R. v. Raham – Who's at Fault in a Case of Reckless Drafting?

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1. Introduction

Ontario's 2007 "stunt driving" offence provisions are riddled with interpretive and constitutional gaps. Whether that bodes well for the public is open to serious dispute. For lawyers, the regime has been a boon. After fifteen reported constitutional challenges and countless other cases,[1] the Ontario Court of Appeal has weighed into the debate, in *R. v. Raham*.[2] Beyond authoritative pronouncements on a frequently-prosecuted provision, *Raham* has broader significance, raising concerns relating to analytical theory, statutory interpretation, constitutional remedies and general principles of regulatory law.

Raham involved uncontested facts. The stunt driving offence with which Raham was charged involved driving 50 kilometers per hour over the speed limit while overtaking a truck; there was nothing else remarkable about her driving.[3]

The stunt driving provision, section 172 of the *Highway Traffic Act,* presents two major problems of statutory interpretation.[4] The first issue, the "Syntax Issue," arises from sloppy legislative drafting, which makes it unclear whether "stunt driving" alone is an offence, or only so qualifies if it occurs "while" "in a race or contest." The second issue, the "Fault

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1 *R. v. Drutz*, 2009 ONCJ 537, [2009] O.J. No. 4909 (QL); *R. v. Van Der Merwe*, 2009 ONCJ 386, 195 C.R.R. (2d) 237; *R. v. Tavukoglu*, 2009 ONCJ 260, [2009] O.J. No. 2410 (QL), rev'd 2009 ONCJ 606, [2009] O.J. No. 5425 (QL); *R. v. Aftab*, 2009 ONCJ 153, 189 C.R.R. (2d) 197; *R. v. Sgotto*, 2009 ONCJ 48, [2009] O.J. No. 647 (QL); *R. v. Brown*, 2009 ONCJ 6, [2009] O.J. No. 269 (QL) [*Brown*]; *R. v. Venckus,* [2009] O.J. No. 1307 (Ct. J.) (QL) [*Venckus*]; *R. v. Bond*, [2008] O.J. No. 5582 (Ct. J.) (QL); *R. v. Mongeon*, 2008 ONCJ 562, 78 M.V.R. (5th) 123 [*Mongeon*]; *R. v. Araujo*, 2008 ONCJ 507, [2008] O.J. No. 4144 (QL); *R. v. Piette*, 2008 ONCJ 466, 77 M.V.R. (5th) 83; *R. v. Vanioukevitch*, 2009 ONCJ 185, [2009] O.J. No. 1929 (QL); *R. v. Luo*, 2008 ONCJ 478, [2008] O.J. No. 3990 (QL) [*Luo*]; *R. v. Goonoo*, 2009 ONCJ 248, [2009] O.J. No. 2215 (QL).

2 2010 ONCA 206, 99 O.R. (3d) 241 [*Raham*].

3 *Ibid*. at paras. 4-6.

4 R.S.O. 1990, c. H.8.

Issue," concerns the availability and scope of a "due diligence" defence.[5] The interpretive problems generate constitutional ones: the provision might be read to threaten imprisonment for conduct that could not be reasonably avoided, in breach of the constitutional fault requirements assured by section 7 of the *Charter*.[6]

Most generally, *Raham* illustrates the critical importance of the analytical question of the order and segregation of the issues in a case.[7] The Court of Appeal considered and decided the Syntax Issue as a matter of pure statutory interpretation, before embarking on what it characterized as a distinct constitutional inquiry regarding the Fault Issue. In point of fact, *both* issues are matters of statutory interpretation that raise the *same* constitutional concern. However, by deciding against a particular construction before dealing with the Fault Issue, the Court of Appeal effectively foreclosed revisiting the Syntax Issue to resolve the constitutional problem. Instead, the Court of Appeal was required to adopt an implausible and problematic alternative interpretation of the provision to save its constitutionality.

Raham is also of practical interest for its treatment of converging matters of interpretation of statute, later-enacted regulations defining the offence elements, and constitutional concerns. Should regulations that generate constitutional concerns give rise to a preference for a different interpretation of the enabling statute? When should we assume, instead, that the executive has overstepped its regulation-making powers? These are questions squarely raised, but perhaps not satisfactorily addressed, in *Raham.*

The case is also significant in signalling the extent to which courts are willing to see constitutional fault requirements as implicit elements of most offences, instead of standards against which legislation can be tested. A presumption of constitutional interpretation will be applied, even where it results in a strained interpretation, in preference to the

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5 As briefly noted in *Raham* at para. 47, "strict liability" offences differ from "absolute liability" offences by reason of the availability of two similar defences, reasonable mistake of fact and due diligence. See also Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed. (Toronto: Butterworths, 2009) at 223-26; John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992) at 79-86.

6 *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

7 To some extent, this relates to what Professor Rutledge calls a matter of "decisional sequencing" in a paper of the same name: Peter B. Rutledge, "Decisional Sequencing," UGA Legal Studies Research Paper No. 10-04 (1 March 2010), online: Social Science Research Network <http://ssrn.com/abstract=1572709>.

grant of a constitutional remedy – even one involving "reading in" the same elements. This approach elides legislative and judicial roles, legislative and constitutional intent. The result is a deemed equivalence of the legislative cues of fault requirements, described in regulatory offence cases such as *R. v. Sault Ste. Marie*,[8] with policy reasons for "reading in" statutory elements, described in constitutional cases such as *Schachter v. Canada.*[9] The outcome compromises legislative certainty, as it can relieve the court of the obligation to articulate the offence elements that the legislation lacked, often a very difficult inquiry.

The final ramification of *Raham* flows from the last, and makes the case important in the law of regulatory offences. The *Raham* court avoided exhaustively describing the kind of conduct that might give rise to a stunt driving due diligence defence, arguably leaving the interpretive exercise incomplete. However, the court was prepared to make a very controversial determination regarding the scope of the defence. The *Raham* court held that one need not be duly diligent at ensuring compliance with the *law,* so long as one had diligently attempted to avoid commission of the *particular* offence charged. It is far from clear that this conclusion is justified.

Ultimately, while *Raham* does not reflect a radical reorientation of regulatory offences in Ontario, the distillation of such legal controversy to fifty-three short paragraphs marks the case as an important precedent.

2. The Syntax Issue: Two Offences or Three?

Subsection 172(1) of the *Highway Traffic Act* reads as follows:

> No person shall drive a motor vehicle on a highway in a race or contest, *while performing a stunt* or on a bet or wager. [emphasis added]

In a decision whose wisdom now appears questionable, the legislature permitted the executive to define the phrases "race or contest" and "stunt."[10] The former phrase was defined to require something resembling criminally negligent conduct.[11] The executive has provided a

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8 [1978] 2 S.C.R. 1299 at 1326.

9 [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68 (QL) [*Schachter*].

10 *Highway Traffic Act,* R.S.O. 1990, c. H.8, as amended, s. 172(20).

11 O. Reg. 455/07, s. 2(3)(i) defines a "race" and "contest" as "Driving a motor vehicle *without due care and attention, without reasonable consideration for other persons using the highway or in a manner that may endanger any person* by … driving a motor vehicle at a rate of speed that is a *marked departure* from the lawful rate of speed" [emphasis added]. It is worth noting that the "race or contest" branch of the stunt

non-exhaustive list of "stunts," which includes driving 50 kilometers per hour over the speed limit, conduct identically described in the discrete "speeding" offence. [12]

The Syntax Issue was whether section 172(1) prohibits two types of conduct (driving in a race or contest, while performing a stunt; driving in a race or contest … on a bet or a wager) or three (driving in a race or contest; driving while performing a stunt; driving on a bet or wager).[13]

The issue arose because of three drafting mistakes. The legislature failed to enumerate the kinds of prohibited conduct in separate clauses, it used a subordinating conjunction between the first and second phrase ("while"), and it amended the existing provision by inserting the underlined clause between two existing clauses. Accordingly, it is difficult to discern whether the phrase "in a race or contest" is intended to stand alone, or be a distributed qualifier of performance of a stunt or participation in a bet or wager, *reddendo singula singulis*.

The Ontario Court of Appeal preferred the Crown's view that section 172(1) prohibits three types of conduct, and therefore omits the "race" or "contest" fault requirements for stunt driving. The court relied upon (a) recorded legislative intent to broaden (not narrow) the pre-existing provision, which clearly criminalized driving "on a bet or a wager;"[14] (b) the placement of the comma between the first and second clauses;[15] and (c) the French version of the provision, which replaces the comma and word "while" with the word "or."[16]

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prohibition closely resembles the federal offence, enacted one year earlier, "Dangerous operation of motor vehicle while street racing;" see *Criminal Code,* R.S.C. 1985, c. C-46, s. 249.4. The dangerous operation of a motor vehicle is an offence that requires penal negligence; see *R. v. Beatty,* [2008] 1 S.C.R. 49 at para. 43, [2008] S.C.J. No. 5 (QL) [*Beatty*].

12 *Highway Traffic Act, supra* note 10, ss. 128(1) and 128(14)(d); O. Reg. 455/07, s. 3(7), "Driving a motor vehicle at a rate of speed that is 50 kilometres per hour or more over the speed limit." Interestingly, the Court of Appeal considered the offences to be the same, before distinguishing their fault requirements; see *Raham, supra* note 2 at para. 28. See also *Mongeon*, *supra* note 1 at para. 15. In earlier cases, the similarly-worded provisions had been considered different; see *Brown*, *supra* note 1 at para. 72; *Venckus, supra* note 1 at paras. 5-6; see also *Luo*, *supra* note 1 at para. 19.

13 *Raham, ibid*. at paras. 14, 17.

14 *Ibid.*at paras. 21-22.

15 *Ibid.* at para. 23.

16 *Ibid* at, para. 24: "Nul ne doit conduire un véhicule automobile sur une voie publique pour y disputer une course ou un concours ou y exécuter des manoeuvres périlleuses ou pour tenir un pari."

These are plausible but not overwhelming arguments. The first argument, regarding a legislative intent to broaden the provision, is undermined by the fact that the 2007 amendments *do* permit expansion or refinement of the scope of the provision through stipulated definitions of "stunt," "race" and "contest." Methodologically, however, it is unclear whether our reading of section 172(1) should be influenced by the executive's subsequent decision to enact definitions in "stunt" and "race or contest" in the form that it has. This is a difficult question that the court did not squarely address.[17]

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[17] Reliance upon regulations to interpret statutes is not unprecedented; see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Butterworths, 2008) at 370-71, citing *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services),* 2004 SCC 54, [2004] 3 S.C.R. 152 at 171; *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 26, [1999] S.C.J. No. 16 (QL); *Re Canada 3000 Inc.*, 2006 SCC 24, [2006] 1 S.C.R. 865 at 898; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706 at 741, *per* Deschamps J., dissenting; *Sero v. Canada*, 2004 FCA 6, [2004] 2 F.C.R. 613 at 630; *R. v. Verma*, [1996] O.J. No. 4418, 31 O.R. (3d) 622 (C.A.). Professor Sullivan argues that, "[w]hen regulations are made to complete the statutory scheme, they are clearly intended to operate together and to be mutually informing." This proposition is stated sufficiently broadly that it would apply to most regulatory regimes. It is probably better framed in this fashion: where the elements of the regulatory regime are inferable from the statutory regime, or supply ancillary details to operationalize it, a presumption of interoperability may arise. Accordingly, where the regulations necessarily "round out" statutory arrangements (*Monsanto*), or simply add detail to a statutory exemption scheme (*Campbell*), functional interoperability may be inferred. Conversely, where the regulations establish a free-standing regime, the presumption may be one of distinction not interoperability (*Verma*). The breadth of the statutory language might also be influenced by the regulator's forbearance in broadening the operation of the statutory regime (*Hilewitz*). Regulations using a particular concept might also provide powerful evidence that the concept is not nonsensical and *might* fit within a statutory definition (*Sero*). It might also be presumed that the legislator has employed an understanding common in the industry and across existing regulatory regimes (*Canada 3000)*. The author would not endorse Professor Sullivan's further argument that, "when both the statute and regulations were drafted by the same government, the intention inferable from the regulations may be entitled to significant weight." Such an inference ignores the parliamentary process and the passage of time (and intervening events) between promulgation of the legislation and the regulations. None of the cases considered by Professor Sullivan are analogous to the "stunt driving" issue. The author's view is that where the legislature can be said to have totally delegated the determination of the content of a prohibition (stunt driving), it is unsafe to assume that the regulatory regime was in the contemplation of the legislature. However, to the extent that the executive has simply fleshed out the common meaning of statutory terms, reliance on the regulations may be less problematic. In other words, and perhaps appropriately for subordinate legislation, the greater the uncertainty associated with interpretation of a statute, and the greater the need for the interpretive assistance of the regulations, the greater the dangers associated with interpretive use of the regulations.

The second argument, regarding comma placement, is grammatically flawed. The presence of the subordinating conjunction "while" *requires* the use of a preceding comma. Moreover, the result of the conjunction is that the second phrase is presumed to modify the first. The Court's interpretation is more consistent with the omission of the word "while."[18] This interpretation also raises the question of why the legislature inserted the "stunt" clause between two existing clauses, when placing the phrase "or while performing a stunt" at the end of the provision would have unambiguously favoured the Court's reading.

The third argument, regarding the French provision, is persuasive, but not conclusive, in the face of competing contextual indicators.[19]

Assuming, as the Ontario Court of Appeal did at points,[20] that it is appropriate to consider the regulations in interpreting the legislative offence, the Court's interpretation generates a highly unusual overall scheme. It is certainly questionable whether the legislature would have contemplated that the executive would adopt a definition of "stunt" whose stipulated meaning dropped all connotations of daring or attempts to attract attention.[21] The legislature presumably would have also expected that the three offences of "racing," "stunting" and "wagering" might share common traits and fault requirements.[22] The legislature's

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[18] The use of the word "while" seems particularly inappropriate on the Court's interpretation because it suggests two simultaneous but distinct activities, *viz.* driving on a highway and performing a stunt. This interpretation is rendered more awkward by the definition of "stunt" which generates the offence of "driving on a highway … *while* driving a motor vehicle at a[n excessive] rate of speed." This incongruity is less apparent if the offence is racing while stunt driving. More generally, note that courts generally place little weight on punctuation in a provision; see Sullivan, *supra* note 17 at 400-02.

[19] A similar ambiguity appeared in English version of the *Patented Medicines (Notice of Compliance) Regulations*, S.O.R./93-133. Although French gender agreement of the clauses commanded one interpretation, the Supreme Court held that the total context dictated the opposite interpretation; see *AstraZeneca Canada Inc. v. Canada (Minister of Health),* 2006 SCC 49, [2006] 2 S.C.R. 560 at 577-78. Usually, at least in cases of vagueness and the criminal law, bilingual interpretation favours a more restricted or limited meaning; see *R. v. S.A.C.,* 2008 SCC 47, [2008] 2 S.C.R. 675 at 684-86.

[20] See e.g. *Raham, supra* note 2 at para. 21.

[21] At a certain point, the implausibility of a stipulated definition in regulations must raise questions of the *vires* of the subordinate legislation: see e.g. *Bristol-Myers Squibb Co. v. Canada (Attorney General),* 2005 SCC 26, [2005] 1 S.C.R. 533 at 568-69.

[22] *Noscitur a sociis*; see e.g. *R. v. Daoust,* 2004 SCC 6, [2004] 1 S.C.R. 217 at 239 [*Daoust*]. However, in *Brown*, *supra* note 1 at para. 33, it was noted that the legislator had been known to enact separate offences with different fault requirements in a single provision before, citing *Regina v. Z-H Paper Products Limited* (1979), 27 O.R. (2d) 570, 107 D.L.R. (3d) 163 (Div. Ct.). The *Raham* Court had no difficulty with this proposition; see *Raham*, *supra* note 2 at para. 27.

presumed surprise might grow further if the executive defined a "stunt" offence in language that quite literally replicates the language of the separate speeding offence,[23] violating the presumption against redundancy in legislative language.[24] Moreover, the replicated offence had been understood to be an "absolute liability" offence.[25] Pairing it, in the stunt driving offence, with the qualitatively different possible sentence of imprisonment would have been known to generate constitutional concerns – a matter presumably not in the contemplation of the provincial legislature. It was this same presumption of constitutionality that the *Raham* court relied heavily upon while separately addressing the Fault Issue.[26]

3. The Fault Issue

The Ontario Court of Appeal resolved the Syntax Issue first, and largely independent of the constitutional issues.[27] Once the Syntax Issue had

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[23] One might imagine the jurisdictional jealousy at Queen's Park if the executive had purported to re-enact every *Highway Traffic Act* offence as a defined "stunt." In *R. v. DeSousa*, [1992] 2 S.C.R. 944, [1992] S.C.J. No. 77 (QL), the Supreme Court was obliged to consider *horizontal* incorporation by reference, whether the criminal offence of "unlawfully" causing bodily harm drew in all legal prohibitions. Sopinka J. stated, "For the reasons given by this Court in *Sault Ste. Marie, supra*, and *Re B.C. Motor Vehicle Act, supra*, s. 269 should not be interpreted so as to bootstrap underlying offences of absolute liability into the criminal law." The same logic likely applies, *mutatis mutandis*, to the present context.

[24] See e.g. *Daoust, supra* note 22 at 239-40. For observations regarding the identity of these provisions, see the cases cited *supra* note 12. Admittedly, Parliament often enacts serious offences that differ from lesser included offences only by way of their fault requirements (e.g. murder and manslaughter), to reflect differences in moral gravity between the offences. Considerably less common are offences that differ only in the availability of a due diligence defence. It does not seem that there can be a *moral* difference between a stipulated *mala prohibita* attracting penalty for its deemed dangerousness (speeding), and a *mala prohibita* attracting penalty for the same deemed dangerousness together with an objectively unreasonable (*i.e.* deemed) failure to take precautions (stunt racing).

[25] *Raham, supra* note 2 at para. 29, citing *R. v. Hickey* (1976), 12 O.R. (2d) 578 (Div. Ct.), rev'd (1976), 13 O.R. (2d) 228 (C.A.); *London (City) v. Polewsky* (2005), 202 C.C.C. (3d) 257, [2005] O.J. No. 4500 (QL) (C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 37 (QL) [*Polewsky*]; *R. v. Harper* (1986), 53 C.R. (3d) 185 [1986] B.C.J. No. 706 (QL) (C.A.); *R. v. Lemieux* (1978), 41 C.C.C. (2d) 33, [1978] Q.J. No. 184 (QL) (C.A.); *R. v. Naugler* (1981), 41 C.C.C. (2d) 33,[1981] N.S.J. No. 547 (QL) (C.A.).

[26] *Raham, supra* note 2 at para. 37. In *Brown*, *supra* note 2 at para. 87, Cuthbertson J.P. made a somewhat unusual observation that Hansard debates concerning the stunt driving legislation, which anticipated constitutional challenges, reinforced the presumption of constitutionality.

[27] *Raham, supra* note 2 at paras. 12-15. The Court did observe, in passing, that

been resolved in the statute, the constitutional question was limited to an analysis of locating fault in one particular mode of "stunt driving," defined in the regulations.[28] Could the offence be one of absolute liability, with no opportunity to defend on the basis of due diligence?

Raham is reflective of the Ontario Court of Appeal's general approach to locating fault in provincial offences. "The proper categorization of … offences as absolute, strict, or full *mens rea* offences will depend on the outcome of the … analysis [in *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299]."[29] The *Sault Ste. Marie* case provides four considerations that may influence this inquiry: the overall regulatory pattern of which the offence is a part; the subject matter of the legislation; the importance of the penalty; and the precision of the language used. As in previous decisions of the Ontario Court of Appeal, these considerations were assessed *seriatim* and particular aspects of the regime were associated with these considerations, with little discussion of the nature or purpose of the framework.[30]

Relying on an earlier case, [31] the regulatory framework of the *Highway Traffic Act* was said to be "neutral." The subject-matter of speeding, public protection,[32] pointed to absolute liability. The penalty and its constitutional consequences were apparently determinative of a strict liability characterization.[33] However, legislative imprecision did not point to any particular characterization.[34] The Court of Appeal then turned to whether the offence "could … possibly admit of a due diligence defence," answered affirmatively, and provided a skeletal description of such a defence.[35]

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one interpretation of the legislation would resolve the constitutional issue; see *ibid.*at para. 16. However, the Court did not seem to give effect to the presumption of constitutionality until considering a different construction; see *ibid.*at para. 37.

28 *Ibid.* at para. 27. Note that what initially seems to be a matter of interpretive *ambiguity* in the statute becomes a matter of *vagueness* in the regulations, concerning whether and to what extent they will accommodate fault requirements.

29 *Ibid.* at para. 31.

30 *Ibid.* at paras. 34-39; see also *R. v. Z-H Paper Products Limited* (1979), 27 O.R. (2d) 570 (C.A.) [*Z-H Paper Products*]; *R. v. Nickel City Transport (Sudbury) Ltd.* (1993), 14 O.R. (3d) 115 (C.A.) [*Nickel City Transport*]; *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (C.A.) [*Kurtzman*]; *R. v. Kanda*, 2008 ONCA 22, (2008) 88 O.R. (3d) 732 [*Kanda*].

31 *Kanda*, *ibid*.

32 At *Raham,* para. 35, the Court of Appeal appeared to endorse the view of the judge below on this issue: *R. v. Raham*, 2009 ONCJ 403, [2009] O.J. No. 3669 (QL) at paras. 24-28.

33 *Raham, supra* note 2 at paras. 37-38.

34 *Ibid.* at para. 39.

35 *Ibid.* at paras. 46-50.

There are a number of problems with the *Raham* approach.

First, by resolving the Syntax Issue before considering the Fault Issue, the Court hamstrung itself in attempting to plausibly locate a constitutionally sound fault requirement in the legislation. The opposite answer to the Syntax Issue was plausible, grounded on legislative language, and would have resolved the Fault Issue. The Court of Appeal's method of resolving the Fault Issue raises many more questions.

Second, a mechanical *Sault Ste. Marie* four-factor analysis is unlikely to be helpful in determining the fault requirements of an offence. This analytical approach has been the subject of criticism.[36] Manning and Sankoff goes so far as to call it "futile."[37] Clearly, it is not the Ontario Court of Appeal's role to disparage the reasoning in *Sault Ste. Marie*, but it has applied it in a rigid fashion that finds no parallel in Supreme Court case law. [38]

Third, in *Raham* it seems at times that the nature of *Sault Ste. Marie* analysis – one of statutory interpretation – fades from view at times. The *Sault Ste. Marie* reading of the case is sometimes suggestive of a metaphysical exercise. The objective of the exercise is to develop a characterization or a "categorization" of the offence, based upon untethered criteria. If, weighing the criteria, a characterization of the offence as one of "strict liability" is appropriate, the offence will be understood to admit of a due diligence defence. This introduces a temptation to reason that, where the availability of a prison term constitutionally mandates particular fault requirements, there is a presumption of a constitutional *characterization* of the offence.[39]

As the Supreme Court has recently noted, offence classification is a "question of *statutory* interpretation … The categories established by this Court were thus based on a presumption of *statutory* interpretation."[40] The presumption allows for an interpretive preference between two plausible interpretations *already available* on the language of the statute.

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36 See Swaigen, *supra* note 5, citing a number of articles and provincial law commission reports.

37 Manning and Sankoff, *supra* note 5 at 220.

38 Compare *Sault Ste. Marie, supra* note 8; *R. v. Chapin,* [1979] 2 S.C.R. 121 [*Chapin*]; *R. v. MacDougall*, [1982] 2 S.C.R. 605; *Re B.C. Motor Vehicle Act*, *supra* note 6; *Lévis (City) v. Tétreault*, 2006 SCC 12, [2006] 1 S.C.R. 420 [*Tétreault*].

39 These are the author's words, not those of the Court. On a general level, this does not seem to be an uncharitable reading of the Court's analysis.

40 *Tétreault*, *supra* note 38 at paras. 16, 18.

It does not allow for a preference between two abstract characterizations of the offence. Moreover, the inquiry is not limited to determining the fault requirements that are constitutionally mandated by a penalty, then inquiring whether the legislature has expressly deprived the court of the right to read-in elements, by stipulating the unavailability of particular defences.[41] Such an approach would assume that the court is entitled to read-in elements that cannot be accommodated by the statutory language. It would also put the legislature to the impossible task of expressly denying defences that the court is unable to define with any precision.[42]

As was acknowledged in *Raham*, the "presumption does not entitle a court to rewrite legislation to avoid a finding of unconstitutionality."[43] But, with respect, that is exactly what the Ontario Court of Appeal was required to do. Looking beyond the penalty provision, there is nowhere in the scheme that a "due diligence" element can be plausibly located, upon the court's resolution of the Syntax Issue. The Court of Appeal had previously determined as much, twice, in the context of the speeding offence, which only differs in its penalty.[44]

Fourth, it is unclear whether the court in *Raham* – or indeed anyone – clearly understands the *Sault Ste. Marie* "principal considerations" dictating fault requirements. They appear to be derived from a longer list of considerations described by Estey C.J.H.C. in *R. v. Hickey*.[45] The

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41 This appears to be precisely the reasoning in *Raham, supra* note 2 at para. 51. It seems to stretch too far the following observation of LeBel J. in *Tétreault*, *supra* note 38 at para. 17: "Absolute liability offences still exist, but they have become an exception requiring clear proof of legislative intent. This intent can be deduced from various factors, the most important of which would appear to be the wording of the statute itself." However, *Raham* does find support in the comments of Archibald, Jull and Roach that "A due diligence defence *can be read into an offence* even if it is not clearly articulated in statutory language. The legislature should, however, clearly state if it wishes to deny the accused a due diligence defence;" see Todd Archibald, Kenneth Jull and Kent Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management,* loose-leaf (Aurora, Ont.: Canada Law Book, 2004+) at 2-32.

42 See *Raham, supra* note 2 at para. 50.

43 *Ibid.* at para. 37.

44 *Hickey*, *supra* note 25; *Polewsky*, *supra* note 25. Note also that the Court in *Raham* had already decided that the legislature had intended to broaden the existing "stunt driving" offence; see *Raham*, *supra* note 2 at paras. 22-23. It might be thought peculiar that they would do so, but in a fashion that only prohibits a *narrower* version of the existing speeding offence, namely one admitting of a due diligence defence.

45 *Hickey, ibid*. at para. 10 (*per* Estey C.J.H.C, dissenting), rev'd 13 O.R. (2d) 228 (Ont. C.A.) (affirming view of Estey C.J.H.C.): "To determine whether the offence created is one of absolute liability (and it is clearly within the power of the provincial

"precision of the language used" requires little elaboration; a textual, contextual and purposive statutory interpretation will assist in determining the fault requirement. This appears to be an overarching, rather than discrete concern. The question of "penalty" is also fairly straightforward: offences punishable by harsher effective sentences demand more rigorous fault requirements.[46] Characterizations of the "regulatory schemes" and statutory "subject matters" have differed widely. Subsumed under these considerations have been at least the following matters: contrast in legislative language across provisions;[47] complexity of the regime and the absoluteness of its prohibitions;[48] difficulty for a citizen in ensuring perfect compliance with the provision;[49] dilution of the efficacy of the regime by permitting a due diligence defence;[50] the importance of the statutory objective;[51] and the

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Legislature, should it so desire, to create an offence for which there is no defence of honest and reasonable mistake of fact) the Court must examine the precise wording of the offence creating the provision, the contextual matter, the type of conduct regulated, the revealed purpose of the Act, the size, type and nature of penalty imposed, and the stigma, if any, to be attached by the community to conviction. Perhaps a further consideration is the disrespect for the law to be engendered by an interpretation of a clear statutory directive which invokes or imports a defence foreign to the plain meaning of the words used by the Legislature." The *Sault Ste. Marie* considerations may have also been a product of the Law Reform Commission of Canada's reports in the 1970s:; see Archibald, Jull and Roach, *supra* note 41 at 2-3 to 2-9.

46 See e.g. *Raham, supra* note 2 at para. 37; *Nickel City Transport*, *supra* note 30 at para. 33; *Z-H Paper Products*, *supra* note 30 at para. 28; *Kurtzman*, *supra* note 30at para. 33; *Kanda*, *supra* note 30 at paras. 33-35. There are difficult questions as to whether one should consider the severity of the penalty upon the particular intended target, and whether contingent liability, such as for non-payment of a fine, is material; see Swaigen, *supra* note 5 at 38-40. It might also be suggested that the range of penalties provided, rather than the maximum, should be considered. A fixed penalty is highly suggestive of an absolute liability offence. A range may suggest either a quasi-criminal sentencing discretion, unlikely to be apt for absolute liability offences, or a means of accommodating a remedy akin to disgorgement, which is more like an administrative monetary penalty (and suggestive of absolute liability).

47 See e.g. *Kurtzman*, *supra* note 30 at paras. 27-28; *Kanda*, *supra* note 30 at paras. 20-25.

48 See e.g. *Nickel City Transport*, *supra* note 30 at paras. 28-30, 34.

49 See e.g. *Kurtzman*, *supra* note 30 at para. 30, *Chapin*, *supra* note 38 at 133.

50 See e.g. *Nickel City Transport*, *supra* note 30 at para. 32; *Kanda*, *supra* note 30 at paras. 29-31. Note, however, in both cases, the relevance of this consideration was questioned.

51 Note that in e.g. *Nickel City Transport*, *ibid.* at para. 54 (*per* Arbour J.A., concurring), the importance of the objective was found to be *directly* related to the stringency of the fault requirement. Elsewhere, these matters were treated as being *inversely* related; e.g. *ibid*. at para. 31 (*per* Tarnopolsky J.A.); *Kanda*, *supra* note 30 at para. 27.

characterization of the offence as a "public welfare" offence.[52] Commentators have also suggested emphasis on the procedural protections afforded during prosecution.[53]

In the author's view, some of these concerns are best suited to distinguishing "true crimes" (*mens rea* offences) from regulatory offences, rather than distinguishing between strict and absolute liability offences.[54] The remaining concerns seem to capture a single idea, which the author would suggest is the thrust of the distinction between strict and absolute liability offences: automaticity.

If the "subject matter" regulated is conduct that is automatic, or involves the insurance of a particular consequence or result,[55] the statutory language is less likely to admit of a due diligence defence. If the "regulatory scheme" contemplates celerity in prosecution and punishment, admitting of little prosecutorial or judicial discretion, the scheme more likely describes an absolute liability offence.[56] The evidence for both kinds of automaticity would be found in the statute.

A speeding offence entails automatic behaviour bringing about an objectively measureable result. As the Court of Appeal had previously found, it is an absolute liability offence *par excellence*.[57] It is quite different from the subject matter of regulations in a number of cases

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52 See e.g. *Z-H Paper Products Limited*, *supra* note 30 at para. 27.

53 Archibald, Jull and Roach, *supra* note 41 at 2-25 to 2-31. There is an obvious risk associated with using procedural protections to characterize an offence, which characterization in turn influences the scope of procedural protections that are constitutionally guaranteed.

54 It will be noted that stigma, severity of penalty, importance of the statutory objective, and absoluteness of the prohibition tend to constitutionally distinguish the use of criminal law power from other legislative powers: see e.g. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 32, [1995] S.C.J. No. 68 (QL); see also Manning and Sankoff, *supra* note 5 at 212-17.

55 Archibald, Jull and Roach describe a spectrum of precision in legal demands in a regulatory context. Although this commentary is not directed to this precise question and does not use the criminal law's concepts of circumstance, conduct and consequence, it is instructive; see Archibald, Jull and Roach, *supra* note 41 at 2-2.10.

56 Compare *Nickel City Transport*, *supra* note 30 at para. 30: "First, the language of the provision is direct and the issue of compliance is simple and straightforward: either a driver has complied … or he/ she has not. Second, there is clearly no allowance for exemptions; once the order is issued, a driver of a commercial vehicle must obey."

57 There is considerable support for this approach and result in *Beatty*, *supra* note 11 at paras. 33-34. The stunt-speeding offence is quite like the absolute liability offence in *Kurtzman*, *supra* note 30 (failing to stop at a red light); but it is also like the strict liability offence in *Nickel City Transport*, *supra* note 30 (driving an overweight vehicle).

involving strict liability, compliance with which would have been understood by the legislature to require something resembling ongoing due diligence.[58]

Fifth, as it is incredibly difficult to situate anything resembling a "due diligence" defence in the statutory language, the exercise is more honestly considered a matter of constitutional "reading-in." That result may be unobjectionable, but as Professor Roach admonishes, "Courts should be candid when they read constitutional standards in to legislation and not rely on fictitious attributions of legislative intent."[59] Constitutionally reading-in involves a different analysis, focused upon "judicial concerns about constitutionality [rather] than … concerns about legislative intent and purposes."[60] It normally requires consideration of whether the rights violations are unjustifiable under section 1 of the *Charter* (a matter which the Crown appeared willing to concede in *Raham*).[61] But more generally, it imports concerns about the institutional competence of the judiciary to forge a new, and perhaps creative, legislative solution.[62]

Finally, there is the matter of propriety of the legislative solution to the Fault Issue actually adopted by the Court in *Raham.* Having determined that the "stunt driving" provision was required to admit of a due diligence defence, the Court took on the task of providing some, very limited,[63] guidance regarding the contours of the defence. The critical question for the Court was whether the "due diligence" defence required

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58 E.g. discharging, depositing, causing or permitting the discharge or deposit of any material in any place that may impair the quality of the water (*Sault Ste. Marie*, *supra* note 8); hunting in a baited area unless it has been inspected more than seven days before (*Chapin*, *supra* note 38); driving without complete compliance with a list of regulatory conditions for licensing, as assessed by a governmental body (*Tétreault*, *supra* note 38); driving while another passenger has not properly adjusted and securely fastened their seat belt (*Kanda*, *supra* note 30, esp. at para. 41); failing to ensure that industrial employees have employed measures and procedures prescribed by the regulations (*Z-H Paper Products Limited*, *supra* note 30); labeling, packaging, treating, processing, selling or advertising any food in a manner that is false, misleading or deceptive and is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety, including by failing to comply with an extensive regulatory regime (*R. v. Rube*, [1991] B.C.J. No. 480, 54 B.C.L.R. (2d) 106 (C.A.), aff'd [1992] 3 S.C.R. 159, [1992] S.C.J. No. 82 (QL))

59 Kent Roach, *Constitutional Remedies in Canada,* looseleaf (Aurora, Ont: Canada Law Book, 2008+) at 14-18.1, citing two due diligence cases.

60 *Ibid*. at 14-8, citing *Osborne v Canada (Treasury Board),* [1991] 2 S.C.R. 69, [1991] S.C.J. No. 45 (QL).

61 *Raham, supra* note 2 at para. 26.

62 See generally *Schachter*, *supra* note 9; Roach, *supra* note 59 at 14-51 to 14-78.1.

63 See *Raham, supra* note 2 at para. 50.

proof of reasonable measures taken to act lawfully, or only proof of reasonable measures taken to avoid liability for the particular offence in question, stunt driving. Relying upon the commentary of John Swaigen and *R. v. Kurtzman* (which Swaigen himself relied upon),[64] the Court concluded that one must only be duly diligent to avoid the particular offence in question.

This is an extremely controversial ruling. It should be noted that it is not directly supported by the Swaigen text or the *Kurtzman* case, which stand for the converse proposition: to avoid strict liability, it is not sufficient to demonstrate due diligence in conduct other than that which is addressed by the provision (*i.e.* taking general safety measures is inadequate if the legislation demands specific ones).[65] It is far less clear that the legislature intended that one could make out a defence to breaching one law by proving deliberate measures taken to flout another. Moreover, in the context at issue in *Raham,* the Court could not accept, without logical contradiction, that by diligently ensuring one was "only speeding," one could avoid a stunt driving charge. According to *Raham,* the only difference between the offence of speeding fifty kilometres per hour over the speed limit and stunt driving is the due diligence defence. Either the due diligence defence cannot be exercised by proof of this kind of speeding (qualifying the scope of the *Raham* ruling on due diligence), or the stunt driving offence is entirely superfluous. Diligence in ensuring the commission of *some* other offences must be unacceptable.

Exactly what kind of diligence will constitute a defence is an extremely difficult question. It has been suggested that one must prove one was attempting to avoid the same *kind* or *type* of conduct.[66] Likewise, in the context of *mens rea* offences dealing with narcotics[67] and firearms,[68] it has been suggested that believing one was dealing with a different product that is otherwise illicit is no defence. There may, however, be some support for the *Raham* position by analogy to case law dealing with incapacity.[69]

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64 Swaigen, *supra* note 5 at 98-100; *Kurtzman*, *supra* note 30.

65 This proposition is most clearly articulated in *R. v. Brampton Brick Ltd.*, [2004] O.J. No. 3025, 189 O.A.C. 44 (C.A.) [*Brampton Brick*].

66 Archibald, Jull and Roach, *supra* note 41 at 4:45. Arguably, the problem is also analogous to a vexing problem in double jeopardy case law: do the two offences constitute sufficiently distinct delicts as to allow separate prosecution?

67 *R. v. Kundeus*, [1976] 2 S.C.R. 272; *R. v. Blondin*, [1971] 2 W.W.R. 1, aff'd. [1971] S.C.J. No. 42 (QL).

68 *R. v. Williams*, 2009 ONCA 342, [2009] O.J. No. 1692 (QL) at paras. 19-23.

69 Demonstration of incapacity negativing a specific intent required by an offence may provide a full defence to that offence and result in liability for a lesser included

At least when dealing with true criminal offences, if the judiciary is called upon to divine implicit *mens rea* elements, there is comfort in the powerful linguistic and legal presumption of symmetry between the *actus reus* and *mens rea* elements of an offence. [70] Intent is required for the stipulated criminal conduct, knowledge is required of the statutorily-described circumstances and consequences.[71] Quite what "due diligence" defences should be read-in to a regulatory offence provision is far less clear.

Assuming one can discern the nature of the defences that might be legally available, there may be an obligation on the prosecution to particularize the facts negativing them in the charge. Dealing with a strict liability offence from a different regime, the Ontario Court of Appeal has held that "[i]t is not sufficient for the Crown to simply allege that *every* precaution reasonable in the circumstances was not taken."[72] Ironically, the consequence of *Raham* may be that the executive's lack of legislative precision must be remedied through prosecutorial exactitude. A related problem involves the use of a "stunt driving" charge to prosecute lesser included offences. Although such a practice is acceptable in principle,[73] it can give rise to a host of problems, such as fair notice and fair labelling concerns,[74] dilution of criminal law concerns,[75] pressured plea-

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offence; see e.g. *R. v. Hilton*, (1977), 34 C.C.C. (2d) 206, [1977] O.J. No. 550 (QL) (C.A); *R. v. Daviault*, [1994] 3 S.C.R. 63, [1994] S.C.J. No. 77; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523.

70 Exceptionally, some offences do not have perfect symmetry between each element of the *actus reus* and *mens rea* of the offence; see *R. v. Creighton*, [1993] 3 S.C.R. 3, [1993] S.C.J. No. 91 (QL) (foreseeability of death not required for manslaughter conviction). Thus, a defence to a conviction on a more serious charge also requires conscious abstention from lesser criminal conduct.

71 Manning and Sankoff, *supra* note 5 at 147-51, 167-70. The authors lament the absence of a legal codification of this principle in Canadian legislation. *The Rome Statute of the International Criminal Court*, whose drafting was heavily influenced by Canada, includes such a provision; U.N. Doc. A/CONF.183/9, Art. 30.

72 *Brampton Brick*, *supra* note 65 at para. 24; *Provincial Offences Act,* R.S.O. 1990, c. P. 33, s. 35. If such particularities are never warranted in light of the nature of the stunt driving by speeding offence, there is again reason to believe that the automaticity of the offence militates against the availability of such defences.

73 See e.g. *Provincial Offences Act, ibid*., s. 55.

74 See generally, the considerations listed for amendment of an information or certificate, and the possibility of requiring particulars: *Provincial Offences Act, ibid*., s. 34(4), 35.

75 See e.g. Archibald, Jull and Roach, *supra* note 41 at 2-4, citing Law Reform Commission of Canada, *Our Criminal Law* (Report 3) (Ottawa: Information Canada, 1967) at 11.

bargaining[76] and the inefficiency associated with strenuous defences to more serious charges.

4. Conclusion

In summary, *Raham* is an important case in the jurisprudence relating to regulatory offences. It may represent the high-water mark of judicial leniency in reading statutes to accommodate the availability of a due diligence defence. It breaks new ground regarding the scope of such defences. It is the rare case where the executive, legislature and judicial branch have conspired to each contribute perplexing interpretive and constitutional concerns to an offence. Studious lawyers rejoice, careless drivers lament.

76 See e.g. Archibald, Jull and Roach, *ibid*. at 17.