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Opinion relating to section 34 of the Proposals
to amend the *Criminal Code* (general principles)

Codification of the defences of ignorance of the law and mistake of law

by

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INTRODUCTION

This opinion deals with section 34 of the Proposals to amend the general principles presented by the federal Minister of Justice on June 28, 1993, which provide new rules for the defence of ignorance or mistake of law.

The proposed amendments comprise a new version of the text proposed by the Law Reform Commission.⁽¹⁾ They are different from that text in that they do away with one situation in which the defence of reasonable mistake of law would be available when the mistake is based on an interpretation of the law given by a court of appeal. They appear to limit the scope of the excuse of non-publication of the law. The draft bill is, on the other hand, more specific in its recognition of the defence of ignorance of the law and mistake of law when the elements of the offence logically make that defence available. The statutory provision is still likely to cause problems in distinguishing between the concepts of "fact" and "law". Finally, Parliament has favoured a drafting of the statutory provision that borrows the overblown style of federal statutory law and shelves the efforts that were made by the Law Reform Commission to take the opportunity provided by a codification of the general principles of criminal law to improve the quality of the legal language (English and French).

I. THE POLICY CHOICE:

The proposed amendments seem to be a compromise, in legislative terms: they reflect a degree of realism in the desire to bring the law into line with changes in the approach taken in the literature and by the courts, while at the same time making some concessions to the resistance to changing the rule that ignorance of the law is no excuse. By compromising in this way, however, the amendments may be compromising their purpose, and this is what we shall attempt to illustrate.

The statutory provision appears to be the result of a pragmatic, strategic approach by the legislator, amounting to recognizing in the law what has been won in the courts in terms of ignorance of the law and mistake of law. The legislative position is in fact prudent: the exceptions essentially rest on the perception of a consensus as to judicial recognition of the exceptions or on opinion in the literature and trends toward reform which favour making these exceptions. This prudence is also expressed in a legislative approach of withdrawal from proposals for exceptions to the rule respecting ignorance of the law which prompt disagreement or resistance among interested groups.

The proposed amendments cannot, however, be described as resolutely reformist or progressive. We must point out how the exceptions to the rule that ignorance of the law or mistake of law is no excuse, as they are currently envisaged by Parliament, are first and foremost the result of timid, confused and inconsistent judicial activity. The courts have sometimes demonstrated creativity in allowing an exception to the rule respecting ignorance of the law, but more often the solutions applied by the courts have created legal confusion. Some courts favour acquitting an accused whose ignorance was in no way his or her own fault, or whose mistake resulted from a mistaken interpretation of the law by a competent authority, and they have often adopted a process of reasoning and analysis that conceals the true reason for acquitting. The legal rule set out in section 19 of the Code, or the common law maxim *ignorantia juris neminem excusat*, when applied rigorously, unconditionally, absolutely and implacably, could be difficult to counteract.

Several Canadian,⁽²⁾ English⁽³⁾ and American⁽⁴⁾ authors have agreed that despite their protests that the maxim has historically not been absolute, it has been followed slavishly and prompted an unwavering conviction in each of their respective judicial systems that it is both necessary and draconian. In their opinion, the fervour and the conviction with which judges, lawyers and the police hold to it rest not on any historical analysis, any rational or scientific argument as to the need for an absolute rule, or any demonstration that it is particularly necessary.⁽⁵⁾ On the contrary, this conviction could be better explained by the ideology underlying the common law legal systems. Legal positivism, the preeminence of the principle of legality and the doctrine of judicial utilitarianism would appear to provide the ideological foundation for the rule.⁽⁶⁾

It is interesting to compare how the rule has been applied and interpreted in American and English law. The maxim has been applied more strictly in England, where the constitution is founded almost entirely on the recognition of the legislative supremacy of Parliament and the rule of law. In the United States, the constitutional principles of fundamental justice and individual freedoms provided a better environment for the development of exceptions to the rule or mitigation of its severity.⁽⁷⁾ Another not insignificant factor might be the influence of the 1962 Model Code of the American Law Institute in the United States, which proposed major exceptions to the principle that ignorance of the law or mistake of law is no excuse.⁽⁸⁾ Legislation in several American states has been inspired by the A.L.I. Model Penal Code.

There is also some common ground in the American, English and Canadian university literature on the need to legislate on this question: only concrete legislative proposals can bring about official recognition of the exceptions to the maxim. We

must therefore describe judicial activity as timid in the context of an absolute legal rule that ignorance of the law or mistake of law is not a defence, and we must not be surprised at the incoherence and inconsistency of advances in the English and Canadian case law, which must be seen in the context of this adversity.

The legislative position of simply recognizing the timid and inconsistent advances made by the courts cannot be described as particularly reformist. It legitimizes the sporadic and hard-won ways in which the courts have mitigated the severity of the maxim.

However, we should not underestimate the breakthroughs made by the courts in mitigating the severity of the rule that ignorance of the law or mistake of law is no excuse. If we were to give one main reason to explain all of the judgments that have favoured acquittal in certain circumstances where there was unavoidable ignorance or mistake of law where the person was not blameworthy, it might be this: the courts have generally acquitted an accused where the ignorance or mistake of law arose because he or she did not have the requisite culpability, did not believe that he or she was in an illegal fact situation, did everything that was reasonable not to break the law, could not be blamed or was morally innocent. In other words, the courts have been confronted with the following dilemma: the rule that ignorance of the law is no excuse, which is generally considered to be essential to a legal system founded on the principle of legality, sometimes produces injustice in individual cases. The courts have generally mitigated the severity of the maxim for reasons of justice and fairness to an accused; as well, they have entered acquittals by emphasizing the culpability of the offender or the fact that no blame could be attributed to him or her. Ultimately, most of the decisions in which the courts have agreed to mitigate the severity of the maxim may be explained by considerations of justice and fairness.

The choice facing Parliament is therefore how to reconcile the requirements of the public interest, effectiveness, necessity and legality that justify the rule that ignorance of the law and mistake of law are no excuse with the objectives of a criminal law that is fair to all Canadian citizens. Have justice and necessity been reconciled in the proposed amendments set out in section 34? **In our opinion, the legislative proposal has not achieved the best balance of these interests. A proposal that gave more liberal recognition to exceptions, and was consequently more reformist, would have been more consistent with the new theoretical approaches to the rule respecting ignorance of the law.**

Modern criminal law is in a particularly fortunate position for resolving this tension between legislation that is effective in controlling crime and a fair law that will punish only those who deserve it. Pointless severity in the criminal law, which

has only a mediocre record of controlling crime, is currently being questioned, and criticism is being levelled at the unjustly punitive nature of our criminal law. Greater sensitivity to justice in our criminal law is based also on criticism of the ineffectiveness of our system and questioning of its harshness and excessive severity on the ground of effectiveness. Promotion of the theory of justice is as well at the core of the ideology now in ascension. The legal community, more and more of whom are followers of Rawls,⁽⁹⁾ are helping to promote this theory; the development of the concept of fundamental justice and individual fairness has encouraged this in the Canadian legal world since the advent of the Charter; the importance of the concepts of culpability and blame in assigning criminal liability is playing an important role in the development of a new ranking of the values of effectiveness and justice in criminal law.

This is the backdrop against which we should examine the legal rule concerning ignorance of the law and mistake of law. As well, a number of authors have expressed their scepticism as to how useful it is in criminal law and instead emphasize the injustice it has caused. This theoretical critique provides the setting for our attempt to promote a legislative solution that is more open to recognition of exceptions and would more exhaustively alleviate the injustices that have been identified in the literature concerning the rigorous application of the rule. Why would the legislative reform sift through all the potential injustices and accept only some, leaving others out?

We believe that a balance between the public interest, on the one hand, which proposes that the rule that ignorance of the law is no excuse is necessary, and the idea, on the other hand, that injustice cannot be permitted in individual cases may be better achieved through the following legislative decisions:

1. There should be exceptions made for the all major injustices identified in studies that have examined the question (English, American, Canadian);
2. There must be consistency in Canadian criminal law between the decision to emphasize the concepts of culpability and negligence in our criminal law and how the legal rule respecting ignorance of the law and mistake of law is framed.⁽¹⁰⁾
3. The rule should be fully stated. Parliament should not opt for silence on the ground that the Charter will provide in part for how the rule is developed, or that the courts will find original solutions and exercise

their clemency by reducing sentences or will otherwise remedy abuses of process or discretion.

4. The rule should be clearly stated and should not create more problems of legal interpretation than the problems it proposes to solve.

We must now examine section 34 of the Proposals to amend the Criminal Code, more specifically, keeping the following parameters in mind: has Parliament corrected all the major injustices in the present rule; is it consistent, transparent, clear and accessible; and does the legislation aspire to generality, an objective which is to be sought in "codifying" the general principles of the criminal law? Does the legislation achieve the objective that the legislator has set?

II. STUDY OF SECTION 34 OF THE PROPOSED AMENDMENTS

1. Introductory paragraph: the rule and the defence

Section 34(1): Neither ignorance of the law nor mistake of law is a defence to an offence unless

COMMENT

The substance of the legislative statement adequately reflects the choice made by Parliament, to adopt an intermediate solution lying between preserving the legislative *status quo* and eliminating section 19 of the Code. The rule is not absolute, since there are exceptions. The rule is, moreover, found in the general part of the Code in the provisions respecting defences. It is not stated as a restriction on the definition of the concepts of culpability or negligence or as a general rule of criminal law.

We agree with this opinion. This is a strategic delineation drawn against the absolute and necessary nature of the rule in order to guarantee the effectiveness of the law and legality in criminal law, in support of the idea of recognizing personal defences based on ignorance of the law or mistake of law.

We might observe that the legislator has chosen not to distinguish between the defences on the basis of whether they are excuses or justifications.⁽¹¹⁾ For ignorance of the law and mistake of law, this ambiguity or lack of precision creates confusion around the legislative choices, for the following reason. For those who hold to the absolute rule, any exception to the rule constitutes an erosion of legality. Recognition of an exception is therefore seen as a justification. They are likely to say: this provides a ground of exculpation to those who do not know the law, and we cannot agree that the enforcement of the law depends on whether the accused happens to want to obey it or ignore it. For those who hold to an approach founded on justice, the issue is rather one of excusing accused who, by reason or their ignorance of mistake of law, are not guilty or are morally innocent. If we look at the defence from the point of view of excuse, we see that neither the imperative nature of legal rules nor the rule of law is in any more danger in a case of ignorance or mistake of law than in cases where mistake of fact may be pleaded.

In short, if mistake of law is not set up in the domain of justifications or excuses this may help to reduce future objections to the legislative choice. However, the lack of precision in respect of the true nature of the defences has perhaps caused

a legislative loss of sight of the implicit choice: it has indeed codified the excuses of ignorance of the law and mistake of law. The legislator was, for example, receptive to the lobby of those who did not want to recognize the defence of mistake of law in certain circumstances (particularly when it is based on a decision of a Court of Appeal). According to the arguments of these opponents, exceptions to the maxim respecting ignorance of the law are justifications which legitimize the right to be ignorant, thereby encouraging ignorance or perhaps creating regional disparities in law enforcement. Those who oppose the exception from this perspective will always adhere to the strict rule.⁽¹²⁾

It is therefore up to the legislator, even though it has decided not to distinguish between justifications and excuses, nonetheless to accept the logical consequences of the defences that it is proposing to create: the exceptions set out in section 34 of the Proposals are indeed excuses in the classic sense of the criminal law. If proposing to recognize other exceptions, the legislator should logically formulate them as excuses.

2. 1st exception: the concept of culpability and the defence

Section 34(1)(a): the description of the offence provides a defence of claim of right or colour of right, or otherwise provides a defence of ignorance of the law or mistake of law, and the ignorance or mistake relates to that defence;

34(1)a): *la disposition créant l'infraction prévoit expressément un moyen de défense fondé sur un droit dont l'existence est réelle ou prétendue telle ou sur l'apparence de droit ou un moyen de défense fondé sur l'ignorance de la loi ou l'erreur de droit, et l'ignorance ou l'erreur alléguée se rapporte au moyen de défense prévu.*

COMMENTS:

The wording of this exception causes us some difficulties for us; the language is obscure and the turn of phrase overly subtle. The English and French versions are sufficiently different in substance to prompt questions as to the extent and scope of the exception. For the purposes of a critical examination of this provision, we assume that the legislator intended to cover the following cases:

1. when an offence requires the *mens rea* described in the specific term "without colour of right", ignorance or mistake of law or a mistake of law that confers colour of right on an accused or prompts an

accused to claim a right which he or she does not have, gives rise to a defence;

2. when an offence requires *mens rea* of a specific type that logically assumes that an accused appreciates the unlawfulness of his or her conduct if the accused is to be found guilty, the defence of ignorance of the law or mistake of law that negates this specific *mens rea* constitutes a defence;
3. when the legislator expressly or impliedly recognizes a specific defence of ignorance of the law or mistake of law, the accused may adduce evidence of the fact that this specific situation of ignorance applied to him or her or that he or she acted under the influence of that mistake.⁽¹³⁾

We support a statutory text that purports to cover all these fact situations. The legislator would be recognizing that the concept of guilt might sometimes take on specific characteristics that demand that ignorance or mistake of law be taken into account. For example, mistake of law may be inconsistent with dishonesty or fraudulent intent.⁽¹⁴⁾ Some opinions point out that this defence might be available where a provision creates an offence that includes words such as "knowingly", "wilfully" or "unlawfully".⁽¹⁵⁾ The inclusion of the expressions "without lawful or reasonable excuse" could perhaps be interpreted as making a defence such as is contemplated in section 34(1)(a) available.⁽¹⁶⁾ Finally, the section might be stating that it is open to Parliament to establish specific situations of ignorance of the law or mistake of law.⁽¹⁷⁾

What we would like the *Criminal Code* to deal with are assaults on the fundamental values of Canadian society, what some would call true crimes. History shows that the plea of ignorance of the law or mistaken interpretation as to the scope of the prohibition is exceptional and rare in the case of true crimes. The cases involve foreigners who were ignorant of English law in the 19th century world.⁽¹⁸⁾ Lack of knowledge of the classic offences or true crimes is unlikely and is never argued before the courts. In other words, determination of the guilt of the offenders in cases of truly criminal offences does not involve considerations relating to their knowledge of the law. On the other hand, ignorance or mistake of law is most frequently pleaded in the case of true crimes when the specific characteristics of the *mens rea* of the offences logically makes those defences available and when it is impossible to assign such specific culpability to an accused without taking this into account. With the exception of crimes that require such specific knowledge, the rule that ignorance of the law or mistake of law is no excuse has not been a significant

source of injustice in cases involving true crimes. Finally, it is relatively easy to agree with the idea that since the criminal law enshrines recognized moral principles or principles that prohibit only conduct that is intolerable in the eyes of the whole world, we should not recognize the defence of ignorance of the law.

Accordingly, it appears to us to be entirely acceptable to make the defence of ignorance of the law or mistake of law available in cases involving true crimes, only where this defence negates the specific culpability required in order to convict.

The legislator may, however, choose to create regulatory offences which have no specific moral connotation, by assigning a specific *mens rea* to them which assumes that mistake of law will be taken into account. When the legislator includes words such as "fraudulently", "dishonestly", "without colour of right", "knowingly", "unlawfully" and "wilfully" in a regulatory text it must be consistent with its choices and acknowledge that these words convey recognition of excuses based on ignorance of the law or mistake of law. We are of the opinion as well that the words "lawful excuse" could also make the excuse of ignorance of the law available where that defence is in the nature of an excuse.

Finally, we would note the differences between the English and French versions, which cause us some problems.

The English phrasing, "the description of the offence provides", best expresses the idea that the state of mind described by the provision creating the offence, which constitutes an element of the offence, may make a defence available. On the other hand, the words "otherwise provides" are more equivocal in measuring the scope of the provision. The French text, "*la disposition créant l'infraction prévoit expressément un moyen de défense ...*", gives the impression rather that the defence will be available only where colour of right or a defence of mistake of law is specifically created by Parliament. The French version seems to us to be more reductionist; we suggest this because of the use of the word "*expressément*" and the fact that the exception is described from the perspective of defences rather than by reference to the elements of the offences (as it is in the English text).

We propose a French version of a provision that would take into account all that we would like to see in it:

L'état d'esprit précisé par la disposition créant l'infraction confère un moyen de défense fondé sur l'apparence de droit ou sur la revendication erronée d'un droit existant ou fictif ou permet en raison de ses

caractéristiques particulières un moyen de défense d'ignorance de la loi ou d'erreur de droit.

La disposition créant l'infraction ou la législation prévoit un moyen de défense fondé sur l'ignorance de la loi ou l'erreur de droit dans les circonstances qui y sont précisées.

[TRANSLATION]

The state of mind required by the description of the offence provides a defence of colour of right or mistaken claim of right or because of its specific characteristics admits of a defence of ignorance of law or mistake of law.

The description of the offence or the legislation provides a defence of ignorance of the law or mistake of law in the circumstances set out therein.

3. 2nd exception: the *actus reus* and private rights

Section 34(1)(b): the description of the offence includes an element that concerns a matter of private rights, and the ignorance or mistake relates to that matter of private rights;

(2) For the purpose of paragraph (1)(b), ignorance or mistake relating to the existence or interpretation of an Act or of regulations made thereunder does not constitute ignorance or mistake that relates to a matter of private rights.

34(1)b La disposition créant l'infraction comporte une question liée à des droits privés à laquelle se rapporte l'ignorance ou l'erreur alléguée;

(2) L'alinéa (1)b ne s'applique pas lorsque l'ignorance de la loi ou l'erreur de droit concerne l'existence ou l'interprétation d'une loi et de ses règlements.

COMMENTS:

The legislator has recognized the defence of mistake of law when it relates to an element of an offence that concerns private rights. From this point of view, the

Proposals confirm the changes developed by the courts, which have gradually treated this type of mistake as a mistake of fact or a mistake of law that is available subject to the same conditions as mistake of fact. Some descriptions of offences incorporate in their substance rules or concepts borrowed from civil law (for example, the concepts of ownership, marriage and custody); these private law concepts then become a material element of the *actus reus*.⁽¹⁹⁾ To the extent that the legislator defines knowledge (i.e. having knowledge) in relation to the express and implied elements of the offence, the situations in which the defence of mistake as to an element in the nature of a private law rule is available will vary depending on the *mens rea* of the offence and/or the rules of liability in question. From this perspective, the statutory text is consistent with the other provisions of the proposed amendments.

We are not happy with the French version. Although the legislator uses the expression "*la disposition créant l'infraction*" throughout its proposed amendments to translate the expression "the description of the offence", we believe that the word "*infraction*" in French is entirely adequate to convey that the reference is to the content of the offence and the way it is formulated in a statutory text. We therefore make the following suggestion:

L'infraction comporte un élément constitutif concernant des droits privés et l'ignorance ou l'erreur s'y rapporte.

[TRANSLATION]

The description of the offence includes an element that concerns a matter of private rights and the ignorance or mistake relates to that matter of private rights.

This wording eliminates the subjunctive clauses [subordinate? - Tr.] (i.e. the use of "*que*", "*à laquelle*") which complicate the style in French and the legal language. In addition, the suggested text for paragraph (a) illustrates that the exception derives from the *mens rea* of the offence, while the paragraph set out above provides that the exception derives from the *actus reus* of the offence.

The legislator's intention is to limit the scope of application of the exception solely to cases of mistake which relates to the legal concept of private rights and which constitutes an element of the offence. At least, this is the impression we get from the text of section 34(2).

On occasion a criminal provision incorporates the effect of some other legislation of a public nature, rather than of a concept of private law, in the elements of an offence. In other words, another statutory provision or another Act may form part of the relevant elements of an offence provided in the *Criminal Code* or part of the background of the offence. The Supreme Court has acknowledged in a majority judgment that ignorance or mistake concerning such a law could be accepted in the form of a mistake of fact.⁽²⁰⁾ That judgment, in which the judges who took part in it were by no means unanimous and on which as many opinions have been expressed as there were people expressing them, clearly illustrated that it may be extremely difficult in such cases to distinguish between "fact" and "law" in order to decide between a situation involving ignorance of the law, on the one hand, and absence of culpability or negligence, on the other hand, on the part of the person who committed the offence. One way of looking at things is to argue that the general rule that ignorance of the law or mistake of law is no defence does not allow for a plea of ignorance or mistaken interpretation of any law of a public nature, whether directly or indirectly. It seems that this is the choice that the legislator intended to make in subsection 34(2) of the Proposals.⁽²¹⁾

On the other hand, we have the choice made by a majority of the judges of the Supreme Court in *Prue & Baril*, who decided to treat the matter differently. When a legislative body creates a criminal offence and provides that the formulation or content one of its elements depends on another Act or regulation, that element, the normative content of which depends on another law, may be regarded in the same way as a material element of the criminal offence or a relevant legal element of its *actus reus*. If this is the case, the situations in which ignorance or mistake may be pleaded in respect of that material aspect of the offence will depend on the rules of liability applicable to the offence.

This opinion amounts to giving preference to the theory that in such cases the question is decided from the perspective of culpability or negligence. This choice resembles the opinion expressed by the German concept of what is a "fact" in law.⁽²²⁾ It covers not only everything that can be perceived by the senses, but also to everything that can be perceived by the mind, such as social, moral and legal rules. This idea is also found in articles published in American journals which argue that ignorance as to a "collateral matter" (i.e. as to an Act other than the one under which the charge is laid) should not be treated like a direct situation of ignorance or mistaken interpretation of the law.

The text of section 34(2) which would best reflect this position in theoretical terms would be as follows:

Pour les fins de l'alinéa 1, l'ignorance ou l'erreur portant sur toute circonstance pertinente d'une infraction n'est pas assimilable à l'ignorance de la loi ou à l'erreur de droit lorsque la définition de cette circonstance dépend en tout ou en partie d'une loi autre que celle créant l'infraction.

[TRANSLATION]

For the purpose of paragraph 1, ignorance or mistake relating to any relevant element of an offence does not constitute ignorance of the law or mistake of law where the definition of that element depends in whole or in part on an Act other than the Act that creates the offence.⁽²³⁾

We are quite certain that this choice would not cause social chaos or anarchy, and that it would be more consonant with its theory of justice and fairness. As the Law Reform Commission rightly pointed out, the dangers that the defence of ignorance of the law presents are sometimes more imaginary than real.⁽²⁴⁾

In any event, the distinction made by the legislator between mistake of private law and mistake of public law undoubtedly derives from the lack of consensus as to whether the defence of mistake of any law of public interest should be available in Canadian criminal law.

However, if we assume that the legislator intended to exclude ignorance of the law or mistake of law in respect of any offence when that ignorance or mistake is based on another Act, or on a statutory provision other than the one creating the offence, subsection (2) as it is formulated fails to achieve its objective.

We may therefore continue to predict judicial disagreement as to the concepts of "fact" and "law" in Canadian criminal law. There are several physical elements of criminal offences the content of which could depend on a legal definition or involve another Act or regulation in order to define those elements. For example, the words "authorization", "licence" and "suspension" in a provision creating an offence could refer to the meaning given to those words in another statute. On the other hand, the words "prohibited weapons", "restricted weapons", "narcotics", "controlled drugs", "restricted drugs", "consent" and "nuisance" also have a legal content that depends on the Act that creates the offence. The difficulty in interpreting and classifying these concepts in relation to the legal rule proposed in section 34(2) of the bill is immediately apparent. If we cannot persuade the legislator to adopt our first choice, it would appear to us to be preferable to go back to the option proposed by the Law Reform Commission, which amounted simply to providing for the defence of mistake of private law, without defining that concept restrictively. Given that

paragraph 34(1)(b) already provides that it is the only situation in which the defence is available, subsection (2) may be considered to be redundant, in view of the introductory paragraph. It will create other sources of conflict between the concepts of "fact" and "law". Finally, the concept of "private law" is not ambiguous; the courts have never claimed that this concept encompasses the legal rules of public law. The debate has always been around the difficulty of classifying the subject matter of the ignorance or mistake: the "fact" of which ignorance may be claimed or the "law" of which it may not. The proposed text does not appear to us to be an improvement in terms of clarifying this question.

4. 3rd exception: officially induced mistake

Section 34(1)(c): the offence was committed under an officially induced mistake of law.

(3) For the purpose of paragraph (1)(c), an officially induced mistake of law is a defence only if

(a) the mistake is in respect of the existence or interpretation of a law and results from information or advice given by an official responsible for the administration or enforcement of that law,

(b) the person relied in good faith on that information or advice, and

(c) it was reasonable for the person to have relied on that information or advice,

but information or advice given by an official mentioned in paragraph (a) to the effect that the law will not be enforced in a particular case or in particular circumstances does not provide a basis for the defence of officially induced mistake of law.

34(1)(c): *La personne a commis l'infraction parce qu'elle a été induite en erreur par un fonctionnaire.*

(3) *Une personne est induite en erreur par un fonctionnaire si:*

(a) *l'erreur en cause porte sur l'existence ou l'interprétation de la loi et découle de renseignements ou conseils donnés par un fonctionnaire chargé de l'application ou du contrôle de celle-ci;*

- (b) *elle s'est fiée à ceux-ci de bonne foi;*
- (c) *il était raisonnable pour elle de s'y fier.*

Ne peuvent toutefois constituer un moyen de défense les renseignements ou conseils voulant que la loi ne serait pas appliquée dans un cas ou des circonstances donnés.

COMMENTS:

The dispute over the maxim respecting ignorance of the law is a phenomenon of modern criminal law. The proliferation of regulatory offences which have no particular moral connotation has created problems, because in reality it has become impossible for a reasonable person to know all the criminal laws he or she must obey: an individual may not even have been able to avoid a mistake of law, either by seeking out his or her own information or by taking the precaution of getting information from other people; someone may even have shared a common mistake with the qualified authorities he or she consulted; or he or she may have relied on the interpretation given in a judicial decision in respect of the law with which he or she was concerned. In situations like these, a person who is accused of having broken the law and convicted exercised such diligence as is normally required in human relationships and who was unable after doing so to avoid the mistake is being unfairly punished.

As we know, the Supreme Court has created rules of liability based on negligence, considering this minimum standard of blame to be generally required for regulatory criminal offences.⁽²⁵⁾ The Court did not want to frame the general rules governing these offences in absolute terms, and was loath to convict morally innocent people. Due diligence, we now know, is a question that must be assessed in the context of the person pleading it; it is this context that enables a court to distinguish between situations of negligence and cases of due diligence. In addition, it is expected that a diligent person will be aware of the rules governing his or her situation or activity.⁽²⁶⁾

However, there may be cases in which, even though an accused has demonstrated due diligence and tried to obey the law that applied to his or her situation, he or she was at the mercy of a mistaken interpretation of the law induced by an official authority to whom the accused went looking for advice to be sure that his or her conduct was lawful.

The case law and literature disclose three primary sources of such mistaken interpretation in practice. It may have been induced by a competent administrative authority with responsibility for administering the law; it may derive from the professional opinion of a legal adviser from whom an accused sought counsel; and it may result from a judicial decision finding the conduct of an accused to be lawful but punishing it as a result of a judicial reversal.

In all these cases, our opinion is that a court would be able to distinguish between a situation where a mistaken interpretation of the law pleaded as a defence by the accused is the result of his or her own negligence or bad faith, or derives from equivocal, evasive or non-categorical advice as to the lawfulness of his or her conduct, or results from a clear but mistaken opinion given by an authority in an attempt to properly inform the accused as to his or her conduct so that he or she would not break the law.

The Canadian case law excuses mistaken interpretation of the law induced by a competent administrative authority⁽²⁷⁾ but refuses to make an exception to the rule in section 19 of the Code when the error is brought about by a legal adviser⁽²⁸⁾ or is based on a judicial decision.⁽²⁹⁾ The legislator has chosen in its bill to define the only exception recognized in the case law and simply to recognize mistake of law induced by a competent administrative authority.

It is possible, however, to imagine specific cases illustrating that an accused may engage in unlawful conduct when he or she intended the complete opposite, by seeking the advice of a lawyer or relying on a judicial opinion of a court of appeal. No defence would be available in the case of errors such as these, which were induced by an authority.

On this point, while following the results of the case law that developed in the context of an absolute maxim, the legislator has decided to distinguish, in respect of officially induced mistake, between acceptable sources of mistake and unacceptable sources of mistake, without regard for the fact that whether the accused exercised due diligence may be concretely assessed in all of these fact situations.

The A.L.I. Model Penal Code, which was prepared in 1962, adopted a much more liberal position in respect of mistaken interpretation of the law induced by a source external to the accused.⁽³⁰⁾ In addition, several American states have demonstrated greater openness to recognizing exceptions in response to that Model Code.

According to that Code, an accused may plead a defence by showing that his or her conduct appeared to him or her to be lawful, relying on another statute, a judicial decision, an administrative order or an interpretation given by an official responsible by law for interpreting or applying the provision defining the offence. The Law Reform Commission accepted mistake induced by a competent administrative authority and mistake or ignorance attributable to a judgment of a court of appeal subsequently reversed.⁽³¹⁾

The bill itself reduces the statutory exception to a single case: mistaken interpretation of an offence provision caused by a competent official administrative authority.

There seems to be a Charter argument for rejecting the Law Reform Commission's suggestion that the exception based on mistaken interpretation resulting from a judgment of a court of appeal be recognized. There are fears that such an exception would be constitutionally vulnerable because of the principle that everyone is equal before the law.⁽³²⁾

American law has used the Constitution to expand the field of exceptions to the rule that ignorance of the law is no excuse, particularly when the mistake was induced by a competent authority. It is argued that the Constitution should protect accused persons against arbitrary action and tyranny on the part of the official authorities responsible for administering the law and even that it could be contrary to due process to subject accused persons to vague and imprecise laws.⁽³³⁾

When we direct our attention to the fact that a mistaken interpretation of the criminal law, particularly in the regulatory context, might have been caused by an official authority which specializes in administering that law, or been based on the decision of a judge who had attempted to interpret it and whose opinion was subsequently reversed by a higher court, or resulted from the opinion of a legal adviser who was specifically asked to assess the lawfulness of a person's actions, it is easy to imagine how vague, complex or obscurely worded the law must have been to result in a mistaken interpretation by an authority that has expertise in or in respect of the law. Although it is easy to imagine different fact situations, depending on whether the mistake was induced by a competent administrative authority, a legal adviser or a judicial decision, we would argue that an excuse should be available to an accused who made positive and diligent attempts to comply with the law, relying on the reasoned opinion of one of these authorities, and who was induced into a mistake.⁽³⁴⁾

Of course, nothing other than due diligence on the part of the accused, *bona fide* mistake or reasonable mistake of law could be considered in any of these fact situations. Rather, the context of each fact situation should determine whether the mistake was, first, induced by an authority, whether it is relevant to the accused's actions, and whether it has all the characteristics of a clear opinion with respect to the lawfulness of those actions. It must then be determined whether it was reasonable for the accused to hold this mistaken belief as to the lawfulness of his or her conduct, and whether the mistake was *bona fide*.

The legislator has decided, *a priori*, that certain sources of mistake (i.e. mistakes conveyed by a legal adviser or resulting from an interpretation given in a judgment of a trial court or by a court of appeal) cannot provide a legal basis for reasonable *bona fide* error and cannot establish that an accused exercised diligence in attempting to comply with the law. They are legally irrelevant.

The legislative choice of only one case in which the exception based on mistake induced by an authority will be available is therefore not an exhaustive treatment of all situations where mistake is caused by a competent authority and consistent with due diligence on the part of an accused seeking to obey the law. In our opinion, convicting someone who has tried to obey the law and treating such a person in the same way as an accused who has chosen not to obey the law is questionable. It is indefensible to make examples in criminal law of people who are morally innocent. Finally, the courts have all the expertise and skill that is needed to distinguish between people who are negligent and people who are innocent if the law lays down a legal rule that instructs them to do so in a case where someone is induced into a mistaken interpretation of the law.

In the context of the legislative proposal being examined, several undesirable phenomena may occur when an accused who was induced into a mistake as to the lawfulness of his or her conduct by a legal adviser or a judgment is charged with a crime and can nonetheless establish that he or she honestly and reasonably followed the advice of a lawyer (when the lawyer has often relied on the case law or on the opinion of a competent official authority) or relied on a judicial decision. If the court hearing the case is kindly disposed to the accused, it may acquit him or her on the basis that there was a mistake of mixed fact and law. The law will then be even more confused as to these concepts. The court may convict and show clemency in sentencing; in so doing, it imposes the burden of the mistake on the accused (when the mistake was either professional or detectable only by the Supreme Court through a complex reasoning process as to the meaning of the law).

The court may also find the conduct of prosecutors in going after "truly innocent" people to be offensive and questionable and find that there has been an abuse of process. The court may also find that the criminal law is indeed wrong if it convicts someone unfairly when the person was obviously caught up in a very nebulous law. We can look forward to some lovely Charter arguments.

Why, in reforming the criminal law, would the legislator not develop a law that is better equipped to control prosecutorial discretion, better drafted and more liberal, so as not to create more legal confusion and so as to be more consistent with the philosophy of the Charter? Is there a good reason for continuing to be so timid in reforming the rule respecting ignorance of the law?

Finally, we would note that in the wording of paragraph (c) the expression "*fonctionnaire*" appears to us to be narrower than the English expression "officially induced". The expression "*fonctionnaire*" is translated by "official" in subsection (3). However, the word "*fonctionnaire*" in French also means "civil servant". It may be wiser to go back to using the expression "*autorité administrative compétente*" [competent administrative authority] which was used by the Law Reform Commission; this expression is more general and less technical.

The text could read as follows (note: we have tried to correct the awkward French): "*la personne a commis l'infraction après avoir été induit en erreur par une autorité administrative compétente, par un conseiller juridique ou par une décision judiciaire.*"

(3) Une personne est induite en erreur selon l'alinéa (2)(d) si:

- (a) l'ignorance de la loi ou l'interprétation erronée de la loi découle de renseignements officiels donnés par l'autorité administrative chargée de l'application et de la mise en oeuvre de la loi, de l'avis professionnel catégorique d'un conseiller juridique ou d'une conclusion d'une décision judiciaire, attestant de la légalité d'une conduite.*
- (b) elle s'y est fiée de bonne foi (Note: "ceux-ci": not French)*
- (c) il était raisonnable dans les circonstances de s'y fier (Note: "pour elle": unnecessary words), ("dans les circonstances": important words in order to understand the context).*

[TRANSLATION]

the person committed the offence after being induced into a mistake by a competent administrative authority, by a legal adviser or by a judicial decision.

(3) A person is induced into mistake under paragraph 1(d) if:

- (a) the ignorance of the law or mistaken interpretation of the law results from official information given by the administrative authority responsible for the administration or enforcement of that law, from the unequivocal professional opinion of a legal adviser or from a conclusion in a judicial decision, attesting to the lawfulness of a course of conduct,**
- (b) the person relied in good faith on that information or advice, and**
- (c) it was reasonable in the circumstances to have relied on that information or advice.**

The final portion of subsection (3) is pointless. It is obvious that the advice of an administrative authority suggesting that the law would not be enforced is not a situation of mistake induced by an administrative authority. Why should the legislation deal with only this one case where the defence would not be available? The general part of a Code codifies general principles, not details and nuisance cases. The legislator has not yet realized that this is a codification.

5. 4th exception: Publication of the law

Section 34(4) Nothing in this section affects the defence of non-publication of regulations that is provided by subsection 11(2) of the *Statutory Instruments Act*.

34(4) Le présent article ne porte pas atteinte au moyen de défense fondé sur la non-publication des règlements qui est prévu au paragraphe 11(2) de la Loi sur les textes réglementaires.

COMMENTS

This provision includes a rule in the general part of the *Criminal Code* that is already provided in the *Statutory Instruments Act*⁽³⁵⁾ and would continue to exist even if Parliament did not refer to it in the Code. What is the point of reiterating it in the *Criminal Code*?

In our opinion, it is appropriate for the Code to set out the whole legal rule that consists in asserting the fact that before providing for the punishment of the conduct of accused persons who unwittingly broke a law, the State must have fulfilled its duty to give fair warning to its citizens. Proper notice must be given to accused persons of the existence of the law that has been violated. In the case of Acts enacted by Parliament, the State has fulfilled its duty when the legislation passes third reading, receives royal assent and is proclaimed. These formalities give concrete effect to the maxim *nulla poena, nullum crimen sine lege* and establish that once they have been carried out not only is knowledge of the law presumed, but also violation of the law will be punished.

However, in the regulatory context, the formalities of publication may be very complex and variable, there may be no real publication of the regulation and it may be difficult to access. The proliferation of statutory instruments makes the problem even more acute. In these cases, the courts have sometimes sought to mitigate the severity of section 19 of the Code.

One court refused to apply the maxim respecting ignorance of the law when the manner in which the statutory instrument was published was somewhat irregular and suggested that the prosecution's inability to prove that the accused had actual knowledge of the incriminating regulation could have exculpatory effect.⁽³⁶⁾ Another court drew a distinction⁽³⁷⁾ (which the Supreme Court subsequently rejected⁽³⁸⁾) in respect of the way ignorance of the law is treated, between situations where the legislation in question is a law of general application and situations where the legislation is a statutory instrument or an order in council, in order to mitigate the severity of the maxim in the case of delegated legislation.⁽³⁹⁾ Regulatory legislation is, moreover, the area where problems of unavoidable ignorance arise most acutely for accused persons.

Parliament is aware of this problem, and has tried in the *Interpretation Act* and *Statutory Instruments Act* to monitor the process by which statutory instruments are put in force in order to ensure proper and effective publication of delegated legislation. To that end, it has provided for the defence of non-publication when a statutory instrument has not been officially published. However, where there has

been publication in the *Official Gazette*, the presumption of knowledge of the delegated legislation applies. It may therefore be said that the defence that is already recognized is destined to play a minor role in how unavoidable ignorance on the part of accused persons who have unwittingly violated statutory instruments will be dealt with.

Given that the legislator has already expressed its willingness to consider ignorance or mistake in respect of the interpretation of the law where the ignorance or mistake is induced by a competent official authority, it has accordingly precluded the suggestion that unavoidable ignorance that may result simply from difficulty of access to the legislation could be a defence. Even if ignorance is not attributable to any specific negligent behaviour on the part of the accused, passivity, lack of interest or indifference on his or her part cannot be treated in the same manner as diligence and amount to a negligent approach to the fact that all laws must be obeyed.

The sole purpose of subsection (4) is therefore to establish that unavoidable ignorance is only a defence when Parliament itself has failed in its duty to give fair warning to its citizens in the regulatory context. Parliament may also fail in this general duty in respect of legislation. It goes without saying that a law that is tainted by irregularity in terms of proclamation or coming into force is not binding. Why not deal with Parliament's general duty of fair warning, in both legislative and regulatory matters, in the general part of the *Criminal Code*? Why refer only to this minimum duty in respect of regulations? Here again, the legislator's actions are not those of a codifier, but rather those of a legislative drafter. On this point, the Law Reform Commission exhibited greater transparency.⁽⁴⁰⁾ Because we must "break down open doors", we propose the following wording, which could comprise the final paragraph of section 34(1):

L'ignorance de la loi peut être imputée à la non-publication de la disposition créant l'infraction ou à une irrégularité dans les formalités de sa sanction ou de mise en oeuvre.

[TRANSLATION]

Ignorance of the law may be attributed to non-publication of the provision creating the offence or an irregularity in the formalities by which it was sanctioned or came into force.⁽⁴¹⁾

CONCLUSION

Finally, the following is the French version of the statutory provision that would, in our opinion, be more consistent with the philosophy that is supposed to be Parliament's inspiration in its general reform of the criminal law.

34(1) *L'ignorance de la loi ou l'erreur de droit ne constitue pas un moyen de défense sauf dans les cas suivants:*

- (a) *L'état d'esprit précisé par la disposition créant l'infraction confère un moyen de défense fondé sur l'apparence de droit ou sur la revendication erronée d'un droit existant ou fictif ou permet en raison de ses caractéristiques particulières un moyen de défense d'ignorance de la loi ou d'erreur de droit.***
- (b) *La disposition créant l'infraction ou la législation prévoit un moyen de défense fondé sur l'ignorance de la loi ou l'erreur de droit dans les circonstances qui y sont précisées.***
- (c) *L'infraction comporte un élément constitutif concernant des droits privés et l'ignorance ou l'erreur s'y rapporte.***
- (d) *la personne a commis l'infraction après avoir été induit en erreur par une autorité administrative compétente, par un conseiller juridique ou par une décision judiciaire.***
- (e) *L'ignorance de la loi peut être imputée à la non-publication de la disposition créant l'infraction ou à une irrégularité dans les formalités de sa sanction ou de mise en oeuvre.***

(2) *Pour les fins de l'alinéa 1, l'ignorance ou l'erreur portant sur toute circonstance pertinente d'une infraction n'est pas assimilable à l'ignorance de la loi ou à l'erreur de droit lorsque la définition de cette circonstance dépend en tout ou en partie d'une loi autre que celle créant l'infraction.*

(3) *Une personne est induite en erreur selon l'alinéa (2)(d) si:*

- (a) *l'ignorance de la loi ou l'interprétation erronée de la loi découle de renseignements officiels donnés par l'autorité administrative chargée de l'application et de la mise en oeuvre de la loi, de l'avis professionnel catégorique d'un conseiller juridique ou d'une conclusion d'une décision judiciaire, attestant de la légalité d'une conduite.*
- (b) *elle s'y est fiée de bonne foi*
- (c) *il était raisonnable dans les circonstances de s'y fier.*

[TRANSLATION]

34(1): Neither ignorance of the law nor mistake of law is a defence to an offence unless

- (a) **The state of mind required by the description of the offence provides a defence of colour of right or mistaken claim of right or because of its specific characteristics admits of a defence of ignorance of law or mistake of law.**
- (b) **The description of the offence or the legislation provides a defence of ignorance of the law or mistake of law in the circumstances set out therein.**
- (c) **The description of the offence includes an element that concerns a matter of private rights and the ignorance or mistake relates to that matter of private rights.**
- (d) **the person committed the offence after being induced into a mistake by a competent administrative authority, by a legal adviser or by a judicial decision.**
- (e) **Ignorance of the law may be attributed to non-publication of the provision creating the offence or an irregularity in the formalities by which it was sanctioned or came into force.**

(2) For the purposes of paragraph (1), ignorance or mistake relating to any relevant element of an offence does not constitute ignorance of the law or mistake of law where the definition of that circumstance depends in whole or in part on an Act other than the Act that creates the offence.

- (3) A person is induced into mistake under paragraph 1(d) if:**
- (a) the ignorance of the law or mistaken interpretation of the law results from official information given by the administrative authority responsible for the administration or enforcement of that law, from the unequivocal professional opinion of a legal adviser or from a conclusion in a judicial decision, attesting to the lawfulness of a course of conduct,**
 - (b) the person relied in good faith on that information or advice, and**
 - (c) it was reasonable in the circumstances to have relied on that information or advice.**

NOTES

- (1) LAW REFORM COMMISSION, *Recodifying Criminal Law*, Report 30, vol. 1 (Ottawa: L.R.C., 1986) at 31-32. This is a modified version of that presented by the LAW REFORM COMMISSION in *The General Part: Liability and Defences*, Working Paper 29 (Ottawa: L.R.C., 1982) at 77-84.
- (2) Hélène DUMONT, "Étude sur l'ignorance de la loi" (1978) 13 *R.J.T.* 665; Gisèle CÔTÉ-HARPER, Antoine D. MANGANAS and Jean TURGEON, *Droit pénal canadien*, 3d ed. (Yvon Blais, 1989) at 517-38; Nancy S. KASTNER, "Mistake of Law and the Defence of Officially Induced Error" (1986) 28 *Cr. L. Q.* 308-40.
- (3) H.J. ASHWORTH, "Excusable Mistake of Law" (1974) *Crim. L. Rev.* 652; W.J. BROOKBANKS, "Recent Developments in the Doctrine of Mistake of Law" (1987) 11 *Crim. L.J.* 195; Paul MATHEWS, "Ignorance of the law is no excuse?" (1983) 3 *Legal Studies* 174; Glanville WILLIAMS, *Criminal Law: The General Part* (London: Steven & Sons, 1961) c. 8; *Textbook of Criminal Law*, 2d ed. (1983) c. 20; J.C. SMITH and B. HOGAN, *Criminal Law* (London, Edinburgh, 1988); D. O'CONNOR, "Mistake and Ignorance in Criminal Cases" (1976) 39 *M.L.R.* 644.
- (4) A.T.H. SMITH, "Error and Mistake of Law in Anglo-American Criminal Law" [1985] *A.A.L.R.* 3; P.K. RYU and H. SILVING, "Error juris: a comparative study" (1956-57) 24 *U. Chi. L.R.* 421; H. SILVING, "Rule of Law in Criminal Justice," cited in G.O.W. MUELLER, *Essays in Criminal Science* (London: Fred B. Rothman & Co., Sweet & Maxwell, 1961); R. PERKINS, "Ignorance and Mistake in Criminal Law" (1939) 88 *U. of Pa. L. Rev.* 35; R.M. PERKINS, "Ignorance or Mistake of Law Revisited" (1980) *Utah L.R.* 973.
- (5) A.T.H. SMITH, *loc. cit.*, note 4 at 3.
- (6) Jerome HALL, *General Principles of Criminal Law*, 2d ed. (New York: Bobbs-Merrill, 1960) at 382-83; "Ignorance and Mistake in Criminal Law" (1957) 33 *Ind. L.J.* 1; "A Comment on Error Juris" (1976) 24 *Am. J. Comp. Law* 680; O.W. HOLMES, *The Common Law*, Lecture II, *The Criminal Law* (Boston: Little, Brown & Co., 1963) at 41; AUSTIN, *Lectures on Jurisprudence*, 187-9, 4th ed. at 498.
- (7) A.T.H. SMITH, *loc. cit.*, note 4, makes this comparison and asserts that the U.S. Constitution is responsible for the more lenient attitude in American law toward the rule that ignorance of the law is no excuse.
- (8) A.L.I., *The Model Penal Code*, P.O.D. (Philadelphia, 1962), section 2.04.
- (9) John RAWLS, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

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- (10) It is interesting to note that the A.L.I. MODEL PENAL CODE codifies the defences of ignorance and mistake of fact and law in the same provision; see section 2.04, *loc. cit.*, note 8.
- (11) The White Paper introduces the defences of ignorance of the law and mistake of law in the section on defences. For an interesting discussion of excuses and justifications, see: Paul H. ROBINSON, "Criminal Law Defences, A Systematic Analysis" (1982) *Columb. L.R.* 199; H. FINGARETTE, "Rethinking Criminal Law Excuses" (1980) 89 *Yale L.J.* 1002; George FLETCHER, *Rethinking Criminal Law* (Boston: Little, Brown & Co., 1978); Eric COLVIN, *Principles of Criminal Law*, 2d ed. (Toronto: Carswell, 1991). Complete this discussion by reading A. MCGILLIVRAY, *Reconciling the Defences: A Response to the White Paper*, which was submitted to the Department of Justice for the March 25-26 seminar on the White Paper. We agree with the dropping of the distinction between excuses and justifications. However, the distinction remains relevant when discussing the positions taken on the reform's proposed exceptions to the rule concerning ignorance of the law. The L.R.C., in Working Paper 29, *op. cit.*, note 1 at 77-78, clearly showed the confusion that results from treating ignorance of the law as an excuse or justification.
- (12) *Toward a New General Part for the Criminal Code of Canada*, framework document on the proposed new general part of the Criminal Code submitted for the consideration of the Standing Committee on Justice and the Solicitor General, at 93-95. See the comments of the working group that rejects the exception relating to court of appeal decisions by invoking s. 15 of the Charter (we are referring to the opinion of the Canadian Association of Chiefs of Police).
- (13) It appears that section 34(a) of the Proposals is based on the Australian draft bill (*Review of Commonwealth Criminal Law Interim Report and Commentary Draft Bill: The Crime Amendment Act* (1990)), which allows ignorance of the law or mistake of law to be pleaded if, under the statute, this defence is specifically provided for or if the plea prevents the accused from having the *mens rea* required by the definition of the offence. Section 34(4) of the White Paper is also based on the proposal of the Law Commission's Draft Criminal Code for England and Wales 1989, which reads as follows: *Ignorance or mistake as to a matter of law does not affect liability to conviction of an offence except - (a) where so provided; or (b) where it negatives a fault element of the offence.*
- (14) For the crimes of theft and fraud, an available defence is that the offender had a good-faith but mistaken belief in the existence of a right. Mistake of law may serve to negate the guilty state of mind. Despite *R. v. Shymkovich*, [1954] S.C.R. 606, mistake of law and colour of right constitute defences to the offences of theft and fraud: *R. v. Howson*, [1976] 2 O.R. 63; *R. v. De Marco* (1974), 13 C.C.C. (2d) 369; *Spot Supermarket Inc. v. The Queen* (1980), 50 C.C.C. (2d) 239; *R. v. Carroll*, [1960] O.W.N. 9; *R. v. Hemmerly* (1976), 30 C.C.C. 141; *Lilly v. R.* (1983), 1 S.C.R. 794 (colour of right).
- (15) The word "knowingly" expressly used in a description of an offence might indicate that the legislator requires specific knowledge of unlawfulness to hold a person liable for the offence. Several authors feel that mistake of law may be taken into account in determining specific

intent: G.A. BURBRIDGE, *A Digest of the Criminal Law* (Toronto: Carswell, 1890) at 38; J. CRANKSHAW, *Criminal Code of Canada* (Toronto: Carswell, 1915) at 39; Gisèle CÔTÉ-HARPER, Antoine MANGANAS, *op. cit.*, note 2 at 520; T. ARNOLD, "State-Induced Error of Law, Criminal Liability and *Dunn v. The Queen*: A Recent Non-Development in Criminal Law" (1978) *Dalhousie L.J.* 559 at 584. The courts have been more divided and have asked whether the use of the term "knowingly" required something in addition to the classic concept of *mens rea*. Glanville WILLIAMS relies on *Gaumont British Distributors Ltd. v. Henry*, [1939] 2 K.B. 711 and other authorities when he maintains that the use of either of the words "knowingly" and "wilfully" may make a defence of ignorance or mistake of fact or law available. On this point, see *Criminal Law: The General Part*, s. 110 and s. 59. See also *Curr.* [1968] 2 Q.B. 954.

In our opinion, the use of these terms in the wording of s. 34(a) of the White Paper would make it possible to plead ignorance of the law. The Supreme Court has already accepted a plea of ignorance of the law in *R. v. Docherty* (1990), 51 C.C.C. (3d) on the ground that the accused had not committed the offence "voluntarily". The term "unlawfully" has made a defence of mistake of law available in a case in which the accused had been induced into error by a lawyer: see *R. v. Burkinshaw and Zora*, [1973] 3 W.W.R. 150; the solution is discussed by T. ARNOLD, *loc. cit.*, note 14 [Tr--this should be 15] at 580.

(16) The courts have generally found that mistake of law cannot constitute such an excuse: *R. v. Andsten and Pétrie* (1960), 128 C.C.C. 311; *R. v. McFall* (1976), 26 C.C.C. (2d) 181; *R. v. Gibson*, [1976] 6 W.W.R. 484; *R. v. Parrot* (1980), 51 C.C.C. (2d) 539; *R. v. Arieh* (1972), 6 C.C.C. (2d) 171; *Giroux v. The Queen*, [1979] C.S. 1059. However, there are a few exceptions: *R. v. Marché de Qué. Inc. v. Bégin*, [1969] 1 Ex. C.R. 3; *R. v. Bachand*, C.S.P. St-François, J.E. 81-656; *R. v. Martel*, [1975] C.S.P. 288; *Prévost v. The Queen* (September 15, 1979), C.A. Montreal in. 500-10-000185-783. Gisèle CÔTÉ-HARPER, Antoine MANGANAS and Jean TURGEON ask why Parliament would have used the expression "without lawful or reasonable excuse" if it did not want to add something to classic *mens rea*: *op. cit.*, note 2 at 521. A legislator that recognized the excuses of ignorance of the law and mistake of law would lend weight to the opinion that the expression "without lawful or reasonable excuse" makes new defences available.

(17) See our note 13.

(18) On this point, see: *R. v. Bailey*, [1800] Russ & Ry 1.

(19) It should be noted that the courts have been very incoherent regarding the recognition of the defence of mistake relating to a private law concept included in the definition of an offence. The rule that ignorance of the law is no defence has contributed to this incoherence.

- On the topic of mistake concerning a property right, see: *R. v. Shymkovich*, *supra*, note 14; *R. v. Pace*, *supra*, note 14; *R. v. De Marco*, *supra*, note 14; *Lilly v. R.*, *supra*, note 14.

- On the topic of mistake as to marital status in bigamy cases, see: *R. v. Simard* (1931), 37 R.L. (n.s.) 166; *R. v. Brinkley* (1907), 12 C.C.C. 454; *R. v. Morgan* (1942), 4 D.L.R. 321; *R. v. Bleiler* (1912), 19 C.C.C. 249; *R. v. Haugen* (1923), 41 C.C.C. 132; *R. v.*

Sellars (1905), 9 C.C.C. 153; *R. v. Woolridge* (1980), 49 C.C.C. (2d) 300; *R. v. Gould*, [1968] 1 All E.R. 849.

- On the topic of mistake as to custody in child abduction cases, see: *R. v. Ilczyszyn* (1988), 45 C.C.C. (3d) 91; *R. v. Cook* (1984), 12 C.C.C. (3d) 471; *R. v. Austin* (1957), 27 C.R. 355; *R. v. Landry* (1979), 26 N.B.R. (2d) 307.

- (20) *R. v. Prue and Baril*, [1979] 2 S.C.R. 547.
- (21) It is surprising that the White Paper goes against the majority decision in *Prue and Baril*, *id.*, which has the merit of limiting the rule that ignorance of the law is no excuse within the meaning of section 19 Cr. C. to cases of ignorance of the statute creating the offence and mistake concerning the scope of the statute creating the offence. This Supreme Court position is consistent with Glanville Williams' opinion that a distinction must be made between ignorance that concerns "the centre of the crime charged" and ignorance that "belongs only to its legal background". On this point, see G. WILLIAMS, *Criminal Law: The General Part*, 12th ed., *op. cit.*, note 3 at 344.
- (22) H. SILVING, "Rule of Law in Criminal Justice," *loc. cit.*, note 4 at 359; H  l  ne DUMONT, *loc. cit.*, note 2 at 670.
- (23) In a provision different from ours, New Zealand proposes a solution that is in the same spirit as our suggestion. See section 26(2): "A person is not criminally responsible for any act or omission that the person believes to be justified if that belief is based on ignorance or on mistake as to any matter of law other than the appropriate indictment": *New Zealand: Crimes Bill* (1989) and *The Report of the Casey Committee* (1991).
- (24) H  l  ne DUMONT, *loc. cit.*, note 2 at 670; Working Paper 29, *op. cit.*, note 1 at 77.
- (25) *R. v. Sault Ste-Marie*, [1978] 2 S.C.R. 1295.
- (26) *R. v. Molis*, [1980] 2 S.C.R. 356.
- (27) *R. v. MacDougall*, [1982] 2 S.C.R. 605; *R. v. Cancoil Thermal Corp.* (1986), 52 C.R. (3d) 198; *R. v. Robertson* (1984), 43 C.R. (3d) 39; *R. v. Flemming* (1980), 43 N.S.R. (2d) 249; *Seguin v. The Queen*, J.E. 88-584.
- (28) *R. v. Campbell* (1973), 2 W.W.R. 246; *R. v. MacIntyre* (1983), 24 M.V.R. 67 (Ont. C.A.).
- (29) *R. v. Brinkley* (1907), 12 C.C.C. (2d) 454; *R. ex. rel. Irwin Daley* (1957), 118 C.C.C. 116; *R. v. Slegg, Forest Products Ltd.* (1974), 17 C.C.C. (2d) 149; *Dunn v. R.* (1977), 21 N.S.R. (2d) 334.
- (30) On this point, see s. 2.04(3)(b), *supra*, note 8.

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- (31) L.R.C. *Recodifying Criminal Law*, *op. cit.*, note 1.
The Commission was originally in favour of the defence of mistake of law resulting from reliance on judicial authority (on this point, see the version of s. 10(3)(b) in Working Paper 29, *op. cit.*, note 1). After representations were made to the Commission, it then proposed limiting the defence of mistake resulting from reliance on judicial authority to court of appeal decisions alone. In our opinion, the Commission's first choice is more in keeping with the idea of recognizing a true excuse for a defendant who tried to respect the law. It is difficult to distinguish in terms of culpability between offenders induced into error by a trial decision and those induced into error by a court of appeal decision. What are we to think? Could it be that those who asked the Reform Commission to change its position felt that trial judgments were more suspect in legal terms and court of appeal judgments more credible? This would mean that a defendant would never be justified in relying on a trial judgement and could be found guilty by doing so. The distinction seems arbitrary.
The Canadian Bar Association, in *Principles of Criminal Liability, Proposals for a New General Part of the Criminal Code* (1992), comes out in favour of the Law Reform Commission's first choice (at 115 and 108, s.17(b)(ii)). We also prefer this first choice.
- (32) See our note 12.
- (33) A.T.H. SMITH, *loc. cit.*, note 4 at 5. See also *Lambert v. California*, 355 U.S. 225.
- (34) Several authors are in favour of the defence of mistake of law based on the legal advice of a lawyer, and believe that the "estoppel" option should not be relied on. On this point, see: N. KASTNER, *loc. cit.*, note 2; T. ARNOLD, *loc. cit.*, note 15; A.T.H. SMITH, *loc. cit.*, note 4 at 7-8.
- (35) R.S.C. 1985, c. S-22.
- (36) *R. v. Ross* (1944), 84 C.C.C. 107; *R. v. Michelin Tires Manufacturing (Canada) Ltd.* (1975), 15 N.S.R. (2d) 105; *R. v. Catholique* (1980), 49 C.C.C. (2d) 65; *R. v. Scott*, [1978] 3 W.C.B. 51; *R. v. Fleming*, 43 N.S.R. (2d) 249; *Molis v. R.*, *supra*, note 26.
- (37) *R. v. MacLean* (1974), 17 C.C.C. (2d) 84.
- (38) *Molis v. R.*, *supra*, note 26.
- (39) Judge O'Hearn recognized in *Fleming*, *supra*, note 35 [Tr--this should be 36], that the distinction he had made in *MacLean*, *supra*, note 36 [Tr--this should be 37], was no longer valid following *Molis v. R.*
- (40) L.R.C., volume 30, *op. cit.*, note 1 at 31, section 3(7)(b)(i): "non-publication of the law in question" (second version). The first version, set out in Working Paper 29, s. 10(3)(a), reads as follows: ". . . resulting from non-publication of such law".
- (41) The L.R.C.'s first version is also acceptable to us.

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