IN THE SUPREME COURT OF CANADA

(On Appeal from the Ontario Court of Appeal)

B E T W E E N :

THE WHOLESALE TRAVEL GROUP INC.

Appellant/Respondent

\- and -

HER MAJESTY THE QUEEN

Respondent/Appellant

\- and -

COLIN CHEDORE

RESPONDENT'S FACTUM

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PART I - RESPONDENT'S STATEMENT OF THE FACTS

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1. The Respondent accepts as substantially correct the statements of fact contained in paragraphs 1-21 of the Appellants' factum, with the exception of the closing sentence in paragraph 20.

2. Colin Chedore is not a party to this appeal, nor was he a party in the Court of Appeal.

PART II - POINTS IN ISSUE

3. It is respectfully submitted that the Ontario Court of Appeal correctly decided that the offence set out in paragraph 36(1)(a) of the Competition Act (hereinafter "the Act") is one of strict liability, but erred in concluding:

a) that paragraphs 37.3(2)(c) and (d) of the Act constitute an impermissible limitation on the defence of due diligence, in violation of s.7 of the Canadian Charter of Rights and Freedoms (hereinafter, "the Charter");

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b) that the words "he establishes that" in ss.37.3(2) of the Act which require an accused to prove the defence of due diligence on a balance of probabilities, violate s.11(d) of the Charter, a holding which overturns this Honourable Court's judgment in R. v. City of Sault Ste. Marie.

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PART III - ARGUMENT

A. The Nature of the Offence

4. The offence of misleading advertising is one of a number of provisions in an act which seeks to mitigate the effects of anti-competitive business behaviour. In reviewing the legislative scheme found in the Combines Investigation Act, this Court concluded

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> ....that the Act as a whole embodies a complex scheme of economic regulation. The purpose of the Act is to eliminate activities that reduce competition in the market-place. The entire Act is geared to achieving this objective. The Act identifies and defines anti-competitive conduct. It establishes an investigatory mechanism for revealing prohibited activities and provides an

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extensive range of criminal and administrative redress against companies engaging in behaviour that tends to reduce competition. In my view, these three components, elucidation of prohibited conduct, creation of an investigatory procedure and the establishment of a remedial mechanism, constitute a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy.

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General Motors of Canada Limited v. City National Leasing, [1989] 1 S.C.R. 641 at 676

Thomson Newspapers Limited et al. v. Director of Investigation and Research, Combines Investigation Act et al., [1990] 1 S.C.R. 425 at 510 (per La Forest J.)

5. The offence of misleading advertising has existed in various forms since it first appeared as an amendment to the Criminal Code in 1914; it was transferred to the Combines Investigation Act in 1969. This transfer underscores that the offence is meant to be part of a larger scheme of economic regulation.

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History of the Legislation, Appellant's Brief of Authorities

Black, "A Brief Word About Advertising," 20 Ottawa Law Review 509 at 514 (1988)

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See purpose of Act, The Competition Act, s.1.1

6. Prior to the legislative amendments in 1976, the comparable provisions to the offence under consideration here were generally interpreted as creating what would now be called an absolute liability offence.

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R. v. J. Clark & Sons Ltd. (1972), 9 C.C.C. (2d) 404 (N.B.C.A.)

<u>R.</u> v. <u>Firestone Stores Ltd.</u> (1971), 6 C.C.C. (2d) 277 (Ont. C.A.)

<u>R.</u> v. <u>G. Tamblyn Ltd.</u> (1972), 6 C.C.C. (2d) 471 (Ont. C.A.)

<u>R.</u> v. <u>Viceroy Construction Co. Ltd.</u> (1975), 29 C.C.C. (2d) 299 (Ont. C.A.)

10 <u>R.</u> v. <u>Imperial Tobacco Products Ltd.</u> (1971), 22 D.L.R. (3d) 51 (Alta. S.C., A.D.)

Trebilcock et al., A Study on Consumer Misleading and Unfair Trade Practices (Vol. 1), (Canada: Department of Consumer and Corporate Affairs, 1976) p.48 (hereinafter "Misleading Trade Practices")

Black, "A Brief Word," <u>supra</u> at 525-526

20 7. The conversion of the offence to one of strict liability in 1976 had been occasioned in part by the work of the Law Reform Commission of Canada, which had recommended to the Minister of Justice in March, 1976 that:

> ... regulatory offences should admit of a defence of due diligence. This should at least be tried as a temporary measure with a limited number of offences by way of experiment to allow the results to be monitored. Such (30) a defence would allow [the accused] to exonerate himself by showing that he used all reasonable care. It would also call upon him to explain himself and show what happened. This would be fair, expedient and practicable - fair to the morally blameless, expedient for the public scrutiny of standards of care, and practicable if recent legislation is our guide.

40 Law Reform Commission of Canada, <u>Our Criminal Law</u>, 1976, pp. 22-23

Trebilcock et al., "Misleading Trade Practices," <u>supra</u> p.52

8. Following the 1976 Amendments to the <u>Act</u>, which gave the offence sharper definition and added the modified due diligence

defence impugned in these proceedings, this Court enunciated the tripartite scheme for the classification of criminal and quasi-criminal offences in R. v. City of Sault Ste Marie (hereinafter "Sault Ste Marie"). In effect, this judgment was a judicial recognition of the fairness of the legislative approach already recognized in the Combines Investigation Act: henceforth a public welfare offence would presumptively be of the type created by the Combines Investigation Act, that is, an offence in which proof beyond reasonable doubt of the actus reus leads to conviction
10 unless the accused establishes that he took all reasonable care.

R. v. City of Sault Ste Marie, [1978] 2 S.C.R. 1299

9. Since the 1976 amendments, and after Sault Ste Marie, the offence of misleading advertising has been judicially interpreted to be one of strict, not absolute, liability.

20 R. v. Consumer's Distributing Company Limited (1980), 57 C.C.C. (2d) 317 at 324 (O.C.A.)

Case on Appeal, Judgment of the Court of Appeal, pp. 118-120 (per Zuber J.A.); p.99 (per Tarnapolsky J.A.)

10. While the offence is one of strict liability by its structure, it is also presumptively one because of its character. As Mr. Justice La Forest has noted,

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> The conduct regulated or prohibited by the Act is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct
40 which is only criminal in the sense that it is in fact prohibited by law. One's view of whether it

> should be so proscribed is likely to be functional or utilitarian, in the sense that it will be based on an assessment of the desirability of the economic goals to which combines legislation is directed or its potential effectiveness in achieving those goals. It is conduct which is made criminal for strictly instrumental reasons.
>
> The Act is thus not concerned with "real crimes" but with what has been called "regulatory" or "public welfare" offences.

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Thomson Newspapers, supra at 510

11. Furthermore, as Mr. Justice La Forest has noted, unlike in the case of true crimes, "the Act does not seek to prevent the proscribed conduct as an end in itself, but seeks to prevent the results to which it is believed the behaviour will lead." Thus the offence of misleading advertising under this Act is not so much concerned with the social value of preventing a form of deception per se, but preventing it insofar as it frustrates the regulatory goal of attaining a satisfactory level of informative content in advertising which engenders fair competition. For this reason, any "stigmatization" that occurs because of a conviction is qualitatively different than that occasioned by, for example, a conviction for fraud under s.380 of the Criminal Code.

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Thomson Newspapers, supra at 512, 515

Trebilcock et al., "Misleading Trade Practices," pp.1-7, 47-48

12. Therefore, contrary to the assertions in paragraphs 38 and 39 of the Appellant's Factum, it is not correct to state that the offence of misleading advertising focuses on dishonest conduct. The moral blameworthiness of the conduct is largely if not totally irrelevant to the legislative goal.

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B. The Constitutionality of Strict Liability Offences

(1) Background - Historical Development of Strict Liability Offences

13. In Sault Ste Marie, this Court reviewed the history of absolute liability offences and noted that they had been a judicial creation, founded on expediency, in respect of minor offences. The Court also noted that this category of offences had gradually evolved into a legislative tool for the protection of public and social interests.

R. v. City of Sault Ste Marie, supra at 1310-1312

14. The historical development of these offences has been described as follows:

> However, by the nineteenth century the general rule had been established and accepted that mens rea was a required element for conviction of all crimes. In the face of a newly industrialized Britain which increasingly mechanized and de-personalized the workplace and generally resulted in appalling living conditions for many, the need for exceptions to this rule became more and more pressing. Ingeborg Paulus, in an informative article entitled Strict Liability: Its Place in Public Welfare Offences, describes the intolerable legal and practical situation which had arisen in nineteenth-century Britain:
>
> > Some one hundred years ago people starved to death; were accidentally killed during work; lived in indescribably unhealthy and filthy conditions and, as a consequence, died of infectious diseases;....were poisoned or made ill by unwholesome food - all because means were lacking to prove that those who were exploitative or negligent were in fact

> guilty of morally reprehensible crimes. This history of the Passenger Acts, fac ory legislation, sanitary and public health regulations, and the food and drug law, clearly shows that the overall abuses resulting from the industrial revolution, could only be curbed by a compulsorily enforced criminal law which suspended the requirement of mens rea.

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> Paulus looks in detail at the development of nineteenth-century food and drug legislation. She provides documentation of a mid-1800s period, and describes the great difficulties in enforcing these laws, caused in large part by a general requirement of mens rea. While several amendments to improve the likelihood of enforcement were passed in this period, complete removal of the mens rea requirement was resisted, and apparently considered "too novel."

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Kernaghan R. Webb, "Regulatory Offences, The Mental Element and the Charter: Rough Road Ahead" 21 Ottawa L.Rev. 419 at 427

15. It is respectfully submitted, therefore, that the importance of strict liability offences to the public interest cannot be gainsaid; indeed they have been described as "the main coercive mechanisms employed by Canadian governments to implement public policy objectives outside the criminal sphere." A 1986 stu , for the Law Reform Commission estimated that there were 97,000 federal regulatory offences on the statute books.

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Law Reform Commission of Canada, Policy Implementation, Compliance and Administrative Law, Working Paper 51 (Ottawa: The L.R.C.C., (1986)) at 38

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Webb, "Regulatory Offences," supra at 420

(2) Does Section 7 of the Charter Require that Guilty Intent be a Requisite Element of the Offence of Misleading Advertising?

16. While s.36(1)(a) of the Act must comport with Charter principles, section 7 does not compel any change in the fundamental nature of this regulatory offence. The longstanding characterization of the offence as a public welfare offence not requiring proof of mens rea ought to remain unchanged despite the advent of the Charter. There is no support in the decisions of this Honourable Court for the proposition that s.7 of the Charter demands that this offence be one in which the Crown must prove intention or recklessness. The penalties and stigma, if any, attached to the offence are substantially the same in the post-Charter era as in the pre-Charter era.

> Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486

17. Any suggestion that the Charter now specifically requires regulatory offences to be converted into offences of mens rea ignores the compelling reason for the judicial and legislative creation of strict liability offences described in pars. 13-14, supra.

18. This Court has made it clear that section 7 will require a specified minimum level of mens rea for only a small number of true criminal offences, for example, murder and theft.

> R. v. Vaillancourt, [1987] 2 S.C.R. 636 at 652-3
>
> R. v. Logan (1990), 58 C.C.C. (3d) 391 at 397-400

19. The conversion of misleading advertising to an offence demanding the proof of mens rea would impose an impossible burden on the Crown. The collaborative way advertising is prepared, and the numerous steps in the preparation of the advertisement may make it impossible to affix responsibility.

Black, "A Brief Word" supra at 563

10 Trebilcock et al. "Misleading Trade Practices" supra at 59-66

(3) Does Section 11(d) of the Charter Require the Crown to Prove Negligence?

20. The placing of the persuasive burden on the accused through the use of the words "he establishes that" in ss.37.3(2) of the Act does not infringe s.11(d) of the Charter since:

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a) the reasons for imposing the persuasive burden with respect to non-negligence on accused persons in strict liability offences are as compelling today as they were when this Honourable Court decided Sault Ste. Marie;

b) the allocation of the burden is the same as that in other common law jurisdictions, namely, New Zealand, Australia and to a lesser extent, England; and

30

c) the s.11(d) jurisprudence of this Honourable Court which the Court of Appeal referred to ought not to have been applied to strict liability offences.

21. In Sault Ste. Marie, this Court recognized, for the first time, a distinct category of offences for which a demonstration of non-negligent conduct by an accused would result in his acquittal.

40 While it was open for the Court to decide that the accused need only bear an evidential burden with respect to the negligence issue

(ie. requiring the Crown to demonstrate an absence of diligence), it chose to impose a persuasive burden. In the words of Dickson, J. (as he then was):

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

R. v. City of Sault Ste. Marie, supra at 1325

22. In choosing to allocate the burden in this way, the Court in effect acted upon the suggestion of the Law Reform Commission of Canada, as referred to in paragraph 7 supra.

23. Furthermore, it is respectfully submitted that while it is a fundamental rule of criminal law that the accused is presumed to be innocent until his or her guilt is proved by the Crown beyond a reasonable doubt, at common law an exception developed to this rule for a class of offences created by regulatory legislation. Thus in respect of certain offences which prohibit the doing of acts save in certain circumstances or by certain persons, the law required the accused to have the legal burden of showing he fell within the exempted set of circumstances or within the exempt category of persons. In part, the reason for the advent of the exception provision is the difficulty which would otherwise rest on the prosecution to show lack of authority to commit the offence and the comparative ease with which the accused could show he fit within the circumstances excusing the offence. Accordingly, the

imposition of a burden on the accused in specified circumstances was seen as needed "to ensure justice is done both to the community and the defendant."

R. v. Edwards, [1975] Q.B. 27 at 39-40 (C.A.)

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 at 542-545 (Ont. C.A.)

10

24. In Sault Ste. Marie, similar considerations led the court to lend judicial support to the creation of a half-way house in respect of regulatory offences whereby guilt would follow proof of the actus reus but it would be open to the accused to avoid liability by proving that he had taken all reasonable care. Implicit, if not express, in the Court's judgment is the view that to make the defendant disprove negligence - prove due diligence - would be both justifiable and desirable.

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R. v. City of Sault Ste. Marie, p. 1320-1, 1324-6

25. Therefore, the considerations justifying the imposition of a burden of proof on a defendant in certain circumstances such as those envisaged at common law in R. v. Edwards, supra, or specifically in relation to strict liability offences, remain unchanged by the Charter.

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R. v. Lee's Poultry Ltd., supra, p. 544-5

26. It is respectfully submitted that the cogency of the reasons for the allocation of the burden have not diminished over time; indeed a large number of law reform commissions, academics, and judges have recognized their persuasiveness both before and after Sault Ste. Marie.

Law Reform Commission of Canada, The Meaning of Guilt: Strict Liability, 1974, pp. 33-35

Law Reform Commission of Canada, Our Criminal Law, 1976, pp. 22-23, 32-33

Law Reform Commission of Saskatchewan, Proposals for Defences to Provincial Statutes, (1986)

10 Institute of Law Research and Reform of Alberta, Defences to Provincial Charges, (1984)

Webb, "Regulatory Offences" supra at 423

Peiris, Strict Liability in Commonwealth Criminal Law, (1983) 3 Legal Studies 117 Vol. 3, No. 2 (1983)

Case on Appeal, Reasons for Judgment of the Ontario Court of Appeal, per Zuber J. at p.127

20

R. v. Ellis Don Ltd. et al, Unreported judgment of the Ontario Court of Appeal released December, 1990 per Carthy J. dissenting

Contra: Ontario Law Reform Commission "Report on the Basis of Liability for Provincial Offences." (1990)

27. Furthermore, the justice of the Sault Ste. Marie approach has been recognized by high judicial authority in other

30 jurisdictions, namely:

a) New Zealand

Civil Aviation v. McKenzie [1983] N.Z.L.R. 78 (C.A.)

Millar v. Ministry of Transport [1986] 1 N.Z.L.R. 660 (C.A.)

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b) Australia

Maher v. Musson (1934), 52 C.L.R. 100 at 104-105 (H.C.A.)

Proudman v. Dayman (1941), 67 C.L.R. 536 (H.C.A.)

c) England

Tesco Supermarkets Ltd. v. Nattrass [1971] 2 All E.R. 127 (H.L.) per Lord Diplock

28. The great weight of authority, both in Canada and abroad, favours retention of the Sault Ste. Marie allocation of the persuasive burden for regulatory, or public welfare, offences. It is both reasonable and practical that the government, in pursuit of regulatory goals in the collective interest, be able to demand a reasonable standard of care from the regulated and that they demonstrate the steps they took to achieve the standard. To hold otherwise would be to invite more intrusive government action to: a) monitor compliance with regulatory standards; and/or b) gather evidence of non-compliance. It would also force the Crown to have employees testify against other employees or their employers.

R. v. Chaulk and Morrissette, Unreported Judgment of the Supreme Court of Canada released December 20, 1990 per Lamer C.J.C. at 38-39

29. It is essential to recognize that most, if not all, of the leading decisions of this Court on s.11(d) of the Charter concerned offences for which persons convicted inevitably face serious moral opprobrium or stigmatization namely:

a) Drug trafficking - R. v. Oakes
b) Burglary - R. v. Holmes
c) Impaired driving - R. v. Whyte; R. v. Penno
d) Possession of restricted weapons - R. v. Schwartz
e) Sexual relations with underage females - R. v. Nguyen; R. v. Hess
f) Murder - R. v. Vaillancourt
g) Hate-mongering - R. v. Keegstra

30. In each of the foregoing cases, the Court made it clear that it recognized that it was dealing with a criminal offence. For example, in Oakes the Court stated:

> The presumption of innocence is a hallowed principle lying at the very heart of criminal law... [It] protects the fundamental liberty and human dignity of any and every person accused by the Statute of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences...[emphasis added]

R. v. Oakes, [1986] 1 S.C.R. 103 at 119

See also:

R. v. Holmes, [1988] 1 S.C.R. 914 at 944-945 , per McIntyre, J.

R. v. Schwartz, [1988] 2 S.C.R. 443 at 462 per Dickson, C.J.C.

R. v. Penno, Unreported Decision of the Supreme Court of Canada released October 4, 1990, per Mclachlin J. at p.6

R. v. Vaillancourt, [1987] 2 S.C.R. 636 at 654, per Lamer J.

R. v. Whyte, [1988] 2 S.C.R. 3 at 18 (per Dickson C.J.C.)

31. By contrast, in Thomson Newspapers Mr. Justice La Forest placed great emphasis on the regulatory character of the Competition Act in support of the proposition that the aims and scope of the act are such as to create a diminished expectation of privacy in the minds of those whose conduct is regulated. It is submitted that the analysis of Mr. Justice La Forest is equally applicable to the interpretation of s.11(d) rights.

Thomson Newspapers, supra, per La Forest J. at pp. 508-514

32. It is acknowledged that the recent decisions of this court in R. v. Keegstra and R. v. Chaulk and Morrisette have settled the issue as to whether the right protected in s.11(d) of the Charter pertains solely to proof of those factors that may be characterized as "elements of the offence"; a clear majority held in both cases that the right must not be so narrowly construed. However, even in the most recent case, Chaulk and Morrisette, the authority of R. v. Schwartz is not doubted. The Schwartz decision remains significant since it deals with statutory provisions which are in one sense regulatory in nature. Indeed, as Madam Justice Wilson noted in Chaulk and Morissette "Schwartz, in my view is distinguishable from the Vaillancourt, Holmes and Whyte line of cases on the ground that it deals with regulated not prohibited activity."

> R. v. Keegstra, Unreported decision of the Supreme Court of Canada released December 13, 1990
>
> R. v. Chaulk and Morrisette, supra
>
> R. v. Schwartz, supra

33. At issue in Schwartz were ss. 89(1) and 106.7(1) of Part II of the Criminal Code (as the provisions then were). After reviewing the history of the provisions, and noting that the legislative intent was clearly to strictly control the use of offensive weapons, Mr. Justice McIntyre stated that the impugned provisions were in effect part and parcel of a "licensing system" which did not violate s.11(d):

> The theory behind any licensing system is that when an issue arises as to the possession of the license, it is the accused who is in the best position to resolve the issue. Otherwise, the issuance of the certificate or license would serve no useful purpose. Not only is it rationally open to the accused to prove he holds a license (see R. v. Shelley, [1981] 2 S.C.R. 196, at p.

> 200, per Laskin C.J.) it is the expectation inherent in the system.

R. v. Schwartz, supra, at 486

R. v. Chaulk and Morrisette, supra, per Wilson, J. dissenting at p. 7

34. These comments in Schwartz echo the words of Dickson J. in Sault Ste. Marie. To be effective, regulatory systems require the cooperation of, and make demands upon, the regulated, who in turn derive benefits from the system. In the regulatory offence context, therefore, s. 11(d) should be interpreted in a flexible and purposive way which recognizes the complexity of the regulator's task.

35. A strict application of this Court's s.11(d) jurisprudence to regulatory offences is inconsistent with the contextual approach the Court has adopted in construing Charter provisions. As Madame Justice Wilson has stated:

> The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s.1. It is my view that a right or freedom may have different meanings in different contexts.

The Edmonton Journal v. The Attorney General for Alberta et al., [1989] 2 S.C.R. 1326 at 1355-1356

R. v. Keegstra, supra, at p.31 (per Dickson C.J.C.)

Thomson Newspapers, supra, at 540, (per La Forest J.)

36. Thus considering the historical reasons for the development of regulatory offences and their importance in helping to achieve legislative goals in complex fields, it would be both reasonable and just to confine the protection afforded by s.11(d) to proof of factors which are elements of the offence.

R. v. Schwartz, supra

10 R. v. Sutherland (1990), 55 C.C.C. (3d) 265 at 280-281 (N.S.C.A.)

37. Furthermore, such an interpretation gives substantial content to the right while recognizing the important community interest in attaining the regulatory goals. This Court has been prepared to recognize the importance of the community interest in construing Charter provisions.

20 Thomson Newspapers, supra, at 539 per La Forest J.

R. v. Beare, [1988] 2 S.C.R. 387 at 403-405

R. v. Askov et al, Unreported Judgment of the Supreme Court of Canada released October 18, 1990 per Cory J. at p.24

(4) Do the Statutory Defence Provisions Violate s.7 of the Charter?

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38. It is respectfully submitted that the statutory defence provided by s.37.3(2) of the Act does not effectively convert a strict liability offence into one of absolute liability through the inclusion of paragraphs (c) and (d).

Case on Appeal, Judgment of the Ontario Court of Appeal, p 97 (per Tarnapolsky J.A.)

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39. It is acknowledged that the statutory defence afforded by ss.37.3(2) of the Act is more restricted than the common law defence of due diligence. The section is composed of four distinct and severable parts; the statutory equivalent of the common law defence is contained in paragraphs (a) and (b) of the section, yet the statutory defence is not complete unless paragraphs (c) and (d) are also made out.

10 R. v. Consumers Distributing Company Ltd., supra, at 325-327

40. However, the fact that a limitation is placed on a defence does not thereby render it unconstitutional. This Court has recently held in R. v. Penno that the exclusion of a defence does not thereby render an offence unconstitutional; a fortiorari, a limitation on the defence need not be unconstitutional per se.

20 R. v. Penno, supra, per McLachlin, J.

41. It is respectfully submitted that the limitation on the defence of due diligence must be considered in light of the nature of the offence, the object of the statute and the burden imposed on the accused. Due diligence is not a static concept; what standard of conduct is reasonable to prevent the commission of the offence must vary from statute to statute. In demanding both the taking of reasonable precautions and corrective advertising, Parliament has indicated that continued vigilance is the only
30 appropriate standard for the Competition Act.

Tesco Supermarkets Ltd. v. Nattrass, [1971] 2 All E.R. 127 at 151, per Lord Diplock

Civil Aviation Department v. McKenzie, [1983] N.Z.L.R. 73 at 81-86 (C.A.)

R. v. Gulf of Georgia Towing Co. Ltd., [1979] 3 W.W.R. 84 at 87, 88 (B.C.C.A.)

42. The offence of misleading advertising is part of a comprehensive statutory scheme which

> ... is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity.

Thomson Newspapers, supra, per La Forest J. at 510

see also par.4, supra

43. As part of its promotion of competitive conditions, the Act seeks to protect both competitors and consumers from the effects of uncompetitive practices such as misleading advertising. While the offence of false advertising is complete once a representation is made, its effects persist and the harm continues unabated. Providing for corrective advertising at the earliest opportunity as in s.37.3(2)(c) and (d), enhances the regulatory goal by ensuring that the anti-competitive danger posed by a false or misleading representation is minimized. Without these additional requirements, the misleading advertiser may reap an economic windfall and continue to harm both the competitor who refrained from making such representations and the public who acted upon the representations. The actions contemplated by s.37.3(2)(c) and (d) are merely those which the duly diligent advertiser would take to avoid gaining an unjust benefit.

Competition Act, R.S.C. 1985, c.C-34, S.1.1

Trebilcock et al., "Misleading Trade Practices," supra at 67-68, 123-129

Best, "Controlling False Advertising: A Comparative Study of Public Regulation, Industry Self-Policing, and Private Litigation," 20 Ga. L. Rev. 1 at 44-47 (1985)

44. Furthermore, these provisions, which were added by the 1976 amendments to the Act, were supported or suggested by potentially affected groups. Both the Retail Council of Canada and Dominion Stores made submissions to a parliamentary committee in support of corrective advertising as a defence to the charge.

Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue No. 32 March 25, 1975, pp.41-42

Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs, Issue No. 31 March 24, 1975, p.7

W. T. Stanbury, Business Interests and the Reform of Canadian Competition Policy 1971-1975, (Toronto: Methuen, 1977) at 159ff

45. It is respectfully submitted that when these provisions are seen in their regulatory context, they are not so much a limitation on the defence as a means of forestalling prosecution. In this way they are analogous to the gun control registration certificate provision of the Criminal Code which withstood constitutional challenge in R. v. Schwartz.

R. v. Schwartz, [1988] 2 S.C.R. 443 at 491 (per McIntyre J.)

46. It is further submitted that the operation of the provisions does not result in a hardship on accused persons. While each of paragraphs 37.3(2)(a) - (d) must be met by the defence, each of these constituent elements are clearly separate, distinct and severable elements. Indeed, in R. v. Consumers Distributing,

supra, at page 329, Mr. Justice Blair envisaged that notwithstanding the language of s.37.3(2), if in specific instances compliance was rendered impossible, paragraphs (c) and (d) would have no application and would not need to be met.

R. v. Consumers Distributing, supra, p.329

47. It is implicit in the judgment of Blair J.A. in Consumers 10 Distributing that the applicability of paragraphs (c) and (d) is predicated upon the acts complained of coming to the attention of the accused. In addition, compliance with sub-section (c) need not involve any admission that the representation was false or misleading. Mr. Justice Blair states at page 329 of the case:

> "In the long interval between the completion of the investigation and the laying of the charge, Consumers could have prepared some form of modest 20 retraction in the form of a warning to purchasers of the product which would have met the requirements of the section."

48. Therefore, the accused could, for example, merely bring to the attention of the relevant members of the public the fact that the Director of Investigation and Research has taken issue with some aspect of the representation at issue. This would entail no admission of culpability.

30 49. Those minimal corrective measures which Mr. Justice Blair suggested could be taken to satisfy (c) and (d) would permit an accused to continue to deny the actus reus but preserve his right to rely on the statutory defence. Therefore, in considering whether sections 37.3(2)(c) and (d) have been satisfied, it is relevant to determine when the investigating authorities discovered the advertisement and when the accused became aware of an alleged breach of s.36(1)(a).

50. Thus, if the accused chooses to ignore the possibility that an offence has been committed after it has been brought to his attention, ultimately he risks having a court find him guilty of the offence as a matter of law. However, once having been apprised of the facts which constitute the offence, he still has an opportunity to provide himself with a defence by taking steps to bring the error to the attention of those persons likely to have been reached by the representation. This does not require the
10 accused to admit the offence, but rather provides him with an additional opportunity to exculpate himself in the event that a court of law finds the offence has indeed been committed.

> R. v. Total Ford Sales (1987), 18 C.P.R. (3d) 404 at 408 (Ont. Dist. Ct.)

51. In a certain sense all that sections 37.3(2)(c) and (d) of the Act do is underline the fact that the representation once
20 made may continue to have force and effect in relation to the class of persons reached by the representation long after the making or actual publication of the representation. Accordingly, s.37.3(2) of the Act imposes an obligation of due diligence on the accused, not only in relation to the making of a representation but also in relation to the correction of a representation once the nature of the false or misleading nature of the representation has been brought to his attention. If an accused chooses not to correct a misleading or false representation and thereby is found guilty, he is not blameless and thus conviction and punishment is justifiable.

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52. In response to paragraph 31 of the Appellant's Factum, it is respectfully submitted that pars. 37.3(2)(c) and (d) do not violate the "right to silence" in s.7 of the Charter since:

a) the right to silence is inherently a right to be exercised by individuals only, and thus the Appellant corporation lacks standing to assert the right;

b) at a minimum, the provisions require only that consumers be warned, not that an admission of guilt be made;

10

c) the right to silence vests only after an individual's detention; and

d) neither the purpose nor the effect of the provisions cause the harm the right is intended to protect, i.e., subversion of the voluntariness of communication to investigative authorities.

53. It is respectfully submitted in any event that a corporation is not a "person" so as to be able to take advantage of the rights protected by s.7 of the Charter.

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Irwin Toy Ltd. v. Quebec (Attorney General) [1989] 1 S.C.R. 927

54. Furthermore, this Court has previously rejected the notion that corporations can vicariously assert Charter rights. In the context of s.11(c) of the Charter, this Court refused to extend the meaning of "witness" to allow a corporation to take advantage of the privilege against self-incrimination.

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R. v. Amway Corporation, [1989] 1 S.C.R. 21

55. This Court made it abundantly clear in R. v. Hebert that the right to silence is an individual's right which accrues after detention.

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R. v. Hebert (1990), 57 C.C.C. (3d) 1 at 24,26,27,34,37,39

56. Alleged encroachments on the right to silence must be examined in the context in which they appear, for the right to silence is not a blanket protection against state-induced communications. As Mr. Justice La Forest noted in Thomson Newspapers:

> ...in assessing whether a measure violates the principles of fundamental justice, the specific context in which it operates must be steadily borne in mind. The application of these principles must be attuned to that context.

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Thomson Newspapers, supra, at p.541

57. In this regard it is important to remember that all that ss.37.3(2)(c) and (d) do is require that advertising errors be corrected immediately. If no error occurs, no communication need be made; if there is doubt about the error, a warning need only be communicated, as suggested in R. v. Consumer's Distributing. (see pars. 44-51 infra) The correction assists the attainment of the regulatory objectives, and balances the interests of the accused with those of the community.

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Thomson Newspapers, supra at p.541

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Section 1 of the Charter

A. General Principles

58. It is respectfully submitted that if all or any part of ss.37.3(2) of the Act is found to offend sections 7 or 11(d) of the Charter, the impugned provisions may be saved by s.1 of the Charter in that:

a) the objective of the law, that is, the promotion of vigorous and fair competition, is of sufficient importance;

b) the means chosen are proportional to the objective in that:

10

i) there is a rational connection between the means chosen, that is, a modified strict liability scheme with an onus on the accused to prove non-negligence, and the end sought;

ii) the means impair the affected rights as little as possible while still maintaining an effective regulatory scheme; and

20

iii) the effect on the accused's rights is not unduly harsh.

R. v. Oakes, supra

59. In approaching the question of whether the infringement of a protected right is justified under s.1, this Court and others have recognized certain guiding principles, namely:

30

a) it is not essential that evidence be called by the party seeking to sustain the infringement, since aspects of the Oakes analysis may be self-evident;

R. v. Oakes, supra, at 138

b) the application of the Oakes test should not be inflexible, particularly where the Court is considering legislative choices regarding alternative ways of regulating business; and

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Edwards Books and Art Limited et al v. The Queen, [1986] 2 S.C.R. 713 at 772

c) in looking at what is demonstrably justified in a free and democratic society it is appropriate to

consider legislative choices made by other free and democratic societies.

Re Federal Republic of Germany and Rauca (1983), 4 C.C.C. (3d) 389 at 406 (Ont. C.A.)

60. In respect of the approach adopted in other jurisdictions, it is respectfully submitted that their regulation of false or misleading advertising is as restrictive as that found
10 in the Competition Act:

a) Britain

Trade Descriptions Act 1968, 22. 13, 14, 24

Fair Trading Act 1973, ss. 13, 14, 17, 22, 23

Control of Misleading Advertisement Regulations,
20 1988, SI/915

Tesco Supermarkets, supra

Wings Ltd. v. Ellis, [1984] 3 All E.R. 577 (H.L.)

b) United States (Federal)

Federal Trade Commission Act, s. 5
30

c) Australia

Trade Practices Act 1974, s. 52, 53, 80, 85

Darwin Bakery Pty. Ltd. v. Sully (1981) 51 F.L.R. 90

40 d) New Zealand

Fair Trading Act 1986, ss. 9-21, 37-45

e) European Economic Commmunity, Council Directive 84/450 (Sept. 10, 1984)

61. While the fact of legislation illustrates a shared commitment to deter false or misleading advertising, the wide variation in means employed illustrates that the goal is not easily achieved. Indeed, academic commentators have consistently pointed out that there is sharp disagreement over the best method to deter, or control, false advertising.

Black, "A Brief Word" supra at 511-512, 546, 564-565

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A. Best, "Controlling False Advertising", supra

Michael Blakeney, Shelagh Baines, "Advertising Regulation in Australia: An Evaluation", 8 Adelaide L. Rev. 29 (1982)

62. A Parliamentary Committee has recently recognized that the problem is not susceptible to easy solutions and that the present provisions may be inadequate to combat the problem.

20

Report of the Standing Committee on Consumer and Corporate affairs on the Subject of Misleading Advertising (June, 1988), pp.3, 19-20 (hereinafter, "Standing Committee Report")

B. **The Oakes Test**

1) **Is the legislative goal of sufficient importance to warrant the infringement(s)?**

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63. It is respectfully submitted that the legislative goals of ensuring vigorous and fair competition, are of sufficient importance to justify both: a) the modification of the due diligence defence; and b) the placing of a persuasive onus on the accused.

Competition Act, 1985, s.1.1

Thomson Newspapers, supra at 510 (per La Forest J.)

General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641 at 676

Black, "A Brief Word", supra, at 509

Best, "Controlling False Advertising," supra at 8-11

10

64. The predominance of advertising also illustrates the importance of the goals. In 1987, over $6 billion was spent in Canada on advertising.

"Standing Committee Report", supra at 2

2) Are the means proportional to the end?

20

a) Are the measures adopted rationally connected to the objective?

i) the persuasive onus - the words "he establishes that"

65. It is respectfully submitted that, for the reasons given in R. v. City of Sault Ste. Marie and the other authorities referred to in pars. 7-8, 13-15, and 26, supra, the placing of the persuasive onus on an accused with respect to proof of non-negligence is rationally connected to the legislative objective.

30

66. What was recognized in Sault Ste. Marie and by those other commentators referred to in par. 26, supra is that the burden of proving the absence of diligence is an extremely difficult, if not impossible, one to meet. In using the words "he establishes that," Parliament has turned its mind to the problems inherent in attempting to prove that an inadequate standard of care led to the

making of the misleading representation. This Court has recently recognized, in R. v. Chaulk and Morrissette, that the shifting of the burden in such circumstances is rationally related to the objective.

> R. v. Chaulk and Morrissette, supra, at 31-35 (per Lamer C.J.C.)

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67. Furthermore, as stated in pars.10-12, supra, the moral culpability of the advertiser is largely irrelevant to the legislative goal. In this respect, the offence and defence provisions relating to misleading advertising are similar to the impugned provisions in R. v. Keegstra. With respect to those provisions, the majority of this Court held:

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> That a defence may be warranted by reason of the merit associated with truthful statements does not, however, make clear parliament's objective in requiring that the accused prove truthfulness on a balance of probabilities. The objective behind the defence's reverse onus is closely connected with the purpose fuelling the offence in s.319(2). Harm is created whenever statements are made with the intention of promoting hatred, whether or not they contain an element of truth. If the defence is too easily used, the pressing and substantial objective of Parliament in preventing such harm will suffer unduly, and it is therefore in the furtherance of that same objective that truthfulness must be proved by the accused on the balance of probabilities. For the reasons given in discussing the purpose behind s.319(2), I consequently find that Parliament's objective in employing a reverse onus in s.319(3)(a) is pressing and substantial.

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> R. v. Keegstra, supra at 99-100

40

ii) Corrective advertising - paras. 37.3(2)(c) and (d)

68. To prevent undue harm to consumers, and to preclude an unfair competitive advantage, it is both fair and rational for the Government to demand corrective advertising at the earliest possible time. Furthermore, the corrective advertising may stop short of an admission of wrong doing.

R. v. Consumer's Distributing, supra at 329

10 E.E.C. Council Directive, supra

69. It is further submitted that, as seen in par. 60, supra, it is a common feature of legislation in other jurisdictions that the state may seek corrective advertising.

b) the extent of the impairment

20 70. The test, on this branch of the Oakes analysis, is not whether a different legislative scheme is possible, or if possible, would be superior. With respect to regulatory offences, the legislature is entitled to some deference by the courts in deciding when actors in regulated fields may bear an additional burden so that valid social objectives may be pursued.

Edwards Books and Art, supra, at 772

30 Irwin Toy Ltd. v. A. G. Quebec, supra, at 992-994

U. S. A. v. Cotroni, [1989] 1 S.C.R. 1469 at 1489-1490

Reference Re Sections 193 and 195.1(1)(c), [1990] 1 S.C.R., 1123 at 1137 (per Dickson C.J.C.); 1196-1199 (per Lamer J.)

71. Parliament is not required to choose the least intrusive means to achieve its goals. Clearly, there is a less intrusive
40 means with regard to s.11(d) rights; the Ontario Court of Appeal

chose that option, the imposition of an evidentiary burden, in R. v. Ellis Don. However, as noted in Chaulk and Morrissette,

> when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.

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R. v. Chaulk and Morrissette, supra at 36 (per Lamer J.)

72. While a statute which required the accused solely to raise a reasonable doubt about non-negligence would be a lesser impairment on his s.11(d) rights, it may serve to defeat the legislative goal of encouraging veracity in the claims of advertisers by permitting advertisers to be somewhat less than diligent in ensuring veracity. Higher standards of care presumptively lead to fairer competition.

20

R. v. Ellis Don et al, supra at pp.16-17 (per Carthy J.A., dissenting)

73. As in Keegstra, Parliament has exercised a legislative choice between legitimate concerns. Prior to 1976, the faultless could be convicted. While this might have a greater deterrent effect, Parliament chose to relax the strictness of the legislation. To go further would, in the language of R. v. Keegstra, "excessively compromise the effectiveness of the offence in achieving its purpose," which is to discourage all misleading advertisements, whether negligent or not.

30

R. v. Keegstra, supra at 101-102 (per Dickson C.J.C.)

74. It is both permissible and helpful to examine the legislative history of the provisions to assist in ascertaining the

reasons for enacting them. It appears that the corrective advertising provisions were added in part to reflect the administrative reality that prosecutions were not undertaken where corrective advertising was done. These provisions also paralleled the longstanding requirements of the law of defamation.

P. Fitzgerald, " Misleading Advertising: Prevent or Punish?" (1973), 1 Dal. L.J. 246 at 252-258

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Trebilcock et al., "Misleading Trade Practices" _supra_, at 67-68

c) the effect of the measures

75. The effect of the measures, when considered in light of the importance of the legislative objectives, is not severe. This Appellant, a corporation, faces only a monetary penalty upon

20

conviction. This penalty will reflect in large part the extent to which the offender departed from a standard of reasonable care and need not impose an undue hardship. Indeed, one study has concluded that the reality of the legislation is that advertisers have little to fear because of the insignificant nature of the sentences imposed.

W.T. Stanbury, "Penalties and Remedies Under the Combines Investigation Act 1989-1976", 14 Osgoode Hall L.J. 571

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Standing Committee Report, _supra_ at 45-46

Remedy

76. In paragraphs 34-36 of its factum, the Appellant suggests that the Court of Appeal "rewrote" the offence. Should this Honourable Court uphold the Court of Appeal's findings in respect of the constitutionality of the legislation contrary to the arguments presented herein, it is respectfully submitted that it

would be appropriate to strike down only those portions of the statute necessary to prevent the infringement of rights, as the Court of Appeal did.

Constitution Act, 1982, s.52

Case on Appeal, Reasons for Judgment of the Court of Appeal, pp. 113-114 (per Tarnapolsky J.A.)

10

R. v. Nguyen; R. v. Hess (1990), 59 C.C.C. (3d) 161 at 183 (S.C.C.)

77. Should this Court go further than the Court of Appeal and strike down all of s.37.3(2), the effect would be to preserve the common law due diligence defence.

Criminal Code, s.7(3)

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PART IV - ORDER REQUESTED

78. It is respectfully requested that the Appeal by the Appellant Wholesale Travel Ltd. be dismissed, the Appeal by the Respondent be allowed, and the matter referred to the Provincial Court of Ontario for trial.

79. With respect to the constitutional questions, the

30 Appellant submits 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?

10

Answer: No

Réponse: Non

Question

20

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. 11(d) de la Charte?

30

Answer: No

Réponse: Non

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?

40

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: Yes

Réponse: Oui

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 10th day of January, 1991.

Michael R. Dambrot, Q.C.

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Robert W. Hubbard

Robert J. Frater

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PART - V

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