Obstructing a Peace Officer: Finding Fault in the Supreme Court of Canada

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I. INTRODUCTION

DURING THE PAST DECADE, and particularly since the decision in *R. v. Creighton*,[1] Canada has witnessed a steady drift by the Supreme Court from traditional forms of subjective fault to a more objective analysis of criminal responsibility. The direction of the Court is not at all clear. The uncertainty and confusion has been heightened by the discovery of "special stigma" offences[2] and the ongoing debate over the nature of specific and general intention as they relate to the defence of intoxication.[3] When one adds the short-lived notion of the intoxicated automaton from the infamous *Daviault* case[4] and the federal government's reflex reaction to that decision,[5] it seems entirely appropriate to suggest that this would be a good time to start over.

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1 *R. v. Creighton*, [1993] 3 S.C.R. 3 [hereinafter *Creighton*].

2 See *R. v. Martineau*, [1990] 2 S.C.R. 633 [hereinafter *Martineau*].

3 See D. Stuart, *Canadian Criminal Law*, 3rd ed. (Scarborough: Carswell, 1995) at 385–401 [hereinafter Stuart] and, T. Quigley, "Specific and General Nonsense" (1987) 11 Dal. L.J. 75.

4 *R. v. Daviault*, [1994] 3 S.C.R. 63 [hereinafter *Daviault*]. See I. Grant, P. Healy, T. Quigley & D. Stuart, "Criminal Reports Forum on *Daviault*: Extreme Intoxication Akin to Automatism Defence to Sexual Assault" (1995), 33 C.R. (4th) 269. See also M. Drassinower & D. Stuart, "Nine Months of Judicial Application of the *Daviault* Defence" (1995), 39 C.R. (4th) 280.

5 See s. 33.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code* or *Code*].

This comment will examine these issues within the context of one offence, obstructing a peace officer in the execution of his duty. Through this narrow focus it is possible to illustrate the uncertainty generated by the current approach. At that point it will be suggested that we get off the treadmill and think seriously about constructing a rational analytical framework for future decision making.

II. RESISTS OR WILFULLY OBSTRUCTS

SECTION 129(a) OF THE *CRIMINAL CODE* PROVIDES THAT IT IS AN OFFENCE to resist or wilfully obstruct a peace officer in the execution of his duty. Section 129(b) provides that it is also an offence to omit, without reasonable excuse, to assist a peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that he or she is required to do so. These offences, which may be prosecuted summarily or by indictment, carry a maximum penalty of imprisonment for a term not to exceed two years.

Although most of the case law focuses on the concept of "obstruction" there are a few decisions that deal with the meaning of "resists." In *R. v. Alaimo*[6] the accused, who was on a legal strike, threw a garbage can at a truck passing through a picket line. He had been warned by the police to let such vehicles pass unimpeded. A charge of "resisting a peace officer in the execution of his duty" was dismissed. Opper, Prov. Ct. J. found that the legislation created two distinct offences—resisting and wilfull obstruction. He held that the offence of resisting a peace officer required, at the very least, some direct confrontation with and some small degree of force by the accused against the peace officer personally. The Court also held that merely challenging authority, though it might support a charge of wilfully obstructing a peace officer, is not sufficient to support a charge of resisting.[7]

Where an accused is charged with both offences the failure to convict on the charge of obstruction will not preclude a conviction for resisting. In *R. v. Anderson*[8] there was contradictory evidence as to whether the accused actually heard the police request to move a vehicle. When the accused did not respond he was arrested following a struggle. The accused was found not guilty of wilful obstruction on the basis that he lacked the requisite *mens rea* for the offence.

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6 *R. v. Alaimo* (1974), 27 C.C.C. (2d) 491 (Ont. Prov. Ct.) [hereinafter *Alaimo*].

7 *Ibid.* at 495–496 *per* Opper, Prov. Ct. J. See also *R. v. Biron* (1976), 23 C.C.C. (2d) 513 (S.C.C.); *R. v. Stortini* (1978), 42 C.C.C. (2d) 214 (Ont. Prov. Ct.); and, *R. v. Lemoine* (1992), 113 N.S.R. (2d) 361 (Prov. Ct.).

8 *R. v. Anderson* (1997), 111 C.C.C. (3d) 540 (B.C. C.A.) [hereinafter *Anderson*]; leave to appeal to S.C.C. refused (1997), 90 B.C.A.C. 240, 147 W.A.C. 240 (S.C.C.) (Lamer C.J.C., Cory, McLaughlin JJ.).

Finch J.A. also held that the lawfulness of the arrest did not depend on whether the appellant was convicted for the underlying offence of obstruction. In this case the police officer believed the appellant had committed the offence of obstruction and, accordingly, that there was a reasonable ground for arrest. The Court affirmed the conviction for resisting a peace officer in the execution of his duty.[9]

In cases dealing with the offence of obstruction the courts have been very careful to draw a distinction between conduct that actually obstructs and conduct—or the lack thereof—that simply makes the job of the police more difficult. For example, the refusal to identify oneself or answer questions in the absence of a legal obligation to do so will not amount to obstruction.[10] However, where there is an obligation to identify oneself the failure to respond to police requests for identification does constitute obstruction.[11]

Other situations held to constitute obstruction of a peace officer include: providing a false name;[12] refusing to stop a motor vehicle when requested;[13]

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[9] *Anderson*, *supra* note 8 at 549–550 *per* Finch J.A.

[10] See *Rice* v. *Connolly*, [1966] 2 Q.B. 414 (U.K.) [hereinafter *Rice*]; *R.* v. *Guthrie* (1982), 28 C.R. (3d) 395 (Alta. C.A.); *R.* v. *Lis* (1983), 28 Alta. L.R. (2d) 346 (Prov. Ct.) [hereinafter *Lis*]; and, *R.* v. *Hancott* (1994), 113 Nfld. & P.E.I.R. 172 (Nfld. S.C.).

[11] *R.* v. *Moore* (1978), 43 C.C.C. (2d) 83 (S.C.C.) [hereinafter *Moore*]. This decision was severely criticised on the basis that the Court erred in finding the existence of a common law duty to identify. Absent the existence of the duty the accused could not have been convicted. See A. Mewett & M. Manning, *Mewett and Manning on Criminal Law*, 3rd ed. (Toronto: Butterworths, 1994) at 641–643 [hereinafter Mewett & Manning]; W.J. Braithwaite, "Developments in Criminal Law and Procedure: The 1978–79 Term" (1980) 1 Supreme Court L.R. 187; E. Colvin, *Principles of Criminal Law*, 2nd ed. (Scarborough: Carswell, 1991) at 75 [hereinafter Colvin]; E. Ewaschuk, "What's in a Name? The Right Against Self-Incrimination?" (1979), 5 C.R. (3d) 307; and, A. Grant, "*Moore* v. *The Queen*: A Substantive, Procedural and Administrative Nightmare" (1979) 17 Osgoode Hall L.J. 459. See also *R.* v. *Hudson* (1990), 87 Sask. R. 288 (C.A.). In *R.* v. *Leitch* (1992), 18 C.R. (4th) 224 (Alta. Prov. Ct.), Prov. J. Pepler rejected the *Moore* decision and held that the common law rule finding an individual who refuses to identify himself or herself to the police to be guilty of the *Code* offence of obstructing a peace officer violated the accused's right to remain silent under s. 7 of the *Charter* and could not be justified under s. 1. Judge Pepler suggested that rather than charging an accused with obstruction in these circumstances, the better alternative would be to arrest the accused for failure to identify pursuant to s. 495(2) of the *Code*.

[12] *R.* v. *Johnson* (1985), 41 Sask. R. 205 (Q.B.); *R.* v. *McKerness* (1983), 33 C.R. (3d) 71 (C.S.P. Que.). Of course, giving the false name must occur in circumstances where the police have the right to request identification. See *Lis*, *supra* note 10. In *R.* v. *Whalen* (1994), 143 A.R. 234 (Prov. Ct.), an accused was acquitted on a charge of obstructing a police officer when he failed to produce his drivers license upon request and gave the officer a false name and date of birth. Fradsham Prov. Ct. J. held that in order for an accused to be found guilty of obstructing justice he or she must have done something that caused the officer to expend more than a trifling additional effort in carrying out his or her duties.

leaving the scene of an investigation;[14] refusing to leave a place when requested to do so;[15] destroying or hiding evidence;[16] and, advising others not to co-operate with the police.[17] When the police request is not legally authorised the failure to abide by the request does not constitute obstruction.[18] Also, citizens

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13 *R. v. Griffin* (1935), 63 C.C.C. 286 (N.B. C.A.) [hereinafter *Griffin*]; *R. v. Bothwell* (1986), 45 M.V.R. 1 (Ont. C.A.); *R. v. Taylor* (1960), 129 C.C.C. 330 (B.C. C.A); *R. v. Gallant* (1929), 51 C.C.C. 209 (P.E.I. S.C.); *R. v. Mason* (1935), 63 C.C.C. 97 (N.S. S.C.); and, *R. v. D'Entremont* (1932), 57 C.C.C. 174 (N.S. S.C.).

14 *R. v. Burdette* (1983), 23 Man. R. (2d) 154 (Co. Ct.). In *R. v. Quist* (1981), 61 C.C.C. (2d) 207 (Sask. C.A.), a police officer, having suspected the accused of driving while impaired, asked the accused to get into a police van. Before the officer asked for a breath sample the accused fled the scene. The Court held that he was guilty of obstructing justice because, although he was not under arrest, he was required to remain in the presence of the officer until that officer completed the investigation as authorised by the impaired driving legislation. Contrast *R. v. Gall* (1984), 35 Sask. R. 138 (Q.B.). In that case the accused failed a roadside screening test for impaired driving. When the officer demanded a breathalyzer the accused took flight. He was found not guilty of obstructing a peace officer on the basis that while he did have a duty to remain until the investigation was complete, the investigation was completed once the roadside test was administered, a breathalyzer demand made, and the identity of the accused ascertained. The proper charge would have been failing or refusing to provide breathalyzer samples.

In *R. v. Hargrove* (1985), 35 M.V.R. 217 (N.B. Q.B.), an accused waited for approximately five minutes for a police officer to prepare a ticket for a seatbelt infraction. At that point he left. The Court held that although his conduct may have inconvenienced the police, it did not amount to an obstruction.

15 *R. v. Lykkemark* (1982), 18 Alta. L.R. (2d) 48 (Prov. Ct.); *R. v. Jarvie* (1981), 18 Alta. L.R. (2d) 36 (Prov. Ct.); and, *R. v. Watkins* (1972), 7 C.C.C. (2d) 513 (Ont. Prov. Ct.). In *R. v. Golden* (1936), 67 C.C.C. 292(B.C. C.A.), the accused was convicted of obstruction for continuing to sell flowers on a street corner after being ordered to stop by a police officer.

16 *R. v. Lajoie* (1989), 47 C.C.C. (3d) 380 (Que. C.A.); *R. v. Blackstock* (1983), 32 C.R. (3d) 91 (Sask. Q.B.); *R. v. Marcoux* (1980), 27 C.R. (3d) 281 (Que. S.C.); *R. v. Armstrong* (1980), 5 Sask. R. 323 (Dist. Ct.); and, *R. v. Hnatiuk*, [1937] 1 W.W.R. 666 (Sask. C.A.). In *R. v. Akrofi* (1997), 113 C.C.C. (3d) 201 (Ont. C.A.) [hereinafter *Akrofi*], the accused was convicted of wilfully obstructing a peace officer by disposing of evidence pertaining to a criminal investigation. The accused was a pawnbroker and was requested by the police to hold on to a particular item that had been left with him as it was suspected the item had been stolen. The accused said he would do as requested. Before the police arrived the accused gave the item to a man who came in with a pawn ticket. For a more detailed list of earlier English and Canadian authorities which identify conduct constituting obstruction see C. Ruby, "Obstructing a Police Officer" (1972–73) 15 Crim. L.Q. 375 [hereinafter Ruby]; and, J.R. Tomlinson, "Wilful Obstruction of Peace Officers in Canada" (1968) 26 U.T. Fac. L.R. 31.

17 *R. v. Pati* (1991), 118 A.R. 78 (Prov. Ct.) and *R. v. L.* (1922), 38 C.C.C. 242 (Ont. S.C.).

18 *R. v. Fraser* (1987), 83 N.B.R. (2d) 436 (Q.B.); *R. v. Semeniuk* (1955), 21 C.R. 10 (Alta. Dis. Ct.); *R. v. Dagley* (1958), 29 C.R. 55 (N.S. Mag. Ct.); *R. v. Katchmer* (1961), 36 C.R.

do not obstruct justice when they reasonably resist illegal police activities or offer their opinions as to the legitimacy of police tactics or operations.[19]

A charge of attempted obstruction is also available. In R. v. *Soltys*[20] the accused attempted to drink a glass of whisky after a police officer made a demand for a breathalyzer. The British Columbia Court of Appeal held that this constituted an attempt to obstruct a peace officer since the accused knew that the drinking of the whisky would ensure that a proper analysis of the alcohol in his blood could not be made. Similarly, in R. v. *Lawson*[21] the accused lied to a police officer with the intent to mislead him in his investigation. The officer was not in fact misled and the accused was convicted of attempting to obstruct an officer in the execution of his duty.

III. OMITS TO ASSIST

SECTION 129(b) PROVIDES THAT IT IS AN OFFENCE TO OMIT, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or in preserving the peace, after having reasonable notice that one is required to do so. Obvious potential issues involve the meaning of "reasonable excuse," "reasonable notice" and the type and extent of the required assistance. Unfortunately, the virtual absence of case law requires that this area be approached with a great deal of speculation.[22]

Foster v. *R.*[23] suggests the standard case-by-case approach. Here, a peace officer was attempting to apprehend the son of the accused. The officer asked the father to help take the son to the police car. The accused advised his son to go but ignored a further request for assistance and walked away. The struggle between the peace officer and the son then resumed. The accused was convicted

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380 (Sask. Mag. Ct.); R. v. *Lavin* (1992), 16 C.R. (4th) 112 (Que. C.A.); and, R. v. *Allard* (1994), 63 Q.A.C. 136 (C.A.).

19 R. v. *Long* (1970), 8 C.R.N.S. 298 (B.C. C.A.) [hereinafter *Long*]; R. v. *Munn* (1938), 71 C.C.C. 86 (P.E.I. S.C.); *Titus* v. *Kinch* (1934), 8 M.P.R. 359 (P.E.I. S.C.); and, R. v. *Cook* (1906), 11 C.C.C. 32 (B.C. Co. Ct.).

20 R. v. *Soltys* (1980), 56 C.C.C. (2d) 43 (B.C. C.A.) [hereinafter *Soltys*].

21 R. v. *Lawson* (1973), 22 C.R.N.S. 215 (Ont. Prov. Ct.) [hereinafter *Lawson*].

22 Mewett & Manning, *supra* note 11 at 650:

> Since there are no judicial statements on the subject it is difficult to state what a reasonable excuse would be. One man may be small and puny, another large and strong or one may be a coward, another a hero. The arrested person might be a friend of the person called on to assist. Perhaps it is not surprising there have been few prosecutions under this provision.

23 *Foster* v. R. (1981), 27 C.R. (3d) 187 (Alta. Q.B.) [hereinafter *Foster*].

pursuant to what is now section 129(b) of the *Code* and his appeal was dismissed. Egbert J. held that since the accused knew his son had been arrested, or was about to be arrested, there was no need for the peace officer to advise him of that fact. Accordingly, the notice given by the officer to the accused was reasonable notice under the circumstances. The Court also held that it was not a reasonable excuse to fail to assist a peace officer arresting a person because the person being arrested was the son of the accused. Finally, the Court held that the word "assist" in section 129(b) connotes either verbal or physical assistance. If verbal assistance had the desired effect that would be sufficient. However, if the verbal assistance is obviously ineffectual, then it was incumbent upon the accused to offer such physical assistance as might be required to assist the peace officer in the execution in his duty. Egbert J. further stated that while there was no evidence that the accused was afraid of his son, even if he were, that would not operate as an excuse. On the facts of this particular case the Court noted that there were other people in the immediate vicinity of the incident who could have been called upon by the accused for aid and assistance, but he voluntarily chose not to do so.[24]

A. Public Officer or Peace Officer in the Execution of His Duty

While most alleged offences under section 129 of the *Code* involve police officers, the scope of the legislation is much wider. The definition of "public officer" includes: customs and excise officers, officers of the Canadian Forces, an officer of the Royal Canadian Mounted Police and any officer engaged in enforcing the laws of Canada relating to revenue, customs, excise, trade or navigation. In addition to the police, "peace officer" includes: mayors, wardens, reeves, sheriffs, deputy sherriffs, sherriffs' officers, justices of the peace, many prison employees, customs and excise officers, some fishery employees, pilots of aircraft and some members of the Canadian Forces.[25] Courts have found the word "includes" used in the statutory definitions to conclude that the lists are not exhaustive. The enumerated officials simply serve as specific examples. Game wardens, conservation officers, liquor inspectors and animal control officers are just some of the people who have been added to the list.[26]

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[24] *Foster*, *supra* note 23 at 189–190 *per* Egbert J.

[25] *Criminal Code*, *supra* note 5 at s. 2.

[26] See *R.* v. *McMorran*, [1948] O.R. 384 (C.A.); *R.* v. *Beaman*, [1963] S.C.R. 445; *R.* v. *Jollimore* (1950), 12 C.R. 204 (N.S. S.C.); *R.* v. *Czar* (1984), 29 Man. R. (2d) 224 (Co. Ct.); *R.* v. *Magee* (1923), 40 C.C.C. 10 (Sask. C.A.); *R.* v. *Forhan* (1927), 48 C.C.C. 86 (Alta. Dis. Ct.); *Borgias* v. *R.* (1966), 49 C.R. 38 (Que. C.A.); *Labelle* v. *R.*, [1971] Que. C.A. 641 (C.A.); *R.* v. *Jones* (1975), 30 C.R.N.S. 127 (Y.T. Mag. Ct.); *R.* v. *Nolan* (1987), 58 C.R. (3d) 335 (S.C.C.); *R.* v. *Whiskeyjack* (1984), 17 C.C.C. (3d) 245 (Alta. C.A.); *R.* v. *Smith* (1982), 2 C.C.C. (3d) 250 (B.C. C.A.); *R.* v. *Rushton* (1981), 62 C.C.C. (2d) 403 (N.B.

Much of the case law associated with section 129 of the *Code* has dealt with the phrase "in the execution of his duty." As noted above, both subsections (a) and (b) require that there be "a public officer or peace officer in the execution of his duty." In its attempt to recodify the criminal law, the Law Reform Commission of Canada recognises the difficulty in trying to provide a legislative definition of the concept.[27] The Commission has enunciated a few clear examples. An officer performing an unlawful act is not acting in the lawful execution of his duty. Similarly, a peace officer is not necessarily acting in the lawful execution of his duty simply because he happens to be on duty. For example, drinking a coffee while on duty is not an act done in the execution of the duty. The Commission concluded that acts done in lawful execution of a duty are those that can be regarded as specifically required or authorised by law. However, the Commission also concluded that just what those acts are can best be worked out by the courts on a case-by-case basis.[28] This, in fact, is the current approach.

Mewett and Manning note that Canadian courts have adopted the "*Waterfield* formula" as stated in the 1964 decision of the English Court of Criminal Appeal, *R. v. Waterfield*.[29] In that decision, Ashworth J. stated that rather than attempting to reduce, within specific limits, the general terms in which the duties of the police have been expressed, it would be more convenient to consider what the officer was actually doing. In particular, whether such conduct was *prima facie* an unlawful interference with a person's liberty or property ought to be considered. If the conduct is *prima facie* unlawful, the court must then consider whether the conduct falls within the general scope of any duty imposed by statute or recognised at common law. The court must also note whether such conduct, albeit within the general scope of such a duty, involves an unjustifiable use of powers associated with the duty.[30] Not surprisingly there have been a few problems applying "the formula."

The fact that an officer is "on duty" or "off duty" is not particularly relevant. What is relevant is the requirement that the obstruction must relate to the execution by the officer of that duty.[31] For example, in *R. v. Noel*[32] a plain clothes

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C.A.); *R. v. Renz* (1972), 10 C.C.C.(2d) 250 (Ont. C.A.); and, *R. v. Rutt* (1981), 59 C.C.C. (2d) 147 (Sask. C.A.).

27 Law Reform Commission of Canada, *Recodifying Criminal Law* (Ottawa: Law Reform Commission of Canada, 1987) at 116.

28 *Ibid.* at 117.

29 *R. v. Waterfield*, [1964] 1 Q.B. 164 (C.C.A.) [hereinafter *Waterfield*]. See Mewett & Manning, *supra* note 11 at 637–641.

30 *Ibid.* at 170–171 *per* Ashworth J.

31 *R. v. Tontolano, Kelly and Cadwell* (1975), 28 C.C.C. 562 (Ont. C. A.). See also *R. v. Horton* (1987), 3 Y.R. 50 (Terr. Ct.) [hereinafter *Horton*].

police officer whose specific duties related to enforcement of the federal *Immigration Act* had issued a speeding ticket to the accused. The officer had directed the accused to produce his licence at the detachment offices before the end of the day. When the accused failed to appear, the officer went to his place of business to present the ticket. The accused refused to accept the ticket and, as the officer was leaving, the accused ran to the officer's vehicle and grabbed the keys from the ignition. The officer demanded the return of the keys and advised the accused that he was obstructing him from continuing with his duties. The officer intended to return to his office where he was continuing an investigation under the *Immigration Act*. Another police officer arrived and managed to negotiate a return of the keys.

The British Columbia Court of Appeal held that for the purposes of section 129 of the *Code* a peace officer does not have to be involved in the investigation of a specific offence, with an identifiable suspect, in order to be in the execution of his duty. If, at any given moment while on duty, a peace officer's activities fall within the duties and responsibilities of a peace officer described by statute or common law, then the officer will be engaged in the execution of his duty. However, the Court also indicated that something more than merely being "on duty" or "at work" is required before a peace officer will be in the execution of his duty. Whether a peace officer is in the execution of his duty will depend in each case on the nature of the activities at the time the obstruction occurs. Although, in this case, the officer was in the execution of his duties when he served the ticket, the Court held that this specific duty had been accomplished when he left the premises of the accused intending to drive back to his office. At the moment the officer was obstructed, he was not then either in the execution of his duty or immediately about to embark upon the execution of his duty. The Court concluded that the time spent by a peace officer between the performance of definable duties is not time spent in the execution of his duty. The Court did not address the option of other possible charges.[33]

A contrary result is demonstrated by the decision of *R. v. Johnston*.[34] The Ontario Court of Appeal held that it is not a defence to a charge of obstructing a peace officer in the execution of his duty, when, at the time of the alleged obstruction, the police officer was employed under a private contract to direct traffic outside a brewer's warehouse. Gibson J.A. held that a police officer is on duty at all times and in this case the officer had properly performed an arrest.[35]

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[32] *R. v. Noel* (1995), 101 C.C.C. (3d) 183 (B.C. C.A.) [hereinafter *Noel*].

[33] *Noel*, *supra* note 32 at 189–190 *per* Wood J.A. See also *Anderson*, *supra* note 8.

[34] *R. v. Johnston*, [1965] 2 O.R. 729 (C.A.) [hereinafter *Johnston*].

[35] *Ibid.* at 729 *per* Gibson J.A.

An officer is not acting in the execution of his duty when he purports to exercise non-existent powers or exceeds powers that have been conferred. The recent decision in R. v. *Sharma*[36] provides a good example. In that case a flower vendor was ticketed for selling goods on the street without a licence and in violation of a municipal by-law. A police officer ordered him to move on or face criminal charges. When he refused Mr. Sharma was charged with obstruction contrary to section 129 of the *Code*. In Provincial Court he was convicted of both the by-law charge and the criminal charge. In an unanimous decision the Supreme Court of Canada concluded that the municipal by-law was *ultra vires*, and, accordingly, that the obstruction charge could not be sustained since it was based on an invalid law. The Court also determined that the obstruction charge would fail even if the by-law were valid as there was no legislative or common law authority to arrest the appellant for failing to comply with an order to desist from conduct prohibited by the by-law. The officer's enforcement power was limited to ticketing the offender.[37]

The fact that an officer honestly and/or reasonably believes that he is acting properly and not exceeding his power will not assist in a charge of obstruction. In such circumstances, despite the mistake, the officer is not acting in the exe

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[36] R. v. *Sharma*, [1993] 1 S.C.R. 650 [hereinafter *Sharma*].

[37] *Ibid.* at 671–673 *per* Iaccobucci, J. See also R. v. *Greenbaum*, [1993] 1 S.C.R. 674; R. v. *Thomas* (1993), 78 C.C.C. (3d) 575 (S.C.C.); *Lavin* c. *Quebec (Procureur general)* (1992), 16 C.R. (4th) 112 (Que. C.A.); R. v. *Maynes* (1991), 122 A.R. 310 (Prov. Ct.); R. v. *C.B.* (1988), 90 A.R. 200 (Youth Ct.); R. v. *Bochon* (1986), 2 Y.R. 318 (S.C.); R. v. *Huneault* (1984), 17 C.C.C. (3d) 270 (Que. C.A.); R. v. *Custer* (1984), 12 C.C.C. (3d) 372 (Sask. C.A.); R. v. *Cymbalisty* (1983), 21 Sask. R. 354 (Q.B.) [hereinafter *Cymbalisty*]; R. v. *Prince* (1981), 61 C.C.C. (2d) 73 (Man. Prov. Ct.) [hereinafter *Prince*]; R. v. *Crain* (1981), 35 N.B.R. (2d) 464 (Q.B.); R. v. *Burger*, [1972] 6 W.W.R. 578 (N.W.T. Mag. Ct.); R. v. *Middleton*, [1969] 4 C.C.C. 197 (Ont. C.A.)[hereinafter *Middleton*]; R. v. *Boulanger*, [1969] 4 C.C.C. 85 (Que. Mun. Ct.); R. v. *Calhoun*, [1968] 4 C.C.C. 248 (N.B. C.A.); R. v. *Katchmer* (1961), 36 C.R. 380 (Sask. Mag. Ct.); R. v. *Carroll* (1960), 31 C.R. 315 (Ont. C.A.); R. v. *Hurlen* (1959), 29 C.R. 291 (Ont. C.A.); R. v. *Goth* (1952), 102 C.C.C. 336 (Ont. C.A.); *Johanson* v. R. (1947), 3 C.R. 508 (S.C.C.); R. v. *Sutherland*, [1944] 1 W.W.R. 529 (B.C. C.A.); R. v. *Bouchard* (1941), 76 C.C.C. 392 (Que. C.A.); and, R. v. *La Vesque* (1918), 30 C.C.C. 190 (N.B. C.A.).

Examples of situations where an officer was found to be acting "in the execution of his duty" are: R. v. *L.S.L.* (1991), 89 Sask. R. 267 (Q.B.); R. v. *G.H.* (1991), 121 A. R. 264 (Youth Ct.); R. v. *Mellquist* (1988), 42 C.C.C. (3d) 231 (Sask. C.A.); R. v. *Linta* (1985), 38 Alta. L.R. (2d) 272 (Prov. Ct.); R. v. *Reimer* (1982), 20 Alta. L.R. (2d) 369 (Prov. Ct.); R. v. *Quist* (1981), 61 C.C.C. (2d) 207 (Sask. C.A.); R. v. *Rushton* (1981), 62 C.C.C. (2d) 403 (N.B. C.A.); R. v. *McMaster* (1981), 35 A.R. 258 (Q.B.); R. v. *Tetrault* (1980), 6 Man. R. (2d) 332 (Co. Ct.); R. v. *Biron* (1975), 30 C.R.N.S. 109 (S.C.C.); *Knowlton* v. R., [1974] S.C.R. 443; R. v. *Westlie* (1971), 2 C.C.C. (2d) 315 (B.C. C.A.) [hereinafter *Westlie*]; R. v. *Bonnycastle*, [1969] 4 C.C.C. 198 (B.C. C.A.); R. v. *Williamson* (1966), 48 C.R. 102 (Ont. C.A.); *Beaune* v. R. (1965), 46 C.R. 26 (Que. C.A.); R. v. *Yehl* (1964), 44 D.L.R. (2d) 504 (B.C. C.A.); R. v. *Shore* (1960), 129 C.C.C. 70 (B.C. C.A.). See also Ruby, *supra* note 16.

cution of his duty and the prosecution must fail.[38] In the event that an individual has physically resisted the unlawful interference with their person or property by an officer, that individual will not be subject to a successful prosecution for assault provided the use of force is reasonable in the circumstances.[39]

The status of third parties is less clear. Several cases have held that third parties who intervene on behalf of a person being subjected to an unlawful interference will have a good defence based on the fact that the officer is not acting in the execution of his duty.[40] However, in *R. v. Saunders*,[41] the Nova Scotia Supreme Court held that in the case of an invalid arrest, although the person being arrested has the right to resist, this privilege of resistance cannot be extended to a third party. Cooper J.A. held that any right of resistance is that of the individual arrested and theirs alone.[42] In a more recent decision, *Carr v. Edmonton (City) Police*[43]—a civil action for false arrest, false imprisonment and assault—the Alberta Queen's Bench declined to follow the approach taken in *Saunders*. Instead, the Court adopted the notion of a qualified defence where a third party intervened on behalf of a person being improperly arrested.[44] The plaintiff, a lawyer, was called to the scene of a motor vehicle accident when his son was arrested for impaired driving. When the son was placed in a police vehicle for questioning the plaintiff entered the motor vehicle to speak to him. He refused to exit when requested to do so by the police and was charged with obstruction of justice. Although the son's arrest for impaired driving was determined to be false on the basis that there were no reasonable grounds for an impaired charge, the Court held that, in this particular case, the false arrest did not afford a defence to a charge of obstruction. Cooke J. stated that a person who obstructs an officer making a false arrest has only a qualified defence to a charge of obstruction. A person interceding in a false arrest must make their inquiry in a manner that is not intemperate, unduly persistent, irrelevant or made in an unreasonable manner. The plaintiff had already conferred with his

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38 *R. v. Terrigno* (1995), 101 C.C.C. (3d) 346 (Alta. Prov. Ct.) [hereinafter *Terrigno*]; *R. v. Dale* (1989), 69 C.R. (3d) 74 (Ont. Dist. Ct.) [hereinafter *Dale*]; and, *R. v. Houle* (1985), 48 C.R. (3d) 284 (Alta. C.A.).

39 *Terrigno, ibid.*; *R. v. Thomas* (1993), 78 C.C.C. (3d) 575 (S.C.C.); *Dale, ibid.*; *Cymbalisty*, *supra* note 37; and, *R. v. Potvin* (1973), 15 C.C.C. (2d) 85 (Que. C.A.).

40 *Prince*, *supra* note 37; *R. v. Slipp* (1970), 1 C.C.C. (2d) 275 (N.B. C.A.); *Middleton*, *supra* note 37.

41 *R. v. Saunders* (1977), 34 C.C.C. (2d) 243 (N.S. C.A.) [hereinafter *Saunders*].

42 *Ibid.* at 249 *per* Cooper J.A.

43 *Carr v. Edmonton (City) Police* (1992), 5 Alta. L.R. (3d) 324 (Q.B.) [hereinafter *Carr*].

44 The Court cited the decision of *Sandison v. Rybiak* (1973), 1 O.R. (2d) 74 (H.C.), as authority for this position.

son and knew that he would have a further opportunity to speak to him at the police station prior to the breathalyzer test. In these circumstances, Cooke J. concluded that the conduct of the plaintiff was both unreasonable and unwarranted.[45]

Another consideration in the problem of third party involvement in this specific context involves the concept of the good samaritan.[46] In Canada today there are both common law and statutory bases for the defence of others. At common law, a person may intervene in defence of another, including total strangers. Although there are no statutory provisions in Canada that specifically authorise the defence of friends or strangers, there are a number of sections in the *Criminal Code* that may serve the same purpose. For example, the provisions dealing with arrest powers of private citizens and the power to protect a person under your protection may fall within this category.[47] It should also be suggested that where a third party is mistaken as to the need to intervene and/or the amount of force required for effective intervention, an honest and reasonable mistake should provide a defence to a charge of obstruction.[48]

IV. The Mental Element for Obstructing a Peace Officer

AS INDICATED IN THE PRECEDING DISCUSSSION, the offences of resisting a peace officer, wilfully obstructing a peace officer and omitting to assist a peace officer have different factual requirements. It may also be the case that each of these offences has a different fault requirement or mental element. This has, as will be demonstrated, significant ramifications for the potential application of defences such as mistake, intoxication and automatism.

In *R. v. Terrigno*,[49] a 1995 decision of the Alberta Provincial Court, Fradsham, Prov. Ct. J. held that section 129(a) not only created two separate offences—obstructing and resisting—but that the two offences had different fault elements. The offence of resisting was held to be a general intent offence, whereas the offence of wilfully obstructing was held to be one of specific intent.[50] This distinction was based on the placement of the word "wilfully" im

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45 *Carr*, *supra* note 43 at 332–333 *per* Cooke J. See also *Long*, *supra* note 19 and *Terrigno*, *supra* note 38.

46 See L. Wilson, "The Defence of Others—Criminal Law and the Good Samaritan" (1988) 33 McGill L.J. 756 [hereinafter Wilson].

47 *Criminal Code*, *supra* note 5, ss. 494, 37.

48 Wilson, *supra* note 46 at 813.

49 *Terrigno*, *supra* note 38.

50 *Ibid.* See also *R. v. Peterson* (1982), 69 C.C.C. (2d) 90 (Alta. Q.B.); and, *R. v. Murphy* (1981), 58 C.C.C. (2d) 56 (N.S. C.A.). In *R. v. Lavin* (1990), 77 C.R. (3d) 251 (Que.

mediately before the word "obstructs" and its absence prior to the word "resists." The Court rejected the notion that "wilfully" modified both.[51]

However, the matter is far from settled. In 1997, the Alberta Court of Appeal, in *R. v. Gunn*[52] and without citing *Terrigno* on this point, held that wilful obstruction of a peace officer is a general intent offence. The Court based their decision on the policy considerations and the definitions of specific and general intent provided by Justice Sopinka in *Daviault*[53] and earlier decisions from British Columbia, Quebec and the Yukon.[54]

S.C.), the Quebec Superior Court held that the offence of wilfully obstructing a peace officer requires only a general intent. This decision was not cited in *Terrigno*.

51 *Terrigno, supra* note 38. The Court adopted the reasoning of McDonald J. in *R. v. Peterson* (1982), 69 C.C.C. (2d) 90 (Alta. Q.B.) At 93–94 Justice McDonald states:

> I thought that perhaps through some accident of drafting, somewhere in history, wilfulness as an element of the offence of resisting a peace officer in the execution of his duty might have been omitted. However, the present wording of s. 118 (a) can be traced back to s. 34 of the *Criminal Code* when first enacted in 1866 as the *Offences against the Person Act, 1886* (Can.), c. 162, and, still earlier to the *Offences against the Persons Act, 1869* (Can.), c. 20 s. 39. At that time the only relevant English statute was the *Metropolitan Police Act, 1839* (U.K.), c. 47, s. 18, of which made it an offence to "assault or resist any person belonging to the Metropolitan Police Force in the execution of his duty." It will be noted that the element of wilfulness was not thus required in the case of either form of conduct. The same is true of a similar provision in the *Town Police Clauses Act, 1847* (U.K.), c. 89, s. 20. "Wilfulness" appears to have made its first statutory appearance in regard to either of these offences in England in 1885, in the *Prevention of Crimes Amendment Act, 1885* (U.K.), c. 75, s.2, which stated what the penalty was in "all cases of resisting or wilfully obstructing any constable or peace officer when in the execution of his duty." Thus one must approach with reserve the statement in Williams, *Criminal Law; the General Part* [2d. ed. (1961) at 419], that in England "it is a summary offence by statute wilfully to resist or obstruct any constable or peace officer in the execution of his duty.

52 *R. v. Gunn* (1997), 6 C.R. (5th) 405 (Alta. C.A.) [hereinafter *Gunn*].

53 *Per* McIntyre J. in *R. v. Bernard*, [1988] 2 S.C.R. 833 at 880:

> General intent offences as a rule are those which require the minimal intent to do the act which constitutes the *actus reus*. Proof of intent is usually inferred from the commission of the act on the basis of the principle that a person intends the natural consequences of his or her act. Without attempting to exhaust the policy reasons for excluding the defence of drunkenness from this category of offences, I would observe that it is seldom, even in cases of extreme drunkenness, that a person will lack this minimal degree of consciousness. Moreover, these are generally offences that persons who are drunk are apt to commit and it would defeat the policy behind them to make drunkenness a defence.

Unlike *Terrigno*, the *Gunn* decision does not address the issue of the appropriate fault element for the offence of resisting. If resisting and wilfully obstructing do indeed have different fault elements, and if *Gunn* is correct in holding that wilfully obstructing is a general intent offence, the offence of resisting could be seen to have a fault element of recklessness.[55] In the alternative, it could be determined to be an offence of penal negligence as described in the *Creighton* decision.[56] In that decision the Supreme Court of Canada confirmed that there is no general constitutional principle requiring subjective foresight for criminal offences. An objective fault requirement was held to be constitutionally sufficient for a broad range of offences. Accordingly, a person may be held

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> Specific intent offences are as a rule those that require a mental element beyond that of general intent offences and include "those generally more serious offences where the *mens rea* must involve not only the intentional performance of the *actus reus* but, as well, the formation of further ulterior motives and purposes."

"These are often referred to as "ulterior intent" offences:" *Daviault*, *supra* note 4 at 123 *per* Sopinka J.

[54] *Gunn*, *supra* note 52 at 417 *per* Picard, J.A:

> Most courts have based their analysis on an interpretation of the word "wilful." In *R. v. Goodman* (1951), 99 C.C.C. 366 (B.C. C.A.) [hereinafter *Goodman*], after reviewing the sections in the *Code* which contained the word, Justice Robertson concluded that its definition should follow from the seriousness of the crime. He held that obstructing a police officer in the execution of his or her duty is a crime of relatively low significance, requires a lower form of *mens rea*, and that *mens rea* is present when an accused knows what he or she is doing, intends to do it and is a free agent. This interpretation was affirmed twenty years later by the same court in *R. v. Weslie* [*supra* note 37]. Subsequently, these cases have been applied to hold that nothing more need be proven to satisfy the mental element of s. 129: *R. v. Edmunson*, [1975] W.W.D. 180 (B.C. C.A.) [hereinafter *Edmunson*]. When the *Goodman* requirements are compared to Justice Sopinka's definitions, it appears that the British Columbia courts have held that general intent is required under s. 129.

The Court also cited *R. v. Rousseau*, [1982] C.S. 461 (Que. S.C.) [hereinafter *Rousseau*]; *Lavin v. Quebec (Attorney General)* (1990), 77 C.R. (3d) 251 (Que. S.C.), rev'd. (1992), 16 C.R. (4th) 112 (Que. C.A.) [hereinafter *Lavin*]; and, *R. v. Grandish*, [1995] Y.J. No. 63 (Terr. Ct.) [hereinafter *Grandish*].

[55] See *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.) [hereinafter *Buzzanga*]. In that case where one subsection creating an offence contained the word "wilful" and another subsection creating another offence was silent as to the appropriate mental element, the Court held that the subsection that used the word "wilful" had a fault element of "intention" while the other subsection had a fault element of either intention or recklessness (at 381–382).

[56] *Creighton*, *supra* note 1.

responsible for some *Criminal Code* offences based on negligent conduct evaluated on an objective basis. The Court also held that the constitutionality of crimes of negligence is subject to the caveat that acts of ordinary negligence would not suffice. Rather, the negligence must constitute a "marked departure" from the objective standard of a reasonable person.[57]

Professors Stuart and Delisle note that as a result of *Creighton* and subsequent decisions, today proof of subjective awareness is required for very few crimes in Canada. They argue that where the *Criminal Code* definition of an offence includes a clear *mens rea* word—such as "intentionally," "wilfully," or "knowingly"—Parliament has made its choice of the subjective test clear. They also argue that where the definition of the crime contains no indicia of *mens rea*, and there is no language indicating that the crime is to be interpreted as one of objective negligence, it should be interpreted as an offence of subjective *mens rea*.[58] However, Stuart and Delisle point out that in *R.* v. *Hinchey*[59] the Supreme Court appeared reluctant to adopt an approach of a common law presumption of subjective *mens rea*. On the other hand, in the more recent decision of *Lucas* v. *The Queen*[60]—a case involving the crime of defamatory libel—Justice Cory stated:

> Canadian courts have held that, in the absence of an express legislative provision, it should be presumed that proof of subjective *mens rea* is a requirement of criminal offences.[61]

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57 *Creighton*, *supra* note 1 at 208–209 *per* McLachlin J. and at 224 *per* Lamer C.J.C. The decision has prompted a tremendous amount of comment, mostly critical. See D. Stuart *et al.*, "Criminal Reports Forum: Objective Fault in the Supreme Court" (1993), 23 C.R. (4th) 240.

58 D. Stuart & R. Delisle, *Learning Canadian Criminal Law*, 6th ed., (Scarborough: Carswell, 1997) at 405–406 [hereinafter Stuart & Delisle].

59 *R.* v. *Hinchey* (1996), 3 C.R. (5th) 187 (S.C.C.) See D. Stuart, "Corruption in *Hinchey*: Scrambling *Mens Rea* Principles" (1997), 3 C.R. (5th) 238.

60 *R.* v. *Lucas* (1998), 224 N.R. 161 (S.C.C.) [hereinafter *Lucas*].

61 *Ibid.* at 196 *per* Cory J. Despite this apparent return to the relatively clean lines established by *R.* v. *Sault Ste. Marie*, [1978], 2 S.C.R. 1299 [hereinafter *Sault Ste. Marie*], Stuart & Delisle, *supra*, note 58 at 405, have demonstrated that the criterion of "stigma" adopted by the Supreme Court of Canada has resulted in a very limited number of offences being held to require subjective fault. At the same time the number of offences that do not require proof of subjective fault continues to grow. They offer the following lists. The first category includes crimes that require proof of subjective fault, such as: murder [*Martineau*, *supra* note 2]; attempted murder [*R.* v. *Logan*, [1990] 2 S.C.R. 731]; accessory liability to an offence constitutionally requiring a subjective test [*Logan*, *ibid.*]; war crimes and crimes against humanity [*R.* v. *Finta*, [1994] 1 S.C.R. 701]; and, theft [see the *dicta* in *Martineau*, *supra* note 2 and *Vaillancourt* v. *R.*, [1987] 2 S.C.R. 636]. The second category includes those crimes that do not require proof of subjective fault: unlawful act causing bodily harm [*R.* v. *DeSousa*, [1992] 2 S.C.R. 944]; dangerous driving [*R.* v. *Hundal*, [1993] 1 S.C.R. 867];

While the objective/subjective debate appears to be a never ending work in progress at the Supreme Court of Canada, it may very well be that resisting under section 129(a) and failing to assist under section 129(b) of the *Code* are crimes of penal negligence, and that wilfull obstruction is a crime of general intention.

There is also some confusion as to the meaning of "wilful" in section 129(a). Both *Terrigno* and *Gunn* adopted the reasoning in *Rice*.[62] In that decision Lord Parker defined "wilful" as meaning not only "intentional" but "without lawful excuse."[63] In the *Connolly* case the accused was determined by a police officer to have been acting suspiciously in an area where there had been a number of break and enter offences during the same night. He was asked several times for his name and address. He refused, and when asked to accompany the officer to a police box, declined to do so unless arrested. He was convicted of wilfully obstructing the officer in the execution of his duty. His appeal was successful.

Mewett and Manning argue that while the Court reached the right result, the reasoning was in error. They suggest that while wilfulness goes to *mens rea*, the presence or absence of lawful excuse turns on the external factor of whether or not it was lawful for the accused to act as he did. They note that an act is no less wilful when the accused is entitled to do as is done. In this case the accused had a lawful excuse for not identifying himself and, therefore, in ordering the accused to identify himself, the officer was going outside the scope of execution of duty. Accordingly, the accused should have been acquitted because of the officer's excessive use of power, and not on the basis that the accused had a lawful excuse.[64]

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manslaughter [*Creighton*, *supra* note 1]; failing to provide necessaries of life [*R. v. Naglik*, [1993] 3 S.C.R. 122]; careless use of a firearm [*R. v. Finlay*, [1993] 3 S.C.R. 103 and *R. v. Gosset*, [1993] 3 S.C.R. 76]; causing bodily harm in committing assault [*R. v. Brooks* (1988), 64 C.R. (3d) 322 (B.C. C.A.)]; criminal negligence [*R. v. Nelson* (1990), 75 C.R. (4th) 70 (Ont. C.A.) and *R. v. Gingrich* (1991), 6 C.R. (4th) 197 (Ont. C.A.); and, arson [*R. v. Peters* (1991), 11 C.R. (4th) 48 (B.C. C.A.)]. For explanation, analysis and criticism of the "stigma" criterion, Stuart & Delisle recommend I. Grant & C. Boyle, "Equality, Harm and Vulnerability: Homicide and Sexual Assault Post-*Creighton*" (1993), 23 C.R. (4th) 252 at 258–259 and R. Cairns Way, "Constitutionalizing Subjectivism: Another View" (1990), 79 C.R. (3d) 260. See also Stuart, *supra* note 3 at 187–194.

62 *Rice*, *supra* note 10. See *Terrigno*, *supra* note 38 at 364 and *Gunn*, *supra* note 52 at 418.

63 *Rice*, *ibid.* at 419 *per* Lord Parker C.J. In an earlier Canadian decision, "wilfully" was defined as " ... a deliberate purpose to accomplish something forbidden, a determination to execute one's own will in spite of and in defiance of law" [See *Griffin*, *supra* note 13 at 290 *per* Grimmer J]. In *R. v. Sandford* (1980), 62 C.C.C. (2d) 89 (Ont. Prov. Ct.) at 95 [hereafter *Sandford*], Scullion, Prov. Ct. J. stated that "wilfully" means "that there has to be an evil intention; it means that there must be an intention on the part of the accused to actually obstruct."

64 Mewett & Manning, *supra* note 11 at 649.

Section 129(b) includes the phrase "without reasonable excuse." Section 129(a) contains no equivalent. An argument can be anticipated on the basis of the *expressio unis* doctrine that "without lawful excuse" should not be added to the fault element of section 129(a).[65]

The *Connolly* definition of "wilful" has not yet been expressly accepted or rejected by the Supreme Court of Canada. The decision was simply referred to in the case of R. v. *Buzzanga and Durocher*.[66] In *Buzzanga* the Court held that in the context of the particular offence charged—wilful promotion of hatred—"wilful" meant "intention" and did not include recklessness.[67] However, the Court also held that "wilfully" does not have a fixed meaning and may sometimes include "recklessness."[68]

Subsequent decisions have been terribly inconsistent. In R. v. *Zundel*[69] the Ontario Court of Appeal considered the phrase "wilfully publishes" as it is found in the offence of spreading false news pursuant to section 181 of the *Criminal Code*. The trial judge instructed the jury that the Crown had to prove the accused "did not have an honest belief" in the truth of the pamphlet under consideration. The Court held that equating proof of absence of honest belief in the truth of the pamphlet with proof of knowledge that it was false constituted a misdirection and ordered a new trial. The offence required proof of actual knowledge of the falsity of the statements. Recklessness as to the truth or falsity

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65 Examples of this approach to statutory interpretation can be found in R. v. *Pierce Fisheries*, [1971] S.C.R. 5; and R. v. *Cancoil* (1986), 52 C.R. (3d) 188 (Ont. C.A.).

66 *Buzzanga, supra* note 55 at 379 *per* Martin, J.A.

67 *Ibid.* at 381. Stuart, *supra* note 3 at 204 explains:

> Section 319(1) already prohibited communication of a statement likely to lead to a breach of the peace. Its *mens rea* requirement, although not expressed in the section, was found to be intention or recklessness. Since section 319(2) differed only in the qualifying "wilfulness" requirement, to constitute a separate offence it would have to contain a distinct mental element—which the Court restricted to intention.

In R. v. *Keegstra* (1990), 1 C.R. (4th) 129 (S.C.C.) at 193 [hereinafter *Keegstra*], also involving a charge of wilful promotion of hatred pursuant to s. 319(2), Chief Justice Dickson, speaking for the majority, stated that he agreed with the interpretation of "wilfully" in *Buzzanga*.

> The interpretation of "wilfully" in *Buzzanga* has great bearing upon the extent to which s. 319(2) limits the freedom of expression. This mental element, requiring more than mere negligence or recklessness as to result, significantly reduces the scope of the targeted expression.

68 *Buzzanga, supra* note 55 at 381 *per* Martin J.A.

69 R. v. *Zundel* (1987), 56 C.R. (3d) 1 (Ont. C.A.) [hereinafter *Zundel* (C.A.)].

of the statement was insufficient.[70] Professor Stuart argues that the decision is "wrong" and that Zundel was rightfully convicted if he actually knew of the falsity or was subjectively reckless in that he deliberately risked whether his pamphlet was false.[71]

A somewhat stronger statement can be found in *R. v. Docherty*,[72] a 1989 decision of the Supreme Court of Canada. The accused was charged with wilfully failing or refusing to comply with a probation order pursuant to what was then section 666(1) of the *Criminal Code*.[73] The Court held that the word "wilfully" is synonymous with "intentionally." Justice Wilson stated:

> The word "wilfully" is perhaps the archtypal word to denote a *mens rea* requirement. It stresses intention in relation to the achievement of a purpose. It can be contrasted with lesser forms of guilty knowledge, such as "negligently" or even "recklessly." In short, the use of the word "wilfully" denotes a legislative concern for a relatively high level of *mens rea* ... .[74]

Although the weight of authority calls for a restricted mental element of "intention," critics remain unconvinced and their arguments are compelling. They note that the *Buzzanga* decision was neither cited nor discussed in *Docherty*,[75] and that the *Docherty* decision itself has not been applied to other offences.[76] The suggestion that section 429(1) of the *Code* can be used to establish

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70 *Zundel* (C.A.), *supra* note 69 at 62–64 *per curiam*. In *R. v. Zundel* (1992), 16 C.R. (4th) 1 (S.C.C.) [hereinafter *Zundel*], the Supreme Court of Canada declared section 181 of the *Code* to be unconstitutional. The Court did not address the question of the appropriate fault element or the meaning of the word "wilfully."

71 Stuart, *supra* note 3 at 205. Professor Colvin states that Stuart's criticism represents "a sound argument with respect to both principle and policy." However, he adds:

> ... the words of s.181 nevertheless mandate the conclusion reached by the court. Knowledge that something is false is not the same as knowledge or awareness of a risk that it might be false.

See Colvin, *supra* note 11 at 120.

72 *R. v. Docherty* (1989), 72 C.R. (3d) 1 (S.C.C.) [hereinafter *Docherty*].

73 The word "wilfully" is no longer found in the most recent version of the offence. See section 733.1 of the *Criminal Code*, *supra* note 5.

74 *Docherty*, *supra* note 72 at 9 *per* Wilson J.

75 Colvin, *supra* note 11 at 121.

76 Stuart, *supra* note 3 at 205. Professor Stuart adds:

> The limit of intent is largely asserted and is troubling. Does this mean, for example, that the offence of wilful obstruction of a police officer under s. 139(1) requires proof of intent? If so, is the offence one of specific intent to which drunkenness is a defence?

a specially restricted meaning throughout the *Criminal Code* has been rejected on the basis that

> ... the idea runs counter to the reasoning in *Pappajohn* that the *Code* cannot be read as a fully integrated whole. Inconsistencies between the drafting of its parts must be recognized.[77]

It has also been noted that there are authorities from other jurisdictions holding that wilfulness does encompass recklessness as well as intention.[78] Finally, Professor Stuart argues that, as a general rule, limiting the aware state of mind requirement to actual intent or actual knowledge is artificial and undesirable:

> Such a refinement would make the law relating to mens rea particularly confused and convoluted. How then could one justify the extension of the knowledge requirement for drug offences to recklessness or wilful blindness (*R. v. Blondin*, [1972] 1 W.W.R. 479 (S.C.C.)[B.C.]), or the similar extension to recklessness as to consent in the case of rape (*Pappajohn v. R.*, [1980] 2 S.C.R. 120...[B.C.]) and to wilful blindness in the case of sexual assault (Sansregret v. R., [1985] 1 S.C.R. 570...). The key distinction in terms of fault is between the aware state of mind requirement, which requires the trier of fact to determine that the accused was actually thinking in the prohibited way, and responsibility based on objective negligence, where liability is imposed whether or not the accused thought about the risk. As long as the approach to mens rea in the form of recklessness or wilful blindness remains one of subjective awareness of consequences and/or circumstances, the mens rea extension is narrow, and a sensible widening of the net.[79]

As noted earlier, *R. v. Terrigno*,[80] a 1995 decision of the Alberta Prov. Ct., held that wilful obstruction is a specific intent offence. Yet, in the 1997 decision of *R. v. Gunn*,[81] the Alberta Court of Appeal held that wilful obstruction is a general intent offence. *Terrigno* did not cite *Buzzanga, Zundel* or *Docherty*. In the *Gunn* decision, although Picard J. held that the fault element for wilful obstruction is general rather than specific intent, recklessness or penal negligence, she

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Colvin, *supra* note 11 at 121 states: "*Docherty* is a difficult decision to rationalize. Whereas the word "knowingly" on its face excludes recklessness, the word "wilfully" does not."

77 *Ibid.* at 121. See also D. Stuart, "Annotation" (1990), 72 C.R. (3d) 1 [hereinafter Stuart *Annotation*]. Section 429(1) of the *Criminal Code*, *supra* note 5, reads as follows:

> Everyone who causes the occurrence of an event by doing an act or omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, "wilfully" to have caused the occurrence of the event.

78 Colvin, *ibid.* at 121. The author cites *R. v. Lockwood*, [1981] Qd. R. 209 (C.C.A.).

79 Stuart *Annotation*, *supra* note 77 at 3.

80 *Terrigno*, *supra* note 38.

81 *Gunn*, *supra* note 52.

also held that the reasoning and conclusions of *Docherty* applied only to the specific section of the *Code* being considered and that it had no application to section 129(a). Rather than using *Docherty* as the basis for her decision, Justice Picard cited the judgment of Justice Sopinka in *Daviault*[82] for the proposition that the mental element depends on the nature of the crime.[83] In a recent decision from the Ontario Court of Appeal, Justice Robbins cited *Buzzanga* for the proposition that on a charge of wilful obstruction of a peace officer, "wilful" equals "intention."[84] Suffice it to suggest that at this point in time, lacking a definitive statement from the Supreme Court of Canada, the fault element for the offences of resisting, wilful obstruction and failing to assist remains a mystery.

V. Defences to a Charge of Obstructing a Peace Officer

It was noted earlier that where the alleged wrongful conduct does not constitute resisting, obstruction or failing to assist a charge pursuant to section 129(a) or (b) will not succeed. Similarly, if there is not a peace officer or if the peace officer is not acting in the execution of his duty no offence is made out. It appears that some of the defences, for example, insanity, automatism and officially induced error, would apply uniformly to the different offences. However, there may be three notable exceptions: mistake of fact, intoxication and involuntary act brought about by self-induced intoxication.

A. Mistake of Fact

The defence of mistake of fact has provided much of the focus for the subjective/objective fault debate in Canada. In essence, the courts have determined that where an offence has a subjective fault element the defence of mistake will be evaluated subjectively, and where an offence has an objective fault element the defence of mistake will be evaluated objectively.[85] The line between the two

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82 *Daviault*, *supra* note 4.

83 *Gunn*, *supra* note 52 at 418 *per* Picard, J.A.

84 *Akrofi*, *supra* note 16 at 207 *per* Robbins J.A.

85 Stuart & Delisle, *supra* note 58 at 589, provide a very succinct summary:

> On the issue of whether a mistake of fact is a defence *Pappajohn* v. *R.*, [1980] 2 S.C.R. 120, is still the leading decision. Chief Justice Dickson there decided for the majority that a mistake of fact defence constitutes a denial that the Crown has proved the fault element. It follows that, in the absence of statutory wording to the contrary: 1. Where there is a subjective *mens rea* requirement the mistake need merely be honestly held with reasonableness only relevant to assessment of credibility; 2. Where the fault element requires objective negligence, the mistake must be both honest and reasonable; 3. Where there is a due diligence defence, the mistake must be both honest and reason-

has hardened considerably since the *Creighton* decision when the Supreme Court of Canada held that in applying any objective standard for fault, personal factors other than those relating to capacity are not to be considered.[86]

On a charge of wilful obstruction a mistake of fact will be evaluated subjectively. This follows from the determination that the fault element for this particular offence is subjective, although as previously suggested, the particular subjective fault form—specific intent, general intent or recklessness—may still be open to discussion. If an accused has made an honest mistake as to whether the person allegedly obstructed is a peace officer there should be an acquittal.[87]

Similarly, if the accused lacks the knowledge that the peace officer is engaged in the execution of his duty, an essential component of the *mens rea* of this particular offence is missing. However, in *R. v. Noel*[88] the British Columbia Court of Appeal held, in *dicta*, that the intention to obstruct need not be tied to a specifically defined duty. Justice Wood stated that it is sufficient that a person is aware or knows at the time of the obstructive conduct that the peace officer is engaged in the execution of a duty, whatever that duty may be. Wood J.A. noted that in most cases where the intent to obstruct arises it will be in connection with an obvious duty that the officer is executing. Also, in most cases, the peace officer whose duties are being interfered with will caution the offending individual, at which point any doubt as to that person's knowledge of the circumstance that the officer was engaged in the execution of his duty will disappear. However, in the rare factual circumstance where the defence of mistake could arise, an intention to obstruct a peace officer engaged in the execution of his duty, even though the specifics of that duty are not known to the accused, will suffice for a conviction under the section.[89]

The defence of mistake will be treated much differently when the charge is resisting or failing to assist, assuming those offences are determined to require

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able, with an onus of proof on the accused in the case of regulatory offences; and 4. Where the offence is one of absolute liability, mistake of fact is not a defence.

86 *Creighton*, *supra* note 1 at 74 *per* McLachlin J. While the *Creighton* decision has generated a great deal of controversy and academic comment this particular aspect of the decision, excluding consideration of individual factors in the assessment of objective fault has been the most severely criticised. See Stuart, *supra* note 3 at 237–240. See also D. Stuart, "Criminal Reports Forum: Continuing Inconsistency But Also Now Insensitivity That Won't Work" (1993), 23 C.R. (4th) 240 at 248–251.

87 Cases involving a charge of assaulting a peace officer (section 270 of the *Criminal Code*) have held that knowledge that the person assaulted is, in fact, a police officer is an essential element of the offence. See *R. v. McLeod* (1954), 20 C.R. 281 (B.C. C.A.); and, *R. v. Vicko* (1972), 10 C.C.C. (2d) 139 (Ont. C.A.).

88 *Noel*, *supra* note 32. See also *Anderson*, *supra* note 8.

89 *Noel*, *supra* note 32 at 191 *per* Wood J.A.

something other than a subjective fault element. If these offences are evaluated objectively, the defence of mistake will be evaluated on the same basis. Thus, the "reasonable person" test would be substituted for the actual state of mind of the accused. A mistake of fact would have to be both honest and reasonable.[90]

There are many valid arguments supporting both objective and subjective fault for alleged criminal conduct.[91] In *Creighton* and subsequent decisions, the Supreme Court of Canada has clearly expanded the number of criminal offences that require proof of objective rather than subjective fault. A growing number of academics have accepted this trend with some reservations—in particular, the Supreme Court's refusal to accept a concept of objective negligence that makes generous allowance for individual factors.[92] This grudging acceptance of the expanded use of objective fault is unlikely to diminish the sometimes heated debate over the appropriate fault element for individual offences.[93]

While there may be very good arguments to support either objective or subjective fault for the offences created by sections 129(a) and (b), there appear to be no compelling policy reasons dictating that one or the other be evaluated objectively and another evaluated subjectively. *Sault Ste. Marie*[94] provided a very workable analytical framework, in particular and for current purposes, the assertion that the starting point for analysis of crimes would be based upon subjective fault. The *Vaillancourt*[95] decision, by striking down the concept of constructive murder, built upon that foundation. Many expected these decisions to culminate in a constitutional requirement of subjective intention for all *Code* offences.[96] As suggested above, since *Creighton*, not only has the opposite approach prevailed, at this point it is very difficult to predict the fault element for any particular offence. At best, one is left to suggest that the word "wilful" has meaning: its presence is likely to result in a determination of subjective fault and its absence opens the door for objective analysis of criminal conduct.

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90 See Stuart, *supra* note 3 at 253–259.

91 Professor Stuart has provided a summary of the arguments and concludes that while arguments in favour of the objective standard in criminal law are persuasive, they are not overwhelming. See *ibid.* at 229–230.

92 *Ibid.* at 228–231.

93 The best recent Canadian example involves the exchange between Professors Pickard and Stuart with regard to the choice between subjective or objective fault for the offence of rape. See T. Pickard, "Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime" (1980), 30 U.T.L.J. 75; T. Pickard, "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980), 30 U.T.L.J. 415; and, *ibid.* at 267–271.

94 *City of Sault Ste. Marie*, *supra* note 61.

95 *Vaillancourt* v. *R.*, [1987] 2 S.C.R. 636.

96 See Stuart & Delisle, *supra* note 58 at 405.

The defences of drunkenness and automatism create another set of opportunities for inconsistent treatment. In the event that wilful obstruction is a specific intent offence the defence of drunkenness would be available.[97] This would result in an acquittal unless there exists a lesser included general intent offence. Resisting arrest would not qualify as an included offence given the fact that wilful obstruction can occur in a variety of ways that do not involve the physical force requirement of resisting.[98] The absence of a lesser included general intent offence tends to support the view that wilful obstruction is a general intent offence. In *R. v. Grandish*,[99] the Yukon Territorial Court held that the inclusion of the word "wilfully" in the charge does not mean that the crime is one of specific intent. Faulkner C.J.T.C. concluded that "wilful" does not mean anything more than "intentional" or "deliberate," and that the offence of wilful obstruction is one of general intent and that the defence of drunkenness is not available on this charge.[100] Accordingly, the defence of intoxication would not be available for any of the offences established by section 129.

The *Daviault*[101] decision and the legislative reaction creates the opportunity for a much more complex scenario. In *Daviault*, the Supreme Court of Canada held that evidence of intoxication could go before a jury even in general intent offence cases if it demonstrated such extreme intoxication that there was an absence of awareness akin to a state of insanity or automatism. An extreme state of intoxication akin to automatism was held to negate the *actus reus* of an offence in that a person in such condition is not able to perform a voluntary willed act. The Court also held that, like insanity, this particular defence should be established by the accused on a balance of probabilities.[102]

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97 *Gunn*, *supra* note 52 at 416 *per* Picard, J.A.:

> The distinction between specific and general intent was meant to delineate those offences for which intoxication would (specific intent) and would not (general intent) be an available defence, thereby permitting the courts to keep the shield provided by drunkenness within tolerable limits.

98 "An included offence is one where all of its essential ingredients are to be found among the essential ingredients of the offence charged:" Salhany, The Hounourable Mr. Justice R.E., *Canadian Criminal Procedure*, 6th ed. (Aurora, ON: Canada Law Book, 1994) at 6–137.

99 *Grandish*, *supra* note 54.

100 *Ibid.* at 4–5 *per* Faulkner C.J.T.C. The court cites several cases for the position that wilful obstruction is a crime of general intent: *Edmunson*, *supra* note 54; *Westlie*, *supra* note 37; *Goodman*, *supra* note 54; *Lavin*, *supra* note 54; and, *Rousseau*, *supra* note 31. The Court also cites the following cases for the position that wilful obstruction is a crime of specific intent: *Sandford*, *supra* note 63 and *Horton*, *supra* note 31.

101 *Daviault*, *supra* note.

102 *Daviault*, *supra* note 4 at 103 *per* Cory J.

In response to this decision section 33.1 of the *Code*[103] was enacted in relatively prompt fashion. The section provides that it is no defence that an accused, by reason of self-induced intoxication, lacked the general intent or voluntariness required to commit the offence charged. However, the provision was apparently intended to apply only to crimes of general intent and it only applies to offences under the *Code* or other federal enactment that include, as an element, an assault, or any other actual or threatened interference by a person with the bodily integrity of another.[104]

If wilfully obstructs is a specific intent offence both the defences of intoxication and extreme intoxication would be available to an accused. Section 33.1 would not apply since assault is not included in the offence. If wilfully obstructs is a general intent offence, the defence of intoxication would no longer be available, but an accused could attempt to establish extreme intoxication on a balance of probabilities. On a charge of failing to assist, because it is not a specific intent offence, the defence of intoxication would not be available. However, since this offence does not include assault or any other bodily interference as an element, the defence of extreme intoxication could result in a complete acquittal. On a charge of resisting neither defence would be available. The offence is not an offence of specific intention and this precludes the use of the defence of intoxication. As noted above, this offence does include "some small degree of force"[105]—ie. an assault—thereby invoking the provisions of section 33.1 and precluding the defence of extreme intoxication.

VI. Conclusion

THERE IS NOTHING AT ALL NEW in the suggestion that the classification of a criminal offence—specific intent, general intent, subjective fault, objective fault, etc.—will define the operation of a particular defence such as mistake or intoxication. The classification and impact upon applicable defences is generally determined on the basis of debatable policy determinations. There will be support, and objection, to the holding that intoxication is not a defence to sexual assault but is to robbery. There will be objection to the notion that subjective mistake of fact is a defence to some relatively minor offences, but not to manslaughter, and that self-induced intoxication leading to a state of automatism is not a defence to crimes of violence, but will be in cases of property damage.

Unfortunately, the *ad hoc* nature of the judicial decisions and the legislative responses has created a legal regime that lacks both logic and common sense.

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[103] *Criminal Code*, *supra* note 5, s. 33.1.

[104] D. Watt & M. Fuerst, "Commentary, s. 33.1" in *The 1999 Annotated Tremeear's Criminal Code* (Scarborough: Carswell, 1998) at 66–67.

[105] *Aliamo*, *supra* note 6 at 495–496 *per* Opper, Prov. Ct. J.

What possible rationale would allow the use of subjective mistakes for wilful obstruction, but not for resisting or a defence of extreme intoxication akin to automatism for one offence, but not the other? If, indeed, that is the case which is exactly the point. Prosecutors and defence counsel are left to speculate on fundamental issues with little in the way of guidance. When the underlying premise of criminal jurisprudence begins with "everything is up for grabs," it is clearly time to return to the drawing board in the search for first principles.

In recent years criticism of the Supreme Court of Canada has been unprecedented and merciless. Professor Martin speaks for many of the disillusioned when he states flatly: "The Supreme Court is out of control."[106] This badly divided Court has been depicted as an unlikely source of consistent and predictable growth as it lurches from decision to decision, often trying to undo the damage of its earlier work. A measured assessment would suggest the blame be spread more evenly. What the country is really dealing with is bad legislation made worse. At this point it seems clear that in order to re-establish some semblance of certainty and consistency Canada needs a new *Criminal Code*, one that contains a bold new vision and is based on clearly defined first principles.

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[106] R. Martin, "The Charter Made Them Do It?" (1998) *Law Times* 9:19 at 8.