An Unfair and Costly Burden: Assessing the Impact of Section 794(2) of the *Criminal Code* on the Criminal Justice System

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The "golden thread" of the Canadian criminal justice system is the presumption of innocence—however, section 794(2) of the Criminal Code *places the burden of proof on the accused and forces summary conviction trials to deviate significantly from what the golden thread requires. Enacted almost 150 years ago for the purpose of addressing concerns that have largely been eradicated by other reforms to the law of evidence and procedure, section 794(2) has had a largely detrimental impact on the criminal justice system. Having determined that it is unclear when the clause should be applied and that it leads to delay and extended litigation, the authors examine the constitutionality of section 794(2) under section 11(d) of the* Canadian Charter of Rights and Freedoms. *Specifically, they explain and discount the rationales behind the existence of section 794(2)—ensuring that charges do not fail for lack of "disproof" of an exemption, ensuring efficiency in summary conviction proceedings, and knowledge of exemption being held solely by the accused—and find that it cannot be justified under section 1. Section 794(2) is poorly designed, intentionally irrational and a relic of a bygone era—no reason saves it from a constitutional attack launched using section 11(d) of the* Charter.

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Introduction

Flowing from the proposition that "it is better that ten guilty persons escape than that one innocent suffer",[1] it is often stated that the "golden thread" of the Canadian criminal justice system is the presumption of innocence,[2] which compels the Crown to prove charges against an accused person beyond any reasonable doubt.[3] Notwithstanding this rhetoric, the burden of proving particular matters in a criminal trial does occasionally fall upon the defendant. In addition to the common law defences of automatism[4] and extreme intoxication,[5] both of which must be established by the accused on a balance of probabilities, the *Criminal Code*[6] also reverses the burden of proof in a limited

1. William Blackstone, *Commentaries on the Laws of England*, 1st ed facsimile (Chicago: University of Chicago Press, 1979) vol 4 at 352.
2. This common law presumption is now entrenched as a constitutional obligation. See *Canadian Charter of Rights and Freedoms*, s 11(d), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
3. See *Woolmington v The Director of Public Prosecutions*, [1935] UKHL 1 at 481–82. See also *R v Oakes*, [1986] 1 SCR 103 at 119, 53 OR (2d) 719.
4. See *R v Stone*, [1999] 2 SCR 290, 173 DLR (4th) 66 [cited to SCR].
5. See *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469 [cited to SCR].
6. RSC 1985, c C-46 [*Criminal Code*].

number of situations.[7] Perhaps the most significant of these is also the least well known: section 794(2) of the *Criminal Code*, which, in summary conviction trials, mandates that the "burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant".[8]

The section's wording is daunting, as it implies that summary conviction trials should operate in a manner that deviates significantly from what the golden thread normally requires. After all, the Supreme Court of Canada has stated on multiple occasions that, insofar as the burden of proof is concerned, there is no real difference between the elements of an offence and any relevant defences, regardless of whether they are classified as exceptions, excuses or qualifications. To guarantee a fair trial, the accused is presumed innocent until proven guilty, irrespective of the reason being asserted to support this innocence.[9]

What exactly, then, is one to make of section 794(2)? To tell the truth, the precise scope and intended usage of the clause are somewhat of a mystery, partly because of the fact that, at least until recently, few people seemed to know it existed at all. First enacted in 1869,[10] the provision's intimidating words were largely ignored by the criminal courts for over 130 years. Exceptions in summary conviction trials were treated in the same manner as those for indictable crimes: the Crown was tasked with disproving them beyond a reasonable doubt.

In the late 1990s, seemingly out of nowhere, Crown prosecutors began attempting to use the provision as a means of forcing the accused to bear the burden of proving certain types of excuses or exceptions. These early efforts were largely unsuccessful, as two influential appellate decisions quickly confined the operation of section 794(2). In *R v H (P)*, the Court of Appeal for Ontario suggested—without much in the way of analysis—that use of the

7. See e.g. *ibid* (which punishes any person who fails to comply with a bail condition, "without lawful excuse, the proof of which lies on them", s 145(3)).

8. *Ibid*, s 794(2).

9. See *R v Holmes*, [1988] 1 SCR 914 at 935, 65 OR (2d) 639. The SCC stated that, "[w]ith [excuses and justifications], all that the accused need do is point to some evidence which supports the defence. The Crown is then required to disprove the defence beyond a reasonable doubt." *Ibid*.

10. See *An Act respecting the duties of Justices of the Peace out of Sessions, in relation to summary convictions and orders*, SC 1869, c 31, s 4 [*Justices of the Peace Act*, 1869].

provision was *mostly* restricted to regulatory proceedings, and that a narrow interpretation of the clause should be adopted.[11]

The real setback to those hoping for a broader application of the section was inflicted by *R v Lewko*, a 2002 judgment of the Court of Appeal for Saskatchewan.[12] The Court interpreted section 794(2) as imposing only an evidentiary burden on the accused to show that there was an "air of reality" to any relevant exception, proviso, etc.[13] Where this limited burden was met, it fell to the prosecution to disprove the exception using the ordinary standard of proof: beyond a reasonable doubt. The interpretation completely neutered section 794(2) by treating it akin to defences raised in indictable trials. Since no excuse or exception must ever be put before the trier of fact unless it is first shown to possess an air of reality,[14] courts relying upon *R v Lewko* simply continued applying the conventional approach to the burden of proof and ignored the *Criminal Code*'s wording altogether.

Though not strictly binding outside of Saskatchewan, *R v Lewko* dominated the jurisprudence for more than a decade. In 2014, however, the judgment of another appellate court unexpectedly altered the fate of section 794(2). In *R v Goleski*, the Court of Appeal for British Columbia expressly decided not to follow *R v Lewko*, instead holding that the section meant exactly what it said: in summary conviction trials the burden of establishing exceptions, provisos and excuses *should* rest upon the accused.[15] The SCC subsequently affirmed the decision in a unanimous, one-paragraph judgment.[16]

R v Goleski concentrated exclusively upon the application of section 794(2) in light of the wording and statutory history of the provision—expressly eschewing any consideration of the section's merits or constitutionality. In this respect, it provides a reasonable understanding of the clause. But the judgment

11. *R v H (P)* (2000), 143 CCC (3d) 223 at para 14, 71 CRR (2d) 189 (Ont CA).

12. 2002 SKCA 121, 169 CCC (3d) 359.

13. *Ibid* at para 18. An evidentiary burden requires the accused to point to some evidence capable of supporting the defence in question. See *ibid* at para 20. Whether the burden has been met depends on the application of a legal standard, not a factual one. In assessing the available evidence, the trial judge must accept that every possible inference that can logically be drawn from the evidence should be drawn. See *R v Fontaine*, 2004 SCC 27 at para 72, [2004] 1 SCR 702. The judge should not assess the quality, weight or reliability of the evidence in this process. See *R v Pappas*, 2013 SCC 56 at para 22, [2013] 3 SCR 452.

14. See *R v Gunning*, 2005 SCC 27, [2005] 1 SCR 627.

15. *R v Goleski*, 2014 BCCA 80, 307 CCC (3d) 1, aff'd 2015 SCC 6, [2015] 1 SCR 399.

16. See *ibid* (citing to SCC level).

remains an unfortunate legal development, as a broad interpretation of section 794(2) suffers from a number of severe shortcomings. To begin with, the section's potential scope is enormous; it has the potential to reverse the burden of proof with respect to certain excuses and exemptions for more than one hundred offences,[17] although until the clause is fully interpreted, it is impossible to say for sure how large the impact might be. Amazingly, neither *R v Goleski* nor any other decision has ever definitively established what constitutes the type of "exception, exemption, proviso, excuse or qualification prescribed by law" for which the burden of proof should be reversed.[18]

The uncertainty surrounding the section's potential application is troubling in its own right. A study of the jurisprudence reveals that differing philosophies about the section's application, combined with simple ignorance about its very existence, have led to inconsistency in treatment and application. Crown prosecutors seem equally likely to rely upon the provision or ignore it altogether, resulting in an almost haphazard approach to the burden of proof—something that should be a stable facet of any criminal trial and certainly a feature the defendant should be fully aware of before entering a plea to a particular charge.

The clause has the equally odious effect of making summary conviction trials more complicated and time-consuming. In cases where the Crown has attempted to rely upon section 794(2), defendants have often responded by trying to re-characterize "excuses" as the absence of an element of the *actus reus* or *mens rea* for which the ordinary burden of proof applies.[19] *R v Goleski*'s approach to section 794(2) operates on the implied assumption that the elements of criminal offences can be easily disentangled from the multitude of excuses and provisos that crop up throughout the *Criminal Code*. As we shall demonstrate, however, the *Criminal Code* cannot really be approached in this manner, as it is fairly common for there to be factual overlap between the elements of an offence and potential defences. In the absence of section 794(2), this intersection would not matter much, except perhaps to theorists, as proof of "guilt" in its broadest form would lie with the Crown regardless of how a particular reason for avoiding liability is construed. With the sudden revival of

17. As we shall explore, there are at least 145 offences in the *Criminal Code* that contain a specific form of exception, excuse, proviso, exemption, or qualification to which section 794(2) might be applicable.

18. *Criminal Code*, *supra* note 6, s 794(2).

19. See e.g. *R v Westerman*, 2012 ONCJ 9, 2012 CarswellOnt 460 (WL Can); *R v Butler*, 2013 ONSC 2403, 2013 CarswellOnt 5194 (WL Can).

the clause, however, demarcating the scope of an offence and distinguishing it from any possible excuse or exception has become a matter of considerable magnitude in summary conviction proceedings.

If these flaws were not sufficient cause for alarm, there remains good reason to question the benefits that supposedly justify the section's very existence. The need for the clause purportedly rests upon three rationales: (1) that, in its absence, the Crown would have to disprove matters that are not raised in an information; (2) that summary conviction offences are expeditious matters involving relatively trivial offending that should not require the Crown to navigate difficult matters of proof in the same way that is required for indictable offences; and (3) that reversal is necessary to avoid burdening the Crown with disproving matters that are known only to the accused.

None of these are compelling reasons to save the section from an inevitable constitutional attack launched using section 11(d) of the *Canadian Charter of Rights and Freedoms*.[20] Developments in the jurisprudence have put to rest the idea that the Crown must disprove matters that are not essential to guilt in the absence of an evidentiary foundation. Summary conviction proceedings have evolved into significant undertakings with severe consequences. Finally, there are fairer and more effective ways to address the difficulties in investigating matters known primarily or exclusively by the accused. As a consequence, there is good cause to believe that this sporadically applied, broadly worded and troublesome provision violates section 11(d) and cannot be justified as a reasonable limitation under section 1.[21]

I. Section 794(2): Background and Historical Evolution

Section 794(2) has a long and storied history, one that can be traced back prior to the enactment of the first *Criminal Code*[22] in 1892. An early version of the provision first appeared in *An Act respecting the duties of Justices of the Peace*

20. *Supra* note 2.
21. See *ibid*, ss 1, 11(d).
22. SC 1892, c 29 [*Criminal Code*, 1892].

out of Sessions, in relation to summary convictions and orders in 1869.[23] The original enactment read:

> [I]f the information or complaint in any such case shall negative any exemption, exception, proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same.[24]

The clause has gone through multiple iterations since this version, though the essence of the provision has remained the same. In 1909, for example, the section was restructured to provide that information did not have to specifically refer to or negate any available exemption, while continuing to make clear that whether an information actually did so or not, "no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant".[25] In 1955, the provision was condensed to its current form in two subclauses,[26] with the words "except by way of rebuttal" added as a qualifier to the portion of the clause suggesting that the prosecutor had no obligation to prove that any exception did not favour the defendant, presumably to ensure that the prosecutor could still adduce evidence by rebuttal in situations where the accused advanced an exception.[27] It now reads as follows:

> The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required,

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23. *Supra* note 10 at 339. Though this was the first Canadian legislation on the subject, an earlier English version from 1848 had effect prior to Confederation. See *An Act to facilitate the Performance of the Duties of Justices of the Peace out of Sessions, within England and Wales, with respect to summary Convictions and Orders*, 1848 (UK), 11 & 12 Vict, c 43, s 14 [*Justices of the Peace Act*, 1848].

24. *Justices of the Peace Act*, 1848, *supra* note 23.

25. *An Act to amend the Criminal Code*, SC 1909, c 9, s 717 [*Criminal Code*, 1909].

26. See *Criminal Code*, SC 1953–54, c 51, s 702 [*Criminal Code*, 1953–54].

27. Senate, *Proceedings of the Standing Committee on Banking and Commerce*, 21st Parl, 7th Sess, (16 December 1952) (Hon Salter Hayden). See *R v Goleski*, *supra* note 15 at para 76. The Court of Appeal for British Columbia takes this view, noting that the goal of the additional wording was, "to ensure that if an accused advanced an exception, etc. during the defence case, then the prosecution would have a right to call evidence in rebuttal". *Ibid.* To be clear, developments in the common law render the wording completely superfluous. The rules on reply evidence unquestionably permit the Crown to call evidence to rebut a defence of this sort raised by the accused during his or her case. See Alan W Mewett & Peter Sankoff, *Witnesses* (Scarborough, Ont: Carswell, 1991) vol 1 (loose-leaf updated 2016, release 2) ch 2 at 62–67.

except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.[28]

Despite its ancient lineage, until quite recently section 794(2) and its predecessors were almost never invoked in criminal proceedings. Extensive searches of the jurisprudence reveal that, prior to the late 1990s, the clause was used almost exclusively in the prosecution of regulatory offences—and not even very commonly there.[29] The section was most often applied in response to arguments that the specific inclusion of terms in a penal statute, such as "without reasonable excuse", created an essential element of the offence that had to be proven—or, more accurately, the absence of an excuse disproven—by the Crown. Though the section conceivably affected a large number of summary conviction proceedings involving offences that contained the potential for exceptions, exemptions and the like to be raised, Crown prosecutors rarely attempted to rely upon it, for whatever reason.

One of the first reported uses of the section in relation to a criminal offence occurred in *R v H (P)*,[30] a case in which the accused was charged with joyriding pursuant to section 335 of the *Criminal Code*, an offence that prohibits anyone from being the occupant of a motor vehicle known to be taken without the consent of its owner.[31] The offence allows for one specific exception: the accused can escape culpability by proving that he or she took reasonable steps to exit the vehicle upon learning that it was taken without consent.[32] In *R v H (P)*, the only question on appeal was whether section 794(2) imposed an onus upon the accused to *prove* that he had taken reasonable steps to exit the car.[33]

The Court of Appeal for Ontario concluded that section 794(2) did no such thing—holding that this was not the type of excuse that came within the scope of the clause. Instead, the Court found that section 794(2) applied only

28. *Criminal Code*, *supra* note 6, s 794(2).

29. Compare *Re R v Buday*, [1960] OR 403, 128 CCC 307 (CA); *R v Paranteau* (1963), 43 WWR 700, 1963 CarswellAlta 60 (WL Can) (SC (TD)); *R v Park Hotel (Sudbury) Ltd*, [1966] 2 OR 316, [1966] 4 CCC 158 (Dist Ct); *Hundt v R*, [1971] 3 WWR 741, 3 CCC (2d) 279 (Alta SC (AD)); *R v Stacey* (1990), 82 Nfld & PEIR 164, 257 APR 164 (SC (TD)) [cited to Nfld & PEIR] (these cases all involved regulatory offending).

30. *Supra* note 11.

31. *Supra* note 6, s 335.

32. See *ibid*, s 335(1.1).

33. *Supra* note 11 at para 10.

"in narrow circumstances, usually regulatory offences, where a status in law has been conferred upon the accused who otherwise would be culpable".[34] Consequently, it did not apply to statutory or common law defences. The wording of the judgment unquestionably limited the application of section 794(2),[35] even though the extent to which *R v H (P)* envisaged a residual use of the clause in criminal proceedings was not made clear.[36]

R v H (P) was an important decision, but the more significant interpretation of section 794(2) came two years later in *R v Lewko*,[37] which involved an accused who claimed to have a reasonable excuse for failing or refusing to provide a breath sample.[38] In this case, the Court of Appeal for Saskatchewan read section 794(2) even more narrowly than the Court in *R v H (P)*, concluding that it only required the accused to meet an evidentiary burden in establishing that an excuse was reasonable.[39] In reaching this conclusion, Bayda CJA found that Parliament's addition of the words "except by way of rebuttal" in 1955 implied that the ultimate persuasive burden for all types of defences and excuses remained upon the Crown.[40] As he saw it, requiring the accused to prove a defence on a balance of probabilities would lead to an acquittal if satisfied, leaving the prosecutor with nothing to rebut. In contrast, an evidentiary burden would require the accused to raise *some* evidence of an excuse, which the Crown could then rebut to prove beyond a reasonable doubt that the excuse did not negate culpability. According to the Court of Appeal for Saskatchewan, this was a better fit with the statutory wording.

R v Lewko's approach to section 794(2) quickly became the leading interpretation of the provision, effectively eliminating any need to resort to

34. *Ibid* at para 14.

35. See e.g. *R v J (T)*, 2001 BCPC 242, [2001] BCWLD 1046; *R v G (J)*, 2012 ONSC 1090, 2012 CarswellOnt 1516 (WL Can); *R v Whatmore*, 2011 ABPC 320, 526 AR 124 (all of which adopted the reasoning in *R v H (P)*).

36. The correctness of *R v H (P)*'s interpretation of section 794(2) is discussed in more detail in the text accompanying notes 52–58, *below*.

37. *Supra* note 12.

38. See *ibid* at para 1.

39. See *ibid* at para 35, citing PK McWilliams QC, *Canadian Criminal Evidence*, 3rd ed, vol 2 (Aurora, Ont: Canada Law Book, 2002) at ch 25:10120.

40. *R v Lewko*, *supra* note 12 at para 16.

the clause at all.[41] However, the courts were not unanimous on this view of the section, and judges in some provinces chose not to follow *R v Lewko*, creating a lack of consensus regarding the application of section 794(2).[42] It took twelve years before the matter went back before another Canadian appellate court, this time the Court of Appeal for British Columbia in the case of *R v Goleski*.

In *R v Goleski*, the accused was again charged with failing to provide a breath sample, and to defend the charge he attempted to raise a reasonable excuse.[43] The accused stated that he had failed to provide a sample because he felt he "was being targeted" by the Constable who requested the sample and believed that the Constable "wasn't going to be honest" about the results of the breath sample in the written report.[44] Relying on *R v Lewko*, he contended that he only needed to raise a reasonable doubt as to whether he had a justifiable excuse to refuse the demand.[45]

This time the argument failed, with the Court of Appeal for British Columbia rejecting *R v Lewko*'s approach to section 794(2), holding instead that the burden of proving a reasonable excuse rested on the accused on a balance of probabilities.[46] In looking carefully at earlier versions of the section and taking into account its lengthy history, the Court of Appeal concluded that Parliament had always intended for the clause to impose a persuasive burden on the accused. The Court stated that *R v Lewko* had overemphasized

41. In addition to guiding the application of section 794(2) in Saskatchewan, *R v Lewko* was followed by courts in Alberta, Manitoba, Ontario, New Brunswick and British Columbia. See e.g. *R v Nagy*, 2003 ABQB 690, 336 AR 124; *R v Dolphin*, 2004 MBQB 252, 189 Man R (2d) 178; *R v Smith* (2007), 44 MVR (5th) 290, 2007 CarswellOnt 331 (WL Can) (Sup Ct); *R v Firth*, 2009 NBPC 47, 354 NBR (2d) 23; *R v Long*, 2011 BCPC 480, 2011 CarswellBC 3852 (WL Can).

42. *R v Lewko* was not followed in Newfoundland and Labrador, Nova Scotia and some courts in Quebec. See e.g. *R v Sheehan* (2003), 2003 CarswellNfld 50 (WL Can) at paras 12–13, 57 WCB (2d) 157 (NL Prov Ct); *R v Barkhouse*, 2008 NSPC 2 at para 27, 260 NSR (2d) 394; *R c Dubois*, 2006 QCCS 3692, 2006 CarswellQue 6543 (WL Can); *R c Marcil*, 2015 QCCS 1615, 2015 CarswellQue 3508 (WL Can).

43. *Supra* note 15.

44. See *ibid* at para 12.

45. *Ibid* at para 15. It is quite possible that this explanation does not amount to a reasonable excuse, a point raised by the Attorney General of Ontario intervening in the case at the SCC. The Court declined to address this point in dismissing the appeal. See *R v Goleski*, [2015] 1 SCR 399 (Factum of the Intervener Attorney General of Ontario at para 7); *R v Goleski*, *supra* note 15 (citing to SCC level).

46. See *R v Goleski*, *supra* note 15 at paras 5, 81.

the importance of adding the words "except by way of rebuttal" and ignored the long common law jurisprudence surrounding the provision. The Court also pointed out that the *Charter* had not been raised in argument and, as a consequence, it was unnecessary to consider the constitutionality of the provision.

R v Goleski was subsequently affirmed in a one-paragraph judgment of the SCC.[47] As a result, section 794(2) now unquestionably imposes a persuasive burden on the accused to establish a reasonable excuse on a balance of probabilities with respect to section 254(5), at least where the accused is tried by summary conviction. Nonetheless, there are many matters about the provision that remain unanswered. Though *R v Goleski* clearly stands for the proposition that section 794(2) imposes a burden of proof upon the accused where "an exception, exemption, proviso, excuse or qualification prescribed by law"[48] is raised, it was much less precise in establishing the types of exceptions, etc. that trigger a reversal of the ordinary burden. It also said nothing about whether imposing a reverse onus in these situations is a good idea or one that complies with the *Charter*.

II. The Scope of Section 794(2)

In assessing the impact and constitutionality of section 794(2), it is vital to first understand the scope and potential application of the clause. By virtue of its placement in Part XXVII of the *Criminal Code*, which is restricted to summary conviction offences, it is easy enough to conclude that the section has no application to trials by indictment.[49] Few other conclusions about the clause's applicability are so easily reached, however. To begin with, it is not entirely clear if section 794(2) applies to common law defences—some of which could fall within the term "excuse", which is specifically mentioned in the section—or to "general" statutory defences such as duress,[50] acting under

47. *Supra* note 15 (citing to SCC level).

48. *Ibid.*

49. Compare *R v Ali*, 2015 BCCA 333, 326 CCC (3d) 408 (appearing to suggest that a similar principle of placing the burden to prove exceptions on the defence, perhaps arising at common law, may apply to trials on indictment). But see Peter Sankoff, "Comment on *R v Ali*" (2015) 22 CR (7th) 218 (for a critique of this decision).

50. *Criminal Code*, *supra* note 6, s 17.

authority[51] or defence of person.[52] For ease of reference, we shall refer to both categories from this point forward as belonging to the class of "general defences".

There is little in the way of judicial commentary on this point. The only reference to defences of any kind in the section 794(2) jurisprudence is a throwaway comment from Finlayson JA in *R v H (P)* to the effect that the section "speaks of exceptions, exemptions, provisos, excuses or qualifications. If it was intended to apply to defences, the word is not so arcane that it could not have been included in the list."[53]

Though decisively short of reasoning, there is good reason to believe that Finlayson JA's conclusion was the correct one: section 794(2) almost certainly has no application to general defences. Three separate arguments support this conclusion.

First, no case has ever applied the section to these sorts of defences. While hardly definitive, it is nonetheless interesting that not a single reported decision can be found where the application of section 794(2) has ever even been hinted at, let alone used, with respect to a general defence.

Second, an approach that excludes general defences is consistent with one of the original objectives of the clause: relieving the Crown of having to disprove exceptions that are mentioned in the information. In several of the section's historical iterations,[54] the focus was squarely on avoiding concerns

51. See *ibid*, s 25.

52. See *ibid*, s 34.

53. *Supra* note 11 at para 15. Justice Finlayson relied upon this distinction in refusing to apply section 794(2) to section 335(1.1), which reads that the offence of joyriding, despite proof of the *mens rea* and *actus reus*, "does not apply to an occupant of a motor vehicle or vessel who, on becoming aware that it was taken without the consent of the owner, attempted to leave the motor vehicle or vessel, to the extent that it was feasible to do so, or actually left the motor vehicle or vessel". *Criminal Code*, *supra* note 6, s 335(1.1). According to Finlayson JA, section 335(1.1) is nothing more than "an enlargement of the common law defence of compulsion, duress or coercion". *R v H (P)*, *supra* note 11 at para 15.

In our view, use of the analogy to limit section 794(2) is not compelling. The clause may be an enlargement of compulsion or duress—though there are many differences between the two—but categorizing it as being *akin* to a common law defence provides no guidance as to whether section 794(2) should apply. The common law defences, to the extent they are excluded at all, are exempt from the scope of section 794(2) because they apply generally to all offences, not because of their inherent nature.

54. See e.g. *Justices of the Peace Act*, 1869, *supra* note 10 ("[i]f the *information* . . . negatives any exemption, exception, proviso, or condition in the Statute on which the same is framed, it shall

raised by the manner in which an information was drafted so that it included a reference to a particular exemption or excuse. This strongly suggests that general defences were not the intended problem being addressed by this clause. After all, though an information will occasionally make reference to a specific exception connected to an offence by statute,[55] it is impossible to conceive of one that specifically references a general common law or statutory defence.[56] Given this, it stands to reason that both common law and general statutory defences are excluded from the purview of section 794(2).

Finally, as Finlayson JA pointed out in *R v H (P)*, the wording of the section suggests that general defences were not meant to be included. It is difficult to classify any of the general defences as exceptions, exemptions, provisos or qualifications. Only the term "excuse" implies a broader approach, but general principles of interpretation suggest that this term should be applied narrowly, given the related terms.[57] In addition, approaching the term broadly would lead to an absurd result: defences conceptualized as excuses, like duress, would require the burden of proof to be reversed, but defences conceptualized as justifications, such as self-defence, would not.[58]

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not be necessary for the Prosecutor or Complainant to prove such negative", s 44) [emphasis added].

55. This is because many are simply drafted by officers who refer to the governing statute, replicating the exception in the process. See e.g. *R v Stacey*, *supra* note 29.

56. *Criminal Code*, 1909, *supra* note 25. This Act, however, seemed to broaden this substantially:

> Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation or other document creating the offence, *may be proved by the defendant*, but need not be specified or negatived in the information or complaint, and whether it is or is not so specified or negatived, *no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant*.

Ibid, s 2 [emphasis added].

57. See *R v Goulis* (1981), 33 OR (2d) 55 at 61, 125 DLR (3d) 137 (CA). The Court of Appeal stated that, "[w]hen two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general." *Ibid* [citation omitted].

58. See *R v Paré*, [1987] 2 SCR 618 at 631, 45 DLR (4th) 546. As Wilson J noted, a court should not interpret a clause so as to create "distinctions that are arbitrary and irrational. . . . An interpretation of [a statute] that runs contrary to common sense is not to be adopted if a

For these reasons, it seems logical to restrict the application of section 794(2) so that it excludes general defences. This does not entirely resolve the inquiry into scope, however. It remains necessary to consider what *does* fall into the purview of an "exception, exemption, proviso, excuse or qualification" for the purposes of section 794(2).[59]

There is not much in the way of guidance for this inquiry either, and most of what does exist amounts to *obiter* comments in the context of judgments upon other matters. For example, in *R v H (P)*, the Court of Appeal for Ontario suggested that the section "applies in narrow circumstances, usually regulatory offences, where a status in law has been conferred upon an accused who would otherwise be culpable".[60] While definitive, this comment is not particularly useful. The second part of the statement is designed to uphold the first conclusion—that the clause applies narrowly—but it does not actually seem to accomplish this. One could make the case that *every* exception confers a status in law (a lack of culpability) for a person who would otherwise be culpable.[61]

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reasonable alternative is available." *Ibid*. For a broader discussion of the differences between excuses and justifications, see Morris Manning & Peter Sankoff, eds, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed (Markham, Ont: LexisNexis, 2015) at 417–25.

59. *Criminal Code*, *supra* note 6, s 794(2).

60. *Supra* note 11 at para 14.

61. See *R v Vera*, 2004 ONCJ 144, 2004 CarswellOnt 3327 (WL Can). Justice Brown read the passage from *R v H (P)* somewhat differently, noting that the reverse onus was the product of

> a long line of common law cases, as a result of experience and the need to ensure that justice is done both to the community and to defendants. Through this line of cases, an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged has evolved. This exception has developed in relation to offences arising under enactments which prohibit the doing of an act save in *specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities*.

Ibid at para 11 [emphasis added].

It is an interesting interpretation, but one that is exceptionally difficult to extract from the language of section 794 itself. Moreover, there is no principled reason for the distinction. Why should certain types of excuses—those with *specific* descriptions—require a reverse onus, while general classes of excuse are treated differently? In any event, to the extent that this is what *R v H (P)* was trying to accomplish, it has now been overruled by *R v Goleski*, which applied the reverse onus to a general excuse in section 254(5). See *R v Goleski*, *supra* note 15.

R v Goleski is not much more helpful, though the decision clearly regards section 794(2) in a more expansive light than the Court of Appeal for Ontario did in *R v H (P)*, with the Court of Appeal for British Columbia concluding that, "[s]ection 794(2) applies not just to a 'reasonable excuse' in the breathalyzer context, but to a *broad* range of statutory exceptions."[62] The Court never delved deeply into how broad the range might be, but some insight to its intentions can be divined from the Court's favourable reference to the following passage from *R v Sheehan*, a decision of the Provincial Court for Newfoundland and Labrador, where Gorman J stated:

> In my view, the error in *Lewko* involves a failure to appreciate the distinctive nature of the manner in which Parliament has drafted subsection 254(5). It provides the accused with an opportunity to escape liability in a manner particularized to that subsection. . . . What it does, is that it allows the accused to raise as a reasonable excuse for refusing or failing to comply with a demand, issues that would never constitute a defence to any other charge. Interestingly, when an accused person raises the issue (or defence if you prefer) of reasonable excuse, he or she is conceding that the Crown has proven beyond a reasonable doubt the existence of the requisite *mens rea* and *actus reus* for the offence. Since the excuse must be objectively reasonable, since it only applies if the Crown has proven beyond a reasonable doubt that the accused has committed both the *actus reus* and *mens rea* of the offence and since it does not limit resort to other defences, then the onus of establishing the proffered excuse should rest with the accused.[63]

In contrast to *R v H (P)* and *R v Goleski*, this excerpt at least attempts to provide a means of identifying the types of exceptions that are covered by section 794(2). First, it points out that the opportunity to "escape liability" is particularized to subsection 254(5), in that it gives the accused a defence that would not apply to any other charge. Second, the excuse only arises once the Crown has proven the existence of *mens rea* and *actus reus* for the offence. Third, the reasonable excuse qualification does not limit resort to other defences, and, finally, the excuse must be "objectively reasonable". All four of these are

62. *Ibid* at para 79 [emphasis added]. Not surprisingly, the historical jurisprudence on the scope of section 794(2) is erratic, with some courts adopting the narrow view of section 794(2) propounded in *R v H (P)* and others taking a broader approach, along the lines of the Court of Appeal for British Columbia in *R v Goleski*. See e.g. *R v Khorfan*, 2011 ABPC 84, 506 AR 397; *R v Neary*, 2010 NSSC 466, 940 APR 232; *R v Liptak*, 2009 ABPC 342, 481 AR 116; *R v Truong*, 2008 BCSC 1151, 235 CCC (3d) 547; *R v Williams*, 2008 ONCA 173, 89 OR (3d) 241; *R v Manship Holdings Ltd*, 2007 NSSC 320, 839 APR 273 (applying *R v H (P)*); *R v Le*, 2014 ABPC 177, 2014 CarswellAlta 1329 (WL Can); *R v Spracklin*, 2013 ABPC 55, 551 AR 323; *R v Rose*, 2003 CarswellNfld 212 (WL Can), 43 MVR (4th) 35 (Nfld Prov Ct) (applying a broad approach).

63. *Supra* note 42 at para 13 [footnote omitted].

ostensibly cited as reasons why "the onus of establishing the proffered excuse should rest with the accused".[64]

Whether the four points qualify as justifiable or effective means for limiting the application of section 794(2) to certain types of excuse, while excluding others, is another matter entirely. It is difficult to understand, for example, why the objective reasonableness of the defence provides any guidance whatsoever regarding the burden of proof. To be sure, an excuse in these circumstances will not be accepted unless it is objectively reasonable. But how does this fact in and of itself inform whether the accused should bear the burden of showing how reasonable it is? The other points are equally mystifying. How the existence of other defences helps show that the accused should bear the burden for a particular excuse is anyone's guess. Given that the same point could be made for every offence in the *Criminal Code*, it offers little assistance in functionally delineating the applicability of section 794(2). The same critique applies for the suggestion that "[the excuse] only applies if the Crown has proven beyond a reasonable doubt that the accused has committed both the *actus reus* and *mens rea* of the offence".[65] Again, this is true for almost *every* defence in the *Criminal Code* or at common law[66]—be it a general defence or some form of qualification, proviso or exemption. By definition, these are situations that only come into play once it is concluded that the general requirements of the offence have been met, and such a condition hardly provides an effective or rational way of narrowing the application of section 794(2).

R v Sheehan accordingly leaves the reader with a singular method of narrowing the scope of section 794(2): if the opportunity to escape culpability is *particularized* to that section, then it constitutes an exception, etc., and section 794(2) will be found to apply. To use the example in *R v Goleski*, section 254(5) of the *Criminal Code* specifically provides the accused with the opportunity to raise a reasonable excuse as a means to avoid liability. As such, it is particularized to that offence and should be considered an excuse as opposed to a defence.[67]

In the absence of any other rationale for applying section 794(2) to certain provisions and not others, focus upon this factor seems as logical as any. As

64. *Ibid.*

65. *Ibid.*

66. Intoxication, which is not actually a defence in that it is simply a factor that, in some cases, can be used to show the absence of *mens rea*, could be regarded as an exception to this proposition.

67. See *R v Sheehan*, *supra* note 42 at para 13.

mentioned above, historical iterations of section 794(2) made special mention of the drafting of the information, which implies that the clause was intended to apply to excuses and exceptions that were related to a particular offence. After all, it would not be surprising to see an information drafted in respect of section 254(5) suggest that the offence was committed without reasonable excuse, but one would not expect to see an information referring to general defences that were not exclusively applicable to a particular offence.

This still leaves an incredibly broad array of potential applications for section 794(2). The easiest to identify are those offences that preclude liability where an accused possesses a reasonable excuse for having committed the crime—the very wording that led to a reversal of the burden of proof in *R v Goleski*. The phrase "without reasonable excuse" is written into multiple provisions of the *Criminal Code*,[68] and, although section 794(2) has not been authoritatively applied to each of these sections, it seems logical to assume that the reasoning in *R v Goleski* should extend to these provisions. The jurisprudence suggests that the similar phrasing of "without lawful excuse"[69] will also be sufficient.[70]

These examples are not the only sections to which section 794(2) might apply, as there are many other phrases found throughout the *Criminal Code* that give the accused an opportunity to escape culpability based on some form of exemption, even though many of these have not yet been litigated within the context of section 794(2). It is unclear, for example, whether reliance upon the well-known excuse of "colour of right", which is a particularized exception applicable only to certain offences once the primary elements of the offence have been proven,[71] requires that the burden of proof be reversed. Other examples of potential section 794(2) applications include exceptions beginning with the words "unless"[72] and "except",[73] and other types of specific exemptions or exceptions.[74] It has even been suggested that the requirement

68. See e.g. *supra* note 6, ss 249.1(1), 258(3), 437, 445.1(1)(c), 487.0552(1), 490.031(1), 490.0312, 545(1), 733.1(1).

69. See e.g. *ibid*, ss 56.1(1), 66(2), 82(1)(2), 86(1), 87(1), 89(1), 102(1), 108(1), 127(1), 201(2)(a), 342.2(1), 353.1(1), 372(3), 445(1).

70. See *R v Truong*, *supra* note 62; *R v Qadir*, 2016 ABPC 27, 2016 CarswellAlta 131 (WL Can).

71. See e.g. *Criminal Code*, *supra* note 6, ss 72(2)–(3), 322(1), 326(1), 342(3), 429(2).

72. See e.g. *ibid*, ss 90(1), 204(3), 204(5), 258(1)(a), 276.3(c)–(d), 278.9(1)(c), 362(4).

73. See e.g. *ibid*, ss 216, 258.1(2)(a)–(b), 463, 464, 465(1).

74. See e.g. *ibid*, ss 83.09(1), 91(4), 93(3), 94(3)–(4), 95(3), 96(3), 108(3), 117.01(4), 117.07(1), 117.08, 117.09(1), 159(2), 162(3), 168(2), 354(4), 420(2), 457(2), 462.31(3).

for an accused to have taken "reasonable steps",[75] in the context of a sexual offence, might have to be established by the accused in summary conviction trials.[76]

In total, our review of the *Criminal Code* found no less than 145 offences with the realistic potential to be affected by section 794(2).[77] While the overall number should be regarded as alarming in its own right, the lack of clarity on this point is almost as serious a concern. The application of the clause has been extremely erratic to date, and while part of this is undoubtedly attributable to the competing interpretations of the section that has now been resolved by *R v Goleski*, the section rather remarkably seems to be ignored and referred to in almost equal measure, leading to a haphazard approach to the burden of proof.

To date, there is not much in the way of guidance regarding the precise scope of section 794(2). For something as important as the burden of proof, it is not a situation that should be countenanced, as it raises significant fairness concerns. After all, how can an accused prepare for trial without knowing whether he or she bears the burden of proving what might end up being a critical aspect of the case?

III. Bifurcation of Analysis

The unclear scope of section 794(2) and its potentially enormous application are not the only concerns to address. Equally troubling is the manner in which section 794(2) has created complications by effectively imposing a need for courts to draw precise lines between the scope of certain elements of offences, which the Crown must prove beyond a reasonable doubt, and exceptions covered by section 794(2). The reason for this is straightforward enough. If the

75. See *ibid*, ss 150.1(6), 153.1(5)(b), 171.1(4), 172.1(4), 172.2(4), 273.2(b).

76. See *R v Waffle*, 2014 SKPC 79 at para 32, 447 Sask R 24. In referring to the "reasonable steps" provision, the trial judge noted that "to avail himself of the affirmative defence in s. 150.1 (6) he would have to establish an evidentiary basis through the Crown evidence or defence evidence in order to rely upon it. There is no such evidence before me. In addition the Crown relies on s. s. 794(1) and (2) which further suggests that the onus is on the defence to prove the exception *et cetera*." *Ibid*.

77. This is not the end of section 794(2)'s scope, of course. Part XXVII of the *Criminal Code* is applicable to a panoply of federal criminal offences for which the Crown would ordinarily bear the burden of disproving defences.

burden imposed on the accused differs depending on whether or not an excuse captured by section 794(2) is raised, it benefits the accused to re-characterize any such excuse as an absence of the *actus reus* or *mens rea*. After all, if the choice for the accused is to raise an excuse and bear a persuasive burden, or reframe the same facts as an absence of an essential element of the offence and only have to meet an evidentiary burden, there is really no choice at all. But the result is not particularly positive for the criminal justice system, as approaching matters in this way has the effect of spawning unnecessary litigation and delay. It also reveals a key conceptual flaw behind section 794, as construed by *R v Goleski*: it requires acceptance of the assumption that elements of offences and particular exceptions and excuses can be neatly and easily separated.

This is simply not the case, as the jurisprudence reveals. Consider section 254(5) of the *Criminal Code*, which reads that "[e]veryone commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made under this section." While *R v Goleski* has affirmed that section 794(2) applies to this section, the burden of proof is only reversed in cases where the accused raises an excuse. But the case law in this area demonstrates that delineating excuses of this type from the absence of any required mental element to establish guilt is not a straightforward matter. Consider, for example, a man charged under section 254(5) who testifies that the failure to provide a breath sample occurred because he was suffering from severe bronchitis. For the purposes of assessing the applicability of section 794(2), the difficult question is whether the accused knowingly failed to provide a sample owing to his medical condition—presumably a reasonable excuse—or whether the accused did not *intentionally* refuse to provide a sample and therefore lacked the necessary *mens rea*.[78]

Canadian jurisprudence has been anything but clear on how to approach this problem and a fairly voluminous amount of case law has emerged in response. Some courts have held that presenting a medical condition in the accused's defence, such as a panic attack, simply raises a doubt as to whether or not the accused possessed the necessary *mens rea*.[79] Other courts have held

78. See *R v Westerman*, *supra* note 19 at para 16. The Court noted that there has been "disagreement as to whether [this scenario] should be characterized as an issue of 'reasonable excuse' or of a negation of *mens rea*. The distinction is important because different burdens of proof apply – if it is a reasonable excuse, the burden is on the defendant on a balance of probabilities otherwise, the burden is on the Crown." *Ibid* [footnote omitted].

79. See *R v Slater*, 2015 ONCJ 155, 76 MVR (6th) 345; *R v Barkhouse*, *supra* note 42.

that medical conditions, including respiratory conditions or dental-related conditions, are nothing more than an attempt to raise a reasonable excuse.[80] The dispute is nowhere close to being resolved and is only likely to intensify now that *R v Goleski* has placed increased importance on who bears the burden of proof in these cases.

One does not need to search very hard to find other examples of this type. Consider section 445.1(a) of the *Criminal Code*, which assigns culpability to anyone who "wilfully causes . . . unnecessary pain, suffering or injury to an animal or a bird".[81] The accused can escape culpability, under section 429(2) of the *Criminal Code*, by proving that "he acted with legal justification or excuse and with colour of right".[82]

Imagine, then, that an accused is charged under this section for having caused pain or suffering to an animal and wishes to show that his actions, despite having caused pain or suffering, were undertaken in accordance with some type of provincial code or industry standard involving animals of the type at issue.[83] In this case, one assumes that the burden would be on the accused to show that the attempted lawful excuse was reasonable. But the accused could just as easily argue that the test to prove unnecessary suffering, which involves a complex balance examining the reasonableness of the purpose for having imposed suffering, requires the court to assess the relevant industry standard in resolving whether the *actus reus* has been established.[84] Since proof of the unnecessary suffering endured by the animal is an essential element of the offence, the burden lies with the Crown to prove it beyond a reasonable doubt.

Section 430 of the *Criminal Code* creates a similar situation. Section 430(1)(c) states that "[e]very one commits mischief who wilfully . . . obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property".[85]

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80. See *R v Thomas*, 2006 NBPC 8, 297 NBR (2d) 89; *R v Amjad*, 2015 ONCJ 338, 2015 CarswellOnt 9361 (WL Can); *R v Volodtchenko*, 2015 NSSC 211, 362 NSR (2d) 57. For what it's worth, the authors support this line of interpretation, feeling it is more consistent with the objects of section 254(5).

81. *Supra* note 6, s 445.1(a).

82. *Ibid*, s 429(2).

83. This would most likely amount to a legal excuse, but even if not, it would undoubtedly provide the basis of a colour of right defence, as the accused would be proceeding on the mistaken basis that he or she was complying with the law. See Manning & Sankoff, *supra* note 58 at 1172.

84. See *ibid* at 1300–302.

85. *Criminal Code*, *supra* note 6, s 430(1)(c).

However, section 430(7) provides an exception, specifically, that "[n]o person commits mischief within the meaning of this section by reason only that he attends at or near or approaches a dwelling-house or place for the purpose only of obtaining or communicating information."[86] If a person is charged with the offence of mischief and wishes to avoid liability by showing that he or she only approached the house for the purpose of communicating information, there are two different legal ways of doing so, at least in certain provinces.

The reason lies in the need to show that another person's "enjoyment or operation of property" is obstructed, and the case law in Canada is currently divided as to the extent of obstruction required before criminal fault will arise.[87] *R v Maddeaux* takes a broad view of "quiet enjoyment", holding that it encompasses the right to enjoy the use of the premise in peace and without disturbance.[88] Under this line of authority, an accused who wished to avoid liability for communicating with a neighbour would need to rely on section 430(7). But another line of authority, represented by the Court of Appeal for Quebec's decision in *R c Drapeau*, states that enjoyment should be restricted narrowly to the entitlement or exercise of a right relating to that property.[89] Under this latter line of authority, an accused would never wish to rely upon section 430(7) at all, as he or she would prefer to argue that there was no lawful obstruction, on the grounds that communication of this type does not disturb another person's enjoyment of the property.

Regrettably, the difficulty in delineating elements of certain offences from statutory excuses is not the only problem. As suggested earlier, section 794(2) does not apply to general defences, which creates yet another point of disparity, as there will be situations in which reasonable excuses provided by statute can be conceptualized as general defences. For example, a person who relies on statements by police as a reason for not providing a breath sample could attempt to characterize their actions as falling under the defence of "officially induced error".[90] A person with health problems could try to portray their non-compliance as providing the basis of a necessity defence, on the grounds

86. *Ibid*, s 430(7).

87. Manning & Sankoff, *supra* note 58 at 1281–284.

88. (1997), 33 OR (3d) 378, 115 CCC (3d) 122 (CA).

89. [1995] RJQ 320, 96 CCC (3d) 554 (CA).

90. The defence of officially induced error, at least in regulatory proceedings, must be proven by the accused. Whether this is the case in criminal proceedings has yet to be authoritatively established. See Manning & Sankoff, *supra* note 58 at 462–63.

that performing the test was impossible and placed them in the position of having to harm themselves to comply. All of these defences would need to be disproved by the Crown, while other excuses would have to be proven by the accused.

None of these problems are irresolvable, as it may well be possible to sort each of the particular acts described into clear and distinct groupings, but we would suggest that the endeavour is simply not worth doing. After all, classifying aspects of a criminal act is not an end in itself, as the SCC recently pointed out in *R v Legare*.[91] In that case, the wording of the "luring" provision in the *Criminal Code*[92] caused considerable difficulties in the lower courts, with many expressing disagreement over how the section operates and whether various aspects of the offence are actually part of the *mens rea* or *actus reus*. In holding that the offence is constitutional and provides sufficient guidance to potential offenders, the SCC swept away these concerns, concluding that:

> Is it part of the *actus reus* that the accused communicated with a person of *any age* whom the accused *believed to be* under 14? Is it part of the *mens rea* that the person was *in fact* under 14? I see no conceptual or practical advantage in attempting to resolve these questions. It seems to me preferable . . . to adopt "language which accurately conveys the effect of the law without in itself adopting an unnecessary burden of translation and explanation": *Howard's Criminal Law* (5th ed. 1990), at p. 11.
>
> I believe that the elements of the offence, as I have set them out, achieve that objective: They satisfy the principle of legality by affording the required degree of certainty, respecting the will of Parliament, and reflecting "the overall need to use the criminal law with restraint".[93]

The decision is a sensible one as, whatever path is taken, the Crown remains tasked with proving both the *actus reus* and *mens rea* of the luring offence. But we believe the same reasoning is applicable in the context being considered here. Leaving aside the burden of proof, there is no persuasive reason in the majority of cases to bother distinguishing between elements and excuses so long as what needs to be established to convict or acquit remains obvious. The inevitable results of maintaining a strict approach to section 794(2) are litigation about how certain types of behaviour should be conceptualized accompanied

91. 2009 SCC 56, [2009] 3 SCR 551.
92. *Supra* note 6, s 172.1.
93. *R v Legare*, *supra* note 91 at paras 40–41 [emphasis in original] [citation omitted].

by consequent delay and wasted resources—all to avoid the imposition of a suspect reverse onus clause.

IV. Section 794(2) and the *Charter*

A. Overview and Approach

Ultimately, the real test for section 794(2) will be whether it passes constitutional muster—an assessment that was undoubtedly delayed for years by the interpretation given to the clause in *R v Lewko*. Section 11(d) of the *Charter* enshrines a critical constitutional right, one that ensures that only those individuals found guilty after a fair trial are punished. The section militates against the risk of wrongful conviction and reinforces the importance of human liberty. As Dickson CJC stated in *R v Oakes*, "[t]he presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."[94]

Section 794(2) categorically violates section 11(d). As interpreted by *R v Goleski*, the clause requires the accused to establish any applicable exemption, proviso or excuse on a balance of probabilities in order to escape conviction.[95] On multiple occasions, the SCC has established that clauses of this type have significant rights implications. As the Court succinctly noted in *R v Downey*, "[i]f by the provisions of a statutory presumption, an accused is required to establish, that is to say to prove or disprove, on a balance of probabilities either an element of an offence or an excuse, then it contravenes s. 11(*d*)."[96] In other words, the focus of this right is quite properly upon *how* the accused's guilt is determined, not upon the reason why he or she might not be guilty.

94. *Supra* note 3 at 120.

95. *Supra* note 15.

96. [1992] 2 SCR 10 at 29, 90 DLR (4th) 449. See also *R v Whyte*, [1988] 2 SCR 3 at 18, 51 DLR (4th) 481. Chief Justice Dickson noted for a unanimous Court that "[t]he exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive." *Ibid*; See also *R v St-Onge Lamoureux*, 2012 SCC 57 at para 24, [2012] 3 SCR 187 [*Lamoureux*]. The SCC reiterated this point, noting that "the distinction between elements of the offence and other aspects of the charge is irrelevant to the analysis regarding the right to be presumed innocent. . . . [A presumption] will violate the right to be presumed innocent if [it] can result in the conviction of an accused in spite of a reasonable doubt that the accused is in fact guilty." *Ibid.*

In order for section 794(2) to survive constitutional scrutiny, it will have to be upheld as a reasonable limit under section 1 of the *Charter*. This will not be easy. First, the government would have to show that the section is pursuing a pressing and substantial objective that is sufficiently important to warrant overriding the constitutionally protected right.[97] Assuming that a pressing and substantial objective can be established, the legislative measure must also be a reasonable limit: the means used must be rationally connected to the pressing and substantial objective, they must be reasonably tailored to the objective in that they impair the right as little as possible and the impact of the law on the individual's affected rights must be proportionate to the law's advancing of the public good.[98]

Before considering the section 1 analysis in detail, there remains an important threshold question to assess: should a constitutional challenge involving section 794(2) be directed at this provision specifically or should it instead focus upon the *particular* burden of proof being addressed by the proceeding in question? On at least three occasions, *Charter* challenges directed at section 794(2) have been resolved in favour of upholding the provision. In each case, the primary reason was the manner in which the purported justification was construed.

The most significant of these challenges was raised in the Nova Scotia case of *R v TG*, where the accused was charged with illegal possession of liquor, contrary to a provincial statute.[99] The law effectively banned certain types of possession "[e]xcept as provided by this Act or by the regulations".[100] A separate provincial statute applied the procedural provisions of the *Criminal Code*—including section 794(2)—to summary conviction offences prosecuted

97. See *R v Oakes*, *supra* note 3 at 138–39.

98. See *ibid* at 139. See also *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 94–122, [2015] 1 SCR 331.

99. 1998 NSCA 61, 165 NSR (2d) 265. See also *R v Gray* (1986), 30 CCC (3d) 234, 1 WCB (2d) 4 (BC Co Ct) (reversal reasonable in the context of refusal to meet a demand without a reasonable excuse pursuant to section 254(5) of the *Criminal Code*); *R v Peck* (1994), 128 NSR (2d) 206, 21 CRR (2d) 175 (CA); *contra R v Plante*, 2013 ABQB 222 at paras 74–75, 82 Alta LR (5th) 184. While *R v Plante* did not involve a *Charter* challenge, the decision to adopt the limited approach to section 794(2) advocated by the Court of Appeal for Saskatchewan in *R v Lewko* was based, in part, on *Charter* concerns. The Court noted that "I doubt that an interpretation of [without reasonable excuse] which offends the presumption of innocence could withstand *Charter* scrutiny." *Ibid* at para 74.

100. *Liquor Control Act*, RSNS 1989, c 260, s 78(1)–(2).

in the province.[101] The sole issue on appeal was whether the reverse onus of proof to establish that the possession had not been authorized by the *Liquor Control Act* or regulations was constitutional.

The Court of Appeal for Nova Scotia concluded that it was, but reached this conclusion exclusively by considering whether the procedure was fair in the context of the provincial liquor offence under which the accused had been charged. No reasoning for limiting the analysis in this manner was provided, with the Court simply noting that "[a] *Charter* analysis here must focus on s. 794 of the [*Criminal*] *Code* as it applies to s. 78(2) of the *Act*, not as it may apply to a very large number of other provisions in statutes creating offences."[102] This offhand conclusion effectively resolved the constitutional challenge. From that point forward, it was simple enough to recognize that the reversal took place in the context of a regulatory scheme "that . . . should be more apt to pass a s. 1 analysis",[103] that without the burden convictions would be impossible to obtain, and that knowledge of any lawful reason for possession would lie almost exclusively with the accused.

Though the decision may well have been correct in the context of Nova Scotia's liquor legislation, it is less clear that the Court of Appeal *should* have limited its analysis in this manner or, more importantly, that any future court assessing section 794(2)'s impact should restrict its consideration to the particular exception being relied upon by the accused.[104] There are two primary reasons for suggesting that section 794(2) should need to stand on its own merits in any future constitutional challenge.

First, the approach taken in *R v TG* is a poor way of addressing *Charter* litigation, as it pays little respect to both the needs of litigants and the overall objective of avoiding potential duplication of effort and analysis. Effectively, it would require more than one hundred *Charter* challenges to determine the final constitutional scope of section 794(2), as each of these would have to assess the effect that the clause has individually when it is applied to a particular

101. *Summary Proceedings Act*, RSNS 1989, c 450, s 7.

102. *R v TG*, *supra* note 99 at para 20.

103. *Ibid* at para 48.

104. The challenge in *R v TG* arguably should have focused upon the constitutionality of the *Summary Proceedings Act* provision that imported the reverse onus provision, as this was the legislation that most directly affected the accused.

exception, exemption, proviso or excuse.[105] Moreover, the approach wrongly encourages legislators to create general, rather than specific, clauses with the potential to affect *Charter* rights simply as a means of delaying decisions on constitutionality. Imagine that legislators crafted a general mandatory sentence provision that imposed a minimum sentence for any crime involving a weapon, whatever the scenario. Would the courts seriously suggest that the clause be considered with respect to every potential offence to which it applied? The disadvantages to such an approach, in terms of encouraging multiple rounds of constitutional litigation and discouraging the careful consideration of a law's potential overbreadth appear obvious. The advantages, aside from perhaps giving legislators more comfort in enacting broad laws, are less clear.

Leaving aside the policy advantages of considering the law as a whole, the individualized approach also fails to square up with the existing legal framework governing section 1 justifications. As the SCC noted in *Toronto Star Newspapers Ltd v Canada*, "[t]he objective relevant to the s. 1 analysis is *the objective of the infringing measure*, since it is the infringing measure and nothing else which is sought to be justified."[106] Thus, in *R v KRJ*, where the accused challenged the retrospective application of a new sentencing provision, the Court sensibly held that the legislative objective relevant to the section 1 assessment was *not* that which animated the sentencing measure as a whole, but the objective for imposing its retrospective application.[107]

Focusing exclusively upon the wisdom of reversing the burden of proof in a very specific context distorts the legislative objective behind section 794(2) entirely. After all, it is not section 254(5)—to take one example—that actually imposes a burden to prove there was a reasonable excuse for failing to provide

105. This case-by-case approach would undermine the clarity and certainty that the *Charter* should promote. See *R v Ferguson*, 2008 SCC 6 at para 68, [2008] 1 SCR 96. The Court held that, "[i]t is fundamental to the rule of law that 'the law must be accessible and so far as possible intelligible, clear and predictable': Lord Bingham, 'The Rule of Law' (2007), 66 *Cambridge L.J.* 67, at p. 69." *Ibid.* The approach of considering each application of section 794(2) on its own merits would, to a certain extent, match the effect of granting constitutional exemptions, a remedy that the Court rejected in *Ferguson*. As McLachlin CJ noted in that case, "[t]he mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied." *Ibid* at para 70. The same is true of a case-by-case approach to section 794(2).

106. 2010 SCC 21 at para 20, [2010] 1 SCR 721 [emphasis in original].

107. 2016 SCC 31 at para 62, [2016] 1 SCR 906.

a breath sample; it is section 794(2) that has this effect. If Parliament had desired that kind of focused scrutiny, it could have reversed the burden in this specific scenario and provided a strong rationale for doing so. Instead, it applied this wide-ranging reversal to all offences tried in summary proceedings. As a matter of logic and good policy, the objective of reversing the burden in relation to summary conviction offences must be analyzed by considering the overall importance of doing so in these sorts of proceedings.

An examination of the section 11(d) jurisprudence suggests that if section 794(2) is considered as a whole, it will be difficult to justify. While the *R v Oakes* framework unquestionably provides the structure for any section 1 assessment, three points of scrutiny have tended to dominate the analysis in this area.

(i) Does the Section Completely Reverse the Burden of Proof or Simply Presume a Conclusion that the Accused Can Rebut by Way of an Evidentiary Burden?

While presumptions that require the accused to raise evidence of a reasonable doubt can infringe section 11(d) in the same way as those that impose a burden of proof, they are far easier to justify.[108] Though such presumptions can result in the conviction of the accused, notwithstanding the existence of a reasonable doubt, they are much more likely to be regarded as constituting a minimal impairment of an accused's *Charter* rights. This flows from the fact that a critical concern in the section 1 analysis is focused upon "how easy it [is] for the accused to rebut the presumption".[109]

Overall, the jurisprudence demonstrates a solid preference for the use of evidentiary burdens over reversals of the burden of proof. In *R v Laba*, the Court struck down a reverse onus clause that required the accused to prove that he or she was in lawful possession of certain metal ores on the ground that "the burden of proof on the balance of probabilities is an onerous one which many innocent people may be unable to meet" and, furthermore that "Parliament's purpose will be effectively served by the imposition of an evidential burden".[110]

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108. Any presumption of a fact from the existence of another fact risks the possibility of conviction notwithstanding a reasonable doubt because the conclusion must be drawn in the absence of evidence to the contrary. See *R v Downey*, *supra* note 96 at 30.

109. *Lamoureux*, *supra* note 96 at para 31.

110. [1994] 3 SCR 965 at 1010–011, 120 DLR (4th) 175. See also *R v Fisher* (1994), 17 OR (3d) 295, 111 DLR (4th) 215 (CA); *R v Pena* (1997), 45 CRR (2d) 134, 35 WCB (2d) 152 (BCSC); *R v Robinson*, 2014 BCSC 1463, 116 WCB (2d) 1.

(ii) Does the Reverse Onus Arise in the Context of a Criminal Prosecution or a Regulatory Offence?

Generally speaking, the courts have been much more willing to accept reversals of the burden of proof where the proceeding involves a regulatory offence.[111] This is not surprising. The primary defences to regulatory offending—due diligence and reasonable mistake of fact—have always had to be proven by the accused on a balance of probabilities at common law,[112] and the enactment of the *Charter* did nothing to change this.[113] In contrast, the SCC has held that "[i]mposing a legal or persuasive burden on the accused in respect of an offence characterized as a true criminal offence is a serious impairment of s. 11(*d*)."[114]

(iii) Is the Decision to Reverse the Burden "Internally Rational", in that the Presumed Fact is Tightly Connected to Other Established Facts that Must Be Proven by the Crown?

In assessing whether a reverse onus provision constitutes a reasonable limit upon the accused's rights, a reviewing court should closely scrutinize the connection between what is presumed and what must be established by the Crown before the burden of proof shifts to the accused. For example, in the context of section 254(5), the question would be how unlikely it is that a person would have a reasonable excuse for intentionally failing to provide a breath sample in the face of a valid demand.

Where the connection is a weak one, the reverse onus is unlikely to stand. Thus, in *R v Laba*, the SCC noted that the reverse onus in question

> permits the conviction of a wide range of innocent people and thus constitutes a serious violation of s. 11(*d*). This flows from the facts that the presumption contained in s. 394(1)(*b*) lacks any sort

111. See *R v TG*, *supra* note 99 (where this was a critical aspect of the Court of Appeal for Nova Scotia's decision to uphold section 794(2) in the context of a liquor control prosecution); *R v Wilson* (1997), 191 NBR (2d) 307, 11 CR (5th) 347 (CA) (upholding reverse onus provision in highway traffic context).

112. See *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161 [*Sault Ste Marie* cited to SCR] ("[t]here is nothing in [the jurisprudence] . . . which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities" at 1316).

113. See *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 4 OR (3d) 799 [*Wholesale Travel* cited to SCR].

114. *R v Laba*, *supra* note 110 at 1010.

of internal rationality (i.e., it is not rational to presume from the fact that one has purchased or sold precious metal ore that the transaction was illegitimate).[115]

In contrast, well tailored and tightly constrained reversals of the burden of proof are more likely to survive.[116] For example, in *R v Whyte*, the SCC assessed the validity of a *Criminal Code* section that deems the accused to be in care and control of a motor vehicle where he or she was occupying the front seat, "unless he establishes that he did not enter or mount the vehicle for the purpose of setting it in motion".[117] The Court unanimously concluded that the clause was a reasonable limitation justified under section 1 of the *Charter*.[118] In addition to the importance of the objective in question—avoiding the acquittal of those whose driving was impaired by alcohol—the Court pointed out the strength of the connection between the established and presumed facts:

> [T]here is plainly a rational connection between the proved fact and the fact to be presumed. There is every reason to believe the person in the driver's seat has the care and control of the vehicle. The driver's seat is designed to give the occupant access to all the controls of the car, to be able to operate it. It is true that a vehicle can be occupied by one who does not assume care or control, but a person in this state of mind is likely to assume a position in the vehicle intended for a passenger rather than the driver. In my view, the relationship between the proved fact and the presumed fact [under the provision] is direct and self-evident. . . . [The provision] is intended to achieve the objective identified and is not arbitrary, unfair, or based on irrational considerations.[119]

This approach conforms generally to the minimal impairment ideal that is at the heart of section 1 jurisprudence. The more logically connected the proposition is, the less concerned the Court should be about reversing the burden of proof, as few people will be wrongly convicted by it, and the presumption will simply ensure that offenders do not escape conviction owing to the Crown's inability to disprove remote and speculative propositions.

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115. *Ibid* at 1011.

116. See *R v Downey*, *supra* note 96. Justice McLachlin, as she then was, in dissent, notes that "*Oakes* requires us to ask the preliminary question of whether the presumption is internally rational in the sense that there is a logical connection between the presumed fact and the fact substituted by the presumption". *Ibid* at 42.

117. *Supra* note 96 at 7, citing *Criminal Code*, RSC 1970, c C-34 s 237(1).

118. See *ibid*.

119. *Ibid* at 21–22; *R v Daviault*, *supra* note 5 at 103 (where proof of extreme intoxication was regarded as an extremely rare possibility, justifying the reverse onus).

One has to imagine that the inability to connect section 794(2) to particular outcomes will impose significant difficulties on any attempt to justify the provision. To use section 254(5) as an example, it may be logical to assume that very few people who fail to provide a breath sample have a reasonable excuse for doing so, but it does not really address the core problem with section 794(2).[120] The clause is not confined to any one section and its presumptive quality affects more than one hundred different scenarios and quite possibly as many as 145. It will be difficult, if not impossible, to show the logic of presuming that an exception is unlikely to arise with respect to every statutory situation. Ultimately, the core weakness of the clause lies in its tremendous breadth and the extent to which it reverses the burden of proof in such a variety of scenarios.

Though it is impossible to anticipate with any degree of certainty the objectives the government may advance to justify section 794(2), a review of the jurisprudence, including the discussion that took place on this point in *R v Goleski*, suggests that the following three rationales will be raised to defend the clause and show that it constitutes a reasonable limit, notwithstanding its considerable breadth.

B. Rationale for Section 794(2): Ensuring that Charges Do Not Fail for Lack of "Disproof" of an Exemption

A review of the history of section 794(2), and its predecessor sections, reveals that a primary reason for enacting the clause was to address a problem that, under a modern approach to criminal procedure, no longer really exists. Effectively, the section is designed to ensure that where a specific exception is listed in a statutory provision, "there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like".[121] The clause also protects against the situation in which an information specifically makes reference to the fact that no excuse for the conduct exists. Section 794(2) clearly states that "the prosecutor is not required . . . to prove that the exception [etc.] does not operate in favour of the defendant, whether or not it is set out in the information".

120. *Criminal Code*, *supra* note 6, ss 254(5), 794(2).

121. *R v Edwards*, [1975] 1 QB 27 at 40 (Eng CA).

In assessing the importance of this objective, it is useful to recall, as the SCC has, that large parts of the *Criminal Code*—including the predecessor to section 794(2)—were enacted during "a period of extreme formality and technicality in the preferring of indictments and laying of informations".[122] Historically, any defect or error in drafting an information—perhaps by omitting the words "without reasonable excuse"—might be regarded as a sufficient reason for nullifying it altogether.[123] Conversely, drafting an information in a way that specified "without reasonable excuse" opened the door to the argument that this had to be proven by the Crown.

A good example of how the section has operated to rebut arguments of this sort can be seen in *R v Stacey*, where the accused was charged with being in possession of a fishing net "without having a licence authorizing [him] to use a net in inland waters".[124] After the prosecution closed its case, the accused argued that the Crown had failed to prove an essential element of the offence: that the accused had *not* been issued a licence. This was put forward even though the applicable regulation clearly made this an exception to the fact that "no person shall fish . . . in any inland waters other than by angling"[125], and there was no evidence to suggest that the accused actually possessed a licence. The trial judge accepted the argument and dismissed the charge against the accused. The acquittal was reversed on appeal, however. The summary conviction appeals judge relied upon section 794 to reinforce the fact that the Crown was under no obligation to disprove the existence of a licence. According to the Court, "possession of a licence is a classic example of a true defence and the lack of a licence will not be seen as one of the elements of the offence for the Crown to prove beyond a reasonable doubt".[126]

This approach is extremely sensible and should continue to be applied, but it provides no reason whatsoever to justify the existence of a reverse onus provision. Section 794(1) achieves the task of removing the need for any mention of excuses from the information. The latter part of section 794(2), which makes clear that the prosecutor is not required to disprove excuses or qualifications whether or not they are referred to in the information, achieves

122. *Sault Ste Marie*, *supra* note 112 at 1307.
123. See Steve Coughlan, *Criminal Procedure*, 2nd ed (Toronto: Irwin Law, 2012) at 337–38.
124. *Supra* note 29 at 165.
125. *Ibid*, citing *Newfoundland Fishing Regulations*, NLR 1978-1557, s 10(1).
126. *R v Stacey*, *supra* note 29 at 170, citing *R v Staviss*, [1943] 1 DLR 707, 79 CCC 105.

the remainder. This second part of section 794(2) also squares with modern developments in the law. It is now well established that no defence should be put before the trier of fact unless there is an evidentiary basis—an air of reality—to support it. It is only at that point that the Crown is obligated to disprove the defence beyond a reasonable doubt.[127]

As such, it is difficult to see how the part of section 794(2) that places the burden of proving an excuse or exemption on the accused could be regarded as rationally connected to this objective. The aim of ensuring that the Crown is not tasked with disproving excuses listed in the information, or with disproving every conceivable excuse that might be raised, is achieved by ensuring that only exempting conditions supported by the evidence need to be addressed. The burden of proof, in effect, is superfluous to this objective.

C. Rationale for Section 794(2): Ensuring Efficiency in Summary Conviction Proceedings

Summary conviction proceedings are meant to be less procedurally onerous and shorter in duration than counts laid by indictment. It follows that one can advance the need for efficiency as an objective here. After all, the accused bears the burden of advancing various defences in regulatory proceedings for a similar reason.[128] In *R v Wholesale Travel Group*, a reverse onus imposed by statute was upheld in part for this reason, with the SCC noting that, "[s]ince regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence imports a significantly lesser degree of culpability than conviction of a true crime."[129] It follows that the risk of wrongful conviction is less pressing in this context. As a result, the need for efficiency gains a higher priority.

Several arguments can be advanced against the notion that it is appropriate to take the same approach to summary conviction offences. First, summary conviction offences as a whole look very different from the way they did when the predecessor to section 794(2) was first enacted. At that time, most offending was separated into two distinct groups: indictable crimes and

127. See *R v Holmes*, *supra* note 9 at 935; *R v Cinous*, 2002 SCC 29 at para 80, [2002] 2 SCR 3.

128. See Manning & Sankoff, *supra* note 58 at 285–86.

129. *Supra* note 113 at 219. See also *R v TG*, *supra* note 99 at 15 (which makes similar comments in the context of a challenge to section 794(2) brought within the context of a regulatory proceeding).

summary conviction offences. There were very few hybrid offences[130] and it was reasonable to regard summary conviction offences as a less serious *class* of crimes.[131] But that distinction no longer really exists.[132] The overwhelming majority of crimes in the *Criminal Code* are now hybrid offences by which the Crown can elect to proceed summarily or on indictment. It is as much a means of avoiding the need for a preliminary inquiry and jury trial as it is a statement about the seriousness of the offence.[133]

A corresponding trend is the huge increase in sentence severity since the late 1800s. When section 794(2) was first enacted, every summary conviction offence was punishable by a maximum of six months in prison, while indictable offences possessed maximum penalties of life imprisonment or even death.[134] The default maximum for summary conviction offending is still six months in prison,[135] but most offences impose the risk of much higher periods of incarceration. At least fourteen separate offences now impose maximum penalties of eighteen months' imprisonment,[136] while a wide variety of crimes also require mandatory periods of incarceration to be levied as well.[137]

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130. See *R v Dudley*, 2009 SCC 58 at paras 15–17, [2009] 3 SCR 570.

131. See Law Reform Commission of Canada, "Classification of Offences" (1986) Department of Justice Working Paper No 54 at 17–19, online: <www.lareau-law.ca/LRCWP54.pdf>.

132. See Coughlan, *supra* note 123. Professor Coughlan stated:

> In broad terms, indictable offences are more serious than summary conviction offences but, unfortunately, the classification of the offence is not always a reliable indication of its relative seriousness. It is certainly true that indictable offences carry a higher maximum penalty than summary conviction offences but this, by itself, is not a sound or sophisticated gauge of the seriousness of crimes. Some serious offences of violence may be prosecuted by way of summary conviction procedure while many nonviolent, property offences must be prosecuted by indictable procedure. Neither the severity of the maximum penalty, nor the perceived seriousness of violence provides a sound basis to explain why offences have been designated as they have.

Ibid at 36–37.

133. See Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin Law, 2012) at 753.

134. *Criminal Code*, 1892, *supra* note 22, s 951(2).

135. See *Criminal Code*, *supra* note 6, s 787(1).

136. See e.g. *ibid*, s 270.01(2)(b) (assaulting police officer with a weapon or causing bodily harm).

137. See e.g. *ibid*, s 163.1(3) (distributing child pornography).

Summary conviction offending is unquestionably less serious than indictable offending, warranting certain differences in procedure. Yet, increases in the overall seriousness of penalties and consequent stigma belies the argument that these are trivial proceedings for which critical due process rules can simply be set aside.

In addition, an argument premised on a need for greater efficiency is also somewhat arbitrary given the way in which section 794(2) has been construed by the courts. If we are to accept the argument that summary conviction offending is so much less significant that the ordinary burden of proof need not be applied to certain aspects of an offence, then why should this proposition only be restricted to statutory exceptions? Why not reverse the burden for all defences, regardless of their juridical source?

If efficiency is a key rationale underpinning the need for section 794(2), it is not a very compelling one. In contrast to regulatory offending, summary conviction offences raise the possibility of significant degrees of culpability, demonstrated by the potential for lengthy periods of incarceration. It is difficult to accept that imposing a reverse onus burden for exceptions, etc.—on an entire category of proceedings and with the consequent risk of wrongful conviction that this entails—amounts to a proportionate response in the circumstances.

D. Rationale for Section 794(2): Knowledge of Exemption Held Exclusively by Accused

Perhaps the most significant rationale for reversing the burden of proof with respect to exceptions, qualifications or excuses lies in the purported difficulty of the Crown's ability to *disprove* these matters when knowledge of their existence lies primarily or exclusively with the accused. In *R v Peck*, the Court of Appeal for Nova Scotia relied upon this factor in upholding the use of section 794(2) in connection with section 254(5) of the *Criminal Code*, noting that:

> [s]urely if there are such possible excuses . . . the accused who has exclusive knowledge of the circumstances should be required to establish the excuse on a balance of probabilities. Otherwise the Crown would be obliged to prove beyond a reasonable doubt the absence of such things as medical conditions, denial of right to counsel, unreasonable inconvenience, absence of reasonable

and probable grounds or breakdown of breath detection equipment (*Phinney*, supra, pp. 92–93). It would be impracticable to require the Crown to go so far.[138]

The SCC has also referred to this concern in dismissing *Charter* challenges premised on section 11(d) in appropriate circumstances. In *R v Chaulk*, the reversal of the burden of proof in section 16, with respect to proof of a mental disorder, was upheld primarily "to avoid placing on the Crown the impossibly onerous burden of disproving insanity", as "without the cooperation of the accused, evidence of mental illness would be virtually impossible for the prosecution to obtain".[139] In *R v St-Onge Lamoureux*, the Court focused its section 1 analysis regarding an evidentiary presumption upon "how difficult it would be for the prosecution to prove the substituted fact beyond a reasonable doubt".[140]

While this is undoubtedly an important factor to consider, and potentially a significant enough objective to warrant the imposition of a reverse onus of this kind, there are compelling counter-arguments here as well. First, the approach does not square with the way in which most defences are treated. Taken to its logical conclusion, this rationale would require that most defences be proven by the accused, as the underlying principle is in no way restricted to exemptions or excuses provided by statute. As Bayda CJA noted in *R v Lewko* "there is no reason in logic or in policy to treat the defence of reasonable excuse differently from the defences ordinarily recognized by law".[141] The defence of duress, to take one example, will almost always involve facts known only to the accused. It is similarly difficult to imagine many necessity defences that will be known to the Crown before a plea is entered. Even pleas relying upon the absence of *mens rea* often stem from facts known exclusively to the person who committed the unlawful act.

138. *R v Peck*, *supra* note 99 at para 42. In addition to the points made below, there is good reason to be concerned with the logic being utilized here. Even without section 794(2), the Crown would not be tasked with proving the absence of various reasonable excuses. The law on evidentiary burdens, described in detail in *R v Lewko*, makes clear that in the absence of there being some evidence capable of supporting the excuse, the Crown would not be obligated to disprove anything.

139. [1990] 3 SCR 1303 at 1337, 69 Man R (2d) 161. See also *R v Daviault*, *supra* note 5 at 75–76.

140. *Supra* note 96 at para 31.

141. *Supra* note 12 at para 18.

In all of these situations, "direct knowledge" of the defence or absence of an element is held exclusively by the accused. Yet, despite this fact, there has never been any serious thought of reversing the burden of proof in these situations, even where they are raised in summary conviction proceedings. The reason should be obvious: more convictions would be obtained, but at a significant cost. As Lamer CJ recognized in *Wholesale Travel*, more convictions might be obtained, but "[s]ending the innocent to jail is too high a price."[142]

A traditional reluctance to impose the burden of proving defences upon the accused is not the only reason to be concerned about this rationale. Though reversing the burden of proof undoubtedly addresses the unfairness caused by the Crown's inability to properly rebut defences or exceptions, it overshoots it by a considerable distance. In short, because of difficulties arising from having to disprove something it could not have known about in advance, the Crown receives the benefit of not having to disprove the matter at all.

There are two flaws to the suggestion that reversing the burden of proof is a desirable means of addressing this problem. First, there is good reason to believe that as a matter of fact the Crown is not *always* disadvantaged in the manner described, either because it actually received notice of the potential for an exception during the investigation of the accused or in the sense that notice is simply not a concern because of the nature of the defence. Second, the reversal of the burden of proof does more than just redress the notification and investigation problem: it gives the Crown case the benefit of the doubt in all matters of credibility and reasonableness.[143]

R v Goleski provides an excellent example of both concerns in operation. The accused's reasonable excuse alleged wrongful conduct by the officer and was supported to a certain degree by another witness called by the defence.[144] The officer testified to the contrary. Both witnesses were cross-examined. The trial judge clearly thought there was something to the accused's contentions, noting she was "unable to reject his evidence and that of his passenger outright", but

142. *Supra* note 113 at 204.

143. Normally, the defence gets this benefit because of the application of the presumption of innocence and how this is applied to credibility assessments. See e.g. *R v W (D)*, [1991] 1 SCR 742 at 743, 122 NR 277; *R v JHS*, 2008 SCC 30, [2008] 2 SCR 152.

144. See *R v Goleski*, *supra* note 15 at paras 15–16. To reiterate, there is some reason to be skeptical of whether the conduct in question actually amounts to a reasonable excuse, but this was not an issue on appeal.

convicted the accused anyway, relying on the fact that the accused had not established that "it is more probable than not that the officer was lying".[145]

It is difficult to see how this has anything to do with fairness to the Crown. The defence was not relying upon some health condition of which the Crown was unaware or some concern that was particularly difficult to test in cross-examination. The question, effectively, was who should be believed in light of all the surrounding circumstances? In this light, it is not clear why the Crown should benefit from a reverse onus that affects every aspect of proof, right down to the judge's assessment of the credibility of the witnesses. The trial judge, after hearing all the evidence, had a reasonable doubt about whether or not a reasonable excuse for failing to provide a breath sample existed and convicted nonetheless, even though the Crown was in no way disadvantaged in any procedural sense by the fact that it did not know about the excuse until the trial.

But even if the Crown had been disadvantaged, it can still be argued that the reversal of the burden of proof overshoots its objective. After all, the primary concern here is that the Crown cannot combat the reasonableness of the excuse because such matters are not central to the elements of the offence that the prosecution is tasked with investigating and proving, and it is unreasonable to expect the Crown to investigate for the purpose of disproving something that so rarely arises. This is hardly the only situation in which concern about a lack of notification and inability to investigate a claim raised by the accused at trial has the potential to put the Crown's case at risk unfairly, and there exists more balanced ways of addressing this concern as well.

The common law rules on alibi witnesses provide an apt comparison. Alibi evidence can be difficult for the courts because, by its very nature, it negates

145. *Ibid* at para 16, citing the trial judgement; *R v Goleski*, 2011 BCSC 911 at para 30, 18 MVR (6th) 31.

the possibility that the accused committed the crime for which he or she stands charged. Furthermore, as the SCC noted in *R v Cleghorn*:

> It is a defence entirely divorced from the main factual issue surrounding the *corpus delicti*, as it rests upon extraneous facts, not arising from the *res gestae*. The essential facts of the alleged crime may well be to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammelled start. It is easy to prepare perjured evidence to support it in advance.[146]

The concerns here are not noticeably different from what were raised with respect to, for example, the need to raise a reasonable excuse in section 254(5). The defence is divorced from the main factual issue in most cases, which takes the focus away from the main elements of the offence. Furthermore, it is often suggested that it is easy to make up these sorts of excuses after the fact.[147]

Nonetheless, the response traditionally taken by the common law is not to reverse the burden of proof where an alibi is raised but to level the playing field in a way that responds to real concerns about the defence. In effect, the accused must disclose its alibi defence prior to trial or face the possibility that an adverse inference will be drawn against its legitimacy. Disclosure allows the Crown to investigate the nature of the alibi and prepare for trial in an adequate manner. Surprise is effectively eliminated by the need to provide notice. But the common law does not reverse the burden of proof, mainly because doing so provides an unnecessary "windfall" to the Crown and creates unfairness for those at risk of conviction.

Requiring defence disclosure along these lines raises its own issues that are somewhat beyond the scope of this paper,[148] but the example demonstrates that there is room for creative legal imagination here. Reversing the burden of proof in the manner achieved by section 794(2) may be a way of achieving certain justice goals and avoiding unfairness to the Crown, but it is hardly the only way of doing so. Where violations of section 11(d) are not tightly tailored to their objective and provide benefits to the Crown that go beyond the reason

146. [1995] 3 SCR 175 at 189, 186 NR 49, citing RN Gooderson, *Alibi* (London, UK: Heinemann Educational, 1977) at 29–30.

147. See *ibid* ("alibi evidence . . . can readily be fabricated").

148. See e.g. Suzanne Costom, "Disclosure by the Defence: Why Should I Tell You?" (1996) 1:1 Can Crim L Rev 73.

for which they were created, they should be regarded with a considerable degree of suspicion.

Conclusion

Enacted almost 150 years ago for the purpose of addressing concerns that have largely been eradicated by other reforms to the law of evidence and procedure, section 794(2) now causes more problems than it solves. Most lawyers would have difficulty knowing when it should be applied, assuming they are aware of it at all. The clause is employed sporadically and often sprung as a surprise late in the trial process. Its use often leads to delay and extended litigation as defence lawyers try to avoid its operation. Most alarmingly, it violates section 11(d) in a way that would seem very difficult to justify as a reasonable limit under section 1.

Reversals of the burden of proof should not be countenanced lightly. In the first major decision involving section 11(d) of the *Charter*, Dickson CJC pointed out that the need for the Crown to prove criminal charges against the accused "is essential in a society committed to fairness and social justice".[149] This is no less true for summary conviction offences, where the potential punishment is lower than those for charges on indictment, but where an offender nonetheless "faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms".[150]

Though some violations of section 11(d) will be justified as reasonable limits, a finding of this sort should never be made lightly. The jurisprudence indicates that wholesale reversals of the burden of proof should be scrutinized closely to ensure that they are tightly tailored to their objectives and rationale in light of the reversal in question. Section 794(2) does not come close to meeting this requirement. It is poorly designed, as it applies to a significant range of situations, some of which are possibly instances in which it makes sense to compel the defence to prove its case, but others of which undoubtedly are not. Furthermore, it is internally irrational, creating a different burden of

149. *R v Oakes*, *supra* note 3 at 120.

150. *Ibid* at 119–20.

proof for exceptions depending upon whether the Crown decides to proceed on indictment or not. In short, section 794(2) is a relic of a bygone era and most likely unconstitutional. It should be repealed or struck down as soon as possible.