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

- and - Respondent/Appellant

COLIN CHEDORE

- and -

THE ATTORNEY GENERAL OF NEW BRUNSWICK

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 ALBERTA

Intervenors

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FACTUM OF THE INTERVENOR

PART I

FACTS

1. The Intervenor, the Attorney General of New Brunswick, adopts as correct the facts as set out in the factums of the Appellant and Respondent in this appeal.

PART II

POINTS IN ISSUE

2. The Intervenor, the Attorney General of New Brunswick, takes no position with respect to the constitutionality of subsections 37.3(2)(c) and 37.3(2)(d) of the Competition Act.

3. The Intervenor, the Attorney General of New Brunswick, takes no position with respect to the justification, if any, of sections 36(1)(a) and 37.3(2), under section 1 of the Canadian Charter of Rights and Freedoms.

4. The Intervenor, the Attorney General of New Brunswick, submits that, for the reasons set out herein, the Court of Appeal of Ontario did not err in declaring that the words "he establishes that" in the opening part of subsection 37.3(2) of the Competition Act are of no force and effect by reason of their being contrary to subsection 11(d) of the Canadian Charter of Rights and Freedoms and in holding that such words should severed from subsection 37.3(2).

5. The Intervenor, the Attorney General of New Brunswick, therefore submits that the constitutional questions in this appeal from 1 pursuant to the Order of the Right Honourable Chief Justice of Canada dated the 26th day of July, 1990 be answered as follows:

Question	Answer
1.	Yes
2.	Yes, when read in conjunction with subsection 37.3(2) of the Competition Act

PART III
ARGUMENT

1. The Intervenor, the Attorney General of New Brunswick, submits that subsection 36(1)(a) of the Competition Act, R.S.C. 1970 C. c-23 is a criminal statue and not a strict liability offence.

2. Public welfare offences are prima facie strict liability offences and are not subject to the presumption of full mens rea. Public welfare offences would be construed as full mens rea (i.e. criminal) offences only where words such as "wilfully" , "without intent" or "knowingly" or "intentionally" are used in the statutory provision creating the offence.

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

3. This rule of statutory construction is premised upon the characterization of a statute as a public welfare statute. If a statute can be characterized as other than a public welfare statute the test formulated in R. v. City of Sault Ste. Marie, supra would pose no obstacle to inferring a required mental state (i.e. mens rea) greater than that necessary for regulatory legislation especially in "legislation providing for a restriction on the accused life, liberty or security of the person".

R. v. Vaillancourt, (1987), 39 C.C.C. (3d) 118 (S.C.C.) per Laver, J. at pp. 133-134.

4. The Intervenor, the Attorney General of New Brunswick, submits that section 36(1)(a) of the Competition Act when considered with other provisions of the same legislation has the badges of a criminal provision:

(a) It is punishable by Indictment as well as summary conviction. Subsection 36(5).

(b) It attracts a maximum penalty of five years imprisonment. Subsection 36(5).

(c) Because of (b) above, a person charged upon an indictment for an offence under section 36(1) is entitled to a trial by jury pursuant to section 11(f) of the Canadian Charter of Rights and Freedoms.

(d) For most of its existence, what is now the offence contained in subsection 36(1)(a) of the Competition Act was contained in the Criminal Code.

(e) The offence contained in the impugned provision has elements denoting a degree of moral obloquy, falsehood in statements made for a specific purpose, similar to the elements of several criminal provisions.

(f) It prohibits and punishes specific conduct as opposed to punishing a failure to observe a positive norm.

5. In modern usage, the procedure in indictment is most often used for the most serious of offences and is confined to those which are tantamount to crimes.

6. Proceeding by indictment triggers the provisions of the Criminal Code of Canada regarding an election as to mode of trial, preliminary inquiries, and trial on indictment. The procedure followed is that employed for the most serious of crimes.

7. Should an individual be charged with an indictable offence, that person would be entitled to trial by jury. Trial by jury is reserved for the most serious of crimes. A conviction pursuant to a jury's verdict carries great stigmatization since condemnation by a jury is condemnation by the "judicial" organ

chosen directly from the community at large and directly representative of that community.

8. From its inception in 1914, when the offence of false advertising was introduced as section 406A of the Criminal Code by S.C. 1914, C. 24, S1, until 1969 when the offence of false advertising was added as 33D of the Combines Investigation Act by S.C. 1968-1969, C. 38, S. 115, the offence of "false advertising" was found in the Criminal Code. Taken by itself, Parliament's choice to characterize this offence as a crime can hardly be determinative of this issue - particularly so since Parliament has chosen to remove it from the Criminal Code. The Intervenor submits that, it is, however, a factor which adds its weight to others of more telling vigour. The statutory origins of this provision impel one to a conclusion of criminality more strongly than to neutrality as between a crime and a regulatory offence.

9. The Intervenor submits that the legislation in issue contains elements of moral obloquy, the making of falsehoods for gain, which are also found as constituents albeit not the sole constituents - of crimes, e.g. spreading false news, fraud, obtaining goods by false pretences. Like its origins in criminal law, the moral obloquy contained in the impugned legislation is not of itself decisive. The Intervenor suggest it is, nonetheless, another factor which weighs more in favour of criminality than even neutrality as between a crime and a strict liability (regulatory) offence.

10. Finally, the Intervenor submits that the impugned legislation prohibits specific conduct as opposed to imposing punishment for failure to comply with a positively expressed general norm. The essence of criminal law is the prohibition of conduct in the interest of preserving societal values.

11. In any event, legislation, passed by Parliament so as to promote competition and prohibit combines in restraint of trade has been upheld as a valid exercise of the criminal law power:

Proprietary Articles Trade Association v. Attorney General of Canada, (1931) A.C. 310 (J.C.P.C.)

Goodyear Tire and Rubber Co. v. The Queen, [1956] S.C.R. 303.

12. If the offence can be rightly characterized as a crime, two results follow:

(1) section 7 of the Canadian Charter of Rights and Freedoms mandates the presence of a "minimum mental element" or "mens rea".

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

R. v. Vaillancourt, Supra

(2) the Crown is obliged to prove all "factors affecting guilt" and any provision which places the burden of proof of such a factor upon the accused, such as to require a finding of guilt despite the presence of a reasonable doubt concerning such a factor is contrary to section 11(d) of the Canadian Charter of Rights and Freedoms.

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

R. v. Chaulk and Morrissette, 1990, Supreme court of Canada, unreported

13. The Intervenor submits that the one factor militating against the characterization of the legislation as truly criminal is the presence of subsections 37.3(2)(a) and 37.3(2)(b). Together these sections constitute a statutory expression of the classic "due diligence" defence outlined by Dickson, J. in R. v. City of Sault Ste. Marie, supra.

14. The question which must be resolved in whether the defence of due diligence is a resultant characteristic of a regulatory offence or the determinative factor which, by its very presence, invariably casts the provision in which it is found as a regulatory offence rather than a crime. The Intervenor submits that, upon an examination of the reasoning of Dickson, J. in R. v. City of Sault Ste. Marie, the former is the case.

15. The Intervenor submits that the underlying rationale for the "half-way house" of strict liability lies in the need for a compromise between two extremes: criminal offences and absolute liability offences. The Intervenor submits that in R. v. City of Sault Ste. Marie, it was from the realm of non-criminal penal liability that the concept of strict liability was developed.

16. Lack of diligence, the presence of negligence, is the required mental element of strict liability public welfare offences as opposed to crimes which require mens rea. Yet other public welfare offences may require mens ea R. v. City of Sault Ste. Marie. Absent permissable statutory requirements as to mens rea, strict liability with its accompanying defence of due diligence and defendants burden of proof defines the boundary between two types of non-criminal offences. The lack of such characteristics is not determinative of the public welfare (regulatory) vs criminal offence nature of a provision since such an offence may still be a public welfare offence albeit one of absolute liability. The determinative factor in resolving the true crime vs. regulatory (public welfare) offence question must therefore lie elsewhere than in the presence of the due diligence defence and a burden of proof cast on the defendant.

17. The Intervenor, the Attorney General of New Brunswick, submits that it is because subsection 36(1)(a) and 37.3(2) are criminal provisions that the words "he establishes that" offend section 11(d) of the charter.

18. The further issue of whether a true crime can accommodate the defence of due diligence (which the prosecution would be obliged to prove beyond a reasonable doubt by proving negligence on the defendant's part) is resolved by an examination of the results when the criminal burden is applied to subsection 36(1)(a) and 37.3(2)(a) and (b) of the Competition Act.

19. All prosecutions for criminal as well as quasi-criminal offences are subject to section 11 of the Charter.

> Wigglesworth v. R. (1987), 37 C.C.C. (3d) 385 (S.C.C.) per Wilson, J. p. 401.

20. What, then, results when the burden of proof beyond reasonable doubt is cast upon the prosecution for all elements contained in section 36(1)(a) and subsection 37.3(2)(a) and 37.3(2)(b) of the Competition Act?

21. Assuming the actus reus to have been proved, two defences would remain to be negated: (i) error and (ii) due diligence each, in turn, by the prosecution. For reasons which follow these defences must apply in the alternative although both are available under the existing legislative scheme.

(i) Error - A falsehood is either such by error, i.e. a mistake or without any error; that is with knowledge of its falsity or with wilful blindness as to its falsity which is tantamount to

intention. The proof of a falsehood made without error is proof of deliberate falsehood. The Crown negates 37.3(2)(a) by proof of intentional falsehood. Once lack of error is proved by the prosecution, due diligence, 37.3(2)(b) becomes irrelevant. A falsehood which is intentional or the result of wilful blindness cannot be such despite the exercise of due diligence by the defendant. Indeed, it cannot be the result of negligence. Therefore proof of 37.3(2)(a), the absence of error dispenses with the requirement of proof os s. 37.3(2)(b).

(ii) Due diligence - It is only when the Crown fails to prove lack of error that the Crown is then put to the burden of proving a lack of due diligence (i.e. negligence) as contained in section 37.3(2)(b). Proof of negligence beyond a reasonable doubt would serve to convict the accused despite an error.

22. From this examination it is obvious that when the burden is shifted from the defendant to the prosecution, subsection 37.3(2)(a) and 37.3(2)(b) become mutually exclusive. Unlike that situation, when the burden is cast upon the defendant both elements can co-exist in that proof of non-negligent error is possible. The difficulty which arises does so because both error (i.e. a mistaken belief of fact) and due diligence are elements of strict liability type public welfare offences:

R. v. City of Sault Ste. Marie

R. v Chapin, [1979] 2 S.C.R. 121

23. The result is that the application of the criminal burden to a strict liability offence is not possible. If the offence is to retain its present characteristics, the burden of proof must remain with the defendant. If the prosecution is to be put to the criminal burden of all factors affecting guilt, the nature of a

strict liability offence cannot remain as presently constituted. Any attempt to resolve this problem by characterizing some factors affecting guilt as exemptions or excuses is foreclosed by recent decisions of this court: R. v Whyte, supra and R. v Chaulk and Morrissette, supra.

24. Two possible solutions arise:

(i) treat the impugned legislation a regulatory offence and utilizing the principle of a contextual approach, apply the provisions of section 11(d) of the Canadian Charter of Rights and Freedoms so as to allow for some exceptions in its applications to true regulatory or public welfare offences. The notion of a contextual approach has received support form this court.

Valente v. The Queen, [1985] 2 S.C.R. 673

Reference re s. 94(2) B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486

25. The Intervenor submits that the principle obstacle to the treatment of this statute in such a manner is the severity of the potential penalty. The contextual approach would be used to condone the imprisonment of the morally blameless. In doing so, the purposive approach adopted by this court in numerous cases as the cardinal principle of constitutional interpretation; - See: R. v. Big M. Drug Mart, [1985] S.C.R. 295 - would be abandoned.

(ii) treat the offence outlined in the impugned legislation as a true crime. The one obstacle to doing so lies, in the Intervenor's submission, in the availability of a conviction in the absence of error [s.37.3(2)(a)] by virtue of the existence of negligence [s. 37.3(2)(b)]. Absent intentional wrongdoing or wilful blindness, mere negligence cannot constitute a crime.

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

26. Since proof of the absence of error [s. 37.3(2)(a)] would necessarily preclude the relevance of negligence, s. 37.3(2)(b) could be severed as being a violation of s.7 of the Canadian Charter of Rights and Freedoms leaving the prosecution to prove all the elements of the offence including lack of error causing falsity.

27. Accordingly, the Intervenor, the Attorney General of New Brunswick, submits that this court should

(i) hold that the offence contained in ss. 36(1)(a) and 37.3(2)(a) and 37.3(2)(b) is a criminal offence.

(ii) uphold the judgment of the Ontario Court of Appeal ordering the words "he established that" severed from the opening portion of ss. 37.3(2)

(iii) sever paragraph 37.3(2)(b) from the Competition Act.

Respectfully submitted

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PART IV

TABLE OF AUTHORITIES

1. R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299
2. R. v. Vaillancourt, [1987] 2 S.C.R. 636
3. Proprietary Articles Trade Association v. Attorney General of Canada, (1931) A.C. 310 (J.C.P.C.)
4. Goodyear Tire and Rubber Co. v. The Queen, [1956] S.C.R. 303
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6. Whyte v. The Queen, [1988] 2 S.C.R. 3
7. R. v. Chaulk and Morrissette, Supreme Court of Canada, 1990, unreported
8. Wigglesworth v. R., [1987], 37 C.C.C. (3d) 385 (S.C.C.)
9. R. v. Chapin, [1979] 2 S.C.R. 121
10. R. v. Big M Drug Mart, [1985] 1 S.C.R. 295