21 copies

21779

Court File No. 21779

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
for 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

**FACTUM OF THE INTERVENOR,
THE ATTORNEY GENERAL OF ONTARIO
ON THE CONSTITUTIONAL QUESTIONS**

Jack Johnson
Acting Deputy Attorney General
of Ontario
720 Bay Street
7th Floor
Toronto, Ontario
M5G 2K1

W.J. Blacklock 326-2302
S.J. Page 869-5481
M.P. Tunley 326-4844

Court File No. 21779

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal
for 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

**FACTUM OF THE INTERVENOR,
THE ATTORNEY GENERAL OF ONTARIO
ON THE CONSTITUTIONAL QUESTIONS**

PART I - THE FACTS

1. The Attorney General of Ontario accepts the statement of facts set out in the factums of the appellant and respondent in this appeal and in the appeal of The Wholesale Travel Group Inc. in Court File No. 21779, but takes no position on any factual dispute.

PART II - POINTS IN ISSUE

2. The Points in Issue are stated in the factums of the appellant and the respondent.

3. The Attorney General of Ontario takes no position on the proper interpretation of subsection 36(1) of the Competition Act, R.S.C. 1970, c. C-23, as amended, or on the constitutional validity of subsections (2)(c) and (d) of section 37.3 of the Competition Act.

4. In this appeal, the Attorney General of Ontario will argue that:

(a) assuming that subsection 36(1) can properly be characterized as a regulatory offence as opposed to a true crime, the persuasive burden of proof in respect of the defence of due diligence at common law or under subsections 37.3(2)(a) and (b) of the Competition Act does not infringe sections 7 or 11(d) of the Charter; and

(b) in the alternative, the rationale underlying a persuasive burden of proof in this context will generally provide a compelling justification for any such infringement under section 1 of the Charter, at least where the overall objectives of the regulatory scheme are pressing and substantial.

PART III - ARGUMENT

I. GENERAL

5. The Attorney General of Ontario intervenes in this appeal because of its implications for the many regulatory offence provisions enacted by the Ontario legislature, which cast a persuasive burden of proof on the accused to establish the defence of "due diligence" on a balance of probabilities, either expressly or as a matter of common law, in accordance with the principles enunciated by this Court in *R. v. Sault Ste. Marie*.

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

6. The judgment under appeal has been interpreted as determining that such a burden of proof is in all cases an infringement of section 11(d), which requires justification under section 1 of the Charter.

R. v. Ellis-Don Limited, Ontario Court of Appeal, December 3, 1990, unreported,

Ontario Law Reform Commission, Report on the Basis of Liability for Provincial Offences (1990), at 28 and 47

7. If it is determined that sections 36(1) and 37.3(2)(a) and (b) of the Competition Act create a true crime, then recent decisions of this Court support the conclusion that the onus of proof prescribed by the statute would infringe s. 11(d) of the Charter. In the context of true crimes, it is now established that the presumption of innocence under section 11(d) has very broad application. In the words of Dickson C.J.C. for the Court:

> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of the provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

Whyte v. The Queen, [1988] 2 S.C.R. 3, at 18

R. v. Keegstra, Supreme Court of Canada, December 13, 1990, unreported, per Dickson C.J.C. at pp. 96-99, per McLachlin J. at pp. 60-62

Chaulk and Morrissette v. The Queen, Supreme Court of Canada, December 20, 1990, unreported, per Lamer C.J.C. at pp. 21-28, per Wilson J. at pp. 3-8, per Sopinka J. at p. 1

8. However, if these provisions are properly characterized as a regulatory or public welfare offence based upon the principles of strict liability established by this Court in R. v. Sault Ste.

Marie, then the judgment in appeal implies that the distinction between true crimes and regulatory offences is irrelevant to the analysis of the presumption of innocence. The Attorney General of Ontario submits that this is incorrect, and is contrary to the unanimous decision of this Court in R. v. Sault Ste. Marie.

9. In R. v. Sault Ste. Marie, this Court considered and rejected the submission that a persuasive burden of proof upon the accused to establish the defence of due diligence in regulatory prosecutions would, as a matter of common law, offend against the presumption of innocence as formulated in the classic case of Woolmington v. D.P.P., [1935] A.C. 462.

R. v. Sault Ste. Marie, above, at 1316, per Dickson J. (as he then was) for the Court:

> There is nothing in Woolmington's case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with a burden resting on the accused to establish the defence on the balance of probabilities.

10. The extension of rigorous notions of the presumption of innocence, developed by this Court under section 11(d) of the Charter in relation to true crimes, into the realm of regulatory offences would not only overrule the judgment in that case. It would also mean that virtually all such offences would be prima facie unconstitutional, and would require justification under section 1. The Court ought not conclude that the Charter effects so sweeping a transformation of our system of penal law, where there is a principled alternative.

Penno v. The Queen, Supreme Court of Canada, October 4, 1990, unreported, per Wilson J. (concurring) at p. 4.

11. In this appeal, the Attorney General of Ontario will argue that this Court's recent determination of the common law of Canada in R. v. Sault Ste. Marie was not altered by, and does not infringe

sections 7 or 11(d) of the Charter. The following arguments are advanced:

(a) The judgments of this Court interpreting and applying the Charter do not foreclose, but rather support the position that rights contained in it may have different scope or meaning in different contexts;

(b) The distinction between true crimes and regulatory offences remains a relevant difference of context for the purposes of the presumption of innocence in section 11(d), having regard to the nature, purpose and practical operation of the defence of due diligence in regulatory prosecutions;

(c) The judgment in R. v. Sault Ste. Marie was based upon a comprehensive review of the case law and consideration of the fundamental principles of penal liability, and the resulting common law rules are not contrary to the principles of fundamental justice underlying sections 7 and 11(d) of the Charter; and

(d) There has been no development, either with the enactment of the Charter, itself, or subsequently, that should lead this Court to reconsider this issue.

II. SECTIONS 7 AND 11(d) OF THE CHARTER

A. A CONTEXTUAL APPROACH TO SECTION 11 AND THE PRESUMPTION OF INNOCENCE

12. There is no decision of this Court dealing with section 11(d) of the Charter that addresses the issue of the presumption of innocence in the context of a regulatory offence as opposed to a true crime.

13. In this appeal, the Court is asked either to hold that the enactment of the Charter has somehow overruled this Court's decision on the issue in R. v. Sault Ste. Marie, or to recognize

that the meaning of Charter rights can vary to a limited degree with the context in which they are engaged. It is open to this Court, in effect, to hold that section 11(d) may have more limited scope or operation outside the context of true criminal offences, because our notions of what may constitute truly innocent conduct are different outside that context.

14. A contextual approach to Charter rights has been applied in a variety of cases apart from section 7 and 11 of the Charter.

generally:
Edmonton Journal v. A.G. Alberta, [1989] 2 S.C.R. 1326, per Wilson J. at 1356:

> It is my view that a right or freedom may have different meanings in different contexts.

section 2(a):
Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713, per Dickson C.J.C. (for the majority on the point) at 759

section 2(d):
Reference re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, per Le Dain J. at 390-391

section 8:
Thomson Newspapers Ltd. v. Director of Investigation & Research, [1990] 1 S.C.R. 425

section 15:
Law Society of B.C. v. Andrews, [1989] 1 S.C.R. 143, per Wilson J. (for half the Court on the point) at 152-153

Turpin v. The Queen, [1989] 1 S.C.R. 1296, at 1331-1332

R. v. Sheldon S., [1990] 2 S.C.R. 254, at 289-292

Hess v. The Queen; Nguyen v. The Queen, Supreme Court of Canada, October 4, 1990, unreported, per Wilson J. (for the majority) at pp. 21-23

McKinney v. University of Guelph, Supreme Court of Canada, December 6, 1990, unreported, per La Forest J. (for the majority on the point) at pp. 55-56

15. More important, given the special relationship between sections 7 and 11 of the Charter, it has been recognized that the content of principles of fundamental justice underlying the rights in section 7 may vary to some degree according to the context in which the right is invoked.

Reference re s.94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486, per Lamer J. at 513:

> [The principles of fundamental justice] cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s.7.
>
> In the context of s.7, it seems to me that the nature and quality of the procedural protection to be accorded the individual cannot depend on sterile logic or formalistic classifications of the type of proceeding in issue. Rather, the focus must be on the functional nature of the proceeding and on its potential impact on the liberty of the individual.

Canada v. Schmidt, [1987] 1 S.C.R. 500, per La Forest J. (for the majority) at 522-523:

> A judicial system is not, for example, fundamentally unjust -- indeed, it may in its practical workings be as just as ours -- because it functions on the basis of an investigatorial system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system.

Thomson Newspapers v. Director of Investigation & Research, above, per L'Heureux-Dubé J. at 583:

> Fundamental justice in our Canadian legal tradition and in the context of investigative practices is primarily designed to ensure that a fair balance be struck between the interests of society and those of its citizens.

16. Moreover, specific rights in section 11 of the Charter have been interpreted in a manner that allows a degree of variation in different contexts, across the range of offences to which section 11 has been held to apply.

17. Thus, for example, in R. v. Wigglesworth a majority of this Court (Estey J. dissenting) held, in effect, that the right in section 11(h) not to be tried or punished for the same "offence" in two proceedings applies differently where the two proceedings are both of a kind which "by nature" come within the ambit of section 11, than it does where one of them comes within section 11 only because it involves "true penal consequences".

> R. v. Wigglesworth, [1987] 2 S.C.R. 541, per Wilson J. for the majority at 564-567

18. In Valente v. The Queen, in the context of a provincial regulatory offence, the Court unanimously rejected the argument that provincially appointed judges could not be "independent" tribunals for the purposes of section 11(d) of the Charter because they lack some of the guarantees of judicial independence secured to a superior court judge by sections 96, 99 and 100 of the Constitution Act, 1867. Le Dain J. for the Court concluded:

> It would not be feasible ... to apply the most rigorous and elaborate conditions of judicial independence to the constitutional requirement of independence in s. 11(d) of the Charter, which may have to be applied to a variety of tribunals.

> Valente v. The Queen, [1985] 2 S.C.R. 673, at 692-694

19. This context-sensitive approach to Charter rights provides a means of guarding against the application of rigorous notions of the presumption of innocence, developed in the context of true crimes, across the entire range of offences to which section 11 applies, so as to impugn the validity of legislative and common law schemes that are in no way inconsistent with Canadian concepts of fundamental justice.

20. At the same time, a reasonable degree of consistency in the content and application of rights in section 11 must be maintained. The approach advanced by the Attorney General of Ontario invites no greater diversity in the underlying principles or application

of the presumption of innocence (if it invites any at all) than this Court recognized in R. v. Sault Ste. Marie.

B. REGULATORY OFFENCES AND THE PRESUMPTION OF INNOCENCE

(1) The Evolution of Regulatory Offences at Common Law

21. The legal traditions received into and developed in Canada have always drawn a distinction between truly criminal conduct ("mala in se"), and conduct that is simply prohibited in the public interest ("mala prohibita"). In R. v. Sault Ste. Marie, this Court maintained the distinction between the true criminal offence and the "public welfare" or regulatory offence as "one of prime importance".

R. v. Sault Ste. Marie, above, at 1309-10 and 1312-1313

Webb, "Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead" (1989), 21 Ottawa L.J. 419, at 426-435

22. So fundamental is this distinction to the Canadian legal system that it is embedded in the division of powers in the Constitution of Canada. Only the federal Parliament may decide what conduct is criminal, and valid provincial laws "cannot possibly create an offence which is criminal in the true sense".

Constitution Act, 1867, ss. 91 ¶27, 92 ¶15

R. v. Sault Ste. Marie, above, at 1327

23. At the root of the distinction is the notion that certain kinds of conduct are abhorrent to moral values fundamental to all human society, and ought therefore to be prohibited absolutely, whereas other kinds of conduct are prohibited as part of an attempt to regulate particular social institutions, interests or relationships that we choose to establish, control or promote.

24. In Thomson Newspapers v. Director of Investigation and Research, La Forest J. adopted the language of the Law Reform Commission of Canada, to the effect that a regulatory offence:

> "... is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society and for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society."

Other members of the Court recognized the same distinction, although dividing on its application in that particular case.

> Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J. at 505-517, per L'Heureux-Dubé J. at 564-566, and per Wilson J at 460-461 and 495-496
>
> Law Reform Commission of Canada, Criminal Responsibility for Group Action (1976), at 11-12

25. Regulatory or public welfare legislation can be traced back to the 14th century, but its prevalence increased dramatically in the 19th century. Faced with competing principles and policies arising out of the emerging doctrine of the presumption of innocence on the one hand, and the exigencies of industrial society on the other, 19th century courts and legislatures sought to deter violation of specific regulatory requirements through the recognition of absolute penal liability. Absolute liability was seen as necessary (and is still defended) because of the overwhelming concern for the consequences flowing from abuses relating, for example, to unsafe conditions in the workplace, the adulteration of food, and pollution.

> R. v. Stephens (1866), L.R. 1 Q.B. 702
>
> Fitzpatrick v. Kelly (1873), L.R. 8 Q.B. 337
>
> Sherras v. de Rutzen, [1895] 1 Q.B. 918

R. v. Sault Ste. Marie, above, at 1310-1311

Richardson, "Strict Liability for Regulatory Crime: the Empirical Research", [1987] Crim. L. Rev. 295

Paulus, "Strict Liability: its Place in Public Welfare Offences" (1977-78), 20 Crim. L.Q. 445

Webb, "Regulatory Offences, The Mental Element, and the Charter", above, at 426-431.

26. However, given the increasing variety and complexity of modern technology and commercial activity in this century, specific detailed regulation is not always possible, or desirable. Accordingly, some legislation in Ontario began to introduce concepts of carelessness into public welfare offence provisions, or to express statutory duties in general terms of due care or reasonable precautions. Ontario courts interpreted such provisions as imposing liability for negligence, allowing the defendant to establish a defence of reasonable mistake of fact or due diligence on a balance of probabilities.

R. v. McIver, [1965] 2 O.R. 475 (C.A.), at 481 affirmed on other grounds, [1965] S.C.R. 254

R. v. V.K. Mason Construction Ltd., [1968] 1 O.R. 399 (H.C.), at 402-407

27. During the same period, courts in Ontario and elsewhere began to recognize a defence of reasonable mistake of fact, available at common law for all public welfare offences unless clearly excluded by statute. Unlike the defence of mistake of fact in the context of a mens rea or true criminal offences, some courts held that a burden of proof rested on the accused in a regulatory prosecution to establish this defence on a balance of probabilities.

R. v. Hickey (1976), 29 C.C.C. (2d) 23 (Div. Ct.), reversed on other grounds 30 C.C.C. (2d) 416 (C.A.)

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

28. This Court in R. v. Sault Ste. Marie brought these legislative and judicial developments together by recognizing a general defence of due diligence, including the notion of reasonable mistake of fact, available presumptively in all regulatory prosecutions. This approach was intended to confine the concept of absolute liability, in which there is "no relevant mental element", because it was held to violate "fundamental principles of penal liability". It did not, however, seek to accomplish this by extending the common law presumption of mens rea to regulatory offences. Rather, it introduced a new mental element or standard of fault into this branch of the penal law, by leaving it open to the accused to avoid conviction if he or she establishes that all reasonable steps were taken to avoid the occurrence of the prohibited act.

R. v. Sault Ste. Marie, above, at 1312-1322 and 1324-1325

(2) The Onus of Proof and the Presumption of Innocence

29. This historical review demonstrates that, in the context of regulatory offences, the operation of the presumption of innocence at common law has always struck a slightly different balance between the interests of persons charged with an offence and those of the prosecution, from that which is struck in the context of true crimes.

30. Specifically, both before and after R. v. Sault Ste. Marie, in the context of regulatory offences to which the presumption of mens rea does not extend, the "reasonable doubt" standard inherent in the presumption of innocence applied only to proof by the prosecution of the actus reus of the offence.

31. Under the doctrine of absolute liability, the proof by the prosecution of the actus reus alone constituted the relevant element of culpability. Where the accused voluntarily engaged in some prohibited activity, inherently involving a significant

potential for harm to the public which the statute sought to prevent, it was held that the opportunity to control the regulated activity, coupled with the failure to prevent that harm occurring, implied an element of culpability even in the absence of proof of lack of care in bringing about the prohibited act.

See for example Sweet v. Parsley, [1970] A.C. 133 per Lord Diplock at 163, and see references at para. 25, above

32. To the extent that "fault" can be said to be implicit in the actus reus of an offence in this way, it is subject to proof beyond a reasonable doubt, and the presumption of innocence is not infringed.

33. In R. v. Sault Ste. Marie, Dickson J. added a further step to this fault component. Proof by the prosecution of breach of the statute beyond a reasonable doubt "prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care". This considerably broadens the factual inquiry by permitting the accused to bring forward additional facts to show that "all due care" was taken, not only in respect of the particular conduct charged, but generally with a view to preventing such occurrences. However, integral to the recognition of this broad, new defence was the imposition of a reverse onus of proof on the accused.

R. v. Sault Ste. Marie, above, at 1325-1326 and 1328

34. As has been noted in paragraph 9, above, this Court saw nothing in the common law presumption of innocence standing in the way of the adoption of this onus of proof on the accused. This was because the recognition of the defence subject to the reverse onus was designed, as a package, to permit those accused who can truly be considered blameless to escape conviction.

35. Having regard to the nature, purposes and operation of the defence of due diligence as a fault element in regulatory offences, it is respectfully submitted that the reasons given by the Court supporting this conclusion at common law are equally convincing in relation to the presumption of innocence contained in section 11(d) of the Charter. Those reasons, developed below with reference to case law under the Charter, may be summarized as follows:

(i) the concept of fault developed for regulatory offences in R. v. Sault Ste. Marie is a civil concept, quite distinct from the concept of mens rea in true crimes, and the nature of that fault element does not, as a practical or theoretical matter, lend itself to coherent adjudication on the basis of the criminal standard of "reasonable doubt";

(ii) our reasons for imposing liability and sanctions by means of a quasi-criminal process are also quite distinct in this context; and

(iii) fairness does not require any lesser onus on the accused with respect to due diligence.

(i) The Concept of Fault

36. A number of provincial appellate court decisions support the position that our concepts of fundamental justice, including the presumption of innocence found in section 11(d), do not foreclose the placing of a persuasive burden of proof on the accused in relation to the defence, of due diligence or other defences in the context of regulatory offences.

R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.) at 542-5

R. v. Cancoil Thermal Corporation (1986), 27 C.C.C. (3d) 295 (Ont. C.A.)

R. v. Metro News Ltd. (1986), 56 O.R. (2d) 321 (C.A.) at 346-8

R. v. Gray (1988), 44 C.C.C. (3d) 222 (Man. C.A.)

R. v. Sutherland (1990), 55 C.C.C. (3d) 265 (N.S.C.A.)

contra:

R. v. Ellis-Don Limited, above

37. One reason for this conclusion is that our concepts of "innocence" and fault are quite different for regulatory offences than for true crimes, in that a conviction does not import any necessary implication of moral delinquency or culpability, or the stigma which that involves.

38. In particular, this Court in R. v. Sault Ste. Marie recognized that regulatory offences,

> [a]lthough enforced as penal laws through the utilization of the machinery of criminal law ... are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application.

R. v. Sault Ste. Marie, above, at 1302-1303

39. The underlying duty of care in regulatory statutes is based upon civil law concepts, as is the relevant fault standard. It is clear that there is no necessary element of 'fault' in the sense of moral blameworthiness involved in a finding that a defendant has been negligent. The concept of negligence covers a range of judgments about conduct. At the low end of that range, the notion of bare negligence, without any element of moral blame, could not support the judgment that conduct is criminal in the true sense.

R. v. Sault Ste. Marie, above, at 1309-1310

Salmond & Heuston, The Law of Torts (18th ed., 1981), at 182-183

Reference re s.94(2) of the Motor Vehicle Act (B.C.), above, per Wilson J. at 522

Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J., at 510

40. The moral culpability associated with true crimes generally flows from intention or subjective recklessness regarding the prohibited act and, exceptionally, from negligence of a kind or degree that does import moral fault.

41. Regulatory offences arise out of business or other activity that is not prohibited altogether, but is regulated in the public interest. In this context, it is submitted that a sufficient measure of fault is established where a person in a position to control a regulated activity fails to prevent the prohibited conduct and its harmful consequences, and is unable to bring forward credible evidence to support a defence of due diligence on the civil standard of proof.

42. For these reasons, the stigma arising from a determination of guilt for these offences is less direct, personal and ongoing than it is for true crimes, where it may involve a criminal record and related personal disabilities and disadvantages as well as the sentence imposed by the court.

43. Moreover, the due diligence defence is based upon an objective, rather than a subjective fault element. By definition, this involves measurement of the conduct of the accused against a standard that is not personal, but rather reflects normative social values. Unlike the objective mens rea elements known to the criminal law, this Court's formulation of the defence of due diligence is not focused upon a discrete and relatively narrow factual inquiry. The defence of due diligence in a regulatory context may require a complex, wide ranging examination beyond the immediate circumstances of the offence, into the range of possible precautions (training, inspection, maintenance, etc.) in respect of various factors which were contributing causes of the breach of

statute, the conduct typical or expected of other persons in like circumstances, and the cost and feasibility of the accused adopting these standards.

44. This inquiry involves not just factual determinations, but also a judgment or legal conclusion upon the facts, in this case with respect to reasonableness or negligence. The relevance of particular facts to that judgment or legal conclusion cannot even be assessed until the fact is established, at least with the degree of clarity that is inherent in the standard of proof on a balance of probabilities.

R. v. Ellis-Don Limited, above, per Carthy J.A. at p. 10

Law Reform Commission of Canada, The Meaning of Guilt - Strict Liability (1974), at 33

45. This causes practical difficulties in the application of the "reasonable doubt" standard. It means that the defence of due diligence does not present a simple situation in which "the accused must prove some fact on a balance of probabilities to escape conviction".

Whyte v. The Queen, above, at 18

46. If the "reasonable doubt" standard is to be applied to the defence of due diligence as a matter of constitutional requirement, it is submitted that the courts must articulate with some clarity how it is to operate. Would a reasonable doubt as to only one of several precautions reasonably required suffice to require an acquittal, or must a reasonable doubt be raised as to each and every component of the defence? If something in between these extremes would suffice, what is the applicable test? It is respectfully submitted that the interests of the accused and of the prosecution both require a clear articulation of the governing principles.

(ii) Reasons for Imposing Liability and Sanctions

47. As submitted in paragraphs 21-24, above, the rationale for imposing liability for regulatory offences is not to prohibit or punish the relevant conduct as an end in itself, but rather to preserve or promote some further objective, institution or state of affairs in the interests of a broader social or public policy. The objectives of regulatory legislation typically involve the protection of broad sectors of the public (eg., employees, consumers, motorists, children), or the public generally, from the potential adverse effects of otherwise lawful activities. This involves a shift of emphasis from the protection of individual interests and personal moral fault, the deterrence and punishment of which is the primary objective of true criminal laws, to the protection of public and social interests.

R. v. Sault Ste. Marie, above, at 1312

48. In furtherance of these objectives, modern regulatory legislation typically employs a combination of enforcement and compliance techniques, both voluntary and mandatory, that may include provision for prosecutions for breach of the statute as a last resort.

49. There is a critical balance to be maintained between such prosecutions and the administrative and regulatory aspects of a legislative scheme that encourage compliance and so prevent the injury to the public with which the legislation is concerned. The availability of an effective sanction by prosecution and the likelihood of conviction are strong incentives to voluntary compliance and preventive measures by a regulated enterprise, and thus help to ensure that the standards of care set by regulatory legislation are met.

R. v. Sault Ste. Marie, above, at 1310:

> It is essential for society to maintain, through effective enforcement [of public welfare offences], high standards of public health and safety.

Webb, "Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead", above, at 423

Brathwaite, To Punish or Persuade (1985), Chapter 4

Watson, "The Effectiveness of Increased Police Enforcement as a General Deterrent" (1986), 20 Law and Society Review 294, at 294-299

Fattah, "Fear of Punishment", Law Reform Commission of Canada (1976), at 28

Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J. at 509-512 and 556-557

R. v. Ellis-Don Limited, above, per Carthy J.A. at pp. 15-16

50. The imposition of a persuasive burden of proof in regulatory legislation is based upon specific considerations related to the achievement of the legislative objectives, the integrity of the legislative scheme, and effectiveness and efficiency in its enforcement. These include:

(a) Reluctance of witnesses: generally, the material facts relevant to the issue of due diligence are known only to the accused and, in the case of a regulated enterprise, to its employees and contractors; the ongoing economic relationship means that workers, supervisors, and officers of the enterprise are reluctant to testify for the prosecution.

(b) Maintenance of records and compliance procedures: a persuasive burden reinforces the requirements that regulated enterprises maintain relevant records concerning safety systems, inspection and review procedures, maintenance, and other matters affecting compliance with the regulatory scheme, and encourages the development of internal systems for reviewing

records and procedures, by creating an incentive to have them available to establish due diligence in the event of prosecution.

Brathwaite, To Punish or Persuade, above, at 104

R. v. Ellis-Don Limited, above, per Carthy J.A. (dissenting), at pp. 15-16.

(c) Reduction of Pre-Charge Investigatory Requirements: the specialized personnel and other resources that would be required to conduct a complete pre-charge investigation into all aspects of the due diligence defence would be disproportionately extensive, costly, and intrusive upon the privacy and other interests of the accused at the pre-charge stage.

R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, per Wilson J. at 648-650

Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J. at 507-508, and per L'Heureux-Dubé J. at 494

(d) Avoidance of Adversarial Relations with the Regulated Enterprise: a persuasive burden reinforces a co-operative relationship between the regulated enterprise and enforcement personnel, which is essential to promote voluntary compliance, and discourage undue resort to criminal procedures, which are necessarily adversarial.

Keith, Ontario Health and Safety Law (1989), at 13-6ff

51. This instrumental character of regulatory offences is reflected in the sanctions available on conviction. Thus, the principles governing the quantum of fines imposed upon conviction of a regulatory offence emphasize "the need to enforce regulatory standards by deterrence". For example, in the context of occupational health and safety, Blair J.A., for the Ontario Court of Appeal in R. v. Cotton Felts Ltd. stated:

> Examples of [public welfare offences] are legion and cover all facets of life ranging from safety and consumer protection to ecological conservation. In our complex interdependent modern society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all. To a very large extent the enforcement of such statutes is achieved by fines imposed on offending corporations. The amount of the fine will be determined by a complex of considerations, including the size of the company involved, the scope of the economic activity in issue, the extent of actual and potential harm to the public, and the maximum penalty prescribed by statute. Above all, the amount of the fine will be determined by the need to enforce regulatory standards by deterrence.
>
> R. v. Cotton Felts Ltd. (1982), 2 C.C.C. (3d) 287 (Ont. C.A.), at 294

52. Similarly, with respect to imprisonment as a penalty, a majority of those accused are corporations or other non-natural persons exercising immediate ownership or control over the circumstances of the offence, for whom imprisonment is simply unavailable. In cases where imprisonment on conviction is a possibility for an individual accused, it is made available for instrumental or hortatory purposes, and is very seldom applied in practice because of the judicious exercise of discretion.

> Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J. at 509 and 512-515
>
> R. v. Ellis-Don Limited, above, per Carthy J.A. at p. 18

53. It is respectfully submitted that the availability of imprisonment as a potential punishment for the more serious regulatory offences ought not, itself, to determine the analysis of the presumption of innocence in section 11(d) of the Charter even though, given the nature of the rights in section 7, such possibility has relevance under that section. Indeed, it is only the availability of imprisonment that, both at common law and under the Charter, compels the conclusion that liability must be determined on a basis that is not absolute.

R. v. Sault Ste. Marie, above, at 1313-1314

Reference Re s.94(2) of the Motor Vehicle Act (B.C.), above, per Lamer J. at 515

(iii) Fairness

54. Having reviewed the differences between regulatory offences and true crimes, Dickson J. in R. v. Sault Ste. Marie emphasized that it would not be unfair to require the accused to assume the burden of proving due diligence, "as he is the only one who will generally have the means of proof". He stated:

> In the 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 where it is alleged, for example, that pollution was caused by activities of a large and complex corporation.

R. v. Sault Ste. Marie, above, at 1325

55. This Court has affirmed the application of this same rationale in two recent cases dealing with the presumption of innocence in section 11(d) of the Charter.

Potvin v. The Queen, [1989] 1 S.C.R. 525, per Wilson J. (for the Court on this issue), at 547:

> Absent exceptional circumstances not present here, it seems to me perfectly reasonable to expect an accused to be able to prove whether or not he or she was deprived of a full opportunity to cross examine the witness. Only the accused, after all, (or his or her counsel) knows what was comprised in that "full opportunity" and the extent to which, if at all, it was denied or restricted.

Schwartz v. The Queen, [1988] 2 S.C.R. 443, per McIntyre J. (for the majority), at 484-486:

> The theory behind any licensing system is that when an issue arises as to the possession of a 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 ..., it is the expectation inherent in the system.

56. This rationale is appropriate to the defence of due diligence because the standard of proof on a balance of probabilities is not onerous in respect of facts that are uniquely within the knowledge of the accused. He or she need only lead some credible evidence of the relevant fact to meet the standard, in the absence of rebuttal by the Crown.

57. It is respectfully submitted that the text of section 11(d) of the Charter, which groups together a cluster of rights relating to the issue of fairness, strongly suggests that this is an important value underlying the presumption of innocence.

58. This Court's decision, in R. v. Sault Ste. Marie, not to treat regulatory offences as offences requiring proof of mens rea reflects its recognition, subsequently reconfirmed in decisions under the Charter, that "the principles of fundamental justice operate to protect the integrity of the system itself, recognizing the legitimate interests not only of the accused but also of the accuser", and that these principles are designed to give the accused a fair hearing, not necessarily "the most favourable procedures that could possibly be imagined."

R. v. Sault Ste. Marie, above, at 1325-1326

Corbett v. The Queen, [1988] 1 S.C.R. 670, per La Forest J. at 745

Lyons v. The Queen, [1987] 2 S.C.R. 309, per La Forest J. (for the majority) at 362

Reference re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123, per Dickson C.J.C. at 1142

(iv) Conclusions

59. For all these reasons, it is submitted that the Charter does not require a mechanical equation of the presumption of innocence with the criminal law standard of reasonable doubt, at least in the context of the defence of due diligence for regulatory offences. The employment of civil concepts of "guilt" and "innocence", together with the limited or attenuated moral and social stigma associated with the application of criminal law sanctions in relation to regulatory offences, support the conclusion that importing some civil standards of proof is neither unfair nor contrary to the "presumption of innocence".

C. STRICT LIABILITY AND FUNDAMENTAL JUSTICE

60. In its approach to the interpretation of constitutional rights and freedoms, this Court has made it clear that the Charter was not enacted in a vacuum. The rights protected must be seen in historical context and in light of the other rights contained in the Charter. La Forest J. speaking for the Court in R. v. Lyons, noted that "the rights and freedoms protected by the Charter are not insular and discrete." Rather, they are aimed at protecting "a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada."

Lyons v. The Queen, above, per La Forest at 326

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295

R. v. Oakes, [1986] 1 S.C.R. 103, per Dickson C.J.C. at 136

Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J. at 516-517 and 536-540

61. This approach is of particular importance in construing the rights set out in section 11 of the Charter, in light of their relationship to the rights in section 7. Sections 8-14 of the

Charter are specific examples of the "principles of fundamental justice", and so provide an "invaluable key" to the meaning of section 7. Similarly, it is submitted that section 7 provides an invaluable key to the meaning of sections 8 to 14 of the Charter. These sections identify specific rights that have been constitutionally protected because, and only to the extent that, they reflect specific principles of fundamental justice.

> Reference re s. 94(2) of the Motor Vehicle Act (B.C.), above, per Lamer J. at 502-3 and 512

62. This Court has recognized that principles of fundamental justice are to be found in the basic tenets of the Canadian legal system, and that "future growth will be based on historical roots". In determining whether any given principle is one of fundamental justice, the Court must consider the principles and policies that have animated legislative and judicial practice in the relevant area. In particular, the common law is "one of the major repositories" of these basic tenets of our legal system.

> Reference re s. 94(2) of the Motor Vehicle Act (B.C.), above, per, Lamer J. at 502-503 and 512-13
>
> R. v. Beare, [1988] 2 S.C.R. 387, at 406
>
> Potvin v. The Queen, above, per Wilson J. at 540-541

63. This approach has been applied in outlining the broad contours of specific rights protected by sections 8 to 14 of the Charter. In particular, it is submitted that the first question one must ask in ascertaining whether a legal rule infringes the presumption of innocence in section 11(d) is whether it is offensive to basic Canadian notions of fundamental justice.

> Penno v. The Queen, above, per McLachlin J. (for the plurality) at p. 4:
>
> > The real question is whether the unavailability of the defence of drunkenness deprives the accused of "liberty and security of the person" in a way which violates "the principles of fundamental justice" and

hence violates the presumption of innocence. (emphasis added)

Lyons v. The Queen, above, per La Forest J. at 327

R. v. Beare, above, at 402-3

Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J., at 516 and 517

64. This is precisely the kind of inquiry embarked on by this Court in arriving at its judgment in R. v. Sault Ste. Marie. The Court held that absolute liability violated fundamental principles of penal liability in Canada, a conclusion confirmed in the constitutional context in the Reference re s. 94(2) of the Motor Vehicle Act (B.C.), above.

R. v. Sault Ste. Marie, above, at 1316, 1319

65. At the same time, based upon the same principled analysis, the Court made it clear that "the correct approach" at common law was to confine the presumption of mens rea to "true crimes". In the area of regulatory offences, the Crown should be called on to prove the prohibited act, leaving it open to the accused to prove, on the balance of probabilities, that all reasonable care was taken to avoid the prohibited conduct. This approach has been adopted at common law by the New Zealand courts.

Civil Aviation v. MacKenzie, [1983] N.Z.L.R. 78 (C.A.), at 81-86

R. v. Sault Ste. Marie, above, at 1325

66. In the context of the Charter, it is submitted that these conclusions support a finding that the principles in R. v. Sault Ste. Marie do not offend against the principles of fundamental justice under either section 7 or section 11(d) of the Charter.

D. DEVELOPMENTS SINCE SAULT STE. MARIE

67. The principles enunciated in the unanimous judgment of this Court in R. v. Sault Ste. Marie have animated legislative and judicial practice in Ontario, and elsewhere, for some time prior to, and consistently since that judgment was rendered in 1978. To the extent that the judgment under appeal now implies that these principles violate our fundamental notions of penal liability in respect of regulatory or public welfare offences, the Attorney General of Ontario submits that it is wrongly decided.

68. There is absolutely no evidence that the governments of Canada and the provinces, in securing the enactment of the Charter, intended to alter or overrule the common law rules as to the presumption of mens rea or the presumption of innocence as applied to regulatory offences, established in that judgment. Indeed, the marginal note to section 11 of the Charter, referring to "proceedings in criminal and penal matters", may be taken to reflect a continued recognition of the distinction between true crimes and regulatory offences, and its significance to the enumerated rights.

69. Since the enactment of the Charter, the defence of due diligence has been made available in all regulatory offences that provide for a possibility of imprisonment. This reflects a recognition that the availability of imprisonment as a punishment implies some minimum required level of "fault". At least for regulatory offences, this minimum level of fault is achieved by leaving open a defence of due diligence on the basis of this Court's judgment in R. v. Sault Ste. Marie.

Reference re s. 94(2) of the Motor Vehicle Act (B.C.), above

R. v. Cancoil Thermal Corporation, above

R. v. Vaillancourt, [1987] 2 S.C.R. 636, at 652

70. There is no evidence whatever, either in this case or in the recent report of the Ontario Law Reform Commission, that the practical application of the burden of proof of due diligence under the principles in R. v. Sault Ste. Marie occasions any unfairness to an accused, that could be the basis for a finding that the principles of fundamental justice are infringed; neither does the case law disclose such concerns. Equally, there is no evidence of difficulty or inconsistency in the application of those principles. The case for infringement of section 11(d) rests upon a bare assertion of abstract principle.

> Ontario Law Reform Commission, Report on the Basis of Liability in Provincial Offences, above, at 47-48

71. As this Court has recognized consistently in its analysis of legal rights under the Charter, it is not the abstract principle but the practical role and operation of the rights in our overall legal system that engage constitutional principles.

E. CONCLUSIONS

72. For all these reasons, if ss. 36(1) and 37.3 of the Competition Act are construed as creating a regulatory offence, then it is submitted that the majority judgment in the case on appeal is in error in extending and applying the judgment of this Court in Whyte v. The Queen, above, to the defence of due diligence under section 37.3(2)(a) and (b) of the Competition Act.

73. For all the same reasons, it is submitted that the Court should reject the argument that, apart from section 11(d) of the Charter, the principles of fundamental justice in section 7 require affirmative proof by the Crown of a subjective mens rea element, even for the most serious of regulatory offences.

74. This Court has affirmed that section 7 encompasses a constitutional requirement that the definition of certain offences include specific, subjective mens rea elements, but has made it clear that this is constitutionally required only for a "few" true criminal offences, distinguished by the serious moral stigma and severity of penalties that they attract.

R. v. Logan, Supreme Court of Canada, September 13, 1990, unreported, per Lamer C.J.C. at p. 8

R. v. Sault Ste. Marie, above, at 1325-1326

75. It is respectfully submitted that the requirements of section 7 of the Charter are satisfied, in respect of regulatory offences, by the requirements laid down by this Court, specifically in relation to one of the more serious regulatory offences in R. v. Sault Ste Marie.

III. SECTION 1 AND THE ONUS OF PROOF OF DUE DILIGENCE

76. If this Court concludes that the onus of proof of defence of due diligence in regulatory offences as recognized in R. v. Sault Ste. Marie offends the presumption of innocence in section 11(d) of the Charter, the Attorney General of Ontario submits that that onus, when used in association with a public welfare offence, will generally meet the tests for justification set out under section 1 of the Charter.

77. A person seeking to justify a limit upon a substantive Charter right must prove two things: that the objective served by the measure imposing the limit is important enough to permit the right to be overridden, and that the means in pursuit of that end do not infringe the right at issue gratuitously, unduly or disproportionately.

Whyte v. The Queen, above, at 20

A. OBJECTIVES

78. Regulatory legislation typically aims to mediate among competing social and economic interests, by protecting broad sectors of the public from the potentially adverse effects of otherwise lawful activities. In assessing the validity of such regulatory arrangements, the courts "must be mindful of the legislature's representative function", particularly when they review legislative efforts to protect the vulnerable.

Edwards Books and Art Ltd. v. The Queen, above, per Dickson C.J.C. at 779

A.G. Quebec v. Irwin Toy Ltd., [1989] 1 S.C.R. 927, per Dickson C.J.C., Lamer and Wilson JJ. at 993-994

McKinney v. University of Guelph, above, per La Forest J. (for the majority on the point) at pp. 41-42

79. Because legislative choices regarding "alternative forms of business regulation do not generally impinge on the values and provisions of the Charter", governments' objectives in developing such schemes are entitled to a "margin of appreciation" when scrutinized under the Charter. So long as the objectives are "reasonable" and not "unimportant or trivial" they are important enough to warrant limiting Charter rights.

Edwards Books and Art Ltd. v. The Queen, above, per Dickson C.J.C. at 770, 772

A.G. Quebec v. Irwin Toy Ltd., above, per Dickson C.J.C., Lamer and Wilson JJ. at 989-990

80. The interests informing regulatory arrangements will vary from statute to statute, but may often prove to engage fundamental values of life, health and public safety, or the protection of vulnerable individuals or groups against abuses of private power. Such values are central to the scheme and purposes of the Charter itself.

Thomson Newspapers v. Director of Investigation and Research, above, per La Forest J. at 506-507 and 509-510

R. v. Sault Ste. Marie, above, at 1310

81. It is in the context of these larger, and generally justifiable, regulatory objectives that the courts must evaluate the specific reasons, advanced in the legislatures and by this Court in R. v. Sault Ste. Marie, for basing successful resort to the defence of due diligence on affirmative proof that the defendant took all reasonable care.

82. The reasons for reversing the onus of proving due diligence are twofold: to protect the integrity and the effectiveness of the regulatory schemes themselves, and to relieve the Crown of the nearly impossible burden of refuting, beyond a reasonable doubt, a defendant's claim to have exercised due diligence. This Court has recognized that each of these objectives independently may be important enough to warrant limitation of Charter rights. Both buttress the defence of due diligence.

Whyte v. The Queen, above, at 26

R. v. Sault Ste. Marie, above, at 1320-1326

R. v. Keegstra, above, per Dickson C.J.C. at pp. 99-100

Chaulk and Morrissette v. The Queen, above, per Lamer C.J.C. at pp. 31-33

B. MEANS EMPLOYED

83. A reasonable limit on a Charter right is one that it is reasonable for the legislature (or the courts) to impose. In assessing the proportionality of means to ends, it is appropriate to consider three questions: whether the means are rationally connected to the end; whether they impair the protected right as little as reasonably possible; and whether the impact of the limit

on the Charter right is in proportion to the importance of the objectives sought to be achieved. It is essential, however, that these three questions be addressed realistically and flexibly, so that the inquiry reflects a regard for the nature of the area sought to be regulated, and is not confined to strict and unchanging standards.

Edwards Books and Art Ltd. v. The Queen, above, per Dickson C.J.C. at 768-769, 781-782, per La Forest J. at 794-795

Schwartz v. The Queen, above, per McIntyre J. at 487-489

(1) Rational Connection

84. Requiring persons accused of committing regulatory offences to prove that they took all reasonable care to comply with the scheme is rationally connected to both of the objectives identified.

85. It promotes the integrity and the effectiveness of the regulatory scheme as a whole in at least two important respects. First, it creates a strong incentive to keep records and to implement procedures that will demonstrate reasonable efforts to satisfy the regulatory standards. Second, it "operates so as to make it more difficult to avoid conviction" where the prohibited act or omission has been proven beyond a reasonable doubt, and so enhances the deterrence value of the offence provisions, and of prosecutions conducted pursuant to them.

R. v. Keegstra, above, per Dickson C.J.C. at p. 100

R. v. Ellis-Don Limited, above, per Galligan J.A. at pp. 11-12 and Carthy J.A. at pp.16-17

86. Similarly, placing a burden on an accused who raises due diligence to prove it on a balance of probabilities furthers "the objective of not putting a burden on the Crown which is virtually impossible to meet" (see paragraphs 43-45 and 54 above).

Chaulk and Morrissette v. The Queen, above, per Lamer C.J.C. at pp. 34-35

(2) The Minimum Reasonable Impairment

87. To be justified for purposes of section 1 of the Charter, a measure that limits the right to be presumed innocent need not be "the absolutely least intrusive means of attaining it objective"; it suffices that it be within "a range of means which impair s. 11(d) as little as is reasonably possible". In comparing alternative means of meeting justified objectives, "it is important to consider whether a less intrusive means would achieve the 'same' objective or would achieve the same objective as effectively". The question is whether alternative measures "would excessively compromise the effectiveness of the offence in achieving its purpose".

Chaulk and Morrissette v. The Queen, above, per Lamer C.J.C. at pp. 36-37, 39

R. v. Keegstra, above, per Dickson C.J.C. at pp.91 and 101

88. Incorporation of a persuasive burden into the defence of due diligence seeks "to strike a balance between two legitimate concerns": the defendants' legitimate interests in hearings that are just and fair, and the important community interest in the integrity and the effectiveness of the relevant regulatory scheme. The result reflects a conscious effort to secure the interests of the scheme in a way that interferes as little as possible with an accused person's right to be presumed innocent. In that sense, it "represents a restrained parliamentary response to a pressing social problem".

R. v. Sault Ste. Marie, above, at 1309-1326

R. v. Keegstra, above, per Dickson C.J.C. at p. 101

Whyte v. The Queen, above, at 26

89. Some courts and commentators have suggested that the objectives of regulatory offences could be achieved less intrusively by requiring only that the defendant raise a reasonable doubt about his or her due diligence.

R. v. Ellis-Don Ltd., above, per Galligan J.A. at pp. 13-14, per Houlden J.A. at pp. 8-9

Ontario Law Reform Commission, Report on the Basis of Liability for Provincial Offences, above

90. Until recently, that was the law in New Zealand: persons charged there with having committed regulatory offences had only to raise a reasonable doubt about the defence of reasonable mistake of fact to be acquitted. Recent decisions of the New Zealand courts, however, have disapproved of the way this arrangement works in practice, and have adopted the persuasive burden following this Court's decision in R. v. Sault Ste. Marie.

Civil Aviation Department v. MacKenzie, above, at 86

Ministry of Transport v. Burnetts Motors, [1980] 1 N.Z.L.R. 51 (C.A.), per Cooke J. at 57-58

91. Reduction of the defendant's burden to prove due diligence to a mere evidentiary burden may defeat the objectives of the offence itself, because of the difficulty prosecutors would experience refuting a due diligence defence beyond a reasonable doubt. This would compromise the effectiveness and integrity of the regulatory scheme, both by neutralizing any incentive to establish, maintain and monitor systems that demonstrate compliance with the regulatory standards, and by reducing significantly the deterrent effect of the offence provision.

Webb, "Regulatory Offences, the Mental Element, and the Charter: Rough Road Ahead," above, at 477

92. Similarly, this lesser standard would not serve the second objective promoted by the persuasive burden at all. The Crown

would still have to bear the almost impossible burden of proving the absence of due diligence beyond a reasonable doubt. The preliminary investigation necessary to prepare the Crown's case to meet this burden would almost certainly intrude to some extent upon other interests of the accused, such as the interest of privacy or in being secure against self-incrimination, that underlie other legal rights in the Charter. These considerations are relevant to the assessment of impairment under section 1.

Chaulk and Morrissette v. The Queen, above, per Lamer C.J.C. at p. 40

93. The Attorney General of Ontario submits, therefore, that a defence of due diligence that imports a persuasive burden interferes as little as is reasonably possible with the presumption of innocence set out in s. 11(d) of the Charter, if indeed it limits it at all. Substitution of any lesser burden could not achieve the "same" objectives, or could not achieve the same objectives as effectively.

Chaulk and Morrissette v. The Queen, above, per Lamer C.J.C. at pp. 36-37

(3) Proportionality of Objectives

94. As submitted in paragraphs 37-43 and 51-52, above, the consequences of being convicted of regulatory offences are generally less severe than those that flow from being convicted of true crimes. As public welfare offences are based on civil, not criminal, notions of fault and duty, the prospect of conviction of such an offence carries no imputation of retribution or moral culpability. Moreover, the sanctions imposed on conviction for regulatory offences are generally less severe than the punishments for committing true crimes, and the impact on a defendant's liberty or security interests are milder.

Thomson Newspapers Ltd. v. Director of Investigation and Research, above, per La Forest J. at 506-507 and 516-517

McKinlay Transport Ltd. v. The Queen, above

95. On the other hand, the objectives served by regulatory arrangements generally gain in significance, because of their explicit linkage to public and societal interests. The specific objectives promoted by reversing the burden of proving due diligence in public welfare offences are no less important than the aims of the regulatory schemes that contain such offences. The reason behind the shift in onus is to ensure that those larger aims are realized effectively.

96. Even in cases involving true crimes, this Court has recognized that the impact of limiting the presumption of innocence will be in proportion to its ends if the limit represents a reasonable choice among available options, or if it would be "unworkable" or "impracticable" given the statutory setting in which the issue arises to require the Crown to prove the relevant fact affirmatively.

Whyte v. The Queen, above, at 27

Schwartz v. The Queen, above, per McIntyre J. (for the majority) at 492-493

R. v. Keegstra, above, per Dickson C.J.C. at pp. 102-103

Chaulk and Morrissette v. The Queen, above, per Lamer C.J.C. at pp. 40-41

97. This Court's decision in R. v. Sault Ste. Marie reflects a considered judgment that reversing the onus with respect to due diligence is the most reasonable way of structuring the law of regulatory offences, precisely because it would be unworkable in most regulatory contexts to require the Crown to prove mens rea, or even an absence of due diligence. These conclusions have been endorsed by courts in other Commonwealth countries and by a clear

preponderance of Canadian law reform commissions and academic commentators.

Civil Aviation Department v. MacKenzie, above

"Strict Liability in Commonwealth Criminal Law" (1983), 3 Legal Studies 117, esp. at 138-139

Law Reform Commission of Canada, The Meaning of Guilt: Strict Liability (1974), esp. Chapter VIII

Law Reform Commission of Canada, Our Criminal Law (1976), esp. at 32-33

Institute of Law Research and Reform of Alberta, Defences to Provincial Charges (1984), esp. at 38

Law Reform Commission of Saskatchewan, Proposals for Defences to Provincial Statutes (1986), esp. at 13

Webb, "Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead", above

Gordon, The Criminal Law of Scotland (2d ed., 1978), at 293-294

Howard, "Strict Responsibility in the High Court of Australia," [1960] 76 L.Q.R. 547

contra:

Ontario Law Reform Commission, Report on the Basis of Liability for Provincial Offences, above

Mahoney, "The Presumption of Innocence: A New Era" (1988), 67 Canadian Bar Review 1.

98. The Attorney General of Ontario therefore submits that the impact of including a persuasive burden in the defence of due diligence is not disproportionate to the objectives advanced by doing so.

C. CONCLUSION

99. For these reasons, the Attorney General of Ontario submits that requiring persons charged with regulatory offences to prove

the defence of due diligence if they rely on it will generally be justified under section 1 of the Charter, at least where the objectives of the regulatory scheme in which the offences operate are themselves of sufficient importance to warrant some restriction on Charter rights.

IV. THE REMEDY IN THIS CASE

100. A law's inconsistency with the Constitution of Canada renders it invalid only "to the extent of the inconsistency". In rectifying Charter infringements in legislative provisions, therefore, courts should declare invalid only those portions of such provisions that entail the infringement. An entire provision should not be struck down unless, without the portions that must be excised, it cannot stand as a functioning whole.

Constitution Act, 1982, s.52(1)

Hess v. The Queen; Nguyen v. The Queen, above, per Wilson J. at p.29

Holmes v. The Queen, [1988] 1 S.C.R. 914, per Dickson C.J.C. (dissenting on other grounds) at 941

Royal College of Dental Surgeons v. Rocket, [1990] 2 S.C.R. 232, at 252.

101. The Attorney General of Ontario therefore submits respectfully that the court below did not err, given its conclusions on the substantive Charter issues, in excising only the paragraphs (c) and (d) and the words "he established that" from the opening words of s.37.3(2) of the Act.

PART IV - DISPOSITION REQUESTED

102. The Attorney General of Ontario requests that this Court conclude that the offence created by combining ss. 36(1) and 37.3(2)(a) and (b) of the Competition Act, if construed to be a regulatory or public welfare offence, does not infringe the rights contained in ss. 7 or 11(d) of the Charter, and in the alternative, that any such infringement is justified under section 1 as long as the objectives of the legislation are pressing and substantial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

W.J. Blacklock

S. John Page

M. Philip Tunley
Of Counsel for the Attorney General
of Ontario

Date: January 17, 1991

PART V - LIST OF AUTHORITIES