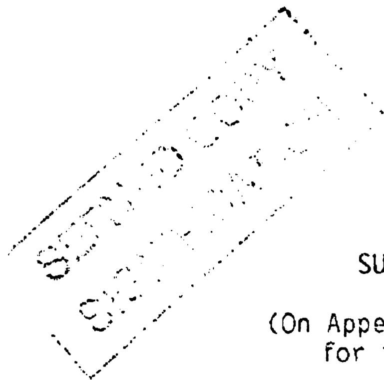

21779

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Court File No. 21779

SUPREME COURT OF CANADA

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

BETWEEN:

THE WHOLESALE TRAVEL GROUP,

APPELLANT/RESPONDENT
(accused)

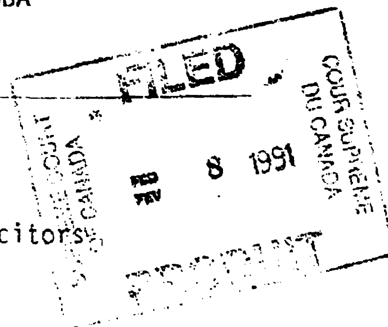
- and -

HER MAJESTY THE QUEEN,

RESPONDENT/APPELLANT

and COLIN CHEDORE

FACTUM OF THE ATTORNEY GENERAL OF MANITOBA
INTERVENER



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PART I

THE FACTS

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

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 Manitoba takes no position on the proper interpretation of subsection 36(1) of the Competition Act, R.S.C. 1970, c. C-23, as amended.

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

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(a) As to the constitutional validity of pars. (2)(c) and (d) of s. 37.3 of the Competition Act, in the light of s. 7 of the Charter, even if those provisions might be construed as creating an absolute liability offence and are therefore unconstitutional vis a vis an accused individual who risks imprisonment, they are not unconstitutional in relation to the Appellant. There are alternative approaches available under s. 52 of the Constitution Act, 1982 to the s. 7 issue and these should be considered when a challenge is brought by an individual accused.

20

(b) Assuming that subsection 36(1) can properly be characterized as a regulatory offence as opposed to a true crime, requiring the accused to discharge the persuasive burden of proof in respect of the defence of due diligence at common law or under pars. 37.3(2)(a)

and (b) of the Competition Act does not infringe ss. 7 or 11(d) of the Charter; and

(c) If this Court rejects the submissions above and finds an infringement, assuming that the offence is properly characterized as regulatory, the placing of the persuasive burden of proof with respect to the due diligence defence on the accused is justified under s. 1 of the Charter, not only in the context of this offence but with respect to such strict liability offences generally.

10

PART III

ARGUMENT

A. INTRODUCTION

1. Overview

5. While this Honourable Court has acknowledged that it is not its role "to pass on the validity of schemes which are not directly before it" (R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at 783), the reasoning that the Court chooses to adopt in this case may either support or threaten the integrity of a large number of regulatory schemes which utilize public welfare offences as part of their implementation strategies. This is the reason that the Attorney General of Manitoba has intervened in these proceedings.

20

R. v. Ellis-Don Limited, December 3, 1990, not yet reported (Ont. C.A.)

6. This Intervener supports the position taken by the Respondent that the impugned provision before this Court is aptly characterized as "regulatory". Unlike many other regulatory offences, this particular offence does present some special factors for consideration in order to determine its proper characterization, for example, the historical antecedents of this particular provision, and the availability of the indictment procedure.

7. Assuming that this Court accepts that the impugned offence is properly characterized as "regulatory", it is submitted that it is crucial to the determination of the Charter issues that the Court examine the concept of a regulatory offence in its appropriate context. While it is acknowledged that s. 11 of the Charter applies to such offences, it is submitted that the meaning of the presumption of innocence in par. 11(d), and certainly the reasonable limitations to it under s. 1, must be interpreted and understood in this context. To elucidate the proper contours of the presumption of innocence in the regulatory offence, one cannot turn a blind eye to the fact that the contest between the state and a person alleged to have committed a true criminal offence, such as murder, break and enter, or robbery, is quite different from the contest between the state and a person, such as the accused in this case, who has voluntarily entered a regulated field and impliedly accepted an obligation to live up to the prescribed standards.

8. Criminal offences are preeminently concerned with moral wrongdoing and therefore "fault" is clearly focused on the mental element; regulatory offences are preeminently concerned with attributing responsibility for harmful conduct and therefore "fault" is focused on what was done by the accused. What was in the accused's mind is obviously very relevant in terms of moral wrongdoing, but is of no relevance in terms of determining whether the accused failed to live up to a required standard. Thus, as will be argued in more detail below, to speak of the "presumption of innocence" in the context of a "mental element" in "regulatory offences" is to attempt to force regulatory offences into a mould that denies their history, purpose and essence.

9. It is respectfully submitted that in the field of public welfare offences, the approach in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299 draws a delicate balance between effective enforcement of these regulatory schemes and the preservation of individual civil liberties. The balance drawn, insofar as strict liability offences offer the accused the opportunity to exonerate itself by establishing due diligence on a balance of probabilities, is fully consistent with Charter values and the specific guarantees in sections 7 and 11(d).

10. Both the Courts and the legislatures have, on the whole, embraced the concept of strict liability as articulated in that case as clear, fair, and practical. Policy objectives can be maintained, and perhaps enhanced, where the regulated know that they may be able to escape conviction and sentence, if, when called upon, they can establish that everything reasonable was done to avoid the happening of the prohibited conduct. (It is submitted that, in some instances, absolute liability may also be practical and necessary, but it is acknowledged that where an individual is liable to imprisonment for committing an absolute liability offence this will rarely pass constitutional muster.)

11. While the provision of an opportunity for the accused to exonerate itself from responsibility also furthers the sense of fairness to the accused, it does not of itself transform the strict liability regulatory offence into one concerned with <u>moral wrongdoing</u> requiring consideration of a mental element or <u>mens rea</u> in the traditional sense.

12. Moreover, it is submitted that the thrust of the Appellant's argument requires this Court to import into the concept of the presumption of innocence a <u>separate</u> concept - the "presumption" that <u>mens rea</u> is a necessary element of an offence. Yet the latter is a principle of fundamental justice that applies <u>solely to true crimes</u>. While the presumption of innocence clearly applies to the <u>mens rea</u> requirement in the context of true crimes, so as to determine the relevant burden and standard of proof, it is submitted that one cannot import a presumption concerning the requirement for <u>mens rea</u> into the regulatory offence via par. 11(d). That <u>Charter</u> provision, it is submitted, is concerned with the burden and standard of proof: it has no substantive role to play in defining offences.

13. Before detailing the arguments under ss. 7, 11(d) and 1, this Intervener will next set out contextual considerations relevant to the Court's analysis under all of those <u>Charter</u> provisions.

2. The Context: The Regulatory Offence in Canada

14. In Canada, government intervention to guarantee or improve the quality of life generally or to protect the vulnerable has been a part of our history as a nation: direct government intervention, as well as intervention through regulation of private actors, are entrenched values in Canadian society. It is submitted that the observations made by Madam Justice Wilson in McKinney v. University of Guelph, December 4, 1990, not yet reported (S.C.C.), as to the role of the Canadian state are correct and relevant to this Court's consideration of the issues in this case under ss. 11(d), 7 and 1 of the Charter.

> *Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society. . . . In my view, it is untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action.*
>
> *...while government intervention has traditionally been acceptable to Canadians, the state has never assumed sole responsibility for economic and social welfare matters. There has always been and continues to be a broad sphere of purely private activity in Canada.*
>
> McKinney v. University of Guelph, per Wilson J. at 46 and see generally at 32-48

15. Consistent with this tradition of intervention, both Parliament and the Legislatures have adopted a number of regulatory schemes which make use of the criminal law process, or, just as significantly, the potential availability of that process, to enforce standards of behaviour. These have been referred to as "public welfare" or "regulatory" offences.

16. A mere recital of a number of examples of other regulatory schemes and public welfare offences demonstrates their importance :

> The Consumer Protection Act, C.C.S.M., c. C200, ss. 94(1) and (2);

The Dangerous Goods Handling and Transportation Act, C.C.S.M., c. D12, ss. 31, 32, 32.1(1), 32.1(2) and 32.3;

The Environment Act, C.C.S.M., c. E125, ss. 31, 32, 33(1), 33(2), 35 and 36;

The Highway Traffic Act, C.C.S.M., c. H60, ss. 155(1)-(10), 188(1)-(3), 189(1), 189(2) and 239;

The Public Health Act, C.C.S.M., c. P210, ss. 33(1) and 33(2);

10

The Workplace Safety and Health Act, C.C.S.M., c. W210, ss. 54, 55(1)-(4); Man. Reg. 189/85, ss. 140-144 (Deep Foundation Excavations)

The Liquor Control Act, C.C.S.M., c. L160.

17. It is submitted that the impugned statutory scheme and other such schemes can properly be viewed as guaranteeing certain rights, for example,

- to consumers, to allow them the freedom to make choices based on accurate information, and without improper pressure;

20

- to workers, to enjoy a safe and healthy workplace;

- to citizens generally, to a clean environment;

- to pedestrians and other users of the highways, to safety.

18. While such "rights" are not protected by specific Charter guarantees, they are nonetheless of obvious importance to the health and well-being of Canadians and to the quality of life we have come to expect in our free and democratic society. For example,

30

> *[a]sbestosis, brown lung disease, lead poisoning, the spread of what were once rare cancers, such as liver cancer, have shaken and aroused a public which has come to regard good health as a right. Understandably, occupational health and safety has become a significant issue for politicians.*

H.J. Glasbeek, "A Role for Criminal Sanctions in Occupational Health and Safety" in New Developments in Employment Law, Meredith Memorial Lectures (1988) 125 at 129

19. Such "rights" are protected by requiring those who choose to carry on activities which carry inherent risk to those rights, to live up to certain requirements and to abide by certain standards of behaviour. These standards are enforced through a variety of approaches including the regulatory offence.

> *The Occupational Health and Safety Act is part of a large family of statutes creating what are known as public welfare offences. The Act has a proud place in this group of statutes because its progenitors, the Factory Acts, were among the first public welfare statutes designed to establish standards of health in the work place. Examples of this type of statute 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.*
>
> . . .
>
> *This aspect of deterrence [positive and educative] is particularly applicable to public welfare offences where it is essential for the proper functioning of our society for citizens at large to expect that basic rules are established and enforced to protect the physical, economic and social welfare of the public.*
>
> R. v. Cotton Felts Ltd. (1982), 2 C.C.C. (3d) 287 (Ont. C.A.) at 294 and 295

20. When the Law Reform Commission of Canada considered the topic of Our Criminal Law in 1976, they acknowledged the utility of the regulatory offence:

> *Such acts have to do with commerce, trade, industry and other matters which must be regulated in the general interest of society; and criminal regulation is a well-tried and useful method of regulation. The regulatory offence, therefore, is here to stay.*
>
> Law Reform Commission of Canada, Report: Our Criminal Law (1976) at 11

21. The Commission's recommendation was that what was known as "strict" liability, what we now refer to as absolute liability, required change, but in recognition of the important social policy goals of regulatory offences, the Commissioners were cautious in their recommendations for change.

> *...we recommend that regulatory offences should admit of a defence of due diligence to be established by the defendant. This should at least be tried as a temporary measure with a limited number of offences by way of experiment to allow the offence to be monitored. Such a defence would allow him to exonerate himself by showing that he used all reasonable care. It would also call upon him to explain himself and show what happened. This would be fair, expedient and practicable - fair to the morally blameless, expedient for the public scrutiny of standards of care, and practicable if recent legislation is our guide: many recent statutes now include due diligence offences.*
> (Law Reform Commission of Canada, supra, at 22-23, emphasis added)

22. With respect, it is submitted that the Court, whose task is not law reform but measuring legislation against Charter guarantees, must proceed with the utmost caution. The various studies and articles cited by the Respondent and the other Interveners support the contention that, in many fields, the regulatory offence ought to be understood as one part of an overall implementation strategy for regulatory standards: it is but one "leg" supporting the regulatory "table":

> *...the question of strict liability for corporate offences cannot be taken in isolation; it forms part of a regulatory scheme and can only be understood in that context.*
> (at 297)
>
> . . .
>
> *Enforcement personnel, it seems, commonly see their main task as the diminution or prevention of the harm against which the particular regulations are directed and regard the criminal law, as incorporated within the regulations, as a resource to assist them in that endeavour.*
> (at 300)

. . .

Legislative schemes regulating corporate conduct are primarily designed to prevent particular harms and are certainly seen in that light by those responsible for their enforcement. In large part, therefore, the overall legitimacy of any regulatory scheme and of the separate elements within it will flow from their combined ability to prevent harm. Each element will both contribute to and reflect the legitimacy of the whole.
(at 304)

10

. . .

In sum, the routine enforcement of regulatory offences typically exposes strict liability as merely one element within a regulatory scheme, the overall thrust of which is preventative. ... The principles of traditional criminal law and penology should not be applied automatically to the regulatory context.
(at 305-306)

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

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23. If the Court denies legislators the effective use of this support, the adverse consequences to society - to consumers, to workers, to those who live near industrial polluters - could well be substantial. The regulatory "table" may collapse. The Charter, it is submitted, will have been utilized by better situated individuals to roll back protections for the vulnerable, protections that Canadians have come to accept and expect. It is submitted that such a result was never intended by the framers of our Charter.

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Knowing that both inspection and preventing violations succeed in saving lives [in coal mines], it would be foolish to respond to our uncertainty over whether the punitive or the persuasive aspect of inspection produces this result by doing away with either punishment or persuasion. We might just do away with the more important one, or with the less important one without which, nevertheless, the more important cannot be viable. For example, persuasion might work best when everyone knows the inspectors can and do resort to punishment if their persuasive overtones are ignored.

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> *Furthermore, the accumulated wisdom from the study of business regulation generally, beyond the limited domain of coal mine safety, instructs us that both punishment and persuasion are vital.*
>
> . . .
>
> *The power to punish helps give legitimacy to regulators who wish to persuade. One is inclined to listen to the persuasive overtones of an inspector if the consequences of not listening are his replacing the velvet glove with the iron fist.*
>
> John Braithwaite, To Punish or Persuade (1985), at 86 and 118

24. There is a further reason for this Court to proceed cautiously. In the case at bar, as with many other regulatory offences, as noted by Braithwaite, the impugned legislation forms part of a scheme of business regulation. Business regulation is rooted in policy choices. By stipulating a defence of due diligence and requiring the accused to establish it on a balance of probabilities, the legislators have made a decision concerning the degree of intrusiveness appropriate in light of the policy goals. The legislators have decided that the incentive for the accused to live up to regulated standards cannot be unacceptably diluted, but fairness to the accused requires the opportunity for exoneration if, as here, it is to be exposed to the sanction of a potentially heavy fine, or, in the case of an individual, potential imprisonment. If the accused conducts itself with the knowledge that it merely has to be in a position to raise a reasonable doubt as to whether it has exercised due diligence, it is submitted that logic leads to the conclusion that this may well diminish the care taken by the corporate or individual accused in an effort to meet the regulated standards. With respect, it is submitted that this Court must bear in mind that if it in effect declares the regulatory offence as we know it today to be unconstitutional, it will be fine-tuning and adjusting the balance of business regulation away from intervention toward a more laissez-faire approach. This is not the task that the Charter has assigned to the judiciary.

B. CHARTER s. 7

1. Absolute Liability and s. 7: Can the Corporate Accused Complain?

25. This Intervener takes no position on the proper interpretation and effect of pars. 37.3(2)(c) and (d) of the Competition Act. However, assuming, for the sake of argument, that the Ontario Court of Appeal was correct in deciding that pars. 37.3(2)(c) and (d) of the Competition Act, when combined with par. 36(1)(a), create an absolute liability offence, it is respectfully submitted that the provisions do not violate Charter s. 7 in respect of the Appellant.

26. The basis for the finding of unconstitutionality by the majority in the Ontario Court of Appeal was the decision of this Court in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 that an accused may defend a criminal charge by arguing that the law under which that charge was brought is unconstitutional.

27. The law at issue in Big M Drug Mart was the Lord's Day Act. Dickson J. (as he then was), for the majority, ruled that the Act had an unconstitutional purpose and therefore was invalid by its nature, not because of the status of the accused.

Big M Drug Mart, supra, at 314 and 333

28. The ruling in Big M Drug Mart did not entail that an individual accused and a corporate accused will receive the equal protection of the Charter in all circumstances. Specifically as regards Charter s. 7, Lamer J. (as he then was) wrote for the majority in the later case of Reference re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, as follows:

> *Of course I understand the concern of many as regards corporate offences, especially, as was mentioned by the Court of Appeal, in certain sensitive areas such as the preservation of our*

> *vital environment and our natural resources. This concern might be dispelled were it to be decided, given the proper case, that s. 7 affords protection to human persons only and does not extend to corporations.*
> (at 518)

29. Subsequently, in Irwin Toy Ltd. v. A.G. Que., [1989] 1 S.C.R. 927, the majority judgment of Dickson C.J.C., Lamer J. and Wilson J. expressly distinguished between the s. 7 protection available to a corporate and an individual accused:

10

> *Imprisonment is clearly one of the penalties envisioned for contravention of, inter alia, ss. 248 and 249 of the Act. A corporation is not, for obvious reasons, subject to imprisonment. By virtue of s. 282 of the Act, directors of corporations are deemed to be parties to offences committed by the corporation and are therefore liable to the penalties listed above. It is, therefore, the directors and representatives of corporations who risk, pursuant to the Act, a restriction of liberty of the kind envisioned in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.*
>
> . . .
>
> *In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter....We have already noted that it is nonsensical to speak of a corporation being put in jail.*
> (at 1002-1003)

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30

30. It is acknowledged that in Irwin Toy, the majority concluded its discussion on s. 7 with the following obiter comment:

> *There are no penal proceedings pending in the case at hand, so the principle articulated in Big M Drug Mart is not involved.*
>
> Irwin Toy, supra, at 1004, quoted by Tarnopolsky, J.A. at 7, Reasons for Judgment (Case on Appeal, at 93).

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31. It is submitted, however, that the distinction pointed out in par. 29 between corporations and individuals, drawn on the basis of *Reference re B.C. Motor Vehicle Act*, is fully justifiable and ought to be specifically addressed in the case at bar. The ratio of *Reference re B.C. Motor Vehicle Act* was that a penal provision combining absolute liability and the possibility of imprisonment violates *Charter* s. 7. It is the combination of these factors that creates the *Charter* violation. Lamer J. emphasized that absolute liability *per se* does not violate *Charter* s. 7. Absolute liability always offends the principles of fundamental justice, but, further, offends s. 7 "...if *as a result*, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest." (at 517, emphasis added).

32. The possibility of imprisonment is an *effect* that may lead to a finding of unconstitutionality, not an unconstitutional *purpose* such as undermined the impugned statute in *Big M Drug Mart*. In the case of a corporation, however, no such effect is possible because the corporation cannot be imprisoned. Indeed, the Appellant has no life, liberty or security interest that may be affected by the penalties in the *Competition Act*.

33. Where the inquiry relates to unconstitutional *effect* as opposed to unconstitutional *purpose*, the status of the accused is relevant. In *Big M Drug Mart*, Dickson J. wrote as follows:

> *As the respondent submits, if the legislation under review had a secular purpose and the accused was claiming that it interfered with his religious freedom, the status of the accused and the nature of his belief might be relevant: it is one thing to claim that the legislation is itself unconstitutional, it is quite another to claim a "constitutional exemption" from otherwise valid legislation, which offends one's religious tenets.*
> (at 315)

34. Therefore, it is submitted that while pars. 37.3(2)(c) and (d) of the *Competition Act*, when combined with par. 36(1)(a), *would* violate *Charter* s. 7 in respect of an individual accused if they

create an absolute liability offence, they do not violate Charter s. 7 in respect of the Appellant.

35. It is submitted, with respect, that there is something fundamentally wrong in combining the principles in Big M Drug Mart and Reference re. B.C. Motor Vehicle Act in the manner proposed by the Appellant. Here, the essence of the corporation's complaint is the deprivation of a s. 7 interest as a result of a penal sanction - imprisonment - which cannot be applied to a corporation. And of course, the purpose of s. 7 is to provide rights to individuals, certainly not to protect the economic interests of corporations. In the case at bar, the accused risks a fine, in the discretion of the Court, which must not exceed $25,000 if the Crown proceeds summarily.

> Competition Act, supra, s. 36(5);
>
> Criminal Code, R.S.C. 1985, c. C46, ss. 719 and 720;
>
> [In the regulatory field, fines are often regarded as merely a cost of doing business. See, for example, Braithwaite, To Punish or Persuade, supra, at 88-89. It is submitted that the potential exposure to fines in the regulatory context should not be viewed as raising any "security of the person" interest under s. 7 of the Charter, even with respect to individuals. Certainly corporations have no security of the person interest under s. 7. See Irwin Toy, supra.]

36. Charges under the Competition Act are frequently brought against corporations as opposed to individuals. And, according t the evidence filed, imprisonment appears exceedingly rare, with one individual being noted as sentenced to jail during the fiscal years 1981-1982 to 1985-1986, in a case which "reflects the seriousness with which Courts are now regarding flagrant and fraudulent attempts to mislead the public."

> Consumer and Corporate Affairs, Canada, "Misleading Advertising Bulletin 4" (July - September, 1986), Case on Appeal at 45-63, esp. at 47

37. The Competition Act is not unique in this respect. Indeed much of our public welfare legislation is primarily aimed at, or

primarily affects corporations, whose operations hold the promise of benefit to shareholders and others as well as risks to society or segments of it. Given that this Court has said that corporate-commercial economic rights are not encompassed within s. 7, and that the Charter generally does not protect economic rights, this Court should be cautious in its extension of Big M Drug Mart lest it lead to corporations obtaining by the "back door" what they plainly cannot get through the "front door", all contrary to the intentions of the framers of the Charter.

10

> Irwin Toy, supra at 1003;
>
> Reference Re Sections 193 and 195.1(1)(c) Criminal Code, [1990] 1 S.C.R. 1123, per Lamer J. at 1164-1171, esp. at 1170-1171:
>
> > *In short I find myself in agreement with the following statement of McIntyre J. in Reference Re Public Service Employee Relations Act, supra [[1987] 1 S.C.R. 313] at p. 412:*
> >
> > > *It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) does not concern itself with economic rights.*

20

38. It is submitted that the Courts can find a way to ensure that the Charter s. 7 protection of the individual's physical and mental integrity is safeguarded, short of striking down the regulatory offence. Both s. 52 of the Constitution Act, 1982 and the principle that s. 7 does not invite the Courts to interfere with the policy making functions of the legislature, impel careful consideration of the appropriate remedial approach. It is submitted that there are alternatives which may be preferable to the approach taken by the Ontario Court of Appeal in this case.

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39. These alternatives should be examined by a Court when faced with a challenge by an individual who actually is at risk of a deprivation of a s. 7 right and not in this case where there is a accused who should not be afforded s. 7 rights. (It might also be noted that the B.C. Motor Vehicle Act case was a reference proceeding, and the Court was not called upon to consider the various "remedial" options consistent with s. 52 of the Constitution Act, 1982.)

40. First, this Court could uphold pars. 37.3(2)(c) and (d) in their entirety and rule that all accused individuals are constitutionally exempt from their operation. In Edwards Books, supra, Dickson C.J. left open the possibility that a provision might be rendered ineffective with respect to a limited class of persons, and in the context of this discussion suggested that different considerations might apply to a corporation than to natural persons.

> See R. v. Edwards Books and Art, supra, at 783-85

41. Secondly, this Court could rule that pars. 37.3(2)(c) and (d) ought to be "read out" of the section when applied to an individual accused, but not when applied to a corporate accused. Thus, the provisions could be of no force and effect in the context of accused individuals only.

> See R. v. Logan (1990), 79 C.R.(3d) 169 (S.C.C.), where this Court held that the words "or ought to have known" were to be read out of s. 21(2) of the Criminal Code only in respect of certain offences.

42. Alternatively, recognizing that imprisonment is rare, a Court could consider declaring inoperative only those parts of pars. 36(5)(a) and (b) which provide for a term of imprisonment, leaving pars. 37.3 (2)(c) and (d) intact. As the Court has said, absolute liability per se does not violate s. 7. It is only the additional possibility of imprisonment that invokes s. 7. The primary point being made here is that it is inappropriate to consider which approach is best until the Court has before it an individual charged with the offence who risks a s. 7 deprivation. (Should this Court reject this Intervener's submissions, and rule that the principle in Big M Drug Mart requires the Court to accede to the Appellant's s. 7 argument, the Court would then have to consider which of the alternatives above is constitutionally required, in the context of this particular statutory scheme. This Intervener takes no position as to which alternative should be adopted.)

43. This Court in Irwin Toy specifically noted that in that case there were no penal proceedings before the Court (par. 30 above). Had there been such proceedings, the Court would have had to consider whether the principle in Big M Drug Mart ought to apply so as to allow a corporation to challenge a penal provision because it might infringe the liberty or security interests of an individual person. It is submitted that this issue is really before the Court for the first time in the case at bar. There is a significant distinction between s. 7 and most other rights guaranteed in the Charter. There is a significant distinction between a corporation and an individual in terms of what interests are at risk in penal proceedings. It is submitted these distinctions support the Court finding Big M inapplicable where the only basis alleged by a corporation for a finding of invalidity is s. 7 of the Charter.

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See Reference Re Sections 193 and 195.1(1)(c) Criminal Code, supra, per Lamer J.:

> ...*s. 7 is, in a manner of speaking, "permissive". In other words the section allows the state to deprive an individual of life, liberty and security of the person as long as it abides by the principles of fundamental justice. It is important to note that the onus is on the person bringing the challenge to demonstrate not only the restriction of the rights but also that the state has not abided by the principles of fundamental justice. In my view then it is desirable to maintain a conceptual distinction between the rights guaranteed by s. 7 and the other freedoms in the Charter*.
> (at 1178-1179, emphasis added)

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44. As has been said, the corporation has no soul to damn or body to kick. It should not be permitted to utilize s. 7 of the Charter in the way it now seeks. It is respectfully submitted that this is "the proper case" to hold that "s. 7 affords protection to human persons only and does not extend to corporations". (see paragraph 28 above)

2. Section 7 and Strict Liability

45. The Appellant also argues that even if pars. 37.3(2) (c) and (d) were struck down, the remaining paragraphs, which create a strict liability offence, violate s. 7 of the Charter, given the penalties which may be imposed. It is submitted that the "status" problems identified above apply equally to this aspect of the s. 7 claim by this Appellant. The impugned provision does not breach s. 7 in respect of the Appellant. For the reasons set out above, the principle in Big M Drug Mart does not apply to assist the Appellant. The concepts of "life, liberty or security of the person" do not apply to a corporation.

46. It is further submitted that there would be an additional "remedial" alternative, in addition to those referred to at paragraphs 40 to 42 above, which this Court could consider when confronted with a challenge brought by an individual accused. In the strict liability context, it would be open to this Court to rule that the discretion to be exercised by a sentencing judge must be exercised in accordance with fundamental justice. Thus, imprisonment could be imposed only where the evidence disclosed "moral culpability". This would accord with the current practice in regulatory offences. Imprisonment is rarely used, and is reserved for the most flagrant of breaches. Still, its potential availability serves an important supportive role in the regulatory system both in symbolic and practical terms.

> See, by analogy, Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at 1079 per Lamer J.;
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> R. v. Beare, [1988] 2 S.C.R. 387 at 410-411;
>
> Contra: in the absolute liability context, see Reference re B.C. Motor Vehicle Act, supra.

47. Irrespective of the status of the accused to complain that strict liability violates s. 7 of the Charter, it is submitted that the defence of due diligence, as established by pars. 37.3(2)(a) and (b) of the Competition Act, does not violate the principles of fundamental justice referred to in Charter s. 7. This Court has decided only that absolute liability violates the principles of

fundamental justice. The strict liability notion was created by the judiciary and exemplifies fundamental justice notions in the context of regulatory offences. See the argument under Charter par. 11(d), infra.

> Reference re B.C. Motor Vehicle Act, supra, per Lamer J. at 515-516

C. CHARTER par. 11(d)

1. Introduction

48. This Intervener acknowledges that the presumption of
10 innocence in par. 11(d) of the Charter applies to regulatory offences.

> R. v. Wigglesworth, [1987] 2 S.C.R. 541

49. This Intervener submits, however, that this Court has not decided the precise meaning or content of the presumption of innocence in the context of regulatory or public welfare offences.

50. This Court has, on numerous occasions, emphasized that Charter rights and freedoms must be interpreted in their proper linguistic, historical and philosophical context.

> R. Big M Drug Mart, supra, at 344;
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> 20 Accord: (1) cases cited in Respondent's factum at p. 17, par. 35;
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> (2) cases cited in factum of intervener A.G. Ontario at pp. 6 and 7, pars. 14 and 15.

51. The presumption of innocence is one of the principles of fundamental justice in our legal system. The principles of fundamental justice, in turn, "...lie in the basic tenets of our legal system. They do not lie in the realm of general public policy, but in the inherent domain of the judiciary as guardian of the justice system."

Ref. re B.C. Motor Vehicle Act, supra, per Lamer J. at 503

52. Therefore, this Intervener submits, in interpreting the appropriate linguistic, historical and philosophical context of the presumption of innocence as it relates to regulatory offences, it is essential to refer to the development of the regulatory offence, as opposed to the criminal offence, at common law.

2. The Historical Development of the Regulatory Offence

53. The historical development of the regulatory offence has been examined to some extent in the factums of the Respondent and the Interveners the Attorneys General of Ontario and Alberta. It is clear that by the time of Sherras v. De Rutzen, [1895] 1 Q.B. 918, the English Courts had accepted that there was a class of offences where the ordinary presumption that mens rea must be proved was liable to be displaced, either by the words of the statute creating the offence or by the subject matter with which it deals.

Sherras v. De Rutzen, supra, per Wright J. at 921

54. This principle had crystallized to the extent that Wright J. was able to cite, in addition to certain exceptional individual cases, three general categories of offences that did not require proof of mens rea:

(1) acts which were not criminal in any real sense, but which in the public interest were prohibited under a penalty;

(2) public nuisances;

(3) proceedings which, though criminal in form, were really only a summary method of enforcing a civil right.

Sherras v. De Rutzen, supra, per Wright J. at 922

55. The numerous cases cited by Wright J. in support of this categorization scheme indicate, it is submitted, that all three

categories involved what today is known as the "regulatory" or "public welfare" offence. For example,

> Category (1): Roberts v. Egerton (1874), Law Rep. 9 Q.B. 494--sale of adulterated tea;
>
> Category (2): Barnes v. Akroyd (1872), Law Rep. 7 Q.B. 474--discharge of black smoke from factory chimney;
>
> Category (3): Hargreaves v. Diddams (1875), Law Rep. 10 Q.B. 582--enforcement of private fishing rights.

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56. The concept of the "no mens rea" offence was categorically accepted by this Court in R. v. Pierce Fisheries Ltd., [1971] S.C.R. 5, per Ritchie J. (for the majority):

> *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. Whether the presumption arises in the latter type of cases is dependent upon the words of the statute creating the offence and the subject-matter with which it deals.*
> (at 13)

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57. While the regulatory offence was being developed in the Courts, the criminal law was evolving in its own right. The culmination of this process was the fabled "golden thread" pronouncement by Viscount Sankey in Woolmington v. Director of Public Prosecutions, [1935] A.C. 462 (H.L):

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> *Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the*

prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.
(at 481-482, emphasis added)

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58. Interestingly, the point at issue in Woolmington was the correctness of the charge to the jury on the onus of proof respecting the "malice", i.e. the mens rea, of the accused. The Court determined that requiring the accused to disprove malice constituted a fatal error in the charge.

59. This Intervener submits that the judgment in R. v. Sault Ste. Marie, supra, must be read in the context of the distinct historical evolution of the "regulatory" as opposed to the "criminal" offence. Indeed, Dickson J. in Sault Ste. Marie began his judgment by emphasizing that nothing in his reasons was intended to "dilute or erode" the basic principle of guilty mind in the case of true crimes.

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The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of true crimes.
(at 1303)

60. This Intervener further submits that nothing in the Sault Ste. Marie judgment can be read as necessarily introducing a "mens rea" requirement into the regulatory offence. In fact, in recognizing three categories of penal offences (mens rea, strict liability and absolute liability), Dickson J. expressly contemplated that absolute liability was an option available to the legislator. Speaking of strict liability he stated:

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The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries....

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the

> *defendant to prove that all due care has been taken. This burden falls on the defendant....*
> (Sault Ste. Marie, supra, at 1325)

61. This passage, it is submitted, properly characterizes the nature of the "fault" or "negligence" recognized in Sault Ste. Marie in the context of regulatory offences. Fault, or negligence, was not incorporated as a proof requirement in regulatory offences. The Court viewed the absence of fault or negligence solely as a means of mitigating the harshness of the "no mens rea" rule. In this respect, "absence of negligence" or "due diligence" becomes simply a shorthand description of a judicial reform: the opportunity, not otherwise available, of avoiding liability for an offence that the accused has been shown to have committed.

Sault Ste. Marie, supra, at 1328

62. Furthermore, it is submitted that subsequent decisions of this Court have recognized that "fault" or "negligence" is not incorporated as a proof requirement in regulatory offences. In The Queen (Can.). v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, this Court rejected the proposition that there is an independent tort of breach of statutory duty. Implicit in the Court's reasoning, it is submitted, is a clear conceptual difference between the notion of negligence on the one hand, and breach of regulatory offences on the other hand. The judgment of the Court was written by Dickson J. (as he then was), who stated as follows:

> *One of the main reasons for shifting a loss to a defendant is that he has been at fault, that he has done some act which should be discouraged. There is then good reason for taking money from the defendant as well as a reason for giving it to the plaintiff who has suffered from the fault of the defendant. But there seems little in the way of defensible policy for holding a defendant who breached a statutory duty unwittingly to be negligent and obligated to pay even though not at fault. The legislature has imposed a penalty on a strictly admonitory basis and there seems little justification to add civil liability when such liability would tend to produce liability without fault. The legislature has determined the proper penalty for the defendant's wrong but if tort admonition of liability without fault is to be*

added, the financial consequences will be measured, not by the amount of the penalty, but by the amount of money which is required to compensate the plaintiff. Minimum fault may subject the defendant to heavy liability. Inconsequential violations should not subject the violator to any civil liability at all but should be left to the criminal Courts for enforcement of a fine.
(at 224-225, emphasis added)

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Also see: Patrick Healy, "Case Comment on R. v. Wholesale Travel Group Inc." (1990), 69 Can. Bar Rev. 761, drawing a distinction between "...mens rea as the actual mental state of the accused and fault as an actor's failure to meet a standard of conduct expected of a reasonable person in similar circumstances."
(at 767)

63. This Intervener submits that it was not the intention of this Court in Sault Ste. Marie, in recognizing the defence of due diligence, to interfere with the proof requirements in relation to regulatory offences. Dickson J., after noting that "[p]ublic welfare offences obviously lie in a field of conflicting values", expressly stated that "...it is essential for society to maintain through effective enforcement, high standards of public health and safety." (at 1310). The due diligence defence, including the reverse onus, was the appropriate means to avoid punishing those who had done everything they could to comply with the law, and were free of moral turpitude in that sense, without diminishing the aim of requiring those in the regulated field to comply with the law by taking all reasonable precautions (at 1311). (It must be noted that the legislators may create a mens rea offence in the public welfare field, by using apt words, such as "knowingly".)

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64. From this historical analysis, this Intervener draws two conclusions respecting the presumption of innocence in regulatory offences, even after Sault Ste. Marie:

1. except where specifically legislated, it does not include a mens rea component;
2. to drop the reverse onus and thus require the Crown to prove negligence, or "fault", would fundamentally alter the character of the regulatory offence.

65. With respect to the first conclusion, this Intervener submits, with the greatest respect, that Lamer J. (as he then was) erred in R. v. Vaillancourt, [1987] 2 S.C.R. 636 at 652, when, in obiter dictum, he characterized Reference re B.C. Motor Vehicle Act, supra, as elevating mens rea to a constitutionally required element for provincial regulatory offences.

66. With respect to the second conclusion, this Intervener submits that there are, in every regulatory offence, elements of "fault" that the Crown is required to prove: the accused has engaged in the regulated activity and has failed to comply with the required standards. Furthermore, where the legislator has expressly prescribed a "reasonable care" standard as opposed to a specific factual standard such as an emission or contamination level, and there is no specific "reverse onus" clause, the Crown will be required to prove a departure from standards of reasonable care in order to secure a conviction. But otherwise proof of negligence is simply beyond the scope of the offence, both in terms of social policy and practical enforcement.

> *The circumstances under which regulatory offences are committed are normally obscure in a way that more serious offences are not. No one commits murder or larceny in a blaze of publicity if he can help it, but a murder or a larceny is nevertheless an exceptional occurrence, not to be compared in frequency of incidence with the bottling and distribution of milk or the parking of automobiles; not, in short, part of a lawful but closely regulated community activity.*
>
> *The exceptional nature of serious crime renders it relatively easy of investigation. Facts connected with its commission are likely, if remembered or observed at all, to be recalled and established in Court without undue difficulty. The outstanding characteristic of regulatory offences for the agencies of law enforcement, on the contrary, is the absence in nearly every case of a circumstance easily distinguishable from a normal lawful community activity upon the basis of which to prove culpability in D [Defendant, i.e. the accused]. There is nothing remarkable about a parked car or one of a thousand bottles of milk in a consignment. If the car is parked in a restricted area, or one bottle of milk in a thousand found to contain diluted milk, there is normally nothing in the available evidence enabling P [Prosecutor] to claim with any show of plausibility that he has proved negligence in D beyond reasonable doubt.*

Unless P is to derive some further advantage in the prosecution as against D, for all practical purposes the mens rea rule might just as well be left intact for regulatory offences. Without some corresponding shift in the burden of proof, an extension of responsibility to include negligence would not reduce the practical difficulty of enforcing this part of the law.

Colin Howard, Strict Responsibility (1963) at 41.

3. The Presumption of Innocence and The Regulatory Offence

10 67. This Intervener acknowledges that this Court has given an expansive interpretation to the presumption of innocence in Charter par. 11(d). The most succinct summary of that interpretation is in R. v. Whyte, [1988] 2 S.C.R. 3, where Dickson C.J.C. (for the Court) stated:

> *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 a 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.*
> (at 18)

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And see:

R. v. Keegstra, not yet reported, Dec. 13, 1990 (S.C.C.) per Dickson C.J. at 97-8;

30 R. v. Chaulk, not yet reported, Dec. 20, 1990 (S.C.C.) per Lamer C.J. at 21-28.

68. This Intervener submits that the emphasis on the "reasonable doubt" rule in this passage simply reflects the "golden thread" principle articulated in Woolmington v. D.P.P., supra, in a criminal law context. As the Respondent has observed (Respondent's factum, p. 14, par. 29), the Charter par. 11(d) principles developed in this Court have occurred in criminal cases. If the conclusions expressed in par. 64 above are correct, the presumption of innocence has a

substantially different meaning in the context of the regulatory offence. The mere fact that Charter par. 11(d) applies to both criminal and regulatory offences would not require the latter to be absorbed into the former, contrary to their separate patterns of evolution in the common law. The "due diligence" principle expressed in R. v. Sault Ste. Marie, complete with reverse onus, is, to paraphrase the words of Lamer J. in Reference re B.C. Motor Vehicle Act, supra, a "basic tenet" of the presumption of innocence principle in a regulatory context, developed within the "inherent domain of the judiciary as guardian of the justice system" (par. 51 above).

69. This Intervener further submits that the "philosophical context" of the regulatory offence must be derived from its modern application. In Sault Ste. Marie, supra, Dickson J. stated that regulatory offences "...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." (at 1302-03). The social issues that gave rise to the proof requirements for regulatory offences in the 19th century are, this Intervener submits, even more compelling today. As has been noted above in par. 22, in most statutes, the regulatory offence is one component of an overall scheme for prescribing and regulating commercial conduct in the interests of wider societal goals.

70. The consequences of viewing the regulatory offence as part of a regulatory scheme are at least two-fold in relation to the principle of "fault" or "negligence":

1. Both the anticipated benefit to the potential offender of engaging in the regulated activity, and the potential harm occasioned by the regulated activity, have intrinsic value irrespective of any notions of fault;
2. The goal of preventing future harm serves as its own justification for imposing sanctions based on non-compliance.

Richardson, "Strict Liability for Regulatory Crime", supra, at 305-06.

Also see:
Pound, Spirit of The Common Law (1921):

> *The good sense of the Courts has introduced a doctrine of acting at one's peril with respect to statutory crimes which express the needs of society. Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals.*
> (at 52)

10 Ingeborg Paulus, "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" (1983), 3 Legal Studies 117 at 130;

English Law Commission, Working Paper #30 (1970), Strict Liability and the Enforcement of the Factories Act, 1961 at 32 and 36 (par. 40) and 42 (par. 45).

71. Therefore, this Intervener submits, there is symmetry between the historical development and the modern application of the 20 regulatory offence: neither necessarily incorporates any notion of "fault". To the extent this principle violates our fundamental notions of fairness, as embodied in Charter par. 11(d), it is submitted that the opportunity to exonerate oneself via the defence of due diligence as developed in Sault St. Marie, including the reverse onus, provides a complete answer.

72. In Reference re B.C. Motor Vehicle Act, supra, Lamer J. recognized and applied the well-developed distinctions in law between offences of mens rea, absolute and strict liability (at 515). That 30 case stands for the proposition that absolute liability violates the principles of fundamental justice. This proposition was adopted directly from the judgment of Dickson J. in Sault Ste. Marie. This Intervener submits, therefore, that nothing in Reference Re B.C. Motor Vehicle Act requires this Court to overrule Sault Ste. Marie in the context of Charter par. 11(d).

73. In Sault Ste. Marie, Dickson J. noted (at 1316) how ironic it would be for the Courts to reject the defence of due diligence in a regulatory context by mechanically applying the rule against reverse

onus developed in a criminal context in Woolmington v. D.P.P., supra. The Intervener submits that it would be doubly ironic for this Court, having repudiated such a mechanical linkage between criminal and regulatory offences, to decide that the unique defining characteristics of the regulatory offence, including the reverse onus respecting due diligence, must now be subsumed into this Court's decisions respecting the application of the Woolmington principle in a criminal law context.

4. Conclusion

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74. This Intervener further submits that this Court should uphold the principle of Sault Ste. Marie in the interests of clarity and certainty in law enforcement. In R. v. Wigglesworth, supra, Wilson J. consciously endowed Charter s. 11 with a relatively narrow scope in order to assure that its protections receive a clear and predictable application (at 558). By analogy, the Sault Ste. Marie principle, sometimes referred to as the half-way house doctrine, has become firmly embedded in the foundations of our law.

75. Furthermore, this Intervener invites this Court to consider the consequences of finding that the Sault Ste. Marie principle violates Charter par. 11(d). Even assuming that a reverse onus is generally justifiable under Charter s. 1, the very process of shifting

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the [illegible] to Charter s. 1 might require the Crown to present a separate and distinct justification in every prosecution for a regulatory offence, depending on factors such as the nature of the offence, the nature of the regulatory scheme, the particular difficulties of proof, and perhaps whether the accused is an individual or a corporation. If this is so, there would be great unpredictability in regulatory offences for a very considerable time to come. It would be very difficult for defence counsel to advise their clients as to how a prosecution might unfold, and what burden of proof they will face. Under the doctrine consolidated and clarified in Sault Ste. Marie, by contrast, regulators know what evidence they need to bring a charge, and prosecutors, defence counsel and judges can determine with relative ease whether an offence is strict or

absolute, and if strict, the evidence can unfold logically according to the procedures that flow from the half-way house doctrine. Compare the difficulties of characterizing and proving the offences in R. v. Chapin and R. v. MacDougall where the trial of the former was held prior to Sault Ste. Marie, and of the latter after Sault Ste. Marie.

> R. v. Chapin, [1979] 2 S.C.R. 121--forced to choose between absolute liability or *mens rea* on a charge of shooting a duck within 1/4 mile of bait, the lower Courts had great difficulty in characterizing the offence. Ultimately, applying Sault Ste. Marie, the Supreme Court found it to be a strict liability offence.
>
> R. v. MacDougall, [1982] 2 S.C.R. 605--all levels of the Courts had no difficulty characterizing the offence of driving a motor vehicle for which a licence was cancelled as strict liability.

76. And not only is the half-way house doctrine workable, it is fair. If Charter par. 11(d) is used to unleash a hurricane over regulatory offences, many may be left standing when the dust clears. But the uncertainty is bound to diminish the effectiveness of the regulatory offence in supporting the enforcement of standards vital to our quality of life.

77. It is respectfully submitted that this Court should interpret Charter par. 11(d), in the context of a strict or absolute liability public welfare offence, as meaning that with respect to the *actus reus*, the burden of proof lies upon the Crown, and the standard of proof is proof beyond a reasonable doubt. This gives valuable protection to the accused in a public welfare offence. It is somewhat ironic that the principal "defence" which the Appellant seeks to advance in the case at bar relates not to the so-called "mental element" at all, but to the *actus reus* itself: the Appellant claims the advertisement was not, in fact, misleading - "its prices were equivalent in value to wholesale prices and...its ads were not misleading." (Appellant's factum, p. 4, par. 6) In this endeavour, the accused will be entitled to the full impact of the presumption of innocence. It is submitted that it was this very protection that the framers of the Charter intended to guarantee when par. 11(d) was given force beyond traditional criminal offences.

See, for example: R. v. Vincent (1971), 18 C.R.N.S. 330 (N.B. Co. Ct.): held, the trial judge had erred in applying the civil rule as to balance of probabilities rather than the criminal rule requiring proof beyond a reasonable doubt so as to convict the accused of speeding. The Crown must prove the accused committed the prohibited act beyond a reasonable doubt; appeal allowed.

Compare the position in the U.S.A.:

10 *The American rule in regulatory offence cases is that no more than the balance of probability need be proved against the defendant.* (footnote omitted)

Howard, Strict Responsibility, supra, at 23

78. Taking the purposive approach to Charter interpretation does not necessarily lead to adoption of the widest possible meaning to a Charter guarantee. Yet this is in fact the approach the Appellant would have this Court adopt. While a broad approach to the presumption of innocence in the purely criminal context is one that the Court has adopted, applying the identical approach in rote fashion to the regulatory context would entail ignoring the Court's own 20 admonitions to interpret such guarantees in their proper context, and so as not to overshoot their intended purpose. Paraphrasing what Mr. Justice La Forest said in Thomson Newspapers Ltd. v. Director of Investigation and Research, [1990] 1 S.C.R. 425 at 507, it is submitted that those subject to the operation of regulatory offences do not have the same expectations concerning the effect of the presumption of innocence as those suspected of committing what are by their very nature true crimes.

D. SECTION 1 OF THE CHARTER

1. Introduction

30 79. Having found a violation of par. 11(d), the majority of the Appeal Court accepted that it might be possible to uphold the reverse onus, but that the Crown had not established that this was so in the case at bar.

Reasons for Judgment, Tarnopolsky J.A., at 27,
(Case on Appeal, at 113)

80. When the Appeal Court decided this issue, it did not have the benefit of recent pronouncements from this Court which have clarified the nature of the s. 1 inquiry that is to be undertaken. In particular, it is submitted that this Court's decisions in McKinney, Keegstra, Chaulk, supra, and Canada (H.R.C.) v. Taylor, December 13, 1990, not yet reported are very relevant. They lead to the conclusion, assuming the impugned provision is properly characterized as a public welfare offence, t..t the Court below erred in failing to
10 find the limit justified under s. 1.

81. It is submitted that as a general rule, once a Court has reached the conclusion that an offence is properly characterized as "regulatory" or as a "public welfare" offence which relates to pressing and substantial concerns, and where, as here, a violation of a specific standard is alleged, the same policy reasons that support that very characterization will lead to the conclusion that an onus to establish due diligence on a balance of probabilities constitutes a reasonable limit to par. 11(d) under s. 1 of the Charter.

82. Thus, it is the position of this Intervener that where by
20 statute or common law or under the Charter, the defence of due diligence as explained in Sault Ste. Marie is available to an accused charged with a violation of a public welfare offence, the requirements of s. 1 of the Charter will be satisfied.

83. While it is acknowledged that the Court has before it only one offence in the Competition Act, it is the position of this Intervener that applying this Court's s. 1 jurisprudence logically compels the general conclusion of "justified limit" for strict liability offences with their corresponding reverse onuses, and that this Court ought to clearly state that this is so. While it is admittedly unusual to seek a s. 1 finding which is actually broader
30 than necessary to deal with the precise issue before the Court, in this Intervener's submission there are compelling policy reasons justifying this approach. The policy reasons lie in the important

social purposes fulfilled by regulatory regimes, and the grave danger to the public welfare that might well result if the validity of large numbers of regulatory offences were thrown into question, indeed, were rendered presumptively invalid. The uncertainty produced would surely diminish the important role played by such offences in the regulatory schemes.

> *Although prosecution and its direct threat are seldom used, routine enforcement is conducted against a background of the criminal law and the implicit threat of its invocation. The fewer the uncertainties which attach to the law, therefore, the stronger is the agency's bargaining position. Certainly, there is ample evidence that enforcement agencies are reluctant to prosecute if they fear they will lose.*
>
> Richardson, "Strict Liability for Regulatory Crime", supra, at 303;
>
> And see Healy, "Case Comment", supra, at 774.

84. Should the Court rule that the reverse onus infringes par. 11(d) without indicating that, in a regulatory offence, it is nonetheless justified as a general rule, many regulators may well conclude that they ought to abandon launching prosecutions, given the scarce resources facing all governments in Canada. If every offence is to be justified under s. 1 on a case by case basis, the resource implications not only on prosecutors and the courts, but on the regulators themselves could be enormous: if, rather than abandoning prosecutions, staff of these agencies concentrated on preparing s. 1 justifications, they would obviously have to abandon other important duties they now perform. And to what end? With respect, it is obvious that regulatory standards do relate to pressing and substantial concerns, that the offences support such standards, and that the reverse onus is necessary to support those standards and to relieve the prosecution from the impossibility of proving that due diligence was not used. The Charter s. 1 argument of the Attorney General of Ontario is adopted.

2. The Proportionality Inquiry

85. In Canada (H.R.C.) v. Taylor, supra, Chief Justice Dickson described the nature of the proportionality inquiry:

> *Adopting the analytical guidelines in Oakes, an impugned measure is seen as proportionate only if the state shows that: i) a connection exists between the measure and objective so that the former cannot be said to be arbitrary, unfair or irrational; ii) the measure impairs the Charter right or freedom at stake no more than is necessary; and iii) the effects of the measure are not so severe as to represent an unacceptable abridgement of the right or freedom.*
> (at 26)

86. It is also apparent, for the reasons set out in the factum of the Attorney General of Ontario, that the Sault Ste. Marie formulation fulfills the proportionality test. Clearly, the rational connection aspect of that inquiry is satisfied.

3. The Minimal Impairment Aspect of the Inquiry

87. In the next several paragraphs, this Intervener will supplement the submissions made by others concerning the "minimal impairment" issue.

88. In McKinney, supra Mr. Justice la Forest discussed the minimal impairment portion of the proportionality test at 41 to 46 of his judgment. He noted that in the case of broadly based social measures where the government seeks to mediate between competing groups, it is by no means easy to determine with precision where the balance is appropriately struck between the claims of such legitimate but competing values. He noted the need for "considerable flexibility having regard to the difficulty of the choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters." (at 42) In such situations, he noted:

> *...the question is whether the government had a reasonable basis for concluding that it impaired the relevant rights as little as possible given the government's pressing and substantial objectives.*
> (at 43)

89. As noted above at paragraph 63, this Court has clearly recognized that public welfare offences lie in a field of conflicting values. In formulating strict liability principles, courts and legislatures are balancing the rights of citizens who expect socially desirable standards to be upheld, with those of individuals and corporations who may be charged with a breach of a regulatory offence.

90. In McKinney, La Forest J. later reiterated that this court will not "second guess" a legislative decision on the means chosen, provided the government had a reasonable basis for concluding the impairment was minimal:

> ***...the operative question in these cases is whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with the guaranteed right, given the government's pressing and substantial objectives.***
> (at 66)

91. Given the weight of judicial and academic opinion in support of the Sault Ste. Marie approach to strict liability offences, how can it be maintained that the legislators or courts lack a reasonable basis for adopting that formula? When this Court, in 1978, developed the strict liability approach there manifestly was a reasonable basis for doing so and this basis remains today. In short, the due diligence doctrine retains the merits claimed for absolute liability but does not entail injustice.

> See: Institute of Law Research and Reform (Alberta), Defences to Provincial Charges (1984):
>
> *It was suggested in earlier decisions [prior to Sault Ste. Marie] that in the case of regulatory offences, only an evidentiary burden should be placed on the accused, so that if evidence was so led, the ultimate burden would remain with the Crown in accordance with ordinary principles of criminal law. However, we are persuaded by the*

> *argument that the operations of the accused are within his knowledge. It would only be in rare situations that the Crown would be in any position to rebut the accused's evidence. This being so, it is a fair requirement to place the burden of proving due diligence upon the accused as Dickson J. did. The burden should be ... proof upon a balance of probabilities.*
> (at 27-28, emphasis added, footnotes omitted)

See also: Law Reform Commission of Saskatchewan, Proposals for Defences to Provincial Offences (1986):

> *... there is a fundamental difference between criminal offences and public welfare offences that justifies the imposition of liability based on negligence and shifting the persuasive burden of proof to the accused in public welfare offences.*
>
> . . .
>
> *... it is reasonable to take into consideration the difficulties of large scale enforcement of public welfare offences. As public welfare offences, provincial offences are generally not considered serious or criminal. Placing the burden of proving negligence on the prosecution in provincial offences would impair the efficiency of prosecutions, and ultimately the utility of prosecutions as a deterrent factor. For these reasons the Commission believes that it is appropriate as a general rule to shift the burden of proof concerning negligence to the accused.*
> (at 11-12, emphasis added)

And see: English Law Commission, Working Paper No. 30, supra:

> *It is arguable that the burden of proving fault should be placed on the prosecution if only to ensure that the full facts are placed before the court, but in view of the undoubted difficulty of proving knowledge or connivance on the part of management we are convinced that the burden of proving due diligence should, as at present, rest with the defendant for the purposes of any statutory defence. The duty of the prosecution, as we see it is to give a factual account of its previous dealings with the firm in question rather than to establish any particular form of fault or blame.*
> (at 64, emphasis added)

92. Standing almost alone in support of the Appellant's position is the recent Ontario Law Reform Commission Report, Report On the

Basis of Liability for Provincial Offences (1990). In two paragraphs they dismiss the conclusions of other studies, without careful analysis (at 47-48). While in some cases the categorization of an offence may present difficulties, it is submitted this is no reason to ignore the fact that there *is* a significant distinction between crimes and regulatory offences, as the Report implies be done. As the Law Reform Commission of Canada said:

> *[There is] a distinction within the criminal law itself. It is the distinction between "real" crimes and mere regulatory offences. The difference between the two is well recognized by ordinary citizens, accepted formerly by criminal jurisprudence and based on logic and common sense. It should be recognized by law.*
>
> Law Reform Commission of Canada, *Report: Our Criminal Law*, *supra*, at 36

93. Moreover, in saying that since the Crown can prove *mens rea* in criminal offences through inferences, they should be able to do the same in regulatory offences, the Ontario Commission ignores the fact that the differing nature of criminal and regulatory offences makes the investigation and evidence issues distinct. It is not difficult to draw inferences about intent when a person walks into a bank, armed with a gun and demands money. However, it is not so easy to draw inferences when a worker is killed washing windows when his platform falls to the ground. This point is made effectively by Howard, *Strict Responsibility*, in the passage quoted in par. 66 *supra*.

94. Concerning corporations, the Ontario Commission rejects arguments that evidence of the operation of systems within a corporation may present special difficulties saying merely "The Commission does not agree. The presumption of innocence is a fundamental right that ought to apply to both individuals and institutions." (at 48) While in the abstract, no one would disagree with the importance of that concept, practical realities have to be given some consideration in giving that concept meaning in the regulatory context.

95. The "compromise" solution the Ontario Commission suggests indicates that even it recognizes that the presumption of innocence needs limiting: it proposes a mandatory presumption as the answer. (at 48) It is this Intervener's position that placing a mere evidentiary burden on the accused in such cases is simply not practicable. In most cases, the Crown will have no knowledge of the events leading to the breach of the standard, or of the particular measures adopted to avoid that occurrence: presumably, even the Commission accepts this, given its recommendation of the mandatory
10 presumption. But allowing the accused to escape conviction where it is able to raise a reasonable doubt is also unfair, because the Crown will still lack access to information which would allow the Crown to test the evidence as to reasonable doubt. Moreover, compliance with a statutory standard is a positive duty and positive steps must be taken. <u>The reasonable doubt approach would result in an acquittal if a court thinks it possible that the accused may have taken reasonable steps to avoid the occurrence</u>. It is obvious that such an approach is not sufficiently supportive of a positive duty to comply with standards. The concepts of reasonable doubt and reasonable care or
20 <u>due</u> diligence do not fit well together.

96. In <u>McKinney</u>, <u>supra</u>, La Forest J. also noted that it is not only the claims of competing individuals or groups that must be considered and reconciled in the s. 1 analysis "but also the proper distribution of scarce resources" (at 45). It is submitted that to the extent a mandatory presumption could work at all, it could only do so if regulators had extensive powers to require and receive detailed reports on every action plan put into place in each organization to ensure compliance with regulated standards. Not only would this be an unwelcome approach, perhaps with its own <u>Charter</u> problems, the
30 resources necessary would be so extensive as to render this approach impracticable.

97. In <u>Keegstra</u>, <u>supra</u>, this Court upheld a reverse onus under s. 1 of the <u>Charter</u>. It is submitted that there is even more compelling justification for upholding the reverse onus in the case at bar. Paraphrasing the rationale of the majority in that case (at 101-102), it is submitted that requiring the accused to prove due diligence on a

balance of probabilities in a strict liability offence is an integral part of the balance referred to in paragraph 89 above, and any less onerous burden would seriously skew the equilibrium. To require the Crown to prove negligence, or even to require only that the accused raise a reasonable doubt as to the existence of due diligence, would, it is submitted, excessively compromise the effectiveness of the regulatory offence in achieving its purpose. Having the accused prove due diligence on the balance of probabilities is an understandable and valid precaution against too easily justifying the harm caused when standards are not met. See also R. v. Whyte, supra, at 27.

98. Where the law articulates standards which must be accepted by all who participate in a regulated activity, there is no injustice in requiring those who benefit through the regulated activity to be able to demonstrate that they have made every reasonable effort to live up to the standards imposed by society, where it can be proven beyond doubt that a standard has been violated.

> See Molis v. The Queen, [1980] 2 S.C.R. 356, per Lamer J. (for the Court):
>
> *...the defence of due diligence that was referred to in Sault Ste. Marie is that of due diligence in relation to the fulfillment of a duty imposed by law....*
> (at 364, emphasis added)

E. REMEDY

99. Other than the comments in pars. 40-42 and 46 above, this Intervener has nothing to add to the submission made by the Intervener the Attorney General of Ontario in his factum at p. 38, par. 100.

PART IV

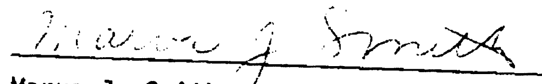
DISPOSITION REQUESTED

100. The Attorney General of Manitoba requests that this Honourable Court answer the first two constitutional questions in the

negative, and the third question in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATE: February 4, 1991



Marva J. Smith, on behalf of
The Intervener,
The Attorney General of Manitoba

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