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THE ENFORCEMENT OF ARREARS AS RESPECT TO CHILDREN

1. Introduction

The enforcement of maintenance payments has been a growing difficulty for our family courts. Single parent families on social welfare are a reality that is co-existent with the increasing incidence of divorce. A court's order for maintenance does not necessarily guarantee payment. This problem is clearly eivdent when support arrears are considered by the courts. The enforcement of arrears or, perhaps, their non-enforcement poses an interesting legal problem. The problem lies in the fact that a court may rescind its earlier maintenance order.

There has developed the one-year rule which has meant that support arrears are not enforced beyond one year. This authority has been described by legal terminology as a 'principle' (Re Steele, [1967] 2 O.R. 97), 'practice' (Eveleigh v. Eveleigh [1969] 1 O.R. 664), 'settled rule' (Thompson v. Thompson [1958] O.W.N. 53), and 'ordinary rule' (Snarenberg v. Crawford, [1966] 1 O.R. 679).[1]

The purpose of this paper is to examine the support arrears in respect to children. In order to understand the enforcement of children maintenance orders, a brief overview of support enforcement is described. This includes the development of arrears when maintenance for a wife has not been paid. The case law deals mainly with this issue and the non-enforcement of such orders.

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[1] Patry v. Patry (1974), 16 R.F.L. 332 at 333-34 (Ont.)

2. Case Law

The Canadian courts have employed a questionable rule of practice of law in not enforcing support orders beyond one year. Roman Komar in his article "The Enforcement of Support Arrears: A History of Alimony, Maintenance and the Myth of the One-Year Rule"[2] discusses the origins and developments of the rule. He questions whether the rule actually does exist, citing early English case law as not really laying down any such rule. Simply stated, the one year rule was developed by the Ecclesiastical Courts of England. This ecclesiastical rule eventually crept into the English secular courts and consequently, with the adoption of English law in the provinces, found its way into Canada'a judicial system. Komar[3] points out that this line was not necessarily the same for laws adopted in Upper Canada. Therefore, Ontario's stance is different because it does not recognize the ecclesiastical courts. If such practices have been adopted, they have been adopted by statute. The present controversy, however, concerns the rule itself and the rule's application when arrears are being considered under the Divorce Act or under a province's summary support legislation.

The Ontario decisions provide an interesting perspective from which to consider all the issues surrounding enforcement of arrears. The decisions lack any uniformity and it seems that each level of the Ontario judiciary has a different view of the law. It is surprising to see the number of cases distinguished as a court strives to determine its own view of the law.

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2 Komar, "The Enforcemtn of Support Arrears: A History of Alimony, Maintenance and the Myth of the One Year Rule" 18 R.F.L., 129.

3 Ibid, p. 143-144.

An excellent overview of Ontario's law is summarized in the High Court decision of Queen v. MacDonald.[4] Krever, J. outlines the development of Ontario's case law as defined under the Judicature Act, the Divorce Act and the Deserted Wives' and Children's Maintenance Act. In addition to these three the courts have considered arrears arising under separation agreements. In Ontario, such arrears cannot be affected by a court order.[5] Western courts have taken a similar view. The reason for this is that when the debt arises it is the same as any money owing under a countract and no court order may affect it.[6]

The first Ontario decisions rejected the one-year rule. In Knox v. Knox[7] the Ontario position was to not discharge arrears of alimony because there was no Ontario law analogous to English statute law. The Judicature Act did not cover such a discharge. This decision demonstrates the peculiarity of Ontario not adopting the one-year rule.[8] In fact, the Knox decision goes so far as to reject the proposition that a court has any discretion in cancelling arrears. On the other hand, the rest of Canada, although similarly grounded in ecclesiastical law, unquestionably accepted the one-year rule and allowed a court a discretion in enforcing arrears.[9] This is evident

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4 The Queen v. MacDonald (1977), 14 O.R. (2d) 409.

5 Eveleigh v. Eveleigh [1969] 2 P.R. 664.

6 Knapp v. Knapp (1975), 21 R.F.K. (Man. Q.B.).

7 [1942] O.W.N. 462.

8 Supra, footnote 3.

9 Ibid. p. 154.

by the Saskatchewan Court of Appeal's decision in 1949. ". . . it is the settled rule that the court will not order the defendent to pay more than one-year's arrears.[10]

Recent decisions ha-e not been confined to common law principles when considering arrears. There is also the interpretation of arrears arising under statute law, by either the Divorce Act or provincial maintenance legislation. Early Ontario decisions demonstrate a blind adherence to its earlier common law stance. In 1974, the Ontario Court of Appeal decided that a judgment in Ontario for alimony or maintenance is final and conclusive as far as arrears of payments are concerned.[11] The maintenance award for the wife and children was made under a divorce decree. It was found that a court had no discretion to retroactively vary the order. The Lear decision rested on Eveleigh v. Eveleigh,[12] a separation agreement, and no arguments were made that the Divorce Act could be applicable. These were the reasons the Ontario Court of Appeal distinguished the case in 1976.[13] In 1975, the Ontario court gave credence to this argument and allowed cancellation of the arrears. In Bicherton v. Bicherton[14] the arrears in question pertained to a maintenance order for an infant child. The judge utilizing Black's Law Dictionary defined "rescind" in section 11(2) of the Divorce Act to include "to abrogate, annul, avoid or cancel." Cromarty, J. concluded that this meant the court had authority not only to avoid an order in total but also to vary it retroactively. This decision in itself seems justified but the court then fell back on the one-year rule of hoarding and disallowed the claim of arrears beyond one year.

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10 McMillan v. McMillan [1949] 1 W.W.R. 769.

11 Lear v. Lear (1974), 17 R.F.L. 136 (C.A.).

12 Supra. footnote 4.

13 Supra. footnote 2.

14 Bicherton v. Bicherton 22 R.F.L. 189 (Ont. S.C.)

Courts in other Canadian provinces have followed a similar route.[15] Section 11(2) has been utilized to allow retroactive recession. There is, however, the problem of reference to the one-year rule. The discretion to cancel arrears is given effect by the Act and also by reference to the old ecclesiastical rule.

The next area of controversy is the area of summary support legislation. Ontario decisions follow no uniform path in interpreting the Deserted Wives' and Children's Maintenance Act.[17] The provincial court decision of Patry v. Patry[16] is an example of reliance upon the one-year rule. Thomson, J. outlines three reasons for the rule; to prevent hoarding of support monies, to disallow a false felief that a wife would not collect the monies, and to enforce a sum which a may will pay rather than go to prison. No interpretation was given to the meaning of the statute. The court simply concluded that the court has a discretion to vary arrears retoractively on the principle of the one-year rule. The final decision the court had to reach was whether the rule applied to arrears of maintenance for children. Based on the third rationale for the rule, the court held that it did apply.

The problem with the decision is that the reasoning is in conflict with the earlier provincial court decision of Steinberg, J. in Condon v. Condon.[18] The court in the Condon

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15 Naughton v. Naughton (1975) 18 R.F.L. 198 (B.C.S.C.); Belof v. Belof (1972) 19 R.F.L. 60 (Sask. Q.B.); Fedorovich v. Fedorovich (1974) 15 R.F.L. 386 (Alta. S.C.) (Case dealing with s. 10 interim order).

16 Patry v. Patry (1975) 16 R.F.L. 332 at 334-335 (Ont. Prov. Ct.).

17 R.S.O. 1970 c. 128.

18 (1973) 16 R.F.L. 310.

case was also concerned with a build-up of maintenance arrears for a wife and two children. Steinberg, J. allowed retroactive variation based on the interpretation of s. 8(2) of the Act. He placed onus on the words "may be confirmed" and decided that the legislature had necessarily implied that, upon re-hearing of the application and upon circumstances of the parties having changed, the judge may decide not to confirm the original order.[19] The arrears were then retroactively reduced.

The Ontario decisions differ both in reasoning and in result. The 1976 decision of Main, J. in Jans v. Page[20] demonstrates this. In this case, as in Patry v. Patry, arrears of maintenance payments were in respect to children. The decision was however in direct conflict with Patry. In addition, the discussion of the Deserted Wives' and Children's Maintenance Act did not include the Condon decision or argument advanced by Steinberg, J. In Jans v. Page the court simply decided arrears for children should not be subject to the one-year rule. Both judges--Thomson, J. in Patry and Main, J. in Jans directed themselves to the issue of children and the one-year rule and came to opposite conclusions. Main rejected the rationale of accepting the third reason for the one-year as also applying to children. He pronounced that . . . "Blind adherence to this kind of thinking ignores the responsibility which courts have in seeing the validly made orders are complied with and the responsibility taht we have to children in whose favour these orders are made".[21] The judge decided that arrears could not be discharged.

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19 Supra, footnote 18 at p. 312.

20 (1976) 29 R.F.L. 210.

21 Supra, footnote 20 at p. 214.

The Alberta position is not altogether clear because of the lack of case law. The Alta. S.C. found in 1964[22] that alimony is an equitable debt and not legal and therefore had discretion over arrears. The decision followed the discretion of the one-year rule. The divorce Act has been interpreted by Alberta courts to allow retroactive variation of maintenance orders.[23] Finally in 1976, the Alta. Supreme Court[24] extended this to include recission of arrears from a Divorce Act order. This order affected children only but the circumstances were such that cancellation was in order. The court stated taht no evidence was led to show the payment of the arrears would benefit the children or that funds were necessary for their well-being.

3. The Special Case of Children

The one-year rule seems to be entrenched into our law. Ontario decisions do not reject its use but allow such discretion. Arrears will not be enforced beyond one year unless special circumstances are shown. This rule is primarily to prevent the wife or former wife from hoarding the payments.[25] The question is whether children constitute special circumstances for which a court will enforce payment of support arrears.

There is little doubt that courts often times view themselves as the protector for children. Perhaps, this is the result of the parens patria doctrine vested in a province's

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22 Kergan v. Kergan (1964), 50 W.W.R. 1973.

23 Fedorovich v. Fedorovich (1974) 15 R.F.L. 386.

24 Rowe (Elliott) v. Elliott (1976) 28 R.F.L. 32.

25 S v. S (1975) 18 R.F.L. 373 at 375 (Sask. Q.B.).

Supreme Court. There are also the obvious policy reasons of protecting the needs of children. Galligan, J. in a divorce proceeding involving children succinctly outlined the role of the court in such proceedings.

> I conceive it my duty in cases where the rights of children are being seriously affected in divorce proceedings to ensure that the parties to the marriage protect the rights of their children. If the parties do not see fit to protect their children's rights then I feel obliged to attempt to do so.[26]

The courts have given special attention to maintenance payments which are in arrears. It seems that the courts do not wish to penalize the child for the conduct of the parents.[27] In the Coffey v. Coffey[28] case children were considered special circumstances so as to extend the time to enforce maintenance payments. A Nova Scotia court[29] found that laches on part of a wife to be a reason to excuse non-payment. However, a similar argument was not accepted when children were considered. The arrears for the children were enforced. In some cases, however, once the child has been established as a special circumstance, the court may decide to retroactively vary but not to remit arrears of payment.[30]

The enforcement of arrears for children is not settled. This is obvious by the two Ontario provincial court decisions

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26 Hansford v. Hansford (1973), 9 R.F.L. 233 at 234.

27 Supra, footnote 19.

28 [1968] 2 O.R. 731.

29 Cottreau v. Cottreau (1971), 4 R.F.L. 265.

30 Supra, footnote 25.

Jans v. Page[31] and Patry v. Patry.[32] These cases have been discussed above but were basically identical fact situations--only children were concerned, the statute was The Deserted Wives' and Children's Act and there was a substantial sum of arrears. The decisions were in direct conflict--one decision stated that the one-year rule did apply to children and the other stated that children were a special circumstance to oust the operation of the rule. Both courts, however, directed themselves to the issue of children and simply came to a different decision. The decisions also varied on whom the onus lies to show why the order should be enforced. In Patry the court concluded the wife and children must show the reasons to enforce beyond one year. Whereas in the Jans v. Page decision the onus was placed on the father for the reasons the order should not be enforced.

It is difficult to determine what a court may decide when faced with overdue maintenance payments for children. The cases definitely reflect consideration of the rights of children but do not confirm what rout a court may take. It would seem that, when a wife and children are considered together, arrears will be cnacelled with consideration to the ecceliastical one-year rule. The difficult issue arises when children are considered alone. In such a case, the court must fully direct itself to the duty of the court in respect to children. The decisions fluctuate--courts have remitted arrears beyond one year, varied the maintnenace payments retroactively or enforced the arrears. The conclusions drawn by Thomson, J. in the Patry[33] decision are extremely helpful.

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31 Supra, footnote 1.

32 Supra, footnote 2.

33 Supra, footnote 1.

He points out following Cottreau and Hansford that the fact children are the recipients of the award should be considered. He also stresses a practical approach should be taken as in Condon when the father found himself hopelessly in arrears. He concluded a discretion did exist by statute to justify retroactive variation (S.B. Desered Wives' and Children's Maintenance Act.) but should be exercised cautiously when children are involved. It would seem this practical rule would be more fair and just.

AN OVERVIEW OF CANADIAN RECIPROCAL ENFORCEMENT OF MAINTENANCE ORDERS LEGISLATION

The provincial legislation called the Reciprocal Enforcement of Maintenance Orders[1] provides a vehicle whereby orders may be recognized by a court in a different jurisdiction. This was not possible at common law and has been remedied by these statutory devices.

There are two separate procedures under R.E.M.O. legislation. The first situation is where a court makes an order against a resident of that jurisdiction. The common law conditions as to jurisdiction are thereby satisfied. The purpose of R.E.M.O. Acts is to make this order effective by registration.[2] The second situation is where the parties are in different jurisdictions and a court utilizes the provisional order. This provisional order will only be effective when confirmed by a court in which the individual resides.[3]

The R.E.M.O. Acts are utilized to bridge the provincial and international boundaries between the domestic acts of reciprocating jurisdictions.

> It is not a statute which creates substantive rights; it does not create new forms of maintenance. Rather it is a procedural mechanism acting somewhat as an interstate extension cord for maintenance orders already made and those yet to be made....But, in all cases, the actual "maintenance order" itself is issued pursuant to another statute entirely, one which creates maintenance rights....[4]

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[1] Herein referred to R.E.M.O.

[2] The Reciprocal Enforcement of Maintenance Orders Act R.S.A. 1970 c.313 s.3.

[3] Ibid. s.6.

[4] Worhs v. Holt (1976) 22 R.F.L. 1 at p. 9.

It is therefore important in such instances to know the domestic laws of the enforcing jurisdiction as well as where the order is made.

There are also differences in the R.E.M.O. Acts which exist in Canada. Diane Dzwiehowski[5] discusses that this lack of uniformity is a result of which draft of the proposed uniform legislation by the Commissioners in Uniformity in Canada a province chose to institute. There are four groups which are divided by the definition of maintenance order in their legislation. The groups are:

A. Newfoundland Northwest Territories Prince Edward Island	1946 Uniform Act
B. Alberta British Columbia Manitoba	1958 Uniform Act
C. New Brunswick Nova Scotia Saskatchewan Yukon Territory	1963 Uniform Act
D. Ontario	does not follow any Uniform Act

The importance of the definition section is when a court is required to enforce or confirm different domestic orders. For example the issue in Worhs v. Holt[6] was if the definition of maintenance order in the Ontario Act covered affiliation orders.

The actual practise of R.E.M.O. legislation will therefore depend on the definition of maintenance order in the Act itself, the domestic legislation of the confirming and initiating jurisdiction and the technicalities of the legislation. The Lt. Gov. in Council has jurisdiction to name reciprocating states.[7]

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[5] D. Dzwiekowski, "The Reciprocal Enforcement of Affiliation Orders" (1976) 22 R.F.L. 29 at p. 53.

[6] Supra, footnote 4.

[7] Supra, footnote 2 s.14.

Alberta Regulation 167/70 defines the reciprocating states[8] as well as the Alberta courts[9] which will receive maintenance orders from a reciprocating state.

The following are the reciprocating states:

England[10]
Island of Malta
Isle of Man
Northern Ireland
Commonwealth of Australia
--State of Victoria
--State of New South Wales
--State of South Australia
--State of Western Australia
--Australian Capital Territory
--Northern Territory of Australia
--Territory of Papua & New Guinea
New Zealand
States of Jersey
Province of British Columbia
Province of Manitoba
Province of New Brunswick
Province of Newfoundland
Province of Nova Scotia
Province of Ontario
Province of Prince Edward Island
Province of Saskatchewan
--Northwest Territories
--Yukon Territory
State of California
Island of Barbados[11]
Province of Quebec[12]
State of Tasmania[13]
Republic of South Africa[14]
Fiji[15]
The Republic of Singapore[16]

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[8]Maintenance Orders Between Reciprocating States Regulations 167/70 s.2.

[9]Ibid s.3

[10]ALTA. REG. 342/75 now includes Wales, Scotland but has a limitation as to what orders.

[11]Alta. Reg. 389/70

[12]Alta. Reg. 68/71

[13]Alta. Reg. 215/71

[14]Alta. Reg. 293/71

[15]Alta. Reg. 73/76

[16]Alta. Reg. 42/77

The courts which may receive maintenance orders in Alberta are:

(a) Supreme Court

(b) District Court where individual whom order is against resides

(c) Family Court where individual whom order is against resides

(d) Magistrate Court where individual whom order is against resides[17]

The following is a list of the R.E.M.O. Acts of Canada's provinces and territories:

B.C. The Family Relations Act, 1972 (B.C.), c.20

Alta. The Reciprocal Enforcement of Maintenance Orders Act R.S.A. 1970 c.313

Man. The Reciprical Enforcement of Maintenance Orders Act, RSM 1970, c. M20

Sask. The Reciprocal Enforcement of Maintenance Orders Act, 1968 (Sask.) c.59

Ontario The Reciprocal Enforcement of Maintenance Orders Act, RSO 1970 c.403

New Brunswick The Reciprocal Enforcement of Maintenance Orders RSNB 1973 c.R-4

Nova Scotia The Maintenance Orders Enforcement Act RSNS 1967 c. 173 (re-enacted 1968 c.37)

Prince Ed. Island The Reciprocal Enforcement of Maintenance Orders Act RSPEI 1974, c. R-8

Newfoundland The Maintenance Orders (Enforcement) (Amendment) Act, 1974 (Nfld.) No. 5

NWT The Maintenance Orders (Facilities for Enforcement) Ordinance RONWT 1974 c.M-4

Yukon The Reciprocal Enforcement of Maintenance Orders Ordinance ROYT 1971 c.R-2

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[17] Supra footnote 8 s.3

THE ENFORCEMENT OF CHILD MAINTENANCE - A CRIMINAL MATTER

There are conflicting decisions regarding the monetary support obligations of parents to their children. The common law and statute law compound the problem of determining exactly what obligation exists. Halsbury's Laws of England list three categories of responsibility for a child's maintenance. They are a common law duty of maintenance, the moral duty of parents and liability under the old poor law.[1]

At common law there is no legal obligation on the part of a father or a mother to maintain a child. A parent may not however neglect a child to the extent to bring himself/herself within the criminal law.[2] There was definitely at common law such a criminal offence to neglect a child. This has now been codified by statute law.[3] There are also provincial statutes which make it an offence to neglect one's child.

Early Ontario cases ignored the idea of legal duty upon a parent. This was partly the result of early English Poor laws not being received into Upper Canada.[5] Consequently an early

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1 Halsbury's Laws of England, Vol. 21 - Infants, Children and Young Persons, Part 2, Family Law sub-topics 419, 420, 421 respectively.

2 Bazeley v. Forder (1868), L.R. 3 Q.B. 559 at 565.

3 C.C. ss. 197-200 cover areas of neglect, abandon / expose an infant under age of 16 to cause unnecessary suffering / injury to health.

4 The Children's Maintenance Act, R.S.O. 1970, c. 67. The Deserted Wives and Children's Maintenance Act, R.S.O. 1970, c. 128.

5 Childs v. Forfar, 67 D.L.R. 17 at 23 - "The statute of Upper Canada (1792), Geo. III Ch. 1 by sec. 6, expressly providing in the exclusion of "any of the Laws of England respecting the maintenance of the poor or respecting bankrupts""

Canadian case found a parent liable to another for a child's maintenance based on an implied promise.[6] No legal duty as such was found. This implied promise reasoning was tied into Halsbury's second category of child support - moral duty of parents. In Childs v. Forfar[7] the court found the poor laws were not in force in Ontario and the criminal code created no liability for making a parent liable for the support of their legitimate children. Further the court reaffirmed there was no civil liability in the parent to support a child unless it proved to be criminal in nature.[8] The court does not rely on any authority but simply find a duty - a moral duty exists.

This reasoning culminated in the Rex v. Wright decision that a criminal charge of failing to support a child could not be maintained unless there was a legal liability to do so.[9] Therefore an appeal from a conviction of refusing to support an eight year old was allowed. The court could not find any legal duty under civil law of Ontario and no such duty imposed by the criminal law. Hence the legal duty to provide necessaries is a condition precedent to foundation exerted for the criminal charge. In order to correct this gap in the common law, the Children's Maintenance Act was passed the next year.[10] This Act made it an offence for a parent to jail, without lawful excuse to provide for the maintenance and education of his child according to his ability. In Re Gutoch, Ferguson, J.

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[6] Latimer v. Hill (1916) 30 DLR 660.

[7] 67 DLR 17 at 18.

[8] 67 DLR 17 at 22

[9] Rex v. Wright [1931] 3 DLR 202.

[10] Kuseta v. Kuseta 7 RFL 89 at 90.

concluded the Act[11] had the effect of making a parent liable to a proper defence in a civil action for the cost of maintenance of his children. The interpretation of the Act is still open to question. Gale C.J.O. in Kuseta v. Kuseta thirteen years later expressed the view that Gutsch did not settle if the Act actually imposed a civil liability and that he didn't have to decide the issue either.

The B.C. courts have taken an inconsistent approach to the issue of liability and the criminal offence. The 1941 case of Rex v. Hall allowed a criminal conviction to stand against a father for failure to provide the necessaries for his child (242 (3)(b) C.C. RSC 1927 Ch. 36). The court held the criminal code imposed the penalty but the duty arose by the operation of the English Poor Laws in British Columbia.[12] The court found the English law was introduced into British Columbia. The decision rested on the application of the English Law to B.C. This was followed in the Re Blanchard[13] decision but not Dedek v. Mantyha[14] which found the Poor Laws were inapplicable to local British Columbia conditions and therefore unapplicable. This matter was resolved by the B.C. C.A. which over-ruled Rex v. Hall and found the English Poor Laws were not part of the law of B.C.[15] The B.C. position interpreting the Wives and Childrens Maintenance Act is also open to question. It seems without the Poor Laws the Act is

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[11] Children's Maintenance Act RSO 1970 Ch. 67. Re Gutsch 19 DLR (2d) 572 at 574 7 RFL 89 at 91.

[12] A number of proclamations were cited--The 1858 Proclamation, The British Columbia Act, 1866 and The English Law Ordinance Act, 1867.

[13] Re Blanchard (1956) 17 WWR 542.

[14] (1960) 32 WWR 361.

[15] McKenzie v. McKenzie 73 WWR 206 at 214.

rendered inoperative.[16]

DOUBLE JEOPARDY

A brief overview of the criminal code provisions and a province's maintenance legislation demonstrate both statutes are dealing with child neglect and imposing a criminal penalty.

The relevant part of the criminal code provides:

S. 197 (1) Every one is under a legal duty
(a) as a parent, foster parent, guardian or head of a family to provide necessaries of life for a child under the age of sixteen
(b)
(c)
(2) Every one commits an offence who being under a legal duty within the meaning of subsection (1) fails without lawful excuse, the proof of which lies upon him, to perform the duty if
(a) with respect to a duty imposed by paragraph (1) (a) or (b)
(i) the person to whom the duty is owed is in destitute or necessitous circumstances or
(ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently
(b)
(3) Every one who commits an offence under subsection (2) is guilty of
(a) an indictable offence and is liable to imprisonment for two years, or
(b) an offence punishable on summary conviction.
(4)..

S. 200 Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and is liable to imprisonment for two years.[17]

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[16] Re Creery v. Creery found no liability and in MacKenzie MacLean, J. stated at 214...It seems to me anomalous that the courts should be asked to infer liability in a case involving maintenance of children from the rather obscure provisions of statutes enacted in former times in England to meet entirely different social conditions from these which exist in B.C. today.

[17] R.S.C. 1970 C-34.

The relevant Alberta legislation is the Child Welfare Act and provides that:

> S. 42 A person who has the care, custody, control or charge of a child and who
> (a) ill-treats, neglects, abandons or harmfully exposes the dhild, or
> (b) causes or procures the ill-treatment, neglect, abandonment or harmful exposure of the child,
> is guilty of an offence and liable upon summary conviction to a fine of not more than one thousand dollars and in default of payment to imprisonment for a term not exceeding two years, or to both fine and imprisonment.
>
> S. 43 A parent or person who is guilty of an act or omission contributory to a child being or becoming a neglected child or likely to make him a neglected child is guilty of an offence and liable upon summary conviction to a fine of not more than two hundred dollars and in default of payment to imprisonment for a term not exceeding six months, or to fine and imprisonment.[18]

These sections of two different pieces of legislation seem to be penalizing the same offence. Section 535 of the Criminal Code provides an individual with the right to plead the special pleas of autre fois acquit and autrefois convict. These please are based on the principle of common law that no person is to be placed twice in jeopardy for the same crime. In order to determine if the pleas are available to the accused, two issues must be determined: first, was there a final verdict on the first charge; secondly, is the second charge identical or substantially identical to the first charge.[19] It is this latter requirement which will defeat the special plea.

The courts have dealt with this issue as a constitutional question. There is no case law where an accused as attempted to enter a special plea to such a charge. The constitutional

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[18]R.S.A. 1970 c.45.

[19]Sahany Canadian Criminal Procedure p. 137.

issue provides however the answer as the courts have not interpreted the provincial legislation as being the same as the federal criminal offence. One of the requirements of the special plea is not met and thus making it unavailable to the accused.

The criminal law power of Canada is assigned to the Parliament of Canada.[20] The provinces are given power to impose penalties so as to enforce provincial laws.[21] This enumeration is sometimes referred to the quasi-criminal power of the provinces. The constitutional question has arisen several times[22] testing the validity of a province's authority to enact the neglect offences. The cases were concerned with similar provisions as outlined above. In Re Gutsch the issue was the information was invalid as the offence under the Children's Maintenance Act was ultra vires the provincial government. The court held there was no duplication and both were concerned with different matters. The criminal code was covering necessaries whereas the provincial legislation was concerned with maintenance and education.

The Rex v. Dowell case involved the British Columbia Infants Act and Canada's criminal code. The provincial legislation was dealing with ill-treatment and neglect. The court held the two sections were different and the criminal code section did not occupy the field. The best judgment in this area was written by Tritschler C.J.Q.B. of Manitoba in Regina v. Chief et al. The accused was charged under Manitoba's Child

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[20] B.N.A. s. 91 (27).

[21] B.N.A. S. 92 (15).

[22] Re Gutsch (1959) 19 DLR (2d) 572. (Ont. H.Ct.), Chief v. Sutton (1963) 42 DLR (2d) 712 (Man.Q.B.) affirm. R. v. Chief 44 DLR (2d) 108 (Man. C.A.), R. v. Dowell [1933] 4 DLR 794 (BCSC).

Welfare Act. The section of the Act and the relevant criminal code provisions were essentially the same as outlined above. The section of the provincial legislation was held to be ultra vires the province. The pith and substance of its purpose was to add to the better enforcement of the Act not to encroach upon the criminal law.[23] Utilizing the words of Judson, J. in O'Grady Tritschlet concluded "that the two pieces of legislation differed both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide provincial ends not otherwise secured and not in any way conflicting with" [in O'Grady v. Spauling 25 DLR (2d) 145 at 161]. It would seem Alberta would follow a similar route. In R. v. Snyder[25] the issue was narcotic possession under the provincial Public Health Act. It was argued the Public Health Act was criminal law. The court refused the submission and followed the reasoning of R. v. Kirkpatrick.

The special plea would seem to be unavailable to the accused if charged under both statutory provisions. Autrefois acquit or convict require the offences be the same. There is also the defence of res judicata available to the accused who pleads not guilty. This plea is a common law defence which precludes the parties from litigating the same particular questions or faits in subsequent proceedings.[26] This special defence is perhaps one of the most mystical legal doctrines and usually does not arise. It is probably inapplicable because of the same reasoning applied when considering the autrefois pleas. The question in each proceeding would be different as the offences are different.

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[23] Supra, ft. note 6 at p. 714.

[24] Regina v. Chief (1963) 42 DLR (2d) 712 at 716.

[25] R. v. Snyder 61 WWR 112.

[26] Supra, ft. note 3.