No: 21779

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal of Ontario)

BETWEEN:

THE WHOLESALE TRAVEL GROUP INC.

Appellant/Respondent
(Accused)

- and -

HER MAJESTY THE QUEEN

Respondent/Appellant

- and -

COLIN CHEDORE

- and -

THE ATTORNEY GENERAL OF ALBERTA

Intervenor

- and -

THE ATTORNEY GENERAL OF MANITOBA
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF NEW BRUNSWICK

Intervenors

FACTUM OF THE ATTORNEY GENERAL OF ALBERTA
INTERVENOR

ROBERT C. MAYBANK
Department of the Attorney General
Constitutional Law Section
4th Floor, Bowker Building
9833 - 109 Street
Edmonton, Alberta

of Counsel for the Intervenor
The Attorney General of Alberta
(403) 498-3312

MESSRS. GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa Agents for the
Attorney General of Alberta
(613) 232-1781

(for the names and addresses of the Solicitors for the parties and their respective Ottawa Agents see inside following title page)

JOHN C. TAIT, Q.C.
Deputy Attorney General of Canada
Justice Building
239 Wellington Street
Ottawa, Ontario
K1A 0H8

(PER; MICHAEL R. DAMBROT)
(613) 952-7553

Counsel for the Respondent/Appellant

McCARTHY TETRAULT
Barristers and Solicitors
Suite 4700
Toronto-Dominion Bank Tower
Toronto, Ontario
M5K 1E6

(PER; W. IAN C. BINNIE)
(416) 362-1812

Counsel for the Appellant/Respondent

ATTORNEY GENERAL OF MANITOBA

SOLOWAY, WRIGHT, HOUSTON, GREENBURG, O'GRADY, MORIN
Barristers and Solicitors
99 Metcalfe Street
Ottawa, Ontario
K1P 6L7

Ottawa Agents for the Attorney General of Manitoba

ATTORNEY GENERAL OF SASKATCHEWAN

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

(613) 232-1781
Ottawa Agents for the Attorney General of Saskatchewan

ATTORNEY GENERAL OF ONTARIO	**SOLOWAY, WRIGHT, HOUSTON, GREENBURG, O'GRADY & MORIN** **Barristers and Solicitors** 99 Metcalfe Street Ottawa, Ontario K1P 6L7 Ottawa Agents for the Attorney General of Ontario
ATTORNEY GENERAL OF QUEBEC	**NOEL DECARY, AUBREY & ASSOCIATES** **Barristers and Solicitors** 111 Champlain Street Hull, Quebec J8X 3R1 (819) 770-8847 Ottawa Agents for the Attorney General of Quebec
ATTORNEY GENERAL OF NEW BRUNSWICK	**GOWLING & HENDERSON** **Barristers and Solicitors** Suite 2600 160 Elgin Street Ottawa, Ontario K1N 8S3 (613) 232-1781 Ottawa Agents for the Attorney General of New Brunswick

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FACTUM OF THE INTERVENOR

PART I

STATEMENT OF FACTS

1. The Attorney General of Alberta accepts the statement of facts set out in the factums of the Appellant and Respondent in this appeal.

PART II

POINTS IN ISSUE AND THE POSITION OF THE ATTORNEY GENERAL OF ALBERTA

2. The Points in Issue are stated in the factums of the Appellant and the Respondent.

3. The Attorney General of Alberta takes no position on the proper interpretation of subsection 36(1) of the Competition Act, R.S.C. 1970, c. C-23, as amended (the "Act") (Appendix 1), nor on the constitutional validity of subsection 2(c) and (d) of section 37.3 of the Act.

4. The Attorney General of Alberta intervenes in this appeal because of the potential impact that a ruling in this appeal may have on regulatory offences created by the Alberta Legislature, where the offence is cast as a strict liability offence by the application of common law principles, or by the provision of a statutory defence.

PART III

ARGUMENT

A. General

1. The majority of the Ontario Court of Appeal held that the impugned sections of the Act offended ss. 7 and 11(d) Charter rights in two ways, by

a) placing a pre-condition on the defence of due diligence otherwise available to the accused, with the result that conviction could occur even where the accused acted with due diligence;

b) placing the persuasive burden of proof on the accused to prove due diligence.

Appeal Book, pp. 96-7

2. In the recent decision in Her Majesty the Queen v. Ellis Don et al, the Ontario Court of Appeal relied on its reasoning in the Wholesale Travel decision to find that a provincial regulatory offence which imposed strict liability offended s. 11(d) rights.

Her Majesty the Queen v. Ellis Don, et al, unreported Dec. 3, 1990 (Ont. C.A.)

3. The Attorney General of Alberta wishes to draw the attention of this Honourable Court to the potential adverse significance to provincial regulatory laws, if this Honourable Court upholds the reasoning of the Ontario Court of Appeal that strict liability in regulatory contexts offends s. 11(d) rights. This Court must exercise caution, when determining the extent to

which principles developed in criminal law, are relevant and applicable in a regulatory context.

4. What is at stake may be no less than the efficacy of provincial regulation promoting public health, welfare and safety, including consumer protection, occupational health and environmental protection legislation. If the estimates of the Law Reform Commission of Canada are correct, in 1974 there were approximately 20,000 regulatory offences in an average province, plus 20,000 federal regulatory offences, 90% of the total being offences of strict liability. In 1974 it was estimated there were 1,400,000 convictions of roughly 850,000 persons for strict liability offences. In 1983 the estimate of federal regulatory offences was 97,000. Undoubtedly, by 1991 the number of strict liability federal and provincial regulatory offences has grown significantly. As stated by the Law Reform Commission, "The problem quantitatively speaking is enormous."

> Law Reform Commission of Canada, "Studies on Strict Liability", 1974 at 10.
>
> Law Reform Commission of Canada, "Policy Implementation, Compliance and Administrative Law", Working Paper 51, 1986 at 38

5. If strict liability is not available with the result that public welfare law may no longer be effectively enforced, the problem is enormous in qualitative terms as well.

6. If current regulatory offence structures are struck down, the entire regulatory approach to implementation of public policy objectives could be seriously and detrimentally affected. The impact on the "regulatory landscape of Canada is potentially enormous."

> K.R. Webb, "Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead", (1989) Ottawa L.R. 419 at 421

7. The essential issue is defining the extent to which principles developed in the criminal context, of a minimum mental requirement under s. 7 of the Charter or of the need to prove guilt beyond a reasonable doubt protected by s. 11(d), ought to be applied in the regulatory context.

8. Principles of a minimum mental element and proof beyond a reasonable doubt, developed in relation to criminal prosecutions, ought not to be applied in a blanket fashion to regulatory offences. The underlying justifications for the development of a minimum mens rea and the presumption of innocence in criminal law, are largely absent in the regulatory context.

9. The nature and purpose of regulatory offences are distinct from true crimes. The purpose of the criminal law is to punish. Consequently, only those who are morally culpable ought to be punished. The purpose of regulatory law is to promote standards of care for the public benefit. Moral blameworthiness or fault is not a necessary ingredient in a regulatory system.

10. The common law has long recognized the need for offences in the regulatory context that were not full mens rea. This presumption of innocence and its requirement that the actus reas and mens rea be proved beyond a reasonable doubt, has not been applied to regulatory offences by the English common law. The common law presumption of mens rea which developed in relation to true crimes is not applicable to regulatory offences.

11. Law reform commissions, academics and the judiciary have advocated and supported the idea that a person accused of a regulatory offence may be required to shoulder a persuasive burden of proving a due diligence defence, notwithstanding the presumption

of innocence which is the golden thread running through the history of the English Criminal Law.

B. Constitutionally Required Mens Rea in Regulatory Offences - A Flexible Approach

12. This Court, in a series of decisions relating to criminal law, has had the opportunity to develop the concept of a constitutionally required minimum mens rea. None of the cases to date has required an evaluation of the appropriateness or applicability of such a doctrine in the non-criminal area.

> R. v. Vaillancourt [1987] 2 S.C.R. 636 - s. 213(d) C.C. -the constructive murder provision
>
> R. v. Logan (1990) 58 C.C.C. (3d) 391 (S.C.C.) - s. 21(2) C.C. - the party provision when applied to s. 212(a) - the attempted murder provision
>
> R. v. Martineau (1990) 58 C.C.C. (3d) 353 (S.C.C.) - s. 213(a) C.C. - second degree murder

13. Even within the criminal area, this Honourable Court has made it clear that any constitutionally driven minimum degree of mens rea must be carefully restricted, by reference to the penal consequence which may result from a conviction, and most particularly, by the nature of the serious social stigma which may follow. It was acknowledged that there is no constitutional impediment to the creation of criminal offences with varying degrees of guilt, and it remains the function of the sentencing process to adjust the punishment for each individual offender accordingly. The offences for which s. 7 requires a minimum degree of mens rea, were described as consisting of but a few. (i.e. murder, theft) Consequently, by its own terms, the principle as defined in the most recent decision on the issue, has no application in the regulatory context.

> R. v. Logan, supra, at 398-400 (per Lamer, C.J.C.)

14. There was a suggestion in obiter in the earlier decision of R. v. Vaillancourt, however, that the decision of this Court in Re B.C. Motor Act [1985] 2 S.C.R. 486 (the "B.C. Reference") inferentially decided that whenever the state resorts to a restriction of liberty, such as imprisonment to assist in the enforcement of a law, the principles of fundamental justice require a minimum mental state which is an essential element of the offence:

> "Even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction."

R. v. Vaillancourt [1987] supra 636 at 652

R. v. Wholesale Travel Ltd, Appeal Book, pp. 9-11 (Ont. C.A.)

15. By its own terms, this suggested principle arising from the B.C. Reference is not inconsistent with the use of strict liability in provincial regulatory offences, and indeed expressly contemplates and apparently approves its use. It may, however, create problems for due diligence type defences drafted by statute, such as s. 171 of the Alberta Highway Traffic Act. (cited with approval by Dickson C.J. in R. v. Sault Ste. Marie).

R. v. Sault Ste. Marie [1978] 2 S.C.R. 1299 at 1312

Highway Traffic Act, R.S.A. 1980, c. H-7, s. 171 (Appendix 2)

16. The suggested recasting of the B.C. Reference as a case deciding that a minimum mens rea is applicable in the regulatory context, and the arbitrary choice of a specific minimum level of mens rea, is unfortunate. The brief statement fails to explore the justifications for the development of a minimum mens rea requirement in the criminal context, and whether those

justifications are present in the context of regulatory offences. The distinct purpose of regulatory legislation, the inapplicability of the common law presumption of mens rea to regulatory offences, the recognition that effective enforcement of many regulatory schemes may be undermined by a specific arbitrarily fixed mens rea requirement, the lack of serious social stigma associated with conviction under a regulatory offence, and the minor nature of penalties often available with only a very remote chance of imprisonment under many regulatory schemes, are all factors which ought to be considered when determining whether a constitutionally required minimum mens rea ought to be imported into regulatory offences generally, and if so, what level of mens rea ought to be required for any particular offence.

R. v. Martineau supra at 360
R. v. Vaillancourt, supra at 653

17. This Court is urged to adopt a flexible approach when determining whether a minimum mens area is constitutionally required for any particular regulatory offence, and if so, the level of mens area appropriate to the circumstances. An approach similar to that taken in relation to s. 8 of the Charter is preferred, where the content of the right is found after an examination of all relevant factors, rather than applying a fixed standard which developed in the criminal context.

Thomson Newspapers et al v. Director of Investigation and Research et al [1990] 1 S.C.R. 425

C. Presumption of Innocence in the Regulatory Context

18. The issue of the general applicability of s. 11 of the Charter to criminal, quasi-criminal, and regulatory offences was canvassed in R. v. Wigglesworth. It was held that the rights guaranteed by s. 11 are available to persons prosecuted by the

state for public offences involving punitive sanctions, (i.e. criminal, quasi-criminal and regulatory offences, federal or provincial). Even minor traffic offences attracting small fines, with virtually no stigma attached, were stated to be the kinds of matters falling within s. 11.

R. v Wigglesworth, [1987] 2 S.C.R. 553 at 559-60

19. In a series of decisions involving true crimes, this Court has developed and explored the content of a "presumption of innocence" protected by s. 11(d) of the Charter. The right as defined in the criminal context, ought not be applied to regulatory offences. The underlying rationale justifying the recognition of the presumption of innocence as defined by reference to criminal law, are absent in the context of regulatory offences. This Court should be flexible when determining the manner and extent to which the right to be "presumed innocent until proven guilty" ought to be applied to regulatory offences.

1. Content of the Presumption in the Criminal Context

20. The content of the presumption of innocence has developed to include the following:

a) i) An individual must be proven guilty beyond a reasonable doubt of all the essential elements of the offence.

ii) It is the State which must bear the burden of proof.

iii) Criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

R. v. Oakes [1986] 1 S.C.R. 103 at 121

R. v. Holmes [1988] 1 S.C.R. 914 at 933 (per Dickson C.J.)

b) The essential elements of the offence include not only those set out by the Legislature in the provision creating the offences but also those required by s. 7. Where the statutory definition of the offence does not include an element which is required under s. 7, there is a violation of s. 11(d).

R. v. Vaillancourt [1987] supra 636 at 654-5.

c) A requirement that the accused provide a lawful excuse or exemption based on criminal capacity rather than disprove an essential element of the offence, also violates the presumption of innocence.

R. v Holmes, supra at 934 (Per Dickson C.J. in the minority)

R. v. Whyte, [1988] 2 S.C.R. 3 at 16-18

R. v. Keegstra, unreported, Dec. 13, 1990, at 97-8 (S.C.C.)

R. v. Chaulk and Morrissette, unreported, Dec. 20th, 1990 at 21-28 (S.C.C.)

d) The presumption however, may not be applicable in every case, such as where the requirement of an accused to establish he was the holder of a registration certificate could not result in a conviction despite the existence of a reasonable doubt on the issue.

R. v. Schwartz [1988] 2 S.C.R. 443 at 485

R. v. Chaulk and Morrissette, supra, at 23-5

2. Rationale for the Presumption in the Criminal Context

21. The justifications relied upon by this Court, to recognize the presumption of innocence as defined, include:

a) The presumption of innocence is a hallowed principle lying at the very heart of criminal law...The presumption of innocence in English Criminal Law has enjoyed longstanding recognition at common law, and has been approved [in relation to true crimes] in Canada in cases such as R. v. Sault Ste. Marie [1978] supra 1299 at 1319.

R. v. Oakes, supra at 119-20

R. v. Holmes, supra at 932-3 (per Dickson C.J.C. dissenting)

R. v. Chaulk & Morrissette, supra at 15 per McLaughlin, J. dissenting

b) An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of personal liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. "To limit s. 11(d) to determinations whether an element is integral or extraneous to an offence, would lose sight of the fact that because of the grave social and personal consequences engendered by a finding of criminal liability, the law requires proof thereof beyond a reasonable doubt."

R. v. Oakes, supra, at 119

R. v. Holmes, supra at 932, 934 (Per Dickson C.J.C. dissenting)

c) The presumption of innocence is referred to in major international human rights documents such as the International Covenant on Civil and Political Rights, 1966, in Article 14(2): Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.

R. v. Oakes, supra, at 121

d) The presumption has been read into the due process provisions of the American Bill of Rights, and has received a high degree of constitutional protection.

R. v. Oakes, supra at 129-31

22. To what extent, if any, are the above mentioned justifications relevant in the regulatory context? The simple answer is that in relation to all regulatory offences, many of the justifications are not relevant, and in relation to many regulatory offences, none of the justifications are relevant. Consequently, the definition of the presumption of innocence which has developed in relation to true crimes, is not appropriate for regulatory offences. Again, this Court is urged to adopt a flexible approach to the application of the s. 11(d) guarantee to regulatory matters, similar to the flexible approach adopted in relation to s. 8 of the Charter.

Thompson Newspapers et al v. Director of Investigation and Research et al [1990] supra at 425

3. Inapplicability of Criminal Rationale in the Regulatory Context

23. The justifications for the development of the presumption of innocence shall be reviewed, and their relevance to regulatory offences examined.

i) Presumption of Innocence is a Hallowed Principle of Criminal Law, and has Enjoyed Longstanding Recognition at Common Law

24. There is a valid and workable distinction to be drawn between true crimes on the one hand, and "civil", "public welfare" or "regulatory" offences on the other.

25. The purpose of regulatory offences is significantly different from that of crimes:

> "...regulatory offences are those which, typically, are committed as much through carelessness as by design. Put it another way, the objective of the law of regulatory offences isn't to prohibit isolated acts of wickedness like murder, rape and robbery: it is to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the need to preserve our environment and husband its resources. In other words, the regulatory offence is basically and typically an offence of negligence."
>
> Law Reform Commission of Canada, Working Paper No. 2, "Criminal Law - Strict Liability", 1974, at 32
>
> Law Reform Commission of Canada, "Studies on Strict Liability", 1974 supra at 2-4
>
> Institute of Law Research and Reform, "Defences to Provincial Charges", Report No. 39, 1984 at 7-11
>
> Law Reform Commission of Saskatchewan, "Proposals for Defences to Provincial Offences", 1986 at 10-12

See also:

G. Richardson, "Strict Liability for Regulatory Crime: the Empirical Research [1987] Crim. L. Rev. 295 at 304

26. The distinction between true crimes and regulatory offences has long been recognized in common law. In 1826, William Blackstone discussed the traditional "mala in se/mala prohibita" dichotomy. Later in the leading case of R. v. Woodrow (1846), 15 M & W 404 (Ex.), the English court determined that in relation to certain (public welfare) offences there was no need for the prosecution to prove fault or mens rea. This development was apparently a result of the pressures of the Industrial Revolution, and the inefficacy of mens rea offences to suppress practices found to be detrimental to the general consumer and workers.

Sir William Blackstone, "Commentaries on the Laws of England", ed. Joseph & Chitty, London, 1826, Vol 1 at 51-2

I. Parker, "Strict Liability: Its Place in Public Welfare Offences" (1977-78) 20 Crim. L. Q. 445 at 455-460

G.L. Peiris, "Strict Liability in Commonwealth Criminal Law", 3 Legal Studies 117 at 121

K.R. Webb, "Regulatory Offences, The Mental Element and the Charter: Rough Road Ahead", (1989) Ottawa Law Review supra 419 at 426-429

27. In 1895, in Sherras v. DeRutzen Wright J. recognized that the presumption of mens rea was not applicable, inter alia, to acts

> "...which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."

Thus the fault or culpability of an accused was important for the conviction of a "true crime", and the presumption of mens rea was consequently applied, but the "moral blameworthiness" or

culpability of the accused was not needed for a conviction of an offence which was not a true crime.

Sherras v. DeRutzen [1895] 1 Q.B. 918 at 922

28. In 1971, the principle in Sherras v. DeRutzen recognizing the distinction between true crimes and regulatory offences, was cited with approval by the Supreme Court of Canada in R. v. Pierce Fisheries Ltd, where the Court stated:

> "Generally speaking, there is a presumption at common law that mens rea is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption."

R. v. Pierce Fisheries Ltd. [1971] S.C.R. 5 at 13-14

29. The distinction between true crimes and regulatory offences was also at the core of this Court's decision in R. v. Sault Ste. Marie, which recognized the distinction between true crimes and regulatory offences, and created the further sub-categories of regulatory offences: strict liability and absolute liability offences.

R. v. Sault Ste. Marie [1978] supra 1299 at 1302-3, 1309-10

30. The common law as it has continued to develop in England and other common law countries, such as Australia and New Zealand, has continued to recognize the distinction between true crimes and regulatory offences.

31. In England, the Privy Council has continued to recognize the category of statutes to which the presumption of mens rea may not apply (where the statute is concerned with an issue of social concern), and the imposition of strict [absolute] liability can be shown to be effective to promote the objects of the statute.

Gammon (Hong Kong) Ltd. v. Attorney General of Hong Kong [1985] A.C. 1 (P.C.)

32. In Australia, the High Court has long recognized the distinction between "true crimes" and offences under statutes dealing with "social and industrial regulation", or "matters of economic and social regulation". No presumption of mens rea is applied to such offences, and strict liability is the rule. The Australian Courts have been scrupulous in affording an accused at least the benefit of the defence of honest mistake of act creating their own "halfway house", where the legislation is silent on the matter.

C. Howard, "Strict Responsibility in the High Court of Australia" (1960) 76 Law Q. Rev. 547 at 562-3

G.L. Peiris, "Strict Liability in Commonwealth Criminal Law", supra at 131-135

33 The New Zealand Courts have expressly adopted the categorization of offences adopted by the Supreme Court of Canada in R. v. Sault Ste. Marie, including the concept of strict liability offences, and the requirement that an accused be required to prove due diligence on a balance of probabilities.

Civil Aviation Department v. MacKenzie [1983] 1 N.Z.L.R. 78 (C.A.)

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

34. The New Zealand Courts draw a distinction between "truly criminal charges and public welfare regulatory offences". The reasons stated for adopting strict liability, are twofold. The purpose of social legislation is to achieve compliance with an objective standard of conduct, so subjective intent has little relevance to the achievement of the purpose of the legislation. Second, since the defendant will ordinarily know far better than the prosecution how the breach occurred and what had been done to avoid it, it is not unreasonable to require a defendant to bear the burden of proving due diligence.

Civil Aviation Department v. MacKenzie, supra at 85

35. In the case of Millar v. Minister of Transport, the New Zealand Court of Appeal suggested no fewer than seven potential categories of offences. After some pragmatic analysis, the meaningful categories were reduced to three, being mens rea, strict liability, and absolute liability. It might be noted that one of the original seven categories which was eventually rejected, was a mens rea offence where in the absence of any evidence mens rea is presumed, but upon the accused raising some evidence of lack of mens rea the prosecution is required to prove knowledge affirmatively. This evidential presumption happens to be the "less intrusive means" advocated by the Ontario Law Reform Commission as an alternative to imposing a persuasive burden on the accused. With respect to this evidential presumption, the New Zealand Court stated that any distinction between it and a full mens rea offence is so narrow as not to be worth preserving.

Millar v. Ministry of Transport supra, at 644-668

Ontario Law Reform Commission, "The Basis of Liability for Provincial Offences", 1990

36. From the foregoing brief historical review, it is clear that the common law has long recognized a distinction between "true crimes", and "regulatory offences". The purpose of true crimes is distinct from the purpose of regulatory offences. As a result, the presumption of mens area has no application to regulatory offences. The Courts of England, Australia, New Zealand and Canada have continued to recognize the fundamental distinction between true crimes and regulatory offences, have applied different common law principles to each category, and have not found the categorization process to be unworkable. The common law does not support the proposition that the presumption of innocence, which requires proof beyond a reasonable doubt of both actus reus and mens rea, is applicable to regulatory offences.

ii) The Gravity of Consequences

37. In R. v. Oakes and R. v. Holmes, it was stated that the presumption of innocence is crucial given the "grave social and personal consequences, including potential loss of personal liberty, subjection to social stigma and ostracism from the community" faced by an individual charged with a criminal offence. Also, the extension of the presumption of innocence doctrine to protect an accused from the onus of proving an affirmative defence, was based on the "grave consequences of criminal conviction" rationale.

R. v. Oakes, supra at 119

R. v. Holmes, supra at 932, 934 (Per Dickson C.J. dissenting)

38. The assumption of "gravity of consequences" expected to flow from a conviction of a true crime, is obviously not accurate in relation to many regulatory offences caught by s. 11 of the Charter. For conviction of a regulatory offence, there is no

criminal record imposed, passport difficulties do not arise, and employment may not be adversely affected. Also, limitation periods for filing charges are generally much more restrictive for regulatory offences. Conviction for a regulatory offence does not carry the type of social stigma, nor lead to the sort of community ostracism, that flows from a criminal conviction.

> Law Reform Commission of Saskatchewan, "Proposals for Defences to Provincial Offences", 1986 supra at 11-12
>
> Law Reform Commission of Canada, "Studies on Strict Liability", 1974 supra at 2-4
>
> Sweet v. Parley [1970] A.C. 132 at 149 per Lord Reid
>
> J.C. Smith and B. Hogan, Criminal Law, 6th ed. (Butterworths: London) 1988 at 104

39. An example of how the assumed "gravity of consequences" is not accurate in relation to regulatory offences, is the recent Alberta Provincial Offences Procedures Act, S.A. 1988, c. P-21.5 (POPA), and particularly the procedures under Part III. POPA reflects an attempt by Alberta to decriminalize minor offences, and to deal with such matters more appropriately. Under POPA, a person charged with an offence does not suffer the potential of arrest for failing to appear, and if convicted faces only the penalty of a relatively small fine, with no possibility of a jail sentence upon conviction directly or in default of payment. Conviction of minor offences such as parking violations, can hardly be said to lead to "social stigma" or "ostracism by the community". Collection of fines is enforced by requiring payment before the offender may renew his driver's licence, or register a vehicle. Yet by the authority of R. v. Wigglesworth, the protections of s. 11 apply. Alberta's attempt to decriminalize traffic violations and introduce procedural efficiency, is currently the subject of a s. 11 challenge on the basis that the new procedures fail to satisfy some of the s. 11 procedural protections. The application of full

criminal procedural protections through s. 11, to all provincial regulatory offences, may thwart provincial attempts to decriminalize minor regulatory offences.

Provincial Offences Procedures Act, S.A. 1988, c. P-21.5 (Appendix 3)

iii) Major International Human Rights Documents

40. In R. v. Oakes, supra, Chief Justice Dickson (as he then was) stated that "further evidence of the widespread acceptance of the presumption of innocence", was its inclusion in major human rights documents. It is not disputed that the presumption is recognized internationally, as an important and even essential concept in criminal law, but the inclusion of the presumption in the Universal Declaration of Human Rights or the International Covenant on Civil and Political Rights is not particularly instructive when determining the extent of the application of the presumption in the regulatory sphere.

R. v Oakes, supra at 120-1

41. The applicability of Article 14 of the International Covenant restricts the application of the presumption of innocence to everyone "charged with a criminal offence." It is submitted that such wording suggests that regulatory matters might be excluded from application of the full blown criminal presumption, without offending the spirit or the letter of the Convention.

iv) The American Bill of Rights

42. In Oakes, supra, it was noted that the American Bill of Rights had afforded a "high degree of constitutional protection to the principle that an accused must be found guilty beyond a reasonable doubt." The rationale for the protection is the "grave

consequences" justification, expressed by Brennan J. in Re Winship 397 U.S. 358 (1970), and cited as follows in Oakes, at 131:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt
>
> R. v. Oakes, supra at 130-1

43. As discussed, the "grave consequences" rationale, particularly that aspect respecting "stigma", loses a great deal of its relevance in the context of a conviction for a regulatory offence.

44. The "high degree of protection" of the right to be presumed innocent in criminal proceedings found in the Due Process clause of the U.S. Bill of Rights, does not prevent a state from imposing on an accused, the burden of proving an affirmative defence on the balance of probabilities. The U.S. Supreme Court has upheld provisions requiring an accused to prove the affirmative defence of "extreme emotional disturbance", or the defence of self-defence, in murder cases.

> Patterson v. New York 432 U.S. 197 (1977)
> Martin v. Ohio 480 U.S. 228 (1987)
>
> See also
>
> C.A. Wright, K.W. Graham, Federal Practice and Procedure, Vol. 21, Federal Rules of Evidence; 1990 Supplement s. 5142

45. The Winship case in 1970, cited in Oakes, was the first case in which the U.S. Supreme Court held that the reasonable doubt standard could be required by the Due Process clause of the Fourteenth Amendment to the U.S. Bill of Rights. The second issue in the case involved the breadth of applicability of the newly constitutionalized reasonable doubt standard. The applicability of the standard was obviously not automatic in all contexts. The Court found that the reasonable doubt standard was applicable to a prosecution for larceny in juvenile delinquency hearings, where the accused faced imprisonment of up to 6 years, given the criminal nature of the proceedings and the onerous penalty involved.

In Re Winship, supra, at 365-8

46. Reference to U.S. constitutional principles does not support the contention that all constitutional procedural protections which evolve in the criminal law, ought to be applied in the regulatory context.

47. American jurisprudence, independently from the English common law, recognized the distinction between true crimes, and public welfare offences. The normal mens rea requirement was not found to be a necessary ingredient of "public welfare" or regulatory offences. The justifications for conviction without proof of fault of American regulatory offences, were remarkably similar to those that evolved in English common law.

Sayre, "Public Welfare Offences", (1933) 33 Col. L. Rev. 55

48. The American terminology often used to distinguish between true crimes and regulatory offences, is "mala in se" and "mala prohibita" or crimes and civil offences. The difference has been stated to be "very real and substantial, and such that it is clearly distinguishable under most circumstances."

R.M. Perkins, Criminal Law, 3rd ed, (The Foundation Press, Inc: New York) 1982, ch. 7, s. 5 "The Civil Offence"

49. The presumption of innocence which is protected by the due process provisions of the U.S. Bill of Rights is not applicable in relation to the prosecution of a "civil offence". As stated by Professor Perkins:

> In a criminal trial the prosecution has the burden of proof as to every element of the offence charged. A presumption may serve the purpose of evidence as to some point unless the defendant raises the issue. But if defendant produces evidence to raise the issue, the prosecution has the burden of satisfying the trier of fact that this element was also present. On the other hand, in the trial of a civil offense the only burden on the prosecution is to prove the actus reus. If the prosecution proves that the defendant did what the statute says should not be done, or failed to do what the statute says should be done, that is sufficient for conviction - if the evidence stops there. But, as pointed out, this does not preclude the possibility of exoneration. The defendant should not be found guilty if he is able to prove that he did not know, and could not be expected to know, the forbidden nature of the contents of a package he was carrying, for example; or that he could not stop because of a sudden brake failure that he could not possibly have foreseen; or that he was forced to act under compulsion that he could not be expected to resist; or other evidence to show that he would not in good conscience, be held accountable. <u>In such proof in a civil-offence case, however, it is not sufficient for defendant to raise the issue - he has the burden of convincing the trier of fact</u>.
>
> (Emphasis Added)

Perkins, supra at 907

50. There is much American jurisprudence relating to whether an offence ought to be characterized as criminal or civil, and if so, which constitutional procedural protections are available. When characterizing offences, and determining which constitutional

procedural protections ought to be extended, the American courts take a very flexible approach, and examine many factors surrounding the legislative act to determine which constitutional procedural protections ought to be extended. For instance, the juvenile delinquency proceedings in Winship which attracted the presumption of innocence guarantee, were not sufficiently analogous to a criminal prosecution for the accused to be entitled to a jury trial.

R.D. Rotunda, J.E. Novak, H.N. Young, Treatise on Constitutional Law, Vol. 2, 1986 at 269

McKeiver v. Pennsylvania 403 U.S. 528 (1971)

51. Reference to U.S. jurisprudence in relation to the extent of protection afforded the presumption of innocence does not support the proposition that imposing an onus on the accused to prove an affirmative defence offends a constitutionally entrenched presumption of innocence. Also, American jurisprudence suggests that a pragmatic, flexible approach ought to be adopted respecting the content of criminal procedural guarantees found in s. 11 of the Charter, when applied to regulatory offences.

4. Content of the Presumption in the Regulatory Context

52. Given the foregoing analysis, the presumption of innocence as defined in relation to true crimes is clearly not appropriate in relation to most, if not all regulatory offences. By reference to what principles ought the presumption be defined and applied in the regulatory context?

53. This appeal raises the fundamental issue of whether strict liability regulatory offences as defined in Sault Ste. Marie offend the presumption of innocence protected by s. 11(d) of the Charter. The Attorney General of Alberta submits that such strict

liability offences are not inconsistent with the presumption of innocence, and specifically joins issue with and supports the Attorney General of Ontario respecting the following propositions, set out in detail in Ontario's factum:

> a) a contextual approach to the interpretation of the content of the presumption of innocence protected by s. 11(d) ought to be taken, allowing the content of the presumption to vary to some degree depending on the context;
>
> b) the distinction between true crimes and regulatory offences remains a relevant difference of context for the purposes of the presumption of innocence, having regard to the nature, purpose and practical operation of the due diligence defence in regulatory prosecutions;
>
> c) The common law rules developed in R. v. Sault Ste. Marie, supra, which were based on a comprehensive review of the case law and considered fundamental principles of penal liability, are not contrary to the principles of fundamental justice underlying ss. 7 and 11(d) of the Charter.
>
> Factum of the Attorney General of Ontario, p. 5

54. The common law rules described in Sault Ste. Marie, are capable of being adapted and applied as Charter rules.

55. The common law distinction between true crimes, and regulatory offences, originally described in Sherras v. DeRutzen, and endorsed in Sault Ste. Marie, is a workable distinction for Charter purposes. For decades, courts have been characterizing offences as true crimes with full mens rea, or regulatory offences to which the presumption of evidence does not apply, where the legislation is silent on the issue. The characterization is made

after consideration of several factors. Those factors such as the subject matter of the legislation, its nature and purpose, the severity of the penalties, and legislative history, may be relied upon when characterizing offences as a true crime or regulatory offence for Charter purposes. Obviously, the factor of the language used, which may have been determinative in the days of Parliamentary sovereignty, is no longer necessarily determinative for Charter purposes.

56. With respect to regulatory offences, strict liability as defined in Sault Ste. Marie does not violate the presumption of innocence, for the reasons set out in the Sault Ste. Marie decision. No inconsistency was found between the recognition of strict liability, and the presumption of innocence in Woolmington v. D.P.P., [1935] A.C. 462. Also, there was no suggestion in Woolmington, that the Court was purporting to address the presumption of innocence in the non-criminal context respecting offences to which the presumption of innocence did not apply.

57. Chief Justice Dickson (as he then was) in Sault Ste. Marie, recognized the need for imposing the persuasive burden on the accused to prove the defence of due diligence, because of "the virtual impossibility in most regulatory cases of proving wrongful intention". It may be in many cases, that even requiring the prosecution to anticipate and meet the due diligence arguments of the accused may undermine the enforceability of the legislation, but such an obligation on the prosecution may be justified to afford an acceptable level of protection to the accused.

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

M.I. Jeffrey, "Environmental Enforcement and Regulation in the 1980's: Regina v. Sault Saint Marie Revisited" 10 Queen's Law Journal 43 at 67-8

Institute of Law Research and Reform, "Defences to Provincial Charges", supra at p. 28,37, para. 2-23, 2-32

Law Reform Commission of Canada, "Criminal Law - Strict Liability", supra, at 32-35

Law Reform Commission of Canada, "Our Criminal Law", 1976 at 22-3

Law Reform Commission of Saskatchewan, "Proposals for Defences to Provincial Offences", supra at 10-13

58. This is not to suggest that a statutory defence which may be somewhat narrower than the common law due diligence defence, could not pass constitutional muster under s. 11(d) of the Charter. Given that the purpose of regulatory legislation is to achieve an objective standard of care, a legislature ought to be given some flexibility in determining the level of standard of care which may be required in some particular business or industry. This level may be established by adjusting the breadth of due diligence type statutory defence made available. A statutory defence may specify certain minimum steps that must be taken by a person wishing to avail himself of the defence to ensure the objective of the legislation is achieved. A court's imposition of the common law defence of due diligence based on notions of fault and blameworthiness, as an arbitrary minimum defence to achieve compliance with s. 11(d), may not assist in creating the pragmatic contours of the presumption of innocence which would best serve the needs of justice.

See Sweet w. Parley [1970] A.C. 132 at 163 supra, per Lord Diplock

59. In conclusion, the content of the presumption of innocence in relation to regulatory offences should vary according to its context, to provide a meaningful constitutional safeguard without frustrating the ability of legislatures to implement policy through enforceable regulatory legislation. This approach would

avoid the spectre of declaring thousands of regulatory offences to be prima facie contrary to constitutionally protected rights of Canadians, to be saved only by prosecutors inundating courts with extensive s. 1 evidence and arguments in relation to each particular regulatory statute, or in relation to specific sections of those statutes.

PART IV

ORDER SOUGHT

60. The Attorney General of Alberta takes no position on the interpretation and characterization of the impugned provisions of the Act, as either criminal or regulatory, but requests this Honourable Court to fully consider the potential significance of its ruling on provincial regulatory legislation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at the City of Edmonton in the Province of Alberta this 28th day of January, 1991.

Robert C. Maybank
of Counsel for the Intervenor
The Attorney General of Alberta

PART V

TABLE OF AUTHORITIES

APPENDIX INDEX