

Court File No. 21779

SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
the Province of Ontario)

B E T W E E N :

THE WHOLESALE TRAVEL GROUP

**APPELLANT/RESPONDENT
(accused)**

- and -

HER MAJESTY THE QUEEN

RESPONDENT/APPELLANT

and **COLIN CHEDORE**

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FACTUM OF THE APPELLANT

THE WHOLESALE TRAVEL GROUP

1. The Appellant, the Wholesale Travel Group Inc. ("Wholesale Travel") hereby appeals on questions of law, the judgment of the Court of Appeal of Ontario, to the extent that the Court rewrote S.37.3(2) of the Competition Act ("the Act") to permit conviction of the accused notwithstanding the absence of intent or wilful blindness in relation to the actus reus of the offence. The Appellant says that the Court lacks the authority to substitute its view of an appropriate defence for that which Parliament itself provided and that in any event the Canadian Charter of Rights and Freedoms (the "Charter") does not permit

creation of such an offence where the actus reus amounts to no more than want of due diligence.

2. The Respondent has also appealed the judgment seeking a reversal on other grounds.

3. The Attorneys-General for the provinces of Alberta, Saskatchewan, Manitoba, Ontario, Quebec and New Brunswick have indicated their intention to intravene in the appeal herein.

PART I

THE FACTS

4. Wholesale Travel was charged with five counts of violating subsection 36(1)(a) of the Act that provides:

36.1 No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatsoever.

(a) make a representation to the public that is false or misleading in a material respect.

Reference: Case on Appeal, Information, pp 1 and 3-4

5. Sub-section 37.3(2) of the Act provides:

37.3(2) No person shall be convicted of an offence under Section 36 or 36.1, if he establishes that,

(a) the act or omission giving rise to the offence with which he is charged was the result of error;

(b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such an error;

(c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been

reached by the representation or testimonial;
and

(d) the measures referred to in paragraph
(c), except where the representation or
testimonial related to a security, were taken
forthwith after the representation was made
or the testimonial was published.

6. The Crown alleges that ads placed by Wholesale Travel were false or misleading because they referred to "wholesale prices". The Crown intends to argue that "wholesale price" must mean the price at which Wholesale Travel acquired its travel packages. If this matter proceeds to trial, Wholesale Travel intends to defend, inter alia, on the basis that its prices were equivalent in value to wholesale prices and that its ads were not misleading.

Reference: Case on Appeal, Information, pp. 1 and 3-4

7. On February 29, 1988, Wholesale Travel appeared for trial before His Honour Provincial Court Judge T. Mercer in Toronto. Following arraignment and pleas of not guilty, counsel of Wholesale Travel brought a motion pursuant to S. 52 of the Constitution Act, 1982 for a declaration that par. 36(1)(a) and SS. 37.3(2) of the Act were of no force and effect as being in violation of its rights under S.7 and SS. 11(d) of the Charter.

Reference: Case on Appeal, Ruling on Motion, p.66

8. The Crown did not challenge the status of Wholesale Travel to contest the constitutionality of the relevant provisions of the Act pursuant to S.52 of the Constitution Act, 1982 or the jurisdiction of the trial judge to consider the issue.

9. The only evidence tendered by the Crown in support of its argument under S.1 of the Charter was a document entitled "Misleading Advertising Bulletin".

Reference: Case on Appeal, Bulletin, pp.45-64

10. On March 23, 1988, the learned trial judge delivered reasons in which he found par. 36(1)(a) and SS. 37.3(2) unconstitutional and of no force and effect as being in violation of S. 7 and SS. 11(d) of the Charter. Accordingly, he dismissed the information against the accused.

Reference: Case on Appeal, Ruling on Motion, pp.65-80

11. With respect to subsection 37.3(2), the learned trial judge stated:

The effect of 37.3(2) is to give an accused a limited statutory defence. Subsection a) and b) by themselves amount to the common law defence of due diligence, but subsection c) and d) detract from this defence by requiring that in addition to proving due diligence on the balance of probabilities, the accused must have made a timely retraction. Thus he must admit the wrongful act before he is permitted to enter a defence of due diligence.

It is obvious that there can be many situations where an accused is precluded from making a retraction, as for example when a charge is laid before he has had an opportunity to do so. In these situations the accused is deprived of all defence and the offence becomes one of absolute liability.

The learned trial judge then referred to the B.C. Motor Vehicle Reference case, and stated that "it is therefore clear that 37.3(2) subsection c) and d) violate S. 7 of the Charter of Rights."

Reference: Case on Appeal, Ruling on Motion, pp. 70-71

12. With respect to paragraphs a) and b) of subsection 37.3(2) of the Act, the learned trial judge stated:

I agree with counsel for the accused and find that in view of the stigma attached to this offence and the penalty involved, an accused is constitutionally entitled to have the charge proved against him beyond a reasonable doubt. I find subsections a) and b) of S. 37.3(2) of the Competition Act violates S. 7 and S. 11 of the Charter of Rights.

Reference: Case on Appeal, Ruling on Motion, p.75

13. The learned trial judge ruled that having struck down pars. 37.3(2)(a) and (b), the common law defence of due diligence nevertheless would nevertheless apply because of the operation of SS. 7(3) of the Criminal Code.

Reference: Case on Appeal, Ruling on Motion, pp. 75-76

14. The learned trial judge considered S. 1 of the Charter, but found that on the evidence before him the impugned provisions were not saved by S.1.

Reference: Case on Appeal, Ruling on Motion, pp. 76-78

15. By notice of Appeal dated April 14, 1987, the Attorney General of Canada, pursuant to Section 762 of the Criminal Code, appealed from the order of the trial judge dismissing the charges against Wholesale Travel on the ground that the decision was erroneous in point of law.

Reference: Case on Appeal, Notice of Appeal, pp. 9-12

16. On August 4, 1988, the Honourable Mr. Justice

Montgomery allowed the appeal and remitted the case to the Provincial Court for trial before another judge.

Reference: Case on Appeal, Reasons of Mr. Justice Montgomery, p.85

17. After reviewing the provisions of the Act in issue and their legislative history, Mr. Justice Montgomery referred to the submissions of counsel for Wholesale Travel and said:

"Mr. Doherty submits that SS. 36(1)(a) and 37.3(2), taken in combination, offend the presumption of innocence guaranteed by S. 11(d) of the Charter in two ways. Firstly, these sections require that the accused admit the actus reus as a condition precedent to availing himself of the defence. In other words, the accused must concede false advertising under S. 36. Secondly, Mr. Doherty contends that these two sections place the persuasive burden of proof with respect to the absence of negligence (i.e. due diligence) on the accused."

Reference: Case on Appeal, Reasons of Mr. Justice Montgomery, p.84

18. His Lordship then noted that:

"In The Queen v. Oakes (1986), 24 C.C.C. (3d) 321 the Supreme Court of Canada held that a statute which requires that the accused disprove an element of the offence

contravenes an accused's constitutional right to be presumed innocent. This legislation requires that the accused admit the central element of the offence, the making of a false representation, before he can advance the one statutory defence permitted."

Reference: Case on Appeal, Reasons of Mr. Justice Montgomery, p.84

19. His Lordship then relied upon the decision of this Court in Holmes v. The Queen with respect to Section 309(1) of the Criminal Code to reverse the decision of the learned trial judge. He stated:

"Just as possession of housebreaking instruments for an innocent purpose can be argued by an accused charged under S. 309 of the Code, so can due diligence be argued by the accused under S. 37 of the Competition Act. Further, for the Crown to secure a conviction under S. 36 of the Competition Act, all elements of the offence must be proved beyond a reasonable doubt.

Parliament's modification of the due diligence defence in para. 37.3(2)(c) and (d) fails to violate S. 11(d) of the Charter since it does not relieve the Crown of proving beyond a reasonable doubt any of the essential elements of the offence."

Reference: Case on Appeal, Reasons of Mr. Justice Montgomery, p.85

20. By Judgment dated November 23rd, 1989, the Court of Appeal for Ontario affirmed the remittance of the case to the Provincial Court for trial but allowed the appeal in part. That

Court ordered that paras. 37.3(2)(c) and (d) of the Competition Act be severed from the rest of SS. 37.3(2)(c), and be declared to be of no force and effect. Also, the words "he establishes that" in the opening part of SS. 37.3(2) were severed and declared to be of no force or effect. The result was to rewrite SS.37.3(2) to provide for a defence of due diligence, the evidentiary burden of which lay on the accused.

Reference: Case on Appeal, Judgment of the Court of Appeal, pp. 28 and 131-132

21. The Honourable Mr. Justice Zuber, in dissent, would have remitted the case to trial on the basis that paras. (c) and (d) of SS. 37.3(2) be declared constitutionally invalid with the balance of the subsection being declared constitutionally valid.

Reference: Case on Appeal, Judgment of the Court of Appeal, p.129

PART II

POINTS IN ISSUE

22. Wholesale Travel respectfully submits that the Court of Appeal for Ontario erred in:

(a) Rewriting paras. 37.3(2)(c) and (d) and deleting the words "he establishes that" in the opening paragraph of 37.3(2); the Court ought to have declared the entire legislative scheme inoperative, and have left it to Parliament to consider the matter afresh;

(b) In the alternative, the Court ought to have required the Crown to prove subjective intent or wilful blindness with respect to the alleged falsity of the statement, rather than the lesser mens rea of want of due diligence.

23. With respect to the constitutional questions, the Appellant will submit that they should be answered as follows:

Question

1. Does ss.37.3(2) of the Competition Act, R.S.C. 1970, c.C-23, as amended, in whole or in part violate ss.7 or 11(d) of the Canadian Charter of Rights and Freedoms

1. Le paragraphe 37.3(2) de la Loi sur la concurrence, S.R.C. 1970, ch.C-23, et modifications ou une partie de ce paragraphe, porte-t-il atteinte à l'art. 7 ou à l'al 11(d) de la Charte canadienne des droits et libertés?

Answer: Yes

Réponse: Oui

Question

2. Does ss.36(1)(a) of the Competition Act, in and of itself or when read in combination with ss.37.3(2) of the Competition Act, violate s.7 or 11(d) of the Charter?

2. L'alinéa 36(1)a) de la Loi sur la concurrence, pris isolément ou avec le paragraphe 37.3(2) de cette loi, porte-t-il atteinte à l'art.7 ou à l'al. 11d) de la Charte?

Answer: Yes

Réponse: Oui

Question

3. If either question 1 or question 2 is answered in the affirmative, is(are) the impugned provision(s) saved by s.1 of the Charter?

3. Si l'une ou l'autre des questions précédentes reçoit une réponse affirmative, peut-on justifier la ou les dispositions contestées en vertu de l'article premier de la Charte?

Answer: No

Réponse: Non

PART III

ARGUMENT

A. THE COMPETITION ACT: THE STATUTORY SCHEME UNDER SCRUTINY

24. Section 36(1)(a) of the Competition Act prohibits the making of a material false or misleading statement for the purpose of promoting a business interest. Similar legislation first appeared in the Criminal Code over sixty years ago.

Reference: Competition Act, Section 36(1)(a), Brief of Authorities Tab 5

History of the Legislation, Brief of Authorities Tab 7

25. The making of a false or misleading material representation constitutes the actus reus of the offence and is determined by an objective assessment of the meaning of the representation and without reference to the culpability of the accused's conduct. The section encompasses all classes of misrepresentations including innocent misrepresentations.

Reference: Competition Act, Section 36(4), Brief of Authorities Tab 5

Regina v. Consumers Distributing Company Ltd.
(1980) 57 C.C.C. (2d) 317 at 325-328 (Ont. C.A.), Brief of Authorities Tab 8

26. Par. 36(1)(a) must be read in combination with SS. 37.3(2). Together they define the scope of the conduct which can attract the penalties (up to five years in jail and an unlimited fine) provided in S. 36.

Reference: Regina v. Consumers Distributing Company Ltd.
(supra) at 326-328 (Ont. C.A.), Brief of
Authorities Tab 8

27. SS. 37.3(2) provides only one defence where a representation is held to be false or misleading. The defence is available only where the accused establishes all of the following:

- (i) that the representation was made as a result of an error [par. 37.3(2) (a)];
- (ii) that he exercised due diligence to prevent the error [par. 37.3(2)(b)];
- (iii) that he took reasonable steps to bring the error to the attention of those likely to be affected by the representation [par. 37.3(2)(c)]; and
- (iv) that the steps referred to in (iii) were taken forthwith after the representation was published [par.37.3(2)(d)].

Reference: Competition Act, SS. 37.3(2), Brief of Authorities Tab 6

28. To come within the statutory defence provided in S. 37.3(2) of the Act, the accused must therefore:

- (i) admit the actus reus of the offence, i.e. that the representation was false;
- (ii) show that the representation was the product of an error, which may include a mistaken belief as to the accuracy of the representation;
- (iii) prove he exercised due diligence; and
- (iv) prove he made a timely and inappropriate retraction.

Reference: R. v. Westfair Foods Ltd. (1985) 18 C.C.C. (3d) 178 (Sask. Q.B.) at pp. 185-187, Brief of Authorities Tab 9

R. v. Westfair Foods Ltd. (1986) 33 B.L.R. 163 (Man. Q.B.), Brief of Authorities Tab 10

R. v. Consumers' Distributing Co. Ltd. (supra), at pp. 326-327, Brief of Authorities Tab 8

B. INFRINGEMENT OF CHARTER RIGHTS

29. Under the Act as enacted, an accused can be convicted even though the trier of fact finds that the accused honestly believed that the representations were true, and took all reasonable steps to insure their accuracy. SS. 37.3(2) requires that an accused who wishes to rely on the defence must admit the falsity of the representations (the actus reus) and must do so in a timely fashion. This effectively relieves the Crown of the burden of proving even the prohibited conduct in cases where the statutory defence is relied on by the accused.

Reference:

Case on Appeal, Reasons for Judgment of the Trial Judge, pp. 70-75

R. v. Westfair Foods (Sask Q.B.) (supra) at p. 187, Brief of Authorities Tab 9

30. The combined effect of S. 36 and SS. 37.3(2) of the Competition Act is to require a conviction in circumstances where there is no blameworthy conduct. Even if an accused establishes that he was not negligent in making the impugned representation, he must be convicted if the representation is found to be objectively false and the accused does not discover and admit his error and make a timely retraction. In all cases, where the actus reus is established, except where a timely retraction is

published, the sections create a crime of absolute liability. This, as was held in the Court below, contravenes S. 7 of the Charter.

Reference: Regina v. Vaillancourt, [1987] 2 S.C.R. 636 at pp. 652-653, Brief of Authorities Tab 11

Reference re: s. 94(2) of the Motor Vehicle Act Reference, [1985] 2 S.C.R. 486 at pp.513-515, Brief of Authorities Tab 12

Regina v. Big M. Drug Mart, [1985] 1 S.C.R. 295 at page 331-332, Brief of Authorities Tab 13

31. The Court of Appeal held that SS. 36(1)(a) and SS. 37.3(2) taken together offend S.7 and 11(d) of the Charter, in two distinct ways. These provisions

- (i) require that the accused admit the actus reus as a condition precedent to the statutory defence; and
- (ii) place the persuasive burden of proof of the absence of negligence (i.e. due diligence) on the accused.

32. In practice, the Court also held, the accused must elect between exercising his constitutional right to require the Crown to prove its allegations, or, on the other hand, trying to

establish the one statutory defence available. The statutory imposition of this "election" offends S. 11(d) of the Charter.

Reference: Regina v. Oakes, [1986] 1 S.C.R. 103 at pp.119-120, Brief of Authorities Tab 14
R. v. Westfair Foods (Saskatchewan) (supra), at page 187, Brief of Authorities Tab 9

33. The requirement that an accused publicly admit the actus reus of the offence pursuant to paragraphs (c) and (d) of subsection 37.3(2) of the Act also violates the constitutional right of the accused to remain silent and thereby violates Section 7 of the Charter.

Reference: Regina v. Hebert (Unreported Judgment rendered June 21, 1990, S.C.C. docket no. 21161), per McLachlin, J. at pp. 21-23 and 31-32, Brief of Authorities, Tab 15
Regina v. Chambers (Unreported Judgment rendered October 18, 1990, S.C.C. docket no. 21385), per Cory, J. at pp. 24-25, Brief of Authorities, Tab 16

C. THE COURT BELOW ERRED IN REWRITING THE OFFENCE

34. In Consumers Distributing the Ontario Court of Appeal said:

"Here Consumers could escape liability by relying on the less stringent common law defence. It would defeat the intent of parliament if this occurred and a lesser defence was substituted by judicial decision

for that carefully provided for in the statute." (Emphasis added)

Reference: Consumers Distributing Co. Ltd., (supra) at page 328, Brief of Authorities Tab 8

35. In this case, the Ontario Court of Appeal severed paras. (c) and (d) from SS. 37.3(2); removed the onus to prove paras. (a) and (b) from the accused; and, undertook its own rewrite of the sections in an effort to render the legislative scheme constitutional. In doing so the Court usurped the function of Parliament.

36. The Ontario Court of Appeal determined in Consumers Distributing that SS. 36(1) and 37.3(2) of the Act constituted a unitary scheme with all parts of the scheme necessary for its operation. The Court thus erred in the present case in rewriting the scheme as it did. In Hunter v. Southam Inc. this Court stated:

"While the courts are guardians of the Constitution and of individuals' rights under it, it is the Legislature's responsibility to enact legislation that embodies appropriate safeguards that comply with the Constitution's requirements. It should not fall into the courts to fill in the details that will rend a legislative lacunae constitutional."

Reference: Hunter et al v. Southam Inc., [1984] 2 S.C.R. 145 at p.169, Brief of Authorities Tab 17

Regina v. Martineau (Unreported Judgment rendered September 13, 1990, S.C.C. docket no. 21122) per L'Heureux Dubé, J., at p.2

D. IN ANY EVENT, THE COURT BELOW ALSO ERRED IN PERMITTING A CONVICTION ON THE BASIS OF "WANT OF DUE DILIGENCE " ONLY

37. Where loss of liberty through imprisonment may result upon conviction, a failure to require moral or criminal culpability before conviction is in violation of Sections 7 and 11(d) of the Charter.

Reference: Regina v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299 at pp.1311-1312, Brief of Authorities, Tab 19

Regina v. Vaillancourt (supra), at p. 652, Brief of Authorities, Tab 11

Reference Re S. 94(2) of the Motor Vehicle Act (supra), at pp. 513-515, 517, Brief of Authorities, Tab 12.

38. Conviction for the offence of misleading advertising contrary to par. 36(1)(a) of the Act carries a stigma of dishonesty for the purpose of obtaining economic advantage. The only mental element which justifies the burden of this stigma is that of a wilful intent to be dishonest or wilful blindness

(criminal recklessness) to the occurrence of the falsehood. Mere negligence does not demonstrate this dishonesty and accordingly, such a rewrite of the mens rea required for the offence does not comply with Section 7 of the Charter.

Reference: Regina v. Vaillancourt (supra), at pp.652-654, Brief of Authorities Tab 11

Regina v. Logan (Unreported Judgment rendered September 13, 1990, S.C.C. docket no. 21382) at pp.10-11, per Lamer C.J.C. Brief of Authorities Tab 20

39. The rationale in strict liability offenses for requiring proof of mere negligence (i.e. lack of due diligence) was formulated prior to the enactment of the Charter. In those days, the Court was limited to the principles of statutory construction of the legislation creating the offence. Sections 7 and 11(d) of the Charter impose an independent standard for determining the appropriateness of the mental element. The appropriateness must be considered in light of the social stigma and potential penalty attracted by conviction. Nothing could be more damaging to a trader in the way of his business than the imputation of dishonest representations to potential customers. In these circumstances conviction must require proof of wilful intent or recklessness on the part of the accused; otherwise, the provision violates sections 7 and 11(d) of the Charter.

- Reference: Regina v. City of Sault Ste. Marie (supra), at pp. 1324-1326 Brief of Authorities, Tab 19
- Regina v. Vaillancourt (supra), at pp 652-654, Brief of Authorities, Tab 11
- Regina v. Logan (supra), per Lamer, C.J.C. at pp. 10-11, Brief of Authorities, Tab 20
- Reference Re S.94(2) of the Motor Vehicle Act (supra), at pp. 515-518 , Brief of Authorities, Tab 12
- F.C. De Coste, "R. v. Sault Ste. Marie: The Jurisprudential Aftermath" (1984) 50 Sask. L. Rev. 276
- Ontario Law Reform Commission "Report on the Basis of Liability for Provincial Offences" (1990)

E. APPELLANT'S POSITION ON THE POINTS TAKEN BY THE CROWN IN THE CROSS APPEAL

(i) Status of the Accused

40. A corporation charged with an offence may defend by showing that the law under which the charge is brought is constitutionally invalid.

- Reference: Regina v. Big M Drug Mart (supra), at pp. 313-314, Brief of Authorities, Tab 13
- Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd., [1990] 1 S.C.R. 705, at page 709, Brief of Authorities, Tab 21

(i) Application of S.7 of the Charter

41. Where a statute provides for imprisonment upon conviction, the principles of fundamental justice require the statutory scheme require the prosecution to prove some element of fault or blameworthiness on the part of the accused as a condition precedent of conviction. A statute which may imprison the blameless is contrary to S.7 of the Charter and must be declared inoperative.

Reference: Reference Re. S. 94(2) of the Motor Vehicle Act (supra), at pp. 513-515, Brief of Authorities, Tab 12

Regina v. Vaillancourt (supra), at pp. 652-654, Brief of Authorities, Tab 11

42. As found by the Court below, the combined effect of s.36 and ss.37.3(2) of the Competition Act is to require conviction in cases where there is no fault. Even where an accused establishes that he was not negligent in making the representation under attack, he must still be convicted if the representation is found to be objectively false and the accused has not admitted his error. In these circumstances absolute liability is imposed. It is respectfully submitted, therefore, that the Court below was correct in its conclusion in that these sections contravene S.7 and S.11(d) of the Charter.

Reference: Regina v. Vaillancourt (supra), at p. 652,
Brief of Authorities, Tab 11

Reference Re S.94(2) of the Motor Vehicle Act
(supra), at p. 515 Brief of Authorities, Tab
12

Regina v. Burt (1988), 1 W.W.R. 385 (Sask.
C.A.) at page 401-402, Brief of Authorities,
Tab 22

(iii) The presumption of innocence

43. The Court below correctly concluded that SS. 36(1)(a) and SS. 37.3(2) taken in combination offend the presumption of innocence guaranteed by S. 11(d) of the Charter, in two distinct ways. These sections:

- (i) require that the accused admit the actus reus as a condition precedent to availing himself of the statutory defence; and
- (ii) place the persuasive burden of proof with respect to the absence of negligence (i.e. due diligence) on the accused.

44. Mr. Justice Tarnopolsky properly interpreted R. v. Holmes, R. v. Whyte and R. v. Schwartz in determining that a

statutory provision which makes it possible for an accused to be convicted despite the existence of reasonable doubt in the mind of the trier of fact as to the guilt of the accused violates Section 11(d) of the Charter.

Reference: Case on Appeal, Reasons of the Court of Appeal per Tarnopolsky, J.A., pp. 111

45. Both R. v. Whyte and R. v. Schwartz confirm that no conviction should follow where there is a reasonable doubt as to guilt. In R. v. Schwartz, it was held for the majority of this Court, that no conviction could issue under Section 89(1) of the Criminal Code despite the existence of a reasonable doubt as to guilt

"because the production of the certificate relieves all doubts in favour of the accused and in the absence of the certificate no defence is possible. In such a case, where the only relevant evidence is the certificate itself, it cannot be said that the accused could raise doubt without at the same time establishing conclusively that the certificate had been issued."

In the present case, on the contrary, a conviction may readily issue despite the existence of a reasonable doubt, as found by the Ontario Court of Appeal.

Reference: Regina v. Schwartz, [1988] 2 S.C.R. 443, pp. 485-486, Brief of Authorities, Tab 23

Regina v. Whyte, [1988] 2 S.C.R. 3 at pp. 18-19, Brief of Authorities, Tab 24

(iv) Section 1 of the Charter

46. It is respectfully submitted that the Court of Appeal correctly held that the Crown did not meet the persuasive burden of proof imposed by S. 1, as interpreted in Oakes. The only evidence relied on by the Crown (a bulletin from Consumer Affairs) does not establish any of the criteria required by Oakes. In particular it does not show any nexus between the provisions in the legislation which offend the Charter, and the achievement of the statute's objective. Nor does the brochure speak to the requirement of minimum interference with constitutional rights. It establishes only that the Crown secures a goodly number of convictions under the present law.

Reference: Case on Appeal, Consumer and Corporate Affairs Canada Bulletin, July 1986, pp. 45-64

47. The rationale for these constitutionally unacceptable provisions is administrative efficiency and prosecutorial convenience. By forcing the accused to elect between the statutory defence and requiring the Crown to prove the actus reus; by eliminating the relevance of the accused belief as to the accuracy of the representations; and by imposing a burden on

the accused to establish a severe and very restricted defence, the legislation facilitates convictions and encourages guilty pleas. Such considerations offer no excuse for the infringement of fundamental rights and freedoms.

- Reference: Regina v. Big M Drug Mart (supra), pp. 352-353, Brief of Authorities Tab 13
- Re Singh and Minster of Employment and Immigration, [1985] 1 S.C.R. 177, at pp. 218-219 Brief of Authorities Tab 25
- Regina v. Metro News (1986), 53 C.R. (3d) 289 (Ont. C.A.) at page 305-306, Brief of Authorities Tab 26

48. The Appellant may also refer to the following authorities in support of its argument:

Regina v. Hess; Regina v. Nguyen (Unreported Judgment rendered October 4, 1990, S.C.C. docket nos. 20809 and 21392)

Regina v. Martineau (Unreported Judgment rendered September 13, 1990, S.C.C. docket no. 21122)

PART IV

NATURE OF THE ORDER REQUESTED

49. It is therefore respectfully requested that this Honourable Court allow the appeal on behalf of Wholesale Travel, set aside the Judgment of the Court of Appeal for the Province of Ontario, and direct an acquittal.

With respect to the constitutional questions, the Appellant submits that the answers should be as follows:

Question

1. Does ss.37.3(2) of the Competition Act, R.S.C. 1970, c.C-23, as amended, in whole or in part violate ss.7 or 11(d) of the Canadian Charter of Rights and Freedoms

1. Le paragraphe 37.3(2) de la Loi sur la concurrence, S.R.C. 1970, ch.C-23, et modifications ou une partie de ce paragraphe, porte-t-il atteinte à l'art. 7 ou à l'al 11(d) de la Charte canadienne des droits et libertés?

Answer: Yes

Réponse: Oui

Question

2. Does ss.36(1)(a) of the Competition Act, in and of itself or when read in combination with ss.37.3(2) of the Competition Act,

2. L'alinéa 36(1)a) de la Loi sur la concurrence, pris isolément ou avec le paragraphe 37.3(2) de

violate s.7 or 11(d) of the Charter?

cette loi, porte-t-il
atteinte à l'art.7 ou à
l'al. 11d) de la Charte?

Answer: Yes

Réponse: Oui

Question

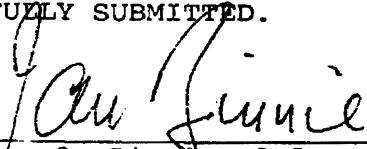
3. If either question 1 or
question 2 is answered in the
affirmative, is(are) the impugned
provision(s) saved by s.1 of the
Charter?

3. Si l'une ou l'autre des
questions précédentes reçoit
une réponse affirmative,
peut-on justifier la
ou les dispositions
contestées en vertu de
l'article premier de la
Charte?

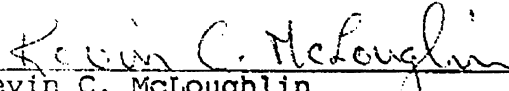
Answer: No

Réponse: Non

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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PART V

AUTHORITIES CITED

SCHEDULE A: JUDICIAL AUTHORITIES

Hunter et al v. Southam Inc., [1984] 2 S.C.R. 145.....19

Re. Singh and Minister of Employment and Immigration
[1985] 1 S.C.R. 177.....27

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[1985] 2 S.C.R. 486.....17,20,22,23,24

Regina v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295.....17,22,27

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1990, S.C.C. docket no. 21385).....18

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Regina v. Metro News (1986), 53 C.R. (3d) 289
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Regina v. Smith (1987), 34 C.C.C. (3d) 97 (S.C.C.).....27

Regina v. Vaillancourt, [1987] 2 S.C.R. 636.....17,20,21,22,23

Regina v. Westfair Foods Ltd. (1985), 18 C.C.C. (3d)
178 (Sask Q.B.).....14,15,16

Regina v. Westfair Foods Ltd. (Supervalu) (1986),
33 B.L.R. 163 (Man. Q.B.).....14

Regina v. Whyte, [1988] 2 S.C.R. 3.....25

SCHEDULE B: STATUTORY AUTHORITIES

The Constitution Act, 1982, Part I, Canadian
Charter of Rights and Freedoms, as enacted by
the Canada Act, 1982 (U.K.) c.11:

Section 1

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 7

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 11(d)

11. Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to

law in a fair and public hearing by an independent and impartial tribunal;

Section 52

52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes

- (a) the Canada Act 1982, including this Act;
- (b) the Acts and orders referred to in the schedule; and
- (c) any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The Competition Act, R.S.C. 1970, c.C-23,
as amended:

S. 36(1), (2), (3), (4), and (5)

36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

- (a) make a representation to the public that is false or misleading in a material respect;
- (b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies upon the person making the representation;
- (c) make a representation to the public in a form that purports to be
 - (i) a warranty or guarantee of a product, or
 - (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified resultif such form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out; or

(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made.

(2) For the purposes of this section and section 36.1, a representation that is

(a) expressed on an article offered or displayed for sale, its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatever made available to a member of the public,

shall be deemed to be made to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside of Canada, by

(f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e), and

(g) the person who imported the display into Canada, in a case described in paragraph (c).

(3) Subject to subsection (2), everyone who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) shall be deemed to have made that representation to the public.

(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars or to imprisonment for one year or to both.

S. 37.3(1), (2), and (3).

37.3(1) Sections 36 to 37.2 do not apply to a person who prints or publishes or otherwise distributes a representation or an advertisement on behalf of another person in Canada, where he establishes that he obtained and recorded the name and address of that other person and that he accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his business.

(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,

- (a) the act or omission giving rise to the offence with which he is charged was the result of error;
- (b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;
- (c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and
- (d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial was published.

(3) Subsection (2) does not apply in respect of a person who, in Canada, on behalf of a person outside Canada, makes a representation to the public or publishes a testimonial.

Criminal Code, R.S.C. 1970, c.C-34, S.7

7. (1) The provisions of this Act apply throughout Canada except

- (a) in the Northwest Territories, in so far as they are inconsistent with the Northwest Territories Act, and
- (b) in the Yukon Territory, in so far as they are inconsistent with the Yukon Act.

(2) The criminal law of England that was in force in a province immediately before the 1st day of April 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(3) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are

inconsistent with this Act or any other Act of the Parliament of Canada. 1953-54, c. 51, ss.6,7.

SCHEDULE C: ACADEMIC REFERENCES

F.C. De Coste, "R. v. Sault Ste. Marie: The Jurisprudential Aftermath" (1984) 50 Sask. L. Rev. 276.....22

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