Court File No.: 21779

IN THE SUPREME COURT OF CANADA

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

B E T W E E N :

THE WHOLESALE TRAVEL GROUP INC. — Appellant/Respondent (accused)

- and -

HER MAJESTY THE QUEEN — Respondent/Appellant

- and -

COLIN CHEDORE

- and -

THE ATTORNEY GENERAL OF MANITOBA
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF NEW BRUNSWICK
THE ATTORNEY GENERAL OF ALBERTA
ELLIS-DON LIMITED
ROCCO MORRA

Intervenors

FACTUM OF THE INTERVENORS

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PART I - FACTS

1. Ellis-Don Limited and Rocco Morra (hereinafter, "these intervenors") take no position in any factual dispute in this appeal.

PART II - POINTS IN ISSUE

2. The points in issue are stated in the factums of the appellant and respondent. These intervenors take no position on the interpretation of the Competition Act, R.S.C. 1970, c.C-23 (as amended). While agreeing with the appellant that ss.37.3 (2) (c) and (d) of the Act create absolute liability offences contravening s.7 and s.11 (d) of the Charter, they will make no submissions on this issue.

3. These intervenors submit that:

(a) a generalized distinction between so-called "public welfare" and "regulatory offences" on one hand and so-called "true crimes" on the other is not an adequate basis upon which the protections afforded by s.7 and 11 (d) of the Charter may be varied;

(b) the submissions of the respondent federal Crown and the intervening provincial attorneys-general on the effect of s.7 and s.11 (d) of the Charter in this appeal are arguments more appropriately made under s.1 of the Charter;

(c) the imposition of a persuasive burden upon an accused to demonstrate "due diligence" is not rationally connected to the purpose of the penal provisions of most public welfare legislation;

(d) there is no adequate justification under s.1 of the Charter to impose such a persuasive burden just because an offence may be justified as "regulatory"; and

(e) the imposition of an "evidentiary burden" upon accused to advance evidence of due diligence, or to point to such evidence in the prosecution's case to raise a reasonable doubt of guilt is a logical and workable alternative to a "persuasive burden" requiring proof on a balance of probabilities.

PART III - ARGUMENT

A. DEFINING THE ISSUES

4. The "legal burden" or "persuasive burden" is the onus borne by a litigant who will lose on an issue unless he or she satisfies the trier of fact to the appropriate degree of conviction: a "balance of probability" in a civil case and "beyond a reasonable doubt" in a criminal case. Wigmore called the "legal burden" the "risk of non-persuasion". Where, at the end of trial, a case is "borderline", the party bearing the burden must lose.

Reference: Cross and Topper, Cross on Evidence, 7th ed., 1990, Butterworths at pp.112-114.
Stuart, D., "Holmes and Whyte: Zig-Zags on Reversing the Onus, Section 1 Care and Control" (1988), 64 C.R. (3d) 143.
R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 per Dickson C.J.C. at pp.210-212.
Ontario Law Reform Commission, Report on The Basis of Liability for Provincial Offences, 1990, at pp.29-30.

5. A "reasonable doubt" is an "honest doubt", a "real doubt", not "an imaginary doubt" or a "speculative doubt". To convict in a criminal case, "the evidence must establish the truth of the fact to a reasonable and moral certainty". Proof beyond a reasonable doubt does not require the Crown to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused".

Reference: Commonwealth v. Webster, 5 Cush. (59 Mass.) 295 (1850, Mass S.C.J.) at p.320.
R. v. Ellis-Don Limited and Rocco Morra, Houlden and Galligan JJ.A., Carthy J.A. dissenting, December 3, 1990 (Ont. C.A.) No.1090/87 per Galligan J.A. at pp.12-13.
Bater v. Bater, [1950] 2 All E.R. 458 (C.A.) per Denning L.J. at p.459.
R. v. Torrie, [1967] 2 O.R. 8 (C.A.) per Evans J.A. at p.11.
O.L.R.C., Report on the Basis of Liability for Provincial Offences, supra, at p.29.

6. Where the legal burden requires proof on a "balance of probabilities", such proof must

be "convincing".

Reference: R. v. Whyte, [1988] 2 S.C.R. 3, 51 D.L.R. 4th 481 per Dickson J. at p.13.
Bater v. Bater, supra, at p.459.

7. The 'evidentiary burden" is the burden of producing sufficient evidence to raise an issue before the trier of fact. In a jury case, Wigmore called it the duty of "passing the judge". In a non-jury case, it is that threshold of evidence which must be met before the judge can properly consider the issue.

Reference: Cross on Evidence, supra, at pp.112-114.
R. v. Cameron [1966] 2 O.R. 777 (C.A.) per McKay J.A. at p.794-795.
R. v. Proudlock, [1979] 1 S.C.R. 525 91 D.L.R. (3d) 449 per Pigeon J. at pp.550-551.

8. The "due diligence" defence developed by Dickson J. in R. v. Sault Ste. Marie, infra, requires the Crown to bear the legal burden of showing beyond a reasonable doubt that the event (the actus reus) constituting the breach of the regulatory statute actually occurred. The accused, however, is obliged to bear the legal burden of showing that, on a balance of probabilities, "all reasonable care" was taken to prevent the occurrence in question.

Reference: R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161.

9. R. v. Sault Ste. Marie created certain rules of statutory interpretation, but no new positive rules of law. For a wide range of statutory offences, it was to be presumed that the legislature intended that an accused could exonerate himself or herself, notwithstanding proof of the actus reus, if he or she took "all reasonable steps to avoid the particular event". Such a presumption could, however, be ruled out if the enactment, either expressly or by necessary implication,

required the Crown to prove "mens rea" or imposed "absolute liability".

Reference: R. v. Sault Ste. Marie, supra, at p.1325-1326.

10. Where the statutory language permits, the Sault Ste. Marie doctrine thus "reads into" regulatory offences a legislative intention to allow the accused the "defence of due diligence". "Due diligence" is simply the opposite of negligence. R. v. Sault Ste. Marie, in effect, holds that, unless the statute in question clearly rules out such an interpretation, "negligence" is an implied "element" of regulatory offences. The proof of the actus reus, the prohibited act, gives rise to a presumption of fact that the accused was negligent, that "reasonable steps" were not taken to prevent the breach from happening. The accused is then required to negative this presumption on a balance of probabilities.

Reference: O.L.R.C. Report on the Basis of Liability for Provincial Offences, supra at pp.26-29.
Mahoney, R. "The Presumption of Innocence: A New Era" (1988), 67 C.B.R. 1 at pp.9-10.

11. Logically, there are two ways in which an accused can be required to displace this factual presumption of negligence arising upon proof of the actus reus. First, the accused may be required to either raise sufficient evidence or point to sufficient evidence in the Crown's case to bring into question whether "all reasonable steps" have been taken. This would be to impose an "evidentiary burden". To impose such an evidentiary burden in this context is *not* to merely require the accused to adduce "some credible evidence" in order to raise a reasonable doubt, as is asserted in paragraph 56 of Ontario's factum. To raise a reasonable doubt, the accused must proffer enough evidence to raise a reasonable doubt that *reasonable* precautions were taken, not merely that *some* precautions were taken.

12. The Sault Ste. Marie doctrine goes beyond placing an evidentiary burden upon the accused

and requires the accused to displace the presumption of negligence on a balance of probabilities. It thus imposes a "persuasive burden". Thus, if at the end of the trial, the trier of fact believes that the accused probably failed to take "all reasonable steps" but is not morally certain that such a failure occurred there must be a conviction. As is the case with absolute liability, the reverse onus in the "due diligence defence" legally gives rise to "the potential to convict a person who has not really done anything wrong": per Lamer J. (as he then was) in Reference Re s.94 (2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486 at p.492.

13. What does it *mean* to be convinced beyond a "reasonable doubt" that an accused has failed to take all "reasonable" precautions? On the same facts, different fact-finders may come to different conclusions. Value judgments as to what is "reasonable" will vary. However, the "reasonable doubt" standard is no more or less inherently illogical when applied to the issue of "reasonable precautions" than it is when applied in cases of criminal negligence. Paragraph 35 of Alberta's factum incorrectly asserts that any distinction between an evidentiary burden and a persuasive burden in this context is "so narrow as to not be worth preserving". The constitutional issue of what "cast of mind" the trier of fact must bring to his or her deliberations is hardly trivial. It is important for the very reason that it probably does affect only the "borderline" case.

Reference: In Re Winship, 397 U.S. 358 (1970) per Harlan J., concurring, at pp.373-374.

14. In few cases will there be much doubt as to the fact of what precautions were or were not taken. The "borderline" case, where the placement of the legal burden is decisive, is more likely to occur in instances where it is difficult to decide whether the precautions actually taken meet the standard of reasonableness. The allocation of the burden will generally relate to the issue as to what is reasonable behaviour in the circumstances. Thus, replacing the persuasive burden with an evidentiary burden is not likely to result in the imposition of an insurmountable evidentiary

onus on the Crown.

Reference: R. v. Ellis-Don Limited and Rocco Morra, supra, per Galligan J.A. at pp.13-14; pp.16-19; per Houlden J.A. at pp.11-12.

B. THE INTERPRETATION OF THE CHARTER

15. The federal government and the provinces contend that R. v. Sault Ste. Marie both reflects the "principles of fundamental justice'" embodied in s.7 of the Charter and strikes the right balance between individual and State interests for the purposes of s.1. However, this Court has made it clear that decisions pre-dating the Charter must be seen as having been constrained by the doctrine of absolute legislative supremacy. The enactment of the Charter did not merely recognize and declare existing rights as of April 15, 1982. R. v. Sault Ste. Marie cannot be treated as an historical icon. The principles underlying the decision must be re-examined having regard to the Charter.

Reference: R. v. Whyte, [1988] 2 S.C.R. 3, 51 D.L.R. (4th) 481 per Dickson C.J.C. at p.14.
R. v. Oakes, [1986] 1 S.C.R., 26 D.L.R. (4th) 200 per Dickson C.J.C. at pp.124-125.
Thomson Newspapers v. Director of Investigation and Research, [1990] 1 S.C.R. 425 per Sopinka J. at p.604.
R. v. Big M. Drug Mart Ltd. [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 per Dickson C.J.C. at pp.343-4.
Mahoney, R., "The Presumption of Innocence: A New Era", supra, at pp.49-56.

16. The cardinal tenet of Charter interpretation was set forth by Dickson J. in Big M. Drug Mart, supra. While cautioning that Charter rights must be placed in their proper "linguistic, philosophical and historical contexts", he made it plain, on behalf of a unanimous Court, that the basic approach must be "purposive" and "generous", as opposed to "legalistic".

Reference: R. v. Big M. Drug Mart, supra, at pp.359-360.

17. In relation to s.11 (d) of the Charter, Dickson C.J.C., for a unanimous Court in R. v. Whyte, supra, stated at p.14-15:

> "An interpretation of s.11 (d) that would make the presumption of innocence subject to legislative exceptions would run directly contrary to the over-all purpose of an entrenched constitutional document."

18. Just as the Charter itself is to be interpreted purposively, the legislation and procedures subject to Charter scrutiny must be analyzed in terms of their actual function and impact upon Charter rights. Lamer J. (as he then was), in Reference re s.94 (2) of the Motor Vehicle Act (B.C.), supra, at p.513 stated:

> "In the context of s.7, it seems to me that the nature and quality of protection to be accorded the individual cannot depend on sterile logic or formalistic classifications of the type of proceeding in issue. Rather, the focus must be on the functional nature of the proceeding and on its potential impact on the liberty of the individual."

19. Thus, the classification of any particular offence as "regulatory" or "public welfare" as opposed to "truly criminal" cannot determine the level of Charter protection to be given to an accused. Moreover, it is not correct to suggest that the "contextual" approach to the Charter means that the *level* or *degree* of protection guaranteed by a Charter right may vary according to the context. In Edmonton Journal v. Alberta, infra, Wilson J. posited that a Charter right or freedom may have different *meanings* in different contexts. There was no implication that the

level of protection afforded by procedural safeguards in prosecutions could vary according to context. Similarly, in Valente v. The Queen, infra, Le Dain J. was very careful to point out that while *form* of the protection of the independence of tribunals guaranteed by s.11 (d) may vary, the "essential conditions" of the Charter protection must always apply.

Reference: Edmonton Journal v. A.G. Alberta, [1989] 2 S.C.R. 1326 per Wilson J. at p.1356.
Valente v. The Queen, [1985] 2 S.C.R. 673 per Le Dain J. at pp.692-693.

20. With the exception of Valente v. The Queen, supra, Thomson Newspapers v. Director of Investigation and Research, infra, and Canada v. Schmidt, infra, none of the cases cited in paragraphs 14-20 of Ontario's factum for the proposition that Charter rights may vary according to the context, deal with the rights guaranteed in ss.8-14 of the Charter. As noted above, Valente stands for the proposition that the "essential conditions" of s.11 (d) must always be met. Thomson Newspapers deals with the purely investigative procedures of the Combines Investigation Act and Canada v. Schmidt, which deals with extradition , has no application to the level of Charter protection which must be afforded in domestic prosecutions.

Reference: Thomson Newspapers v. Director of Investigation and Research, [1990] 1 S.C.R. 425 per La Forest J. at p.542:
"I see a significant difference between investigations that are truly adversarial, where the relationship between the investigated and the investigator is akin to that between the accused and prosecution in a criminal trial and the broader and more inquisitorial type of investigation that takes place under s.17 of the Act."
Canada v. Schmidt, [1987] 1 S.C.R. 500 per La Forest J. at pp.523-524.
Factum of the Attorney-General of Ontario, paras. 14-20, pp.6-9.

21. The argument that the degree of protection accorded by the Charter may vary with the

context is simply a roundabout way of saying that Charter rights may be *limited* by the State in different contexts. This Court has stressed that the preferable course is to give Charter rights a generous interpretation and weigh the "various contextual values and factors in s.1".

Reference: R. v. Keegstra, Dickson C.J.C., Wilson, L'Heureux-Dubé and Gonthier JJ. concurring; McLachlin J. dissenting (on different grounds), Sopinka J. concurring; La Forest J. dissenting, December 13, 1990 (S.C.C.) No.2118, per Dickson C.J.C. at p.27.
R. v. Oakes, supra per Dickson C.J.C. at p.223-224.
Reference Re s.94 (2) of the Motor Vehicle Act, supra, per Lamer J. at p.517:

> "If, by reference to public interest, it was meant that the requirements of public interest for certain types of offences is a factor to be considered in determining whether absolute liability offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the Court as a possible justification under s.1 of a limitation to the rights protected at s.7, then I do agree."

Factum of the Attorney-General of Ontario, para.58 and para.88.

22. Section 7 of the Charter now requires that the State demonstrate a minimum degree of fault before an individual may be deprived of liberty or security of the person. In this sense, as held in R. v. Vaillancourt, infra, the Charter "elevated mens rea from a presumed element in Sault Ste. Marie, supra, to a constitutionally required element". Moreover, as Lamer J. stated in the B.C. Motor Vehicle Act Reference, supra, at p.492:

> "A law that has a potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates the person's right to liberty under s.7 of the Charter..."

Reference: R. v. Vaillancourt, [1987] 2 S.C.R. 636 per Lamer J. at p.652.
R. v. Ireco Canada II Inc. et. al. (1988), 43 C.C.C. (3d) 482 (Ont. C.A.).

C. THE CONSTITUTIONALLY RELEVANT CONTEXT

23. Assuming that the meaning of Charter rights may vary to at least a limited degree, it becomes necessary to determine which contextual variations are constitutionally significant. In the present appeal, the, relevant context is a prosecution which could result in a significant fine, or imprisonment if the accused were an individual.

Reference: R. v. Wigglesworth [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235.

24. In R. v. Wigglesworth, supra, Wilson J., with the support of the full Court on the issue, set out the principles to be applied in determining when s.11 of the Charter can be invoked. It is significant that Wilson J. conceived of her interpretation of s.11 as a comparatively "narrow" one. Nevertheless, it is clear from Wigglesworth that:

(a) "The rights granted by s.11 of the Charter are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e. criminal, quasi-criminal and regulatory offences, either federally or provincially enacted". (at p.554)

(b) "It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the State and who may well suffer a deprivation of liberty as a result of the exercise of that power." (at p.558)

(c) "The phrase 'criminal and penal matters' which appears in the marginal note [to s.11] would seem to suggest that a matter could fall within s.11 either because by its very nature it is a criminal proceeding or because conviction in respect of the offence may lead to a true penal consequence." (at p.559)

(d) "There are many examples of offences which are criminal in nature but which carry relatively minor consequences following conviction. Proceedings in respect of these offences would nevertheless be subject to the protections of s.11 of the Charter. It cannot seriously be contended that, just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s.11. It is a criminal or quasi-criminal proceeding. It is the sort of offence which by its very nature must fall within s.11." (at p.559)

(e) "...if a particular matter is of a public nature intended to promote public order *and welfare* within a sphere of public activity, then that matter is the kind of matter which falls within s.11. It falls within the section because of the kind of matter it is. This is to be distinguished from private domestic or disciplinary matters which are regulatory, protective or corrective and which are intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity." (at p.560) [emphasis added]

(f) "This is not to say that if a person is charged with a private, domestic or disciplinary matter... he or she can never possess the rights guaranteed under s.11. Some of these matters may well fall within s.11 ...because they involve the imposition of true penal consequences." (at pp.560-561)

(g) "In my opinion, a true penal consequence which would attract the application of s.11 is imprisonment on a fine which by its magnitude would appear to be imposed for the purpose or redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity." (at p.561)

(h) "...I shall assume that it is possible that the 'by nature' test can be failed but the 'true penal consequence' test passed. Assuming such a situation is possible, ...the 'by nature test' must give way to the 'true penal consequence' test. If an individual is to be subject to penal consequences such as imprisonment - the most severe deprivation of liberty known to our law - then he or she, in my opinion, should be entitled to the highest procedural protection known to our law." (at p.562)

D. THE DISTINCTION BETWEEN "REGULATORY OFFENCES" AND TRUE CRIMES: A CONSTITUTIONALLY RELEVANT DIFFERENCE?

25. A major contention of the federal and provincial attorneys-general is that the imposition of a persuasive burden on the accused in a "regulatory" prosecution does not violate the "principles of fundamental justice" in s.7, and, therefore does not violate s.11 (d), because conviction of a regulatory offence does not carry the same type or degree of stigma as does conviction of a "true crime". This contention is misconceived in several ways.

Reference: Factum of the Respondent, paras.38-57
Factum of the Attorney-General of Ontario paras.37-42.

26. First, s.7 of the Charter does *not* provide that an individual "may not be stigmatized except in accordance with the principles of fundamental justice"; it states that an individual may not be "deprived of ....liberty ...except in accordance with the principles of fu..damental justice". The right to be presumed innocent until proven guilty is one such principle. The implication of the position of the federal and provincial governments is that where there is less stigma the State needs less justification to punish, an absurd proposition.

27. Second, the argument completely overlooks the fact that "stigma" arises not only from the fact that the public knows a person is a wrongdoer but also from the fact that the state has exercised its power to prosecute and punish. In R. v. Sault Ste. Marie, Dickson J., in rejecting arguments to justify absolute liability, was careful to say that conviction of any offence, no matter how minor, attracts stigma.

Reference: R. v. Sault Ste. Marie, supra, at pp.1311-1312.

28. Third, the very purpose of the penal provisions of any statute, regulatory or otherwise, is to deter not only by penalizing, but by also denouncing the offender.

Reference: R. v. Cotton Felts (1982), 2 C.C.C. (3d) Ont. C.A. per Blair J.A. at pp.294-295.

29. Fourth, for Charter purposes, the distinction between offences which are "mala in se" and "mala prohibitum" is not satisfactory. Social perceptions of what sort of behaviour is inherently wrong may vary over time, even *if* the distinction between the two categories is philosophically tenable. For example, it is quite possible that in the near future offences dealing

with the environment, once regarded as purely regulatory, may well attract a significant degree of social stigma and become regarded as "true crimes". Consensual homosexual behaviour, once seen by both the law and society as inherently heinous, has been completely decriminalized. No one would seriously contend that narcotics offences, which carry a great deal of stigma, should not attract the full procedural protections in ss.7-14 of the Charter, yet the Supreme Court of Canada held in 1978 that the Narcotic Control Act was not "in pith and substance" criminal law.

Reference: R. v. Hauser, [1979] 1 S.C.R. 984
O.L.R.C., Report on the Basis of Liability for Provincial Offences, supra at pp.3-4.

E. JUSTIFICATION UNDER S.1 OF THE CHARTER

30. Paragraph 50 of Ontario's factum states that "the imposition of a persuasive burden of proof in regulatory legislation is based upon specific considerations related to the achievement of the legislative objectives, the integrity of the legislative scheme, and effectiveness and efficiency in its enforcement". The placing of a persuasive burden on the accused is said to be necessary because of: a) the reluctance of witnesses affiliated with the regulated enterprise to testify against it; b) the necessity to encourage record keeping and compliance procedures; c) reduction of pre-charge investigatory requirements; and d) the avoidance of adversarial relations with regulated enterprises. Both the federal government and the provinces seek to justify the reverse onus on the basis that convictions in regulatory matters would be "impossible" to obtain otherwise. Such justifications address the balance to be struck between individual rights and the interest of the State in advancing its legitimate aims. As such, they are more properly addressed under s.1 of the Charter.

Reference: Reference Re s.94 (2) of the Motor Vehicle Act, supra, per Lamer J. at p.517.

31. While the overall objectives of *most* regulatory statutes may be sufficiently important to override Charter rights, the real issue, however, is whether there is a proportionality between the aims of the *particular* legislature provision (i.e. reversing the onus) and the infringement of the right. If the justifications advanced in this appeal for the imposition of the reverse onus are not supported by sufficient evidence or if they lack cogency, they must fail s.1 scrutiny.

1. The Rational Connection Test

32. There is a serious question as to whether the imposition of a persuasive burden in the regulatory context meets the "rational connection test". Penal deterrence is often only one of the means employed by the legislature to discourage behaviour tending to defeat the statutory objective. For example, the Competition Act gives the Competition Tribunal broad powers to compel suppliers to cease certain practices and dissolve mergers. Workplace safety legislation may provide for "stop-work" orders. By contrast, the purpose of the penal provisions of such legislation is to deter by punishing and denouncing the offender. The question therefore arises whether the imposition of a persuasive burden is rationally connected to this objective.

Reference: R. v. Ellis-Don and Rocco Morra, supra, per Houlden J.A. at p.8.
R. v. Cotton Felts, supra, per Blair J.A. at pp.294-295.
Competition Act, R.S.C. 1985, c.C-34, (as amended) ss.75-103.
Occupational Health and Safety Act, R.S.O. 1980 c.321, ss.5-8, ss.9-12; s.23; ss.28-29, ss.33-36 (as amended) by S.O. 1990, c.7, ss.3-5; ss.24-5, s.29; ss.31-37.
Braithwaite, "To Punish or Persuade: Enforcement of Coal Mine Safety", S.U.N.Y. Press, 1985 at pp.91-92.

33. Denunciation is more effective when guilt is established beyond a reasonable doubt because the offender can no longer take refuge in the cloak of innocence. In a criminal trial, the presumption of innocence is a critical factor which lends to its solemnity. The purpose of penal provisions is defeated when the onus of proof is shifted; conviction becomes, morally and socially, less serious that it otherwise would be.

Reference: Cromwell, Thomas A., "Proving Guilt: The Presumption of Innocence and the Canadian Charter of rights and Freedoms", Evidence and the Charter of Rights and Freedoms, (Toronto, Butterworths, 1989) at pp.146-147.
In Re Winship, supra, per Brennan J. at p.364.

34. As the factums of the federal and provincial governments indicate, sentences for regulatory offences are often at the low end of the scale. The Respondent's factum points to a study showing that offenders of the false advertising sections in the Competition Act "have little to fear because of the insignificant nature of the sentences imposed". In Cotton Felts, supra, Blair J.A. noted a trend in the lower courts to impose light sentences for violations of workplace safety laws. As long as the presumption of innocence is not fully recognized in the context of the penal provisions of "regulatory" legislation, there will be a social perception that punishments should not be serious. This social perception will be reflected in a judicial tendency to impose sentences as the low end of the scale.

Reference: R. v. Cotton Felts, supra, at pp.292-294.
W.T. Stanbury, "Penalties and Remedies under the Combines Investigation Act 1976-1989", 14 Osgoode Hall L.J. 571.

35. If a statutory provision tends to defeat its own purpose, the rational connection test in Oakes cannot be met. Ontario, at paragraph 50 of its factum, seeks to explain away the

phenomenon that, while many regulatory statutes provide for significant periods of imprisonment sentences are nevertheless often minimal, by saying that the legislature makes incarceration available for "hortatory and instrumental" purposes. When the State itself acknowledges that its penalties are not to be taken seriously and, at the same time, contends that rights are not violated when the truly innocent may legally be convicted, the result can only be cynicism and disrespect for law.

Reference: Factum of Attorney-General of Ontario, para.50.
R. v. Sault Ste. Marie, supra, at p.1311.
Richardson, G., "Strict Liability for Regulatory Crime: The Empirical Research", [1987] Crim. L. Rev. 295 at p.299.
Mahoney, R., "The Presumption of Innocence: A New Era", supra, pp.54-56.

2. Minimum Impairment

(a) Standard to be Applied

36. The provincial and federal governments maintain that the legislature ought to be given wide scope with respect to the proportionality test because regulatory legislation is generally concerned with maintaining the proper balance between competing interests. Such an argument has no cogency where the right in question is a protection against the prosecutorial power of the State. The situation in this appeal and similar cases is not "polycentric". Therefore, a "minimal impairment" test instead of a "reasonable basis" test is more appropriate.

Reference: Irwin Toy Ltd. v. A.G. Quebec, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 at pp.986-1000.
McKinney v. Board of Governors of the University of Guelph et. al., Dickson C.J.C., Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory, JJ. December 6, 1990 (S.C.C.) No.20747 per LaForest J. at p.45-46.

(b) No Evidence to Justify Infringement

37. The only evidence adduced by the Respondent on the s.1 issue contains no indication whatsoever that the substitution of a constitutionally valid evidentiary burden in the place of a persuasive burden would result in any significant decrease of the conviction rate.

Reference: Case on Appeal, pp.45-63, "Consumer and Corporate Affairs Canada Misleading Advertising Bulletin".

(c) The Justifications Proposed by the Respondent and Provincial Attorneys-General

(i) First Proposed Justification: Reasonable Doubt Standard Means Impossibility of Conviction

38. The rationale stated by Dickson J. in R. v. Sault Ste. Marie for reversing the onus is that the accused will usually have the better means of proof where the defence is "mistake of fact" or "due diligence". Such an observation may have more cogency with respect to the "false advertising" provisions of the Competition Act where the defence of "due diligence" relates to the knowledge of the accused concerning to the truth or falsity of certain facts. However, generally speaking, if lower courts are instructed that the accused must not only adduce (or point to) *some* evidence that care was taken but put forth *sufficient* evidence to raise the issue of whether *reasonable* care was taken, then, there is no reason to believe that accused persons will be afforded any greater leeway to raise fanciful or frivolous defences.

Reference: R. v. Ellis-Don and Rocco Morra, supra, per Galligan J.A. at p.12-13.
R. v. Ireco Canada II Inc., supra, at p.500.

39. The contention that the reasonable doubt standard is "impossible" is belied by the fact

that there is no evidence to show that conviction rates are inadequate for mens rea offences.

Reference: O.L.R.C., Report on the Basis of Liability for Provincial Offences, at p.47.
Stuart, D., "Presuming Innocence: Why Compromise" (1983), 32 C.R. (3d) 334.

40. In many regulatory statutes, the legislature has powerful investigative tools, which, moreover, may be subject to a far less degree of constitutional constraint than criminal investigatory powers.

Reference: Thomson Newspapers v. Director of Investigation and Research, supra.

(ii) Second Proposed Justification: Reluctance of Witnesses

41. The reluctance of witnesses can be a problem in any criminal case. This contention is implicitly based on the assumption that the Crown's need for witnesses will increase if the persuasive burden is replaced by an evidentiary burden - i.e. that the abolition of the reverse onus will decrease guilty pleas because it encourages frivolous defences. As seen above, there is no reason to believe that this is so and no evidence to establish it.

Reference: Bureau of National Affairs, Occupational Health and Safety: Seven Critical Issues for the 1990's, 1989 at p.20.

(iii) Third Proposed Justification: Encouragement of Record Keeping and Compliance Procedures

42. An evidentiary burden requiring the accused to adduce sufficient evidence of reasonable care may, depending on the specific regulatory context, accomplish the same purpose as a persuasive burden. Moreover, in many spheres of activity, the State can better meet this objective by requiring specific record keeping.

(iv) Fourth Proposed Justification: Reduction of Pre-Charge Investigatory Requirements

43. It is ironic that Ontario contends that the infringement of the presumption of innocence may be justified by the need to protect the privacy interests of regulated enterprises when it seeks to rely on the reasoning in Thomson Newspapers, supra, of La Forest J. who pointed out that the privacy interest in the business context is less pressing than it is in other areas of life. Such an argument is simply one of administrative convenience which cannot justify infringement of a Charter right.

Reference: Factum of the Attorney-General of Ontario, para.50 (d), p.20.
Thomson Newspapers v. Director of Investigation and Research, supra, per La Forest J. at pp.516-517.
Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 per Wilson J. at pp.218-219.

(d) Fifth Proposed Justification: Avoidance of Adversarial Relations with the Regulated Enterprise

44. Ontario argues at paragraph 50 (d) of its factum that a persuasive burden reinforces co-operation between the regulated enterprise and enforcement personnel. How this is so is left unexplained. Presumably, the argument rests on the assumption that guilty pleas reduce adversarial procedures and, thus, antagonism. If the State wishes to encourage compliance by co-operation, there are surely more direct, effective, and straightforward means of doing it in many, if not most, regulatory spheres. Moreover, the argument is belied by the observation that regulatory authorities often do not prosecute until there have been repeated offences, which leads to the conclusion that the penal provisions of such statutes are usually only invoked by the State when an adversarial relationship has already come into existence and the practical issue between the authority and the accused is the latter's intention to avoid or defy the regulatory scheme.

Reference: Richardson, G., "Strict Liability for Regulatory Crime: The Empirical Research", [1987] Crim. L. Rev.295 at p.296.

PART IV - DISPOSITION REQUESTED

45. These intervenors request that this Court conclude that the offence created by combining ss.36 (1) and 37.3 (2) (a) and (b) of the Competition Act does infringe s.11 (d) of the Charter and that such an infringement, on the evidence adduced by the Respondent, cannot be justified under s.1.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, Ontario
February 13, 1991.

Earl A. Cherniak, Q.C.

Kirk F. Stevens

PART V - LIST OF AUTHORITIES

	REFERENCE PAGE NO.
Stuart, D., "Holmes and Whyte: Zig-Zags on Reversing the Onus, Section 1 Care and Control" (1988), 64 C.R. (3d) 143.	2
Stuart, D., "Presuming Innocence: Why Compromise" (1983), 32 C.R. (3d) 334.	18
Thomson Newspapers v. Director of Investigation and Research, [1990] 1 S.C.R. 425.	6, 8, 18, 19
Valente v. The Queen, [1985] 2 S.C.R. 673.	8
W.T. Stanbury, "Penalties and Remedies under the Combines Investigation Act 1976-1989", 14 Osgoode Hall L.J. 571.	15

PART VI - LIST OF STATUTES

REFERENCE PAGE NO.

Occupational Health and Safety Act, R.S.O. 1980 c.321, ss.5-8, ss.9-12; s.23; ss.28-29, ss.33-36 (as amended) by S.O. 1980, c.7, ss.3-5; ss.24-5, s.29; ss.31-37. 14