

What Precisely Is A Regulatory Offence?

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Case Commented On: *R v Precision Diversified Oilfield Services Corp*, [2018 ABCA 273](#)

This semester, I will start teaching 1Ls the first principles of criminal law. The main components of a crime, consisting of the familiar terms of *actus reus* or prohibited act and *mens rea* or fault element, will be the focus. These concepts, that every lawyer becomes intimately familiar with in law school, are figments of the common law imagination as *actus reus* and *mens rea* do not figure in the *Criminal Code*. The terms are derived from the Latin maxim, “*actus non facit reum nisi mens sit rea*,” which translates as “there is no guilty act without a guilty mind.” This stands for the proposition that the *actus reus* or prohibited act must coincide or happen at the same time as the *mens rea* or fault element. That maxim, however, fails to shed light on what those terms mean in law. Indeed, what exactly is a prohibited act or *actus reus* depends on the crime as described in the *Criminal Code*, and what exactly is the fault element or *mens rea* depends on a combination of common law presumptions, statutory interpretation, and case law. In other words, it’s complicated. Even more complex is the vision of these terms when applied to the regulatory or quasi-criminal context. In the recent decision of *R v Precision Diversified Oilfield Services Corp*, [2018 ABCA 273](#) [*Precision*], the Alberta Court of Appeal attempts to provide clarity to these terms but in doing so may be creating more uncertainty.

Although apparently straight forward, appearances in the regulatory world are not as they seem. Even the facts of *Precision* suggest the dichotomy that is regulation. On a high-level view, the incident is straight forward: a worker is involved in a workplace incident and suffers serious injuries. But when the trial court wades into the minutiae of the moments surrounding the incident, the factual matrix becomes complex and more nuanced. The simple incident devolves into an evidentiary whirl of drilling rig operations and oilfield “jargon” (at para 8). Arising from this factual cacophony is an incident involving manipulation of a machine by more than one worker creating a toxic mix of automation and human fallibility. The result is tragic.

However, the facts alone do not reflect the entire legal narrative. They must be viewed through the legislative scheme, adding an additional layer of intricacy. The defendant company was charged with two offences under the Alberta *Occupational Health and Safety Act*, RSA 2000, c O-2 [[OHSA](#)]. One offence was of a general nature invoking a general duty under s. 2(1) of the *OHSA* to ensure the health and safety of the worker “as far as it is reasonably practicable for the employer to do so.” The other more specific offence, found under the *Occupational Health and Safety Code 2009*, Alta Reg 87/2009 [[Safety Code](#)], sets out, in regulatory fashion, the detailed rules of workplace engagement (at para 38). The specific rule allegedly breached was s. 9(1) of the *Safety Code*, requiring the company to take measures to eliminate identified workplace hazards or, “if elimination is not reasonably practicable,” to control them. Unsurprisingly, these

two offences are not self-contained but overlap; a not unusual occurrence in regulatory enforcement.

This overlap in offence specification also results in an overlap in the factual foundation. Even so, at trial, the prosecutor took different legal approaches in proving each charge. The offences are strict liability offences, a form of liability proposed in *R v Sault Ste Marie*, [\[1978\] 2 SCR 1299](#) [*Sault Ste Marie*]. This requires the prosecutor to prove the *actus reus* beyond a reasonable doubt, from which the fault element would then be inferred. Upon such proof, the burden of proof shifts onto the defendant to prove, on a balance of probabilities, they exercised all due diligence or took all reasonable steps to avoid liability. This formula for strict liability remains unchanged since the seminal decision of *Sault Ste Marie*. For instance, in *La Souveraine v. Autorité Des Marchés Financiers*, [\[2013\] 3 SCR 756](#) [*La Souveraine*], the Supreme Court's most recent discussion of due diligence requirements for regulatory offences, the court reiterates these basic elements as essential for the fulfilment of regulatory objectives of public welfare and safety (*La Souveraine* at para 54). Effectively then, the due diligence defence rebuts the presumption for fault. The onus rests on the defendant to discharge this burden on the premise they have the best evidence of the reasonable steps and industry standards required to proffer such a defence. For the prosecutor, proof of the *actus reus* is of vital importance in founding a conviction.

Consistent with this strict liability notion, the prosecutor in *Precision*, for the general duty offence under s. 2(1) of the *OHSA*, relied upon “accident as *prima facie* proof of breach” pursuant to *R v Rose's Well Services*, [2009 ABQB 1](#) [*Rose's Well*]. The *Rose's Well* decision considered the same section in arriving at this position (*Rose's Well* at para 68 and *Precision* at para 5). Quite simply, this was an “I think therefore I am” position: there was an accident, the worker was harmed, and Precision Corp. was the entity directing such work, ergo the prosecutor has proven the *actus reus* beyond a reasonable doubt shifting the burden onto the defendant. The more specific *Safety Code* offence, however, required a more detailed analysis of the *actus reus*. In neither of the offences did the prosecutor prove, as part of the *actus reus* requirements, what was “reasonably practicable” in the circumstances. This, the prosecutor submitted, was a matter of proof for the defendant as part of the due diligence defence. The trial judge agreed, convicting Precision Corp. of both charges.

On summary conviction appeal, the judge found errors in this approach. Although the “accident as *prima facie* proof of breach” could be sufficient to prove *actus reus* in some cases, it was “not a strict rule of law” (at para 27). At trial, the prosecutor failed to prove the commission of a “wrongful act” and as such failed to prove the required *actus reus* components of the general duty charge. The “wrongful” part of that act could be found, according to the summary conviction judge, in the failure of Precision Corp. to do what was “reasonably practicable” to avoid the harm as required of the section. This phrase “reasonably practicable” was an essential element of the *actus reus* and without this evidence, the charges could not be made out. The appeal was allowed, and acquittals entered. It is that distinctive “reasonably practicable” phrase, which colours the meaning of the facts and in turn presents difficulties in discerning the not so bright line between *actus reus* and *mens rea* in the alleged contravention of general duty in a regulatory statute such as that set out in s. 2(1) of the *OHSA*.

This means that, unlike most appeals, the facts frame the issue and drive the legal principles. The conversation immediately devolves into a part legal, part factual debate on causation and fault, which requires a deeper dive into the facts. Even the characterization by the summary conviction appeal judge of the act as “wrongful” raises the level of the discourse up a notch. But how deep must the prosecutor go when it is a regulatory offence and not a criminal one? The exacting standards required of a criminal case gives way when the overarching objective is public welfare. Yet, where that line is to be drawn is an ongoing moving target that at some point must give way to clarity and immobility. An incident happens but how much detail is required for the prosecutor to meet the burden of proof? An incident happens but is it merely an unforeseeable accident? An incident happens but is it preventable and did the company do all that is “reasonably practicable” to prevent it? Already the factual matrix broadens into a general discussion of the company’s duty of care and the standard on which they must discharge that duty. However, in the world of *actus reus* and *mens rea*, as borrowed from the criminal law, the lines between act and fault are rigidly applied. The main issue in *Precision* is whether the lines as drawn in previous case law are workable in this regulatory regime of occupational health and safety.

The majority, written by Madam Justice Veldhuis — yes, this is a split decision of the court suggesting this principle may have a future in the higher court — finds the phrase “as far as it is reasonably practicable for the employer to do so” is an active part of the *actus reus*. The minority decision of Justice Wakeling takes the opposite view, leaving the issue of reasonableness to the fault element analysis required in considering due diligence. Although the lines are drawn in *Precision*, they are not written in stone. There are problems with both the majority decision and the dissenting opinion in this case, problems that are inherent to the regulatory/criminal law divide.

For instance, this slippage from *actus reus* into *mens rea* seems natural when considering regulatory offences. *La Souveraine*, one of the more recent decisions of the Supreme Court on regulatory matters, makes this point. There, Justice Wagner, as he then was, for the majority of the court makes preliminary comments on the jurisdiction of the court to hear arguments on *actus reus* issues when leave was granted on the basis of *mens rea* due diligence concerns (*La Souveraine* at para 20). Justice Wagner finds the two issues “inextricably linked” (*La Souveraine* at para 26) and therefore the jurisdiction to consider both was evident.

Here too, in *Precision*, it is difficult to separate the two concepts. In some ways this inability to distinguish clearly between the prohibited act and the fault element results in the finding of the majority in *Precision* that proof of what was “reasonably practicable” must be proven by the prosecutor as part of the *actus reus*. This circularity is embedded in the creation of strict liability as the compromise “half-way house” form of liability in *Sault Ste Marie* (at pp 1313, 1315 and 1322). According to Justice Dickson, as he then was, in *Sault Ste Marie*, this purely regulatory type of liability was needed to relieve the harshness of the absolute liability offence for which a defendant has little ability to defend themselves. Strict liability also assuages the concerns inherent in subjective liability offences, which by nature mimic the full *mens rea* requirements of proof from criminal law. Instead, strict liability permits a contained but fair due diligence defence; a defence mirroring the regulatory obligations of the defendant, yet in a manner which relieves the prosecutor from climbing into the psyche of the defendant and taking on the defendant’s expertise and knowledge to prove a fault element beyond a reasonable doubt. With

strict liability, the prosecutor need only prove beyond a reasonable doubt the objective facts of the *actus reus* thus triggering the response from the defendant to show they acted duly diligently. Key to this form of liability is the inference drawn from the *actus reus* of *prima facie* proof of the fault element. It is in this half-way form of liability where the *mens rea* or fault element can be found in the *actus reus*, binding the two concepts together. It is no surprise then that the majority in *Precision* sees the need for proof of a *mens rea* type concept as part of the *actus reus*, where, based on statutory interpretation, the legislature specifically emphasized the need for it. Without such a finding, the phrase “reasonably practicable” would have little to no meaning.

But does it have meaning on this reading? Or is it merely a euphemism for “show me the facts.” Is not the reality of the majority decision in *Precision* merely another way of putting the prosecutor on notice that, with this offence as it is worded, they cannot simply rely on the surface facts of an accident but must do their own “due diligence” by leading evidence of the circumstances surrounding the incident?

Notably, the majority’s decision may parallel similar findings in careless driving prosecutions, where *actus reus* and *mens rea* elements are interconnected and provide mutual meaning. In a recent decision from the Ontario Court of Justice in *R v Gareau*, [2018 ONCJ 565](#), the Justice of the Peace considering the issue made insightful comments on the “unique nature” of the *actus reus* found in careless driving under the provincial legislation (para 48). JP McMahon correctly points to the essential *actus reus* component of the charge involving a failure to meet the standard of a reasonably prudent driver (see also *R v Shergill*, [\[2016\] OJ No 4294 \(QL\)](#) at para 13). Proving this, the JP opined, “easily leads to confusion” as negligence becomes part of the *actus reus* proof process (para 48). The “practical effect” of this, according to the JP, is that a defendant will be acquitted if the defendant is able to raise a reasonable doubt as to whether they were driving below the required standard. Raising a reasonable doubt is all that is needed as the standard of care forms part of the *actus reus*, which must be proven by the prosecutor beyond a reasonable doubt. Raising a reasonable doubt, as suggested by the JP McMahon (at para 49), is an easier burden to meet than the standard of proof on a balance of probabilities, which is required for a due diligence defence (See *R v Wholesale Travel Group Inc*, [\[1991\] 3 SCR 154](#) at pp 197–198 [*Wholesale Travel*]). The same can be said of the *Precision* decision by importing reasonableness into the *actus reus*, the enforcement mechanism weakens, bringing into question whether the objectives of regulatory regimes are being advanced.

As with all that is regulatory, the *Precision* decision engages a myriad of tough issues. So tough, in fact, that the court of appeal required further argument on a number of specific issues, which resulted in a divided court (at para 31). It is telling that this re-focus was required as the parties drifted back into the *mens rea* or due diligence tropes. As *Gareau* reminds us, looking at *actus reus* where a duty of care is involved is like looking into the fun house mirror that endlessly repeats the same image. Regulatory mind tricks aside, the issues in *Precision* span the legal repertoire with concerns involving the viability of long-held legal principles, application of the rules of statutory interpretation, proof and procedural requirements. All of this, of course, is in the context of promoting the pressing and desired societal objective of ensuring a safe and healthy workplace environment.

Regulation of legitimate activities is a sign of good government and is at the core of our democratic ideal. Of course, there is room for a robust debate on the quantity of regulation needed. Naysayers tend to depict a “nanny state” where our lives are burdened with rules, while those in favour look to the benefits of regulation as providing incentives or nudges to individuals to make those safe and healthy life choices. Whichever side one takes, we all agree that, particularly in the workplace regulation is needed and the proper incentives to comply, considering the potential harm, must be vigorously enforced. *Precision* presents a situation, however, that is all too familiar in the regulatory field: when it comes down to the mechanics of enforcement, who is in the best position to bear the burden of proof and cost? More important is the question of which approach will promote the objective of providing the right kind of incentive without severely impacting the real economic benefits of such activities.

The added difficulty, as exposed in *Precision*, is the reality of the regulatory regime. In the regulatory world, there are no clear edges of the criminal law; rather, there are blurred signposts where the law is part criminal, through the application of criminal law concepts and terminology, and part civil law, as the conduct complained of are not true crimes like murder or theft but engages what we would consider legitimate activities. We want to promote those activities, but we also want to ensure these legitimate activities are performed mindfully, to use a new age term. Mindfulness means we need to recognize we are part of a collective of individuals all doing our own thing but doing it in the same space as one another. We want to be sure people conduct themselves with the other person in mind; when we mow our lawn, when we smoke a cigarette, and when we work, for example. Work, play, and leisure time is not, therefore, truly our own. Underlying this is our drive toward the market economy as we want to incentivize people and corporate entities to strive for innovation and production. In criminal law terms, this is foreign; we want to incentivize people to make the right choices, but we do not concern ourselves with how they make them, as long as they are within the boundaries our criminal law has set for them. Does it therefore make sense — common sense — to impose on the regulatory world criminal-like requirements when the two worlds, criminal and regulatory, are objectively and subjectively not the same?

As recognized by the Supreme Court in a number of decisions (See e.g., *Beaver v The Queen*, [\[1957\] SCR 531](#), *Sault Ste Marie*, and *Wholesale Travel*), there are fundamental differences between the criminal justice system and regulatory regimes. Justice Cory in *Wholesale Travel* succinctly described those differences: “criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care” (at p 219). Thus, the two systems are different yet, “complementary” (*La Souveraine* at para 90). Complementary does not mean one system eclipses the other. Complementary suggests one needs the other. Criminal law underlines our fundamental values and collectively speaks out when egregious wrongs are committed. Regulatory law safeguards the public interest and creates a safe place for us to live. We need both. It is therefore, as suggested by Justice Wagner in *La Souveraine* “essential not to lose sight of the basic differences between the two systems and, as a result, to weaken the application of one by distorting the application of the other” (at para 90). In the context of *Precision*, this caution can be applied to the fallacy of reading into the regulatory field the ill-suited rigidly defined criminal law concepts. For in the regulatory regime the individual rights paradigm is not paramount. Rather, the public good is supreme.

What will be the fallout from this decision? Certainly, prosecutors will be mindful of their proof and particularization obligations under the pertinent sections of *OHSA*. The exact phrase, “as far as it is reasonably practicable for the employer to do so” is integral to this legislation and the previous iterations of this section. Yet, a CanLII search reveals 561 legislative references to the phrase “reasonably practicable” in many occupational health and safety regulations across the country, covering everything from length of ladders (See s. 9 of the Federal [Canada – Nova Scotia Offshore Marine Installations and Structures Occupational Health and Safety Transitional Regulations, SOR/2015-2](#)) to general duties of employers in Saskatchewan (See s. 3 of [The Occupational Health and Safety Amendment Act, 2012](#), SS 2012 c 25). This decision reaches far and will reverberate in the workplace and the many “textbook” examples of public welfare legislation (*Precision* at 46), where a duty of care is required. It may also prove to be the Supreme Court decision which will precisely describe the constituent elements of a regulatory offence. This, we hope, will not be done in criminal law terms but in a manner befitting the objectives of our regulatory regimes.

This post may be cited as: Lisa Silver, “What Precisely Is A Regulatory Offence?” (September 26, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/09/Blog_LS_Precision_Drilling_Sept2018.pdf

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