.

[100] The fact that s. 106F is a strict liability offence, offering to a defendant the potential to escape liability if they used all reasonable care to avoid the commission of the offence, does not displace the prosecution's burden to establish the *actus reus* of the offence.

[101] I would therefore grant leave to appeal, allow the appeal and reinstate the appellant's acquittal.

Beveridge, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.