Is Presuming Guilt for Regulatory Offences still Constitutional but Wrong?: *R v Wholesale Travel Group Inc* and Section 1 of the *Charter of Rights and Freedoms* 20 Years After

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The doctrine of strict liability was embraced by the Supreme Court of Canada in *R v Sault Ste Marie*, a case that was decided before the *Charter of Rights and Freedoms* came into force. Subsequently, in *R v Wholesale Travel Group Inc*, the reversal of the burden of proof imposed on those charged with strict liability offences—to establish on a balance of probabilities that due diligence was exercised—was found to violate the *Charter*'s presumption of innocence under section 11(d), and barely held to be justified under section 1. It is the author's view that strict liability offences that are punishable by imprisonment are vulnerable to *Charter* challenges, and remain increasingly at risk of not being saved by section 1, pursuant to the *R v Oakes* proportionality analysis. Developments since *Wholesale Travel* illustrate that there are a growing number of alternatives to strict liability offences involving imprisonment, a factor that is especially relevant for the proportionality analysis under section 1. As a result, consideration should be given to enacting a discrete category of strict liability offences that include imprisonment, and for which the prosecution should be required to prove *mens rea* on the part of the defendant, in order to justify the use of incarceration upon conviction. In such cases, prosecutors would be required to announce their intentions before the start of the proceedings to seek a penalty of imprisonment, in which case the reverse onus would not apply. Creating a separate category of aggravated strict liability offences that are punishable by imprisonment is another means of accomplishing this objective. Such a paradigm would help preserve the constitutionality of the doctrine of strict liability, should the Court decide to reconsider its decision in *Wholesale Travel,* and particularly whether section 1 of the *Charter* justifies the reverse onus imposed on defendants to prove due diligence in the case of strict liability offences punishable by imprisonment.

La Cour suprême du Canada a entériné la doctrine de la responsabilité stricte dans l'arrêt *R c Sault Ste Marie*, décision que la Cour a rendue avant l'entrée en vigueur de la *Charte des droits et libertés*. Par la suite, dans l'arrêt *R c Wholesale Travel Group Inc.*, la Cour a statué que le renversement du fardeau de la preuve imposé aux personnes accusées d'infractions de responsabilité stricte — afin d'établir selon la prépondérance des probabilités qu'elles avaient fait preuve de diligence raisonnable — violait la présomption d'innocence garantie par la *Charte* à l'alinéa 11(d) et pouvait difficilement se justifier en vertu de l'article 1. Selon l'auteur, les infractions de responsabilité stricte passibles d'une peine d'emprisonnement sont susceptibles d'être contestées en vertu de la *Charte* et risquent de façon croissante de ne pas résister au test de l'article 1, suivant l'analyse de la proportionnalité établie dans l'arrêt *R c Oakes*. Les développements survenus depuis l'arrêt *Wholesale Travel* montrent qu'il existe un nombre croissant de solutions de rechange aux infractions de responsabilité stricte passibles d'une peine d'emprisonnement, un facteur qui se révèle particulièrement pertinent pour l'analyse de la proportionnalité en vertu de l'article 1. Il faut par conséquent envisager de créer une catégorie distincte d'infractions de responsabilité stricte comprenant une peine d'emprisonnement, à l'égard desquelles la poursuite sera tenue de prouver la *mens rea* (soit l'intention coupable) de la partie défenderesse et ce, afin de justifier le recours à l'incarcération sur déclaration de culpabilité. Dans ces cas-là, les procureurs seraient tenus d'annoncer avant le début des procédures leur intention de requérir une peine d'emprisonnement, auquel cas le renversement du fardeau de la preuve ne s'appliquerait pas. La création d'une catégorie distincte d'infractions qualifiées de responsabilité stricte passibles d'une peine d'emprisonnement constituerait une autre façon d'atteindre cet objectif. Un paradigme de ce type permettrait de préserver la constitutionnalité de la doctrine de la responsabilité stricte, advenant que la Cour décide de réexaminer sa décision dans l'arrêt *Wholesale Travel*, et de déterminer, en particulier, dans quelle mesure l'article 1 de la *Charte* justifie le renversement du fardeau de la preuve imposé aux défendeurs afin de démontrer leur diligence raisonnable dans le cas d'une infraction de responsabilité stricte passible d'une peine d'emprisonnement.

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I. INTRODUCTION

The Supreme Court of Canada introduced the notion of strict liability for regulatory offences in its seminal judgment, *R v Sault Ste Marie (City)*.[1] According to this doctrine, strict liability may be viewed as a halfway house between *mens rea* (where the prosecution is required to prove fault or the requisite mental element beyond reasonable doubt, as is the case for all criminal offences) and absolute liability (where there is no fault requirement, and proof of the proscribed act, or *actus reus*, leads to a finding of guilt). In the case of strict liability, however, proof of the prohibited act *prima facie* imports the offence, which then leaves it open to the defendant to avoid liability by proving, on a balance of probabilities, that he or she took all reasonable care. More particularly, the due diligence defence, which may be raised by individuals or corporations alike, is available where the defendant reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent; or if he or she took all reasonable steps to avoid the particular event.

As a consequence of its decision in *Sault Ste Marie*, the Court relieved the prosecution from having to prove negligence in the case of regulatory offences. Instead, the onus was placed on the party charged with the offence to establish that he or she exercised due diligence. The Court reasoned that only the defendant would generally have the means of knowing such proof—that is, the absence of negligence—therefore, it would not be unfair to impose this burden on the charged party. The alternative charge was absolute liability, in which case the defendant was denied any defence whatsoever. In the result, the prosecution was assigned the burden of proving, beyond a reasonable doubt, that the defendant committed the prohibited act, whereas the defendant was obliged to prove, on the balance of probabilities, the defence of reasonable care.

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1 *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, 85 DLR (3d) 161 [*Sault Ste Marie* cited to SCR].

In *R v Wholesale Travel Group Inc*,[2] rendered under the *Charter of Rights and Freedoms*,[3] the Court was asked to determine whether this reversal of the burden of proof for strict liability offences was not merely fair, but constitutional as well. This case again involved a corporate defendant, which although, unlike a person, does not possess a liberty interest, may likewise defend itself by challenging the constitutional validity of a law. The result was a five-four split decision, in which the nine judges hearing the case delivered five separate opinions. The majority held that the reversal of the burden of proof for regulatory offences, even if in violation of the presumption of innocence under section 11(d) of the *Charter*, was justified by section 1; the dissenting judges ruled that section 1 could not save the *Charter* infringement.

To look both backward and forward, then, one may ask whether the justification for reversing the burden of proof for strict liability offences is as compelling today as when it appeared for the Court two decades ago when it decided *Wholesale Travel*. In view of the expansion of regulatory offences and their escalating penalty provisions, it might be queried whether *Wholesale Travel* would be decided the same way today. Most importantly, if it remains a *Charter* infringement to reverse the burden of proof in such cases, but one that can be justified by recourse to section 1, does it follow that the doctrine of strict liability is nevertheless constitutional and fair even in those cases where the prosecutor has the ability to seek punishment which involves lengthy imprisonment or, indeed, any period of incarceration, as opposed to no jail time at all? Indeed, as the dissenting judges in *Wholesale Travel* pointed out, there are less intrusive alternatives available to Parliament than reversing the burden of proof for strict liability offences, namely, placing an evidentiary burden on the defendant instead of a legal one.

Professor Stuart, in a case comment touching on *Wholesale Travel*, posed the question of whether it is too late for its reconsideration.[4] In my view, a number of developments subsequent to the Court's judgment make it particularly appropriate at this time, twenty years afterwards, to return to the issue of the constitutionality of strict liability offences that are punishable by imprisonment. Specifically, the restricted availability of jail for regulatory offences (where *mens rea* must be proven by the prosecution beyond a reasonable doubt) would reflect a constitutional and fair compromise if the Crown was permitted to have the assistance of the reverse onus provision to prove the commission of regulatory offences, which are strict liability in nature, despite the presumption of innocence under section 11(d) of the *Charter*. However, in order to justify this *Charter* infringement pursuant to section 1, the Crown would be permitted to seek imprisonment only where it provided notice of its intention to seek incarceration in the event of conviction, and in such cases, proof

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2 *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154, 84 DLR (4th) 161 [*Wholesale Travel* cited to SCR].

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 Don Stuart, "*R v 1260448 Ontario Inc.*: Is the *Sault Ste. Marie* Approach to Regulatory Offences About to Disappear?" (2004) 16 CR (6th) 147 at 150 [Stuart, "Regulatory Offences"].

of *mens rea* would be required. Imprisonment, in other words, would be restricted to an aggravated class of regulatory offences. Such a factor would be in keeping with the proportionality test in *R v Oakes*,[5] and so preserve the constitutionality of strict liability as a category of public welfare offences should the Court decide to reconsider its decision in *Wholesale Travel* in the future. In short, Professor Stuart's question remains both topical and timely.

II. *R V SAULT STE MARIE*: THE HALFWAY HOUSE OPENS ITS DOORS TO STRICT LIABILITY

The magnitude and importance of regulatory offences, which relate to an incredibly diverse and complex series of activities, was evident long before the Court's decision in *Sault Ste Marie*. In an 1933 article, Francis Bowes Sayre classified regulatory offences as falling into the following eight categories: (1) illegal sales of intoxicating liquor; (2) sales of impure or adulterated food or drugs; (3) sales of misbranded articles; (4) violations of anti-narcotics acts; (5) criminal nuisances (consisting of annoyances or injuries to public health, safety, repose or comfort, obstructions of highways); (6) violations of traffic regulations; (7) violations of motor-vehicle laws; (8) violations of general police regulations, passed for the safety, health, or well-being of the community.[6]

In 1974, the Law Reform Commission of Canada conducted a study on strict liability, in which it was estimated that there were approximately 20,000 regulatory offences in each province, as well as an additional 20,000 federal offences.[7] These numbers did not take into account municipal infractions, such as by-law offences. By 1983, the Department of Justice estimated that there were approximately 97,000 federal regulatory offences.[8] Given such figures, there is no reason to doubt that the number of regulatory offences at all levels of government has continued to expand.[9] It is therefore hard to take issue with the Law Reform Commission of Canada's prediction, made shortly before *Sault Ste Marie*, that "the regulatory offence … is here to stay."[10]

All nine members of the Court in *Sault Ste Marie* agreed with the introduction of strict liability into Canadian law. Under the heading, "*The Mens Rea Point*," Justice Dickson began by noting that "the distinction between the true criminal

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5 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes* cited to SCR].

6 Francis Bowes Sayre, "Public Welfare Offences" (1933) 33:1 Colum L Rev 55 at 73.

7 Law Reform Commission of Canada, *Studies in Strict Liability* (Ottawa: Information Canada, 1974) at 10, cited in *Wholesale Travel*, *supra* note 2 at 221 [LRCC, Studies in S*trict Liability*].

8 Law Reform Commission of Canada, *Policy Implementation, Compliance and Administrative Law* (Working Paper 51) (Ottawa: Law Reform Commission of Canada, 1986) at 38, cited in *Wholesale Travel*, *supra* note 2 at 221.

9 *Wholesale Travel*, *ibid*.

10 Law Reform Commission of Canada, *Report: Our Criminal Law* (Ottawa: Information Canada, 1976) at 11.

offence and the public welfare offence is one of prime importance."[11] For criminal offences, the prosecutor was required to prove a mental element—that is, the accused committed the prohibited act intentionally or recklessly—"with knowledge of the facts constituting the offence, or wilful blindness toward them. Mere negligence [was] excluded from the concept of the mental element required for conviction."[12] As a result, "a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law."[13] Justice Dickson went on to state:

> In sharp contrast, 'absolute liability' entails conviction on proof merely that the defendant committed the prohibited act constituting the *actus reus* of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a malefactor and punished as such.
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> Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is generally held revulsion against punishment of the morally innocent.[14]

The Court proceeded to examine the claims for and against the use of absolute liability for regulatory offences. In favour of absolute liability, it noted two predominant arguments. The first was that "the protection of social interests requires a high standard of care and attention" by those who participate in regulated activities, and that such persons would be more likely to adhere to such standards if they were aware that "ignorance or mistake will not excuse them."[15] Second, there was the matter of "administrative efficiency:" proof of fault would be too great a burden in both time and money to impose upon the prosecution, and requiring proof of the defendant's individual intent would result in nearly every violator escaping unpunished.[16] On the other hand, a number of compelling arguments could be marshalled against absolute liability. "The most telling [was] that it violate[d] fundamental principles of penal liability."[17] In addition,

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11 *Sault Ste Marie*, *supra* note 1 at 1309.
12 *Ibid* at 1309-10.
13 *Ibid* at 1310.
14 *Ibid*.
15 *Ibid*.
16 *Ibid* at 1311.
17 *Ibid*.

there was "no evidence that a higher standard of care resulted from absolute liability."[18] Moreover, since evidence of due diligence was admissible on sentencing, such evidence might as well be heard when determining the issue of guilt.

The Court was thus attracted to strict liability as a means of providing a middle ground for regulatory offences between what it considered to be the two stark alternatives of full *mens rea* and absolute liability. It also took into account that public welfare offences represented a shift of emphasis from the protection of individual interests to the protection of public and social interests. The middle position, represented by strict liability, fulfilled the goals of public welfare offences while still not punishing those who were entirely blameless. As Glanville Williams put it, "There is a half-way house between *mens rea* and strict responsibility which has not yet been properly utilised, and that is responsibility for negligence."[19] The Court agreed.

As a result, the Court held that the correct approach in resolving the issue was to relieve the prosecution of the burden of proving *mens rea*, given the virtual impossibility of acquiring proof of wrongful intention in most regulatory offence cases. It was, after all, the accused alone who would have knowledge of what he or she had done to avoid the breach of the regulatory standard, and it was thus not improper to expect this person to come forward with the evidence of due diligence. In summary, there was nothing wrong with rejecting absolute liability, while opening the doors to the defence of reasonable care.

Sault Ste Marie was greeted positively and met with much critical acclaim. In their biography on Justice Dickson, Robert Sharpe and Kent Roach described his judgment as "an innovative tour de force" which fundamentally changed the prosecution of regulatory offences.[20] Professor Stuart observed that, in general, "it deserves the highest commendation as one of the most comprehensive and comprehensible efforts in any jurisdiction to arrive at an integrated and principled approach to a difficult problem."[21] John Swaigen, one of the first authors in this country to devote a book exclusively to regulatory offences, likened the case to providing "the light at the end of a very long tunnel."[22] Another scholar termed it "a bold stroke of judicial law reform."[23] One other commentator stated that while the case constituted an example of judicial law-making, it was to be acknowledged as "a decision

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18 *Ibid*.

19 Glanville Williams, *Criminal Law: The General Part*, 2d ed (London: Stevens & Sons, 1961) at 262.

20 Robert J Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003) at 220.

21 Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed (Toronto: Thomson Carswell, 2007) at 181 [Stuart, *Criminal Law*].

22 John Swaigen, *Regulatory Offences in Canada: Liability & Defences* (Toronto: Carswell, 1992) at 2.

23 Bruce P Archibald, "Liability for Provincial Offences: Fault, Penalty and the Principles of Fundamental Justice in Canada (A Review of Law Reform Proposals from Ontario, Saskatchewan and Alberta)" (1991) 14:1 Dal LJ 65 at 66 [Archibald, "Liability"].

which has, and will continue to have, far-reaching effect on the development of Canadian public welfare law."[24]

However, *Sault Ste Marie* did raise some areas of concern. As Stuart noted, the due diligence defence recognized by the Court imposed on the accused "a full, persuasive burden of proof on the balance of probabilities," which though intended as a compromise, was not in fact a halfway house at all, but rather the least favourable alternative to the accused, given that other options between subjective *mens rea* and absolute liability included proof of gross or simple negligence tested objectively, without the reversal of the burden of proof.[25] In addition, as noted by Todd Archibald, Kenneth Jull and Kent Roach, the Law Reform Commission of Canada's work on strict liability, which Justice Dickson relied upon when he justified the introduction of this new doctrine, differed in one very significant aspect: the Law Commission of Canada recommended that jail should not be available for strict liability offences.[26] However, the water pollution offence in issue in *Sault Ste Marie* was punishable by a fine of up to $5,000 on first conviction, and for subsequent convictions a maximum fine of $10,000 and one year of imprisonment, or both. As a result of *Sault Ste Marie*, imprisonment was very much a sentencing option for strict liability offences. The question that arose, then, was whether the doctrine of strict liability, while intended to be fair, was nevertheless constitutional.

III. *R V WHOLESALE TRAVEL GROUP INC*: STRICT LIABILITY SURVIVES THE CHARTER OF RIGHTS… BARELY

Almost fifteen years would elapse before the Supreme Court of Canada was asked in *Wholesale Travel* to decide the constitutionality of strict liability. Over this period, the Court had completely changed; none of the judges who joined with Justice Dickson in *Sault Ste Marie* embracing strict liability remained on the bench. And this time, unlike in *Sault Ste Marie*, the Court was sharply divided, barely rejecting the *Charter* challenge by the narrowest of margins, in a five-four split. The nine judges who heard the case delivered, in fact, several separate opinions on the various issues in the case.

The defendant in *Wholesale Travel* was charged with five counts of false or misleading advertising, contrary to the federal *Competition Act*.[27] The punishment,

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24 Nancy Jean Strantz, "Beyond *R v Sault Ste Marie*: The Creation and Expansion of Strict Liability and the 'Due Diligence' Defence" (1992) 30:1 Alta L Rev 1233 at 1257. See also Allan C Hutchinson, "*Sault Ste. Marie*, *Mens Rea* and the Halfway House: Public Welfare Offences Get a Home of their Own" (1979) 17 Osgoode Hall LJ 415 at 417 (commenting that the effect of the Supreme Court of Canada's decision "upon the actual administration and enforcement of law is manifest").

25 Stuart, *Criminal Law*, *supra* note 21 at 185.

26 Todd L Archibald, Kenneth E Jull & Kent W Roach, *Regulatory and Corporate Liability: From Due Diligence to Risk Management*, loose-leaf (consulted in January 2005), (Aurora, Ont: Canada Law Book, 2004), ch 2 at 11.

27 RSC 1985, c C-34.

in the case of conviction upon indictment, was a fine in the discretion of the court or imprisonment for five years, or both; the summary conviction penalty was a fine of $25,000 or imprisonment for a one year period, or both.[28] The legislation also provided a statutory defence if the accused established that the act or omission giving rise to the offence was the result of error, or that he or she took reasonable precautions and exercised due diligence to prevent the occurrence of such error.[29]

Justice Cory, on behalf of Justice L'Heureux-Dubé, gave the majority's principal judgment upholding the constitutional validity of this due diligence defence, despite the reversal of the burden of proof imposed on the defendant to establish it. He began by noting the distinction between criminal offences and regulatory offences, stating that the former "are usually designed to condemn and punish past, inherently wrongful conduct," whereas the latter "are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care."[30] Justice Cory further stated: "It follows that regulatory offences and crimes embody different concepts of fault .... [R]egulatory offences are directed primarily not to conduct itself but to the consequences of conduct."[31] Thus, "Conviction for breach of a regulatory offence [such as false advertising] suggests nothing more than the defendant had failed to meet a prescribed standard of care,"[32] and imported a significantly lesser degree of culpability than conviction for a criminal offence.

In terms of the application of the *Charter* to regulatory offences, Justice Cory wrote that it is important for "the *Charter* to be interpreted in light of the context in which the claim arises."[33] This meant that in *Wholesale Travel*, it was important to consider the regulatory nature of the offence and its place within the larger sphere of public welfare legislation. It followed that the "constitutional standards developed in the criminal context [were not to] be applied automatically to regulatory offences."[34]

Justice Cory proceeded to explain that there were two predominant considerations justifying the difference in treatment as between regulatory and criminal offences: the first related to the "distinctive nature of regulatory activity," whereas the second related to the "fundamental need to protect the vulnerable through regulatory legislation."[35] The "licensing justification," the first factor, signified that regulated defendants had made the choice to engage in the regulated activity, and having placed themselves in a responsible relationship to the public generally, must be taken to accept the consequences of that responsibility.[36] The second factor, the

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28 *Ibid* at s 36(5), as amended by RS 2009, c 2, s 52(5).
29 *Ibid* at s 37.3(2), as amended by RS 2009, c 2, s 52.1(6).
30 *Wholesale Travel*, *supra* note 2 at 219.
31 *Ibid*.
32 *Ibid*.
33 *Ibid* at 226.
34 *Ibid*.
35 *Ibid* at 227.
36 *Ibid* at 228.

"vulnerability justification," required courts to consider that extensive regulatory legislation was essential for the protection of society as a whole, and especially those who were vulnerable and least able to protect themselves.[37]

The constitutional challenge to strict liability could now be placed in proper perspective. The first ground of attack was based on the principles of fundamental justice under section 7 of the *Charter*. The contention was that section 7 was violated in those cases where imprisonment was a sentencing option, since negligence, which is the essence of strict liability offences, did not provide a sufficient degree of fault to justify a conviction. Justice Cory accepted the contention that proof of some degree of fault is required by the *Charter* section 7 right.[38] However, he held that,"with respect to regulatory offences, proof of negligence satisfies the requirement of fault demanded by s 7. Although the element of fault may not be removed completely, the demands of s 7 will be met in the regulatory context where liability is imposed for conduct which breaches the standard of reasonable care required of those operating in the regulated field."[39] In reaching this conclusion, he cited *Sault Ste Marie* in support of the proposition that it would be unworkable to require the prosecution to prove mental culpability on the part of the defendant, and thus a lesser fault standard was appropriate.[40]

Reversal of the burden of proof, on the balance of probabilities, formed the basis of the second *Charter* challenge. It was contended that this constituted an infringement of the presumption of innocence, as guaranteed by section 11(d). This argument, as Justice Cory noted, "represent[ed] a fundamental challenge to the entire regime of regulatory offences in Canada," given that the due diligence was "the essential characteristic of strict liability offences as defined in *Sault Ste. Marie*...."[41] He considered, though, as in the case of the *Charter* section 7 analysis, the importance of regulatory legislation, and how its enforcement strongly supported the use of a contextual approach in the interpretation of section 11(d) of the *Charter* and its application to regulatory offences. In his view, for regulatory mechanisms to operate effectively, the Crown ought not to be required to disprove negligence beyond a reasonable doubt.[42]

The difference in the scope and meaning of section 11(d) of the *Charter* in the regulatory context was not to be taken to imply that the presumption of innocence was meaningless for a regulated accused, as the Crown was still required to prove the *actus reus* of regulatory offences beyond a reasonable doubt.[43] However, "fault [was] presumed from the bringing about of the proscribed result and the onus

37 *Ibid* at 233.
38 *Ibid* at 238.
39 *Ibid*.
40 *Ibid* at 240-41.
41 *Ibid* at 241.
42 *Ibid* at 243.
43 *Ibid* at 213.

shift[ed] to the defendant to establish reasonable care on a balance of probabilities."[44] In the result, Justice Cory concluded that "the presumption of innocence as guaranteed by s 11(d) of the *Charter* is not violated by strict liability offences as defined in *Sault Ste. Marie*."[45] Given this conclusion, there was no need to go on and consider whether any *Charter* infringement under either sections 7 or 11(d) could be justified by section 1. Nevertheless, Justice Cory indicated that had he been required to address this issue, he would have concluded that strict liability offences can be justified under section 1 of the *Charter* for the same reasons he set forth in finding that neither section 7 nor section 11(d) were necessarily infringed by strict liability offences.

A second group of judges, comprising the other portion of the majority, held that while the reverse onus on the defendant to establish due diligence on a balance of probabilities did violate the presumption of innocence under section 11(d) of the *Charter*, they agreed with Justice Cory that the infringement was saved by section 1. However, unlike Justice Cory, Justice Iacobucci (speaking for Justices Gonthier and Stevenson) addressed, in detail, each of the section 1 criteria set out in *Oakes*.

Under the *Oakes* test, there are four criteria to apply: (1) the objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; (2) the means chosen to achieve the objective must be "rationally connected" to the objective and not arbitrary, unfair or based on irrational considerations; (3) the means chosen must impair the right or freedom in question as "little as possible" to accomplish the objective; and (4) the means chosen must be such that that their effects on the limitation on rights and freedoms are proportional to the objective. The last three elements may also be described as constituting a proportionality sub-test, whereas the threshold consideration is that the specific objective of the impugned provision must be pressing and substantial in order to proceed to the three-pronged proportionality analysis.[46]

Applying these factors, Justice Iacobucci first held that the specific objective of placing a persuasive burden on the defendant to prove due diligence was of sufficient importance to justify overriding the right guaranteed by section 11(d).[47] This was in view of the "evidentiary problems which arise because the relevant facts are particularly in the knowledge of the accused," and "to ensure that all those who are guilty of false or misleading advertising are convicted of [such] public welfare offences.[48] As for the second plank of the *Oakes* test, Justice Iacobucci stated that

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44 *Ibid* at 164.

45 *Ibid* at 248-49 [emphasis in the original].

46 See John Webster, "The Proper Approach to Detection and Justification of Section 11(d) *Charter* Violations Since *Laba*" (1995) 39 CR (4th) 113 (for a discussion of the *Oakes* test to the presumption of innocence) [Webster].

47 *Wholesale Travel*, *supra* note 2 at 257.

48 *Ibid*.

there was a rational connection between the desired objective and the means chosen to achieve the objective.[49]

The third requirement of the *Oakes* analysis considered whether the means chosen impaired the right or freedom in question no more than was necessary in order to accomplish the desired objective. The dissenting judges were of the view that the use of a persuasive burden did not satisfy this part of the *Oakes* test, given that "the alternative in question is the use of a 'mandatory presumption of negligence' (following from the proof of the *actus reus*) which could be rebutted by something less than an accused's establishing due diligence on a balance of probabilities."[50] However, Justice Iacobucci cautioned that such a means would frustrate "the effective pursuit of the regulatory objective."[51] It would also "leave the Crown in the legal burden of proving facts largely within the peculiar knowledge of the accused."[52] As a result, he concluded that "Parliament could not 'reasonably have chosen an alternative means which would have achieved the identified objective as effectively' ...."[53]

Finally, Justice Iacobucci considered the proportionate effects of the *Charter* infringement and the legislative objective. He observed that "Those who choose to participate in regulated activities must be taken to have accepted the consequential responsibilities and their penal enforcement ...[one of which was] that they should be held responsible for the harm that may result from their lack of due diligence."[54] Moreover, such regulated parties were in the best position to prove due diligence since they possessed, in most cases, the requisite information. Viewed in this context, and taking into account the fundamental importance of the legislative objective as stated and the fact that the means chosen impaired the right guaranteed by section 11(d) of the *Charter* as little as was reasonably possible, it followed that the effects of the reverse onus on the presumption of innocence were proportional to the objective.[55]

Three of the four dissenting judges delivered separate reasons for judgment. The principal opinion was given by Chief Justice Lamer, who was joined by Justice Sopinka. Chief Justice Lamer rejected the argument that the principles of fundamental justice under section 7 of the *Charter* were violated by imposing a fault requirement based on negligence, as in the case of strict liability offences which permitted a defence of due diligence. However, he held that the modified due diligence defence in the legislation did violate section 7 and could not be saved by section 1, on the basis that the provisions in question could have the effect of

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49 *Ibid*.
50 *Ibid*.
51 *Ibid*.
52 *Ibid* at 258.
53 *Ibid*, citing *R v Chaulk*, [1990] 3 SCR 1303 at 1341, 119 NR 161, Lamer CJ [emphasis in the original].
54 *Ibid* at 258-59.
55 *Ibid* at 259.

depriving an accused of the defence of due diligence, and thus result in the conviction of an accused person who was not negligent.

The issue of the constitutionality of the reverse onus due diligence provision for strict liability offences, in light of the presumption of innocence under section 11(d) of the *Charter*, was addressed at length by Chief Justice Lamer. In his view, the determinative factor in the *Charter* analysis was the fact that the state had resorted to the restriction of liberty through imprisonment for enforcement purposes; a person whose liberty had been restricted by way of imprisonment suffered no less loss of liberty on account of such punishment being due to the commission of a regulatory offence as opposed to a criminal offence.[56] It followed that "A person whose liberty interest is imperilled is entitled to have the principles of fundamental justice fully observed."[57] Thus, the effect of the defendant failing to prove due diligence, on the balance of probabilities, meant that he or she could be convicted of the false or misleading advertising offence notwithstanding the existence of a reasonable doubt as to whether the accused was duly diligent and, therefore, despite the existence of a reasonable doubt as to guilt.[58]

Consequently, Chief Justice Lamer turned to section 1 in order to determine whether this infringement of section 11(d) could be justified. He began his analysis by acknowledging that the specific objective of placing a persuasive burden on the accused so as to ensure that all those who are guilty of the regulatory offence in question were convicted, and to ensure that convictions were not lost due to evidentiary problems in proving guilt, amounted to a pressing and substantial objective for the purposes of the first step in the *Oakes* analysis. He also agreed, with respect to the second *Oakes* factor, that there was a rational connection between the objectives and the means chosen to attain the objectives.[59]

However, with respect to the "as little as possible" criterion, Chief Justice Lamer held that the Crown had not established that it was necessary to convict those who were duly diligent in order to "catch" those accused persons who were not duly diligent.[60] To the contrary, it was open to Parliament to employ a mandatory presumption of negligence, following from proof of the *actus reus*, which could be rebutted by something less than the accused establishing due diligence on a balance of probabilities. "[T]he use of such a mandatory presumption … would be rationally connected to avoiding this impossible burden [of adducing evidence of negligence on an ongoing basis], would fall within the range of means which impair *Charter* rights as little as is reasonably possible, and would also be proportional in its effect on the presumption of innocence."[61]

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56 *Ibid* at 159.
57 *Ibid* at 197.
58 *Ibid*.
59 *Ibid* at 198-99.
60 *Ibid* at 200.
61 *Ibid* at 203-4.

Lastly, Chief Justice Lamer found that the persuasive burden did not pass the fourth criteria in *Oakes* since the effect of the means chosen on *Charter* rights and freedoms was not proportional to the objective. In short, he considered that "sending the innocent to jail is too high a price."[62] Significantly, he went on to observe that it was open to Parliament to maintain the persuasive burden on the defendant, but to remove the possibility of imprisonment, which would be far less intrusive on constitutional rights.[63]

Justice La Forest delivered brief reasons for judgment, being in substantial agreement with Chief Justice Lamer. It was very significant in Justice La Forest's opinion that the regulatory offence in question carried with it a five year period of imprisonment upon conviction. He held that:

> Such a deprivation requires much stricter requirements to conform to the principles of fundamental justice than mere monetary penalties .... Here the effect of the provisions is the removal of the requirement that an offence involving a serious deprivation of liberty be proved beyond a reasonable doubt. While, in my view, in the regulatory context in which the provisions operate a requirement that a reasonable doubt be raised by the accused that he or she has exercised due diligence meets the requirements of fundamental justice (under s. 7 of the *Charter*) in these circumstances, a requirement that the accused prove such due diligence on the balance of probabilities goes too far.[64]

Thus, in his view, the provision substantially divested the accused of the presumption of innocence, and could not be justified.[65]

Justice McLachlin, as she then was, was also in agreement with the conclusions of Chief Justice Lamer. The statutory due diligence defence in question permitted the accused to be convicted in the absence of even the minimum fault of negligence, and thereby was contrary to the principles of fundamental justice under section 7 of the *Charter*.[66] In addition:

> The requirement ... that the accused establish due diligence on a balance of probabilities, ... permits conviction despite a reasonable doubt as to an essential element of the offence; combined with the sanction of imprisonment, the application of this onus upon an alleged offender violates s.11(d) of the *Charter*. Neither of these infringements can be upheld under s. 1 of the *Charter*.[67]

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62 *Ibid* at 204.
63 *Ibid* at 205.
64 *Ibid* at 209-10.
65 *Ibid* at 210.
66 *Ibid* at 259.
67 *Ibid*.

IV. *WHOLESALE TRAVEL*'S LEGACY: PRESUMING GUILT FOR REGULATORY OFFENCES IS CONSTITUTIONAL, BUT IS IT WRONG?

The reaction in academic and legal circles to the *Wholesale Travel Group Inc* case was mixed, unlike the response to *Sault Ste Marie*. On the one hand, the doctrine of strict liability had survived the *Charter* challenge. However, the Court was deeply divided over the issue of reversing the burden of proof in establishing due diligence, particularly in cases where the defendant risked being imprisoned, and for a significant period of time at that. As Chief Justice Lamer put it, "Jail is jail, whatever the reason for it."[68] On the other hand, the absence of incarceration as a punishment for strict liability offences, which had been recommended by the Law Reform Commission of Canada[69] and the Ontario Law Reform Commission,[70] was a significant factor in the minority's view because it considered whether the violation of the presumption of innocence could be saved by section 1 of the *Charter*. This approach has been described as being "sound policy, consistent with the principles of fundamental justice, and to be preferred over the present law ...."[71]

Professor Stuart found the Court's majority reasons for reversing the burden of proof to be "highly disturbing"[72] and "flawed,"[73] and that *Wholesale Travel* stood for the proposition that presuming guilt for regulatory offences was constitutional but wrong. He found the minority was correct in finding that the violation of the presumption of innocence did not infringe the section 11(d) *Charter* right as little as reasonably possible under section 1, given that an alternative viable option would have been for Parliament to employ a mandatory presumption of negligence.[74] He also opined that it was more realistic to focus on the issue of punishment—as had the minority—rather than differentiating between criminal and regulatory cases to determine whether the presumption of innocence had been infringed, and whether the violation could be saved by section 1. Professor Stuart noted that the regulatory offence of misleading advertising was punishable by a period of five years' imprisonment. "A goaled individual accused would find little comfort in the analysis that the offence was not criminal."[75] Similarly, Peter Hogg found that placing such an offence into the "'regulatory' category, despite the fact that it carried a maximum

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68 *Ibid* at 189.
69 LRCC, *Strict Liability*, *supra* note 7 at 37.
70 Ontario Law Reform Commission, *Report on the Basis of Liability for Provincial Offences* (Toronto: Government of Ontario, 1990) at 46 [Ontario Law Reform Commission, *Report on the Basis of Liability*].
71 Archibald, "Liability," *supra* note 23 at 75.
72 Don Stuart, "*Wholesale Travel*: Presuming Guilt for Regulatory Offences is Constitutional but Wrong" (1992) 8 CR (4th) 225.
73 Don Stuart, *Charter Justice in Canadian Criminal Law*, 5th ed (Toronto: Carswell, 2010) at 75.
74 Stuart, "Regulatory Offences," *supra* note 4 at 150.
75 Stuart, *Criminal Law*, *supra* note 21 at 195.

penalty of five years' imprisonment—quite a stretch for doing something that did not imply moral blame worthiness and attracted little social stigma!"[76]

Swaigen made the observation, more generally, that "As the penalties and social stigma attached to [regulatory offences] draw closer to those of criminal law, the original rationale for treating them differently [as enunciated in *Sault Ste. Marie*] is open to question."[77] He was not alone in expressing this view.[78] Swaigen noted, "If imprisonment were available only for crimes and not for public welfare offences, as recommended by the Law Reform Commission of Canada, it would be open to the provincial legislatures and Parliament to designate the same offences as regulatory when committed negligently and as crimes, punishable by imprisonment, when *mens rea* is proven."[79] Alternatively, public welfare offences could be designated to make certain penalties, including imprisonment, available only when *mens rea* was proven; if the prosecution proved negligence only, imprisonment would not be permitted. In order to make this procedure available, the Crown might be required to provide notice of its intention to prove *mens rea* and seek imprisonment.[80] Bruce Pardy, expressed the matter in the following way: "If conviction for regulatory offences is really less serious than for 'true' criminal offences, they should not carry the possibility of incarceration, the most severe penalty available in law ...."[81]

Clayton Ruby and Kenneth Jull also criticized the majority of the Court for placing a "legal burden" on the defendant in strict liability offences, as opposed to merely an "evidentiary burden."[82] They argued that the distinction between regulatory and criminal offences was unworkable—being essentially one of semantics—and that a more appropriate point of demarcation was one that focussed on the penalty being sought by the prosecution. This "liability to imprisonment paradigm [was] appropriate to protect consumers, workers, and other potential victims from serious harm."[83] In such cases, the Crown would be required to prove the accused's guilt beyond a reasonable doubt with the assistance of an evidentiary burden where appropriate. However, where imprisonment was not being sought by the Crown—or where it was unavailable, as in the case of corporate defendants—this paradigm of "alternatives to imprisonment" would have the *Sault Ste Marie* version of strict liability apply.[84] Upon the prosecution proving the *actus reus* beyond a reasonable doubt, the onus would then shift to the defendant to establish due diligence on the

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76 Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Canada, 2007) vol 2 at 47-34 [footnote omitted].

77 Swaigen, *supra* note 22 at xxxix.

78 See e.g. *Rick Libman, Regulating Criminal Offences or Criminalizing Regulatory Offences: Still Debating After All These Years* (LLM Thesis, York University Osgoode Hall Law School, 2001) [unpublished].

79 Swaigen, *supra* note 22 at 215.

80 Swaigen, *supra* note 22 at 215-16.

81 Bruce Pardy, "*MacMillan Bloedel*: Progress on Due Diligence" (2003) 5 CR (6th) 146 at 148.

82 Clayton Ruby & Kenneth Jull, "The Charter and Regulatory Offences: A Wholesale Revision" (1992) 14 CR (4th) 226 at 227.

83 *Ibid*.

84 *Ibid*.

balance of probabilities. The authors proposed that "the mechanism … to determine which category a given offence falls within, is a Crown election …."[85] This would be similar to the approach used for hybrid offences, where the Crown announces its election to proceed summarily or by indictment. The "litmus test" in the case of an elected regulatory offence would be whether or not a period of incarceration was being sought.[86] Such a procedure also has the advantage of making it clear to the defendant, in advance, the penalty that he or she is facing in the event of conviction.[87]

According to Archibald, Jull and Roach, *Wholesale Travel* represented "a philosophical approach towards the underlying rationales of public welfare offences."[88] While noting that it "continues to be the foundational case in the field of regulatory offences," they point out that the Court has not yet had the opportunity to revisit the fundamental principles underlying the decision, despite the remaining points of contention.[89] They found that while the facts constituting the due diligence defence may be within the knowledge of the defendant (such that there is a rational connection between the desired objective and the means chosen to achieve it) this *Oakes* analysis may merit re-consideration given the Court's decision in *Canadian Oxy Chemicals Ltd v Canada (Attorney General)*.[90] In this case, it was held that authorities are entitled to obtain search warrants in order to seize evidence of due diligence. Since it was open to Parliament to employ a mandatory presumption of negligence as opposed to a reverse onus provision with respect to the burden of proof on the issue of due diligence, the authors have questioned whether the section 1 analysis of the reverse onus will stand the test of time.[91]

Other responses to the *Wholesale Travel* decision, and the section 1 *Charter* analysis in particular, were more favourable. Writing a few years before the Court rendered its judgment, Kernaghan Webb expressed a concern that in the absence of the section 1 provision, the presumption of innocence as guaranteed by section 11(d) of the *Charter* posed a very real risk to the constitutionality of the doctrine of due diligence. As Webb noted, "the requirement that the accused establish a defence of due diligence *on the balance of probabilities* sets too high a standard for the purposes of subsection 11(d)."[92] However, he also stated that "it is still possible that [strict liability offences with imprisonment] could be salvaged as a reasonable and demonstrably justified limit on *Charter* rights under section 1."[93] He reasoned

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85 *Ibid*.
86 Kenneth Jull, "Reserving Rooms in Jail: A Principled Approach" (1999) 42 Crim LQ 67 at 110.
87 See *ibid*; Kenneth Jull, "Costs, the Charter and Regulatory Offences: The Price of Fairness" (2002) 81 Can Bar Rev 646 at 661-62.
88 Archibald, Jull & Roach, *supra* note 26 at 2-16.
89 *Ibid* at 2-13.
90 *Canadian Oxy Chemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743, 171 DLR (4th) 733.
91 Archibald, Jull & Roach, *supra* note 26 at 2-16.
92 Kernaghan R Webb, "Regulatory Offences, the Mental Element and the *Charter*: Rough Road Ahead" (1989) 21:2 Ottawa L Rev 419 at 454 [emphasis in the original].
93 *Ibid* at 455.

that "there is a direct and self-evident relation between the fact of an offence of negligence taking place and the presumption that reasonable care must not have been exercised."[94] Second, in terms of the minimal impairment criterion, assuming this threshold is met, "If the accused were required only to raise a reasonable doubt as to the existence of due diligence …[t]he result would be, in effect, to take away the ability of government to impose the negligence standard in regulated contexts."[95] If, on the other hand, strict liability offences were not punishable by imprisonment, the "comparatively trivial penalties attached to such offences might be a factor in persuading courts to allow the balance of probability standard to survive the first two components of the proportionality tests."[96]

Notwithstanding these criticisms, others have argued that *Wholesale Travel* supports the use of significant monetary penalties and imprisonment for other public welfare offence regimes—for example, occupational health and safety.[97] Because of the reverse onus mechanism governing due diligence, directors and officers must be vigilant to ensure that there is an adequate system in place, not simply to avoid liability, but to create a safe work environment. In this manner, a proper safety policy will be put in place at worksites, and directors and officers will avoid liability through prevention of accidents in the first place. With regard to the public welfare context, Jennifer Quaid states:

> [T]he harm is great, the risk obvious, and the actor is capable of taking the reasonable precautions required. The justifications for a lower evidentiary burden on the prosecution are thus largely efficiency-based …. Nonetheless, this debate [over regulatory offences] must not be allowed to obscure the more crucial issue of holding corporations accountable for the harms they cause.[98]

Conversely, a successful *Charter* challenge, based on the presumption of innocence being violated by the reversal of the burden of proof in respect of strict liability offences, would have had "devastating implications for the enforceability of Canadian regulatory legislation."[99]

Marie Comiskey, in her study of Justice Cory's criminal law jurisprudence during his tenure on the Supreme Court of Canada, states that it is in *Wholesale Travel* where he most clearly lays out his conceptual framework for regulatory offences as

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94 *Ibid* at 457.
95 *Ibid* at 459.
96 *Ibid* at 461.
97 See e.g. Jim Thistle, Matthew J Clarke & Joshua Martin, "Key Issues in the New Regime of Occupational Health and Safety: The Right to Refuse Work and Directors' and Officers' Liability" (2003) 26:2 Dal LJ 631.
98 Jennifer A Quaid, "The Assessment of Corporate Criminal Liability on the Basis of Corporate Identity: An Analysis" (1998) 43:1 McGill LJ 67 at 109-10 [footnotes omitted].
99 Strantz, *supra* note 24 at 1238.

they are impacted by the *Charter*.[100] Her article discusses how "Justice Cory held that *Charter* scrutiny is less rigorous in the regulatory context because the social imperatives behind the regulatory offence or offences are accepted as justifying a certain level of intrusion into individual rights."[101] Indeed, of the five opinions delivered in the case, his alone found that the presumption of innocence was not violated by the reverse onus provision of due diligence. According to Comiskey, the issue of prosecutorial efficacy was the driving force in this regard—"if the Crown had to disprove due diligence beyond a reasonable doubt, convictions in regulatory offences would be virtually impossible."[102] While only one other member of the Court joined in this analysis, the three other judges who found that the section 11(d) *Charter* violation was justified by section 1, applied Justice Cory's reasoning to this portion of their judgment.[103]

In a review of the Law Commission of Ontario's Report on the Basis of Liability for Provincial Offences—subsequently relied upon by Chief Justice Lamer in *Wholesale Travel* where he concluded that the section 11(d) *Charter* violation, occasioned by reversing the burden of proof for strict liability offences, could not be saved by section 1—Roach criticized the Commission for assuming the target of regulatory offences to be "individuals outmatched by the state."[104] He further stated:

> Little attention is given to the pervasiveness of corporate and other forms of organizational misconduct in areas such as pollution, work-place safety or the conduct of licensed or regulated economic activity .... The result is that the case for absolute liability and reverse onus provisions as part of regulatory schemes is made to depend on the fairness of their use against individuals.[105]

However, the Commission failed to address the "fundamental policy question of whether corporations and licensees should benefit from any reasonable doubt before they are fined for hazardous activities such as pollution and safety violations."[106] In short, the Commission proceeded on the assumption that "the standards required for protecting individuals who are prosecuted for Criminal Code offences

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100 Marie Comiskey, "Justice Peter de Carteret Cory and His Charter Approach to Regulatory Offences" (2007) 65:2 UT Fac L Rev 77.

101 *Ibid* at 84.

102 *Ibid* at 86.

103 See Alan Gold, "Burden of Proof in Strict Liability Offences," (2006) 483 Criminal Law Net Letter (QL). Alan Gold indicates that while the majority of the judges in *Wholesale Travel* found that the section 11(d) *Charter* infringement is saved by section 1, they relied upon the dissenting view of Justice Cory (that there is no section 11(d) infringement at all), which, in Gold's view, weakens the force of the majority's section 1 analysis.

104 Kent Roach, "Report on the Basis of Liability for Provincial Offences" (1990) 69:4 Can Bar Rev 802 at 802.

105 *Ibid* at 802-3.

106 *Ibid* at 805.

should govern regulatory offences," thereby ignoring the "constitutional distinction between individuals and corporations."[107]

Wholesale Travel gave rise to a number of other concerns. When leave to appeal had been granted by the Court, Patrick Healy commented that one of the main issues to be argued before the Court concerned "the consistency of the defence of due diligence with the presumption of innocence in section 11(d)," a matter that would have implications on the constitutional validity of regulatory offences.[108] With respect to the presumption of innocence and strict liability, Healy noted that if all statutory reverse onus provisions were invalid, unless saved by section 1 of the *Charter*, "the entire class of offences of strict liability would require acquittals wherever there was a reasonable doubt with respect to negligence."[109]As a result:

> The effectiveness of regulatory enforcement would be appreciably diminished … unless the court is prepared to accept that such offences as a class connoteless stigma and should therefore not be construed as rigorously as criminal offences. The spectre of *ad hoc* litigation to save regulatory offences under section 1 is likewise frightful.[110]

Subsequent to the release of *Wholesale Travel*, Chris Tollefson remarked that while regulators greeted the judgment with "considerable relief," many concerns remained.[111] For one, the doctrine of strict liability had come quite close to being "constitutionally nullified."[112] Another concern was the expectancy of future corporations bringing *Charter* challenges with regard to their business interests in regulatory activities.[113] Tollefson noted that the most divisive and controversial issue for the Court was the constitutionality of the due diligence defence, and particularly whether the defence as set out in the legislation violated the presumption of innocence. He stated that it was "by a bare margin [that] the court repelled a frontal assault on the strict liability offence which the court itself had introduced into the law in *Sault Ste. Marie*."[114] As a result of the *Wholesale Travel* decision, the issue of corporate constitutional rights appeared to have been emboldened and liberalized from the perspective of standing to bring *Charter* claims and entitlement to remedies.[115]

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107 *Ibid* at 806. See also Jeff Kehoe, "Ellis Don and Strict Liability for Provincial Offences: Where has *Sault Ste. Marie* Gone?" (1991) 36:3 McGill LJ 1089 (for a similar critical analysis of the Ontario Law Reform Commission's Report).

108 Patrick Healy, "Criminal Law—Strict and Absolute Liability Offences—The Role of Negligence—Presumption of Innocence and Reverse Onus—Charter of Rights and Freedoms, Sections 7, 11; Competition Act, Sections 36, 37.3: *R v Wholesale Travel Group Inc*." (1990) 69:4 Can Bar Rev 761 at 762.

109 *Ibid* at 774.

110 *Ibid* [emphasis in the original].

111 Chris Tollefson, "Case Comments – Commentaires d'arrêt" (1992) 71:2 Can Bar Rev 369 at 369.

112 *Ibid* at 370.

113 *Ibid* at 370-71.

114 *Ibid* at 374.

115 See Chris Tollefson, "Corporate Constitutional Rights and the Supreme Court of Canada" (1993) 19:1 Queen's LJ 309 at 339-43.

The section 1 analysis in *Wholesale Travel* has also been questioned on the basis that "there was no evidence of a real problem securing convictions where the accused only had an evidential burden."[116] Webster stated that "there was not even evidence of a real problem securing convictions with the traditional burden on the Crown. The reverse onus was created in *Sault Ste. Marie* and approved in *Wholesale Travel* in order to overcome a hypothetical problem and not a real problem."[117]

Alan Brudner, in an article on imprisonment and strict liability written after *Oakes* but before *Wholesale Travel*, argued that "the negation of liberty is justified … *only* by the intentional or reckless breach of the law."[118] With respect to the application of the *Oakes* criteria in the case of strict liability offences, which are punishable by imprisonment, Brudner predicted that it would be the least restrictive means of accomplishing the state's purpose where the Crown would be on weak ground. This is due to the fact that "a province may penalize with imprisonment both someone who failed to exercise due diligence, mistakenly believing that he or she was innocent of a violation, and someone who knowingly breached the statute because calculating the amount of the fine, it was still profitable to do so."[119] However, the problem would be averted by levying monetary penalties against "those who negligently breach the statute and by enacting a separate offence punishable by imprisonment of knowingly or recklessly breaching a regulatory law."[120] In this manner, it would still be open to the court to convict a person for failing to take reasonable care in accordance with the "welfare purpose of the statute …. *Mens rea* would be required only for a distinct offence for which imprisonment would be a possible and perhaps a mandatory penalty.[121] Therefore, Brudner recommends the abolishment of prison sentences for regulatory offences that are committed on account of negligence. In its place, he recommends the creation of an offence for knowingly or recklessly breaching a regulatory statute, in which case imprisonment may be imposed.

As for the Supreme Court of Canada's own application of the *Wholesale Travel* decision, it has attracted only passing reference in a handful of cases. On one occasion, it was invoked to justify, in part, Parliament's objective of restricting the promotion of tobacco products in a decision holding that there was no violation of the freedom of expression guarantee under section 2(b) of the *Charter*.[122] It was observed that while restrictions on tobacco advertising constituted a valid exercise of the federal criminal law power, the offences in question were strict liability in nature, and not true crimes.[123] A subsequent application of *Wholesale Travel* can be found in *R v DB*,[124]

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116 Webster, *supra* note 46 at 129.
117 *Ibid*.
118 Alan Brudner, "Imprisonment and Strict Liability" (1990) 40:1 UTLJ 738 at 740 [emphasis in the original].
119 *Ibid* at 752.
120 *Ibid* at 753.
121 *Ibid*.
122 *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 610.
123 *Ibid* at para 20.
124 *R v DB*, 2008 SCC 25, [2008] 2 SCR 3.

a criminal case involving a successful *Charter* section 7 challenge to the presumption of an adult sentence for a young person charged with manslaughter, as well as the attendant publication ban. Here, the majority commented that although violations of section 7 were "seldom salvageable" by section 1, reverse onus provisions did not always fail the section 1 analysis where they involved the presumption of innocence under section 11(d). The *Wholesale Travel* decision was cited as such an example, notwithstanding that it was not a criminal case.[125]

V. BACK TO THE FUTURE: THE CASE FOR WHOLESALE CHANGES FOR WHOLESALE TRAVEL

Wholesale Travel, while upholding the constitutional validity of the doctrine of strict liability, produced considerable discord. A minority of the Supreme Court of Canada found no *Charter* infringement in the presumption of innocence due to the reversal of the burden of proof on the defendant to demonstrate due diligence on the balance of probabilities. The majority of judges found that this violated section 11(d) of the *Charter* but was saved by section 1. However, four judges held that the *Charter* violation could not be justified. There has been no shortage of critical commentary as to the validity of *Wholesale Travel*'s distinction between regulatory offences and criminal offences, particularly given the severity of the penalty for being convicted of misleading advertising—five years' imprisonment.

In the twenty years since *Wholesale Travel*, the regulatory offences landscape has shifted dramatically. It has become increasingly common to find provincial statutes providing for million-dollar fines and lengthy jail terms. For example, under the *Ontario Securities Act*, making misleading statements is an offence that is punishable by a fine of up to $5 million and to imprisonment for a term of up to five years less one day.[126] Likewise, pursuant to the *Environmental Protection Act*, environmental penalties are set at $100,000 for each day that a contravention occurs,[127] and under the *Highway Traffic Act*, stunt driving or racing is punishable by a fine of up to $10,000 and a period of six months in jail, plus a licence suspension of up to two years if it is a first offence.[128] At the same time, the *Criminal Code*[129] has been amended to include, for the first time, negligence-based offences in respect of organizations where death or serious injury occurs at the workplace.[130] Such offences provide regulators a criminal alternative in lieu of prosecuting a company or employer for a regulatory offence under the *Occupational Health and Safety Act*.[131]

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125 *Ibid* at paras 89-90.
126 *Securities Act*, RSO 1990, c S.5, s 122(1).
127 *Environmental Protection Act*, RSO 1990, c E.19, s 182.1(5).
128 *Highway Traffic Act*, RSO 1990, c H.8, s 172(2) [*Highway Traffic Act*].
129 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].
130 *Criminal Code*, *ibid*, s 22.1 as amended by *An Act to amend the Criminal Code (criminal liability of organizations)*, SC 2003, c 21, s 2.
131 *Occupational Health and Safety Act*, RSO 1990, c O.1 [*Occupational Health and Safety Act*].

The developments subsequent to *Wholesale Travel* that mandate such a reconsideration include the following: (i) the *Competition Act*'s replacement of the misleading advertising strict liability offence with either a civil track procedure of reviewable practices or prosecution for a new criminal offence with an explicit requirement of *mens rea*;[132] (ii) the Criminal Code's enactment of a new negligence-based offence for organizations following the Westray mining disaster;[133] (iii) the *Highway Traffic Act*'s recognition of aggravated forms of strict liability offences by virtue of its penalty of imprisonment—replacing the *simpliciter* speeding offence where drivers are fifty kilometres below the speed limit;[134] (iv) the *Ontario Provincial Offences Act*'s requirement that the prosecution provide notice of its intention to seek a period of imprisonment in *ex parte* trial proceedings;[135] and (v) the Law Commission of Ontario's 2011 Report on Modernizing the *Provincial Offences Act*, where it seeks to re-formulate the purpose of informing the prosecution of public welfare offences as opposed to true crimes.[136] I propose to address each of these items in turn below.

A. The Repeal of the *Competition Act*'s Strict Liability Offence of Misleading Advertising and Replacement With a new Civil Track Procedure of Reviewable Practices or Criminal Prosecution

Ironically, the strict liability offence of misleading advertising, which was at the heart of the controversy in *Wholesale Travel*, no longer exists. The procedure, once considered to be essential for the safeguarding of the doctrine of strict liability, has since been replaced by a very different one. This, in turn, has implications on future applications of the *Oakes* criteria to regulatory offences, given the consideration of minimal impairment and other alternatives to the legislation provision which, in such instances, involve a reverse onus imposed on the defendant to establish that due diligence was exercised.

Under the new civil track of reviewable practices, the Competition Bureau has an alternative recourse to criminal prosecution for cases of misleading representations and deceptive marketing that are made knowingly or recklessly to the public.[137]

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132 *Competition Act*, *supra* note 27, s 52(1).

133 *Criminal Code*, *supra* note 130.

134 *Highway Traffic Act*, *supra* note 128, ss 128, 172.

135 *Provincial Offenders Act*, RSO 1990, c P.33, s 54(1).

136 Law Commission of Ontario, *Modernizing the Provincial Offences Act: A New Framework and Other Reforms* (Toronto: Law Commission of Ontario, 2011) at 132 [Law Commission of Ontario, *Modernizing the Provincial Offences Act*].

137 See Publications, *Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the Competition Act*, online: Competition Bureau Canada <http://www.competition.ic.gc.ca> [Competition Bureau, *Misleading Representations*] (for an explanation of this two-track procedure). See also Calvin S Goldman & JD Bodrug, *Competition Law of Canada* (New York: Juris Publishing, 2010) vol 1 at 6-3; Archibald, Jull, & Roach, *supra* note 26 at 2-34; Rick Libman, *Libman on Regulatory Offences in Canada*, loose-leaf (consulted on 20 March 2013), vol 2 (Salt Spring Island, BC: Earlscourt Legal Press, 2002), ch 11 [Libman, *Libman on Regulatory Offences*] (for further information of the civil regime and criminal prosecution mechanism).

The legislative amendments that put these changes in place were made in 1999, and did not change the five-year maximum jail term, which was the punishment for strict liability offences at the time of *Wholesale Travel*. There still exists a due diligence defence under the statute, in that those who demonstrate the exercise of reasonable care cannot be required to pay an administrative monetary penalty.[138]

It appears that most matters within the *Competition Act* are resolved under the civil track, thus leaving only the most serious offences to be dealt with by means of criminal prosecution. The choice as to which approach will be used involves consideration of a number of factors, including the gravity of the alleged infraction, previous anti-competitive conduct and the willingness of the parties to resolve the matter. The choice to proceed against a party along the civil track precludes the laying of criminal charges. However, the Competition Bureau may initially choose to proceed with criminal charges and then change to a civil track to expedite the matter.[139] This "conformity continuum" is geared towards education, compliance, and where necessary, enforcement in order to achieve conformity with the law.[140]

These *Competition Act* amendments were discussed by the Court of Appeal for Ontario in *R v Benlolo*,[141] where the accused were convicted of operating a mail fraud scheme for an Internet Yellow Pages business directory. Penitentiary terms and significant fines were imposed at trial. In upholding these sentences, the court commented about the former and current misleading advertising offence:

> Prior to the 1999 amendments, the same five-year maximum jail term was available as a penalty. However, because the offence was viewed as regulatory rather than fully criminal, and because many of the significant prosecutions were against corporations, jail sentences were not traditionally imposed. Another significant factor was that generally the crimes that came before the court involved legitimate businesses that stepped over the line in promoting their products and were most often limited to a particular advertising campaign.
>
> In 1999, Parliament amended the legislation to give the Competition Bureau more tools to use and more flexibility in its choice of enforcement mechanisms to combat new forms of misleading advertising including large-scale fraudulent schemes. It now had civil remedies that were more easily obtainable to deal with persons whose activities could be curbed and regulated through directives that would protect the public without the need to engage in the

138 *Competition Act*, *supra* note 27, s 74.1(3).

139 Competition Bureau, *Misleading Representations*, *supra* note 137.

140 See Publications, *Conformity Continuum*, online: Competition Bureau Canada <http://www.competition.ic.gc.ca>.

141 *R v Benlolo* (2006), 81 OR (3d) 440, 212 OAC 227 [*Benlolo* cited to OR].

> acrimonious, time-consuming and onerous criminal prosecution process. On the other hand, the criminal offence was changed from a strict liability offence to one of full *mens rea*....
>
> Although the maximum jail sentence was not increased when the amendments were made, as the criminal track was now to be used only in the very serious cases involving traditional criminality, it can be inferred that Parliament intended that the penalties imposed upon conviction be significantly increased, where appropriate, to reflect the new legislative scheme.[142]

Archibald, Jull and Roach observe that the result of the *Competition Act* amendments amounts to a "legal curiosity."[143] It stands in marked contrast to the Court's decision in *Wholesale Travel* which is now based on an offence for which the regulatory offences model has been rejected by the regulator. Thus, in order to prove the commission of the regulatory offence, the very party who requires the benefit of the reversal of the burden of proof under the doctrine of strict liability has determined that such an approach is no longer needed. In effect, "The halfway house of the regulatory offence has dropped by the wayside. It was perceived by the state to be almost as burdensome as proving a criminal offence."[144] And, as the *Benlolo* case demonstrates, prosecution for regulatory offences with a full *mens rea* requirement will not frustrate a successful demonstration of the burden of proof, and imposition of significant punishment, where it is warranted in the circumstances.

The Court of Appeal's judgment in *R v Stucky*[145] also highlights the differences in the *Competition Act*'s use of the strict liability offence of misleading advertising and the subsequent *mens rea* requirement. The defendant was charged with operating a direct mail business in Ontario that sold lottery tickets and merchandise to persons outside Canada; the counts of making false or misleading representations spanned the period both before and after the 1999 amendments to the legislation. Consequently, the defendant was able to rely on a due diligence defence for some of the charges, whereas the prosecution was required to prove full *mens rea* on his part for the others. The court affirmed that the differences in the nature of the charges gave rise to important legal distinctions. For the pre-1999 strict liability offences, it was not open to the defendant to bring a mistake of fact defence due to the legal advice he received—this amounted to a mistake of law, which does not constitute a good defence.[146] However, for the post-1999 offences, the Crown was required to prove beyond a reasonable doubt that the defendant had known of the falsity or

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142 *Ibid* at paras 28-29, 31.
143 Archibald, Jull & Roach, *supra* note 26 at 2-35.
144 *Ibid* at 2-36.
145 *R v Stucky*, 2009 ONCA 151, 256 OAC 4.
146 *Ibid* at para 9.

misleading nature of the representations he made, or was reckless in doing so.[147] This legal distinction serves to illustrate the evolution of the strict liability offence, which was at the heart of *Wholesale Travel*, and is now viewed by the regulator in a very different light.

B. The Enactment under the Criminal Code of a New Negligence-Based Offence of Organizations

Rather than replacing the strict liability offence with one that requires *mens rea* based on knowledge or recklessness, such under the *Competition Act*, the *Criminal Code* was amended in 2004 to provide, for the first time, a negligence-based offence with respect to organizations.[148] A further offence was added for organizations where the prosecution is required to prove fault, apart from negligence.[149] The impetus for this legislation was the Westray mining disaster, which resulted in the deaths of twenty-six miners. When the manslaughter charges against two Westray managers were eventually dropped after protracted legal proceedings, a call for legislative action ensued.[150] Formerly, such workplace fatality cases would typically be treated as regulatory offences under provincial health and safety legislation, an option that continues to be available.[151]

These new *Criminal Code* provisions represent a fundamental change to traditional corporate criminal liability. Rather than seeking to attribute fault to the corporation due to the company's conduct of the "directing mind,"[152] liability under the section 22.1 negligence offence flows from the fault of an organization's senior officers and representatives—this includes employees, agents or contractors who play "an important role in the establishment of an organization's policies or [who are] responsible for managing an important aspect of the organization's activities ...."[153] It is therefore "no longer ... necessary for prosecutors to prove fault in the boardrooms or at the highest levels of corporations ...."[154]

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147 *Ibid*.

148 *Criminal Code*, *supra* note 129, s 22.1.

149 *Criminal Code*, *ibid*, s 22.2.

150 See Jula Hughes, "Restraint and Proliferation in Criminal Law" (2010) 15:1 Rev Const Stud 117; Steven Bittle & Laureen Snider, "From Manslaughter to Preventable Accident: Shaping Corporate Criminal Liability" (2006) 28:4 Law & Pol'y 470; Darcy L MacPherson, "Extending Corporate Liability?: Some Thoughts on Bill C-45" (2004) 30:3 Man LJ 253; Darcy L MacPherson, "Criminal Liability of Partnerships: Constitutional and Practical Impediments" (2009) 33:2 Man LJ 329 (for a history of the events leading up to the enactment of Bill C-4,5 which became sections 22.1 and 22.2 of the Criminal Code).

151 See e.g. *Occupational Health and Safety Act*, *supra* note 131.

152 See *Canadian Dredge & Dock Co v The Queen*, [1985] 1 SCR 662 at 673-74, 19 DLR (4th) 314. Under the corporate identification doctrine, a corporation may be found guilty of a criminal offence by identification of the corporation with its "directing mind," that is, the actions and intentions of the directing mind—the board of directors, officer or manager—constitute the actions and intentions of the corporation.

153 *Criminal Code*, *supra* note 129, s 2 (defining "senior officer").

154 Archibald, Jull & Roach, *supra* note 26 at INT-2.

The criminalization of negligence in the workplace has obvious symbolic importance. It emphasizes the importance of workplace safety, and that negligent conduct, whether through acts of commission or omission, may give rise to criminal culpability in appropriate circumstances. However, in *Sault Ste Marie*, it was the difficulty of proving such behaviour that gave rise to the halfway house of strict liability in the first place, so that the prosecution would not have the burden of proving negligence on the part of the accused. One may therefore ask whether it constitutes another example of a "legal curiosity," to use Archibald, Jull and Roach's words, to have a criminal negligence offence available in place of a strict liability offence, when the latter addresses the very same type of conduct. Put another way, if the *Oakes* criteria requires further consideration than what is available to achieve the objective of the legislation, then an alternative to the regulatory offences model, and reversal of the burden of proof for strict liability, is provided by a criminal offence that is aimed at the same quality of conduct. Moreover, given that the *Criminal Code* provisions apply exclusively to organizations, and thus corporations, there is now prosecutorial flexibility to bring charges against corporate defendants under both criminal and regulatory legislation involving essentially the same delict. Notwithstanding the different levels of the burden of proof that arise in respect of each prosecution, the latter course of action has been constitutionally affirmed by the *Wholesale Travel* decision.

There have been few prosecutions to date under the new *Criminal Code* organization negligence provisions.[155] The overlap between the criminal and regulatory conduct in these offences can be observed in the following two cases. The first case, *R v Fantini*,[156] was brought under the criminal legislation. The defendant was a contractor in Ontario who left a construction site to get materials despite being responsible for the direction of the construction. During his absence, the onsite trench collapsed, killing a worker. The defendant was permitted to plead guilty under the provincial *Occupational Health and Safety Act* and was fined $50,000. As a result, the *Criminal Code* charges were withdrawn. *R v Transpavé Inc* provided the first criminal offence conviction, involving a Quebec company that pled guilty after an employee was crushed to death by a concrete press.[157] The company was found to have improperly trained its workers concerning the dangers involved in operating the heavy machinery in question. A fine of $100,000 was imposed. As these cases demonstrate, similar dispositions were imposed in both instances. However, in one instance the conduct was regarded as a regulatory infraction, with the corresponding burden on the defendant to prove non-negligence, and in the other instance a true crime, where the Crown had the burden of proving negligence. Yet, each consisted of negligence resulting in a fatality at the workplace.

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155 See Libman, *supra* note 137 at 11-131-32.

156 *R v Fantini*, [2005] OJ no 2361 (QL) (Ont Ct J).

157 *R v Transpavé Inc*, 2008 QCCQ 1598, [2008] RJDT 742.

C. The Recognition of Aggravated Forms of Strict Liability Offences

Not all strict liability offences should be considered to be of the same quality, given the different punishment provisions that apply. This argument finds support in the recommendations of both the Law Reform Commission of Canada[158] and the Ontario Law Reform Commission,[159] and their shared view that jail should not be permitted for strict liability offences. The argument is further supported by Brudner's suggestion to enact "a separate offence punishable by imprisonment of knowingly or recklessly breaching a regulatory law."[160] While fines are the penalty sanction most frequently used for strict liability offences, jail is also a sentencing option.[161] Thus, those cases that result in the defendant's loss of liberty might be considered, in essence, aggravated forms of strict liability offences. In terms of the section 1 *Oakes* analysis, the absence of imprisonment as a possible punishment for strict liability offences was considered by Chief Justice Lamer in *Wholesale Travel* as being "far less intrusive on constitutional rights" when coupled with the use of a persuasive burden of proof provision.[162]

The concept of a discrete category of aggravated strict liability regulatory offences has roots, in fact, in the recent jurisprudence. The *Highway Traffic Act of Ontario* offence of speeding[163] has been classified as one of absolute liability in nature, meaning that no defence of reasonable care or lack of fault may be raised.[164] However, subsequent amendments to the statute created the offence of stunt driving or racing, an offence that may be committed where the defendant drives in excess of 50 kilometres per hour over the speed limit.[165] In speeding infractions, the penalty is a fine determined by a mathematical calculation and imprisonment is not available. This is in accordance with the Supreme Court of Canada's decision in *Reference re Section 94(2) of the BC Motor Vehicle Act*[166] that an absolute liability offence will violate the principles of fundamental justice as guaranteed by section 7 of the *Charter* where the defendant is liable to imprisonment.[167] The penalty for the stunt driving offence consists of a fine, a term of imprisonment, or both. Consequently, if the stunt driving offence is classified as an absolute liability offence, as is the case for speeding, it would run afoul of the *Charter* on account of the penalty of imprisonment.

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158 Law Reform Commission of Canada, *supra* note 8.
159 Ontario Law Reform Commission, *Report on the Basis of Liability*, *supra* note 70.
160 Brudner, *supra* note 118 at 753 [footnote omitted].
161 See *R v Cotton Felts Ltd* (1982), 2 CCC (3d) 287, 8 WCB 447 (Ont CA).
162 *Wholesale Travel*, *supra* note 2 at 205.
163 *Highway Traffic Act*, *supra* note 128, s 128.
164 See *R v Hickey* (1976), 13 OR (2d) 228, 70 DLR (3d) 689; *London (City) v Polewsky* (2005), 202 CCC (3d) 257, 138 CRR (2d) 208 (Ont CA), leave to appeal to SCC refused, [2006] 1 SCR xiii.
165 *Highway Traffic Act*, *supra* note 128, s 172.
166 *Reference Re Section 94(2) of the BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [cited to SCR].
167 *Ibid* at 515.

This was the issue before the Court of Appeal for Ontario in *R v Raham*.[168] Although the Ontario Court of Justice held that the stunt driving offence, like speeding, was an absolute liability offence and thus unconstitutional, the Court of Appeal determined that it was properly regarded as a public welfare offence, and *prima facie* one of strict liability. Indeed, the availability of incarceration was one of the factors suggesting that stunt driving should be construed as a strict liability offence, given the presumption in favour of a constitutional interpretation.

Justice Doherty, on behalf of the unanimous court, accepted the Crown's submission that:

> [T]here is nothing inherent in the act of speeding that dictates that all speed-based offences must be characterized as offences of absolute liability .... [T]he act of speeding can involve a wide variety of circumstances, some significantly more dangerous to the public than others .... [T]he legislature may choose to address various forms of "aggravated" speeding by creating discrete offences which can coexist with the generic offence of speeding.[169]

Justice Doherty acknowledged that "the prohibited conduct [in the stunt driving offence] is identical to the conduct prohibited by the offence of speeding [but that there is] nothing illogical in treating one as a strict liability offence and the other as one of absolute liability offence."[170] He further held, "The legislature has chosen, [by enacting the stunt driving offence,] to up the penal stakes for speeding at 50 kph or more over the speed limit by including the risk of incarceration."[171]

As the *Raham* decision demonstrates, the same type of conduct underlying a regulatory offence may be regarded in different ways, and for different purposes. What essentially distinguishes the offence of speeding from stunt driving by speeding is the corresponding punishment. However, the nature of the conduct that constitutes a breach of the regulatory standard is no different, namely, driving in excess of the speed limit. It follows, therefore, that strict liability offences may be differentiated by the punishment that it attaches, although the underlying conduct is the same.

D. The Requirement That the Prosecution Provide Notice of its Intention to Seek a Period of Imprisonment in The Case of *ex Parte* Trial Proceedings under the *Ontario Provincial Offences Act*

The proposal that the prosecution give notice of its intention to seek a term of imprisonment for a strict liability regulatory offence was one of the suggestions made

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168 *R v Raham*, 2010 ONCA 206, 99 OR (3d) 241.
169 *Ibid* at para 30.
170 *Ibid* at para 51.
171 *Ibid*.

by Ruby and Jull in their case comment on *Wholesale Travel*,[172] and by Swaigen.[173] In prosecutions where the defendant is not facing the possibility of imprisonment, they argued that the "original version of strict liability"[174] should apply, such that the legal burden of proving due diligence shifts to the accused. However, where there is a real possibility of imprisonment, the full procedural protections available to accused persons in criminal cases ought to govern, and there should be no reversal of the burden of proof. Such a dichotomy would satisfy the *Oakes* criteria for justifying the violation of the presumption of innocence, according to Ruby and Jull.

At present, there is no provision in the *Ontario Provincial Offences Act* permitting the prosecutor to elect to proceed by way of the ticketing procedure under Part I of the Act—as opposed to the sworn information procedure under Part III—in the same manner as the *Criminal Code*, where the Crown can elect whether to proceed summarily or by indictment. As a result, the Crown's election directly impacts the nature of the punishment for which the defendant is liable, given the higher monetary penalties and lengthier prison terms for indictable offences. The Crown's criminal election is therefore a most significant procedural step, which indicates, among other things, its view of the relative seriousness of the matter, by virtue of the punishment it is seeking.

Likewise, allowing prosecutors to elect in the context of regulatory offences would provide them with this opportunity to express the seriousness of the matter at hand. A prosecutor choosing not to seek incarceration would, in turn, be an indication that the infraction was regarded as a less serious breach of the regulatory standard. On the other hand, where the prosecution would seek incarceration, the parties would know that the matter was being treated more seriously.

The concept of the prosecution making such an election before the court, and indicating its intention to seek a period of imprisonment, was recently endorsed by the Court of Appeal for Ontario in *R v Jenkins*,[175] a case dealing with the propriety of proceeding to trial in the absence of the defendant, or by way of *ex parte* proceedings. In this case, a period of imprisonment was imposed on sentencing, although the defendant was absent for court. The appropriateness of such a disposition was subsequently challenged on appeal.

Section 54(1) of the *Provincial Offences Act* specifically authorizes the holding of a trial in the defendant's absence. A constitutional challenge to this procedure, on the basis of violations of sections 7 and 11(d) of the *Charter of Rights*, had previously been rejected.[176] In *Jenkins*, the Court of Appeal affirmed that it saw no reason to depart from this view of the legislation. However, in doing so, Justice Doherty,

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172 Ruby & Jull, *supra* note 82 at 242.
173 Swaigen, *supra* note 22 at 215-16.
174 Ruby & Jull, *supra* note 82 at 242.
175 *R v Jenkins*, 2010 ONCA 278, 99 OR (3d) 561, leave to appeal to SCC refused, [2010] 2 SCR vii [*Jenkins*].
176 *R v Felipa* (1986), 55 OR (2d) 362, 27 CCC (3d) 26.

speaking for the court, commented that "In upholding the constitutionality of *ex parte* under the Act, I do not suggest that they are or should become the norm. Cleary, there is a risk of a miscarriage of justice inherent in an *ex parte* proceeding that does not exist where the defendant is present."[177] Justice Doherty went on to observe that:

> Prosecutors and judges have a role to play in minimizing the risk of miscarriages of justice through ex parte proceedings. An *ex parte* trial is not automatic when a defendant fails to appear in answer to a charge under Part III of the Act. The prosecutor must request an *ex parte* trial and the trial judge has the discretion to proceed *ex parte* or to take other steps, usually the issuance of a warrant, to compel the attendance of the defendant.[178]

To this Justice Doherty added:

> The court was told in oral argument that there are no formal guidelines in place to assist prosecutors in deciding when to request an *ex parte* trial. In every case where the prosecutor will seek a custodial sentence upon conviction, the prosecutor would be well-advised to consider whether an *ex parte* proceeding is appropriate. The longer the period of imprisonment sought, the less inclined the prosecutor should be to request an *ex parte* trial. If the prosecutor ultimately decides that it would be proper to proceed *ex parte*, he or she should advise the trial judge, before the trial begins, of their intention to seek a custodial sentence and the range of sentence that they anticipate will be appropriate. The trial judge can use this information to decide whether to proceed with the trial or take other action, such as adjourn the hearing and issue a warrant for the defendant's arrest.[179]

The procedure of the prosecutor alerting the court of its position on sentencing at the beginning of the *ex parte* trial is essentially the same as that proposed by Ruby and Jull and Swaigen, in relation to strict liability offences that are punishable by imprisonment, and for which the Crown is seeking such a penalty. By requiring such an election, the court would know the prosecutor's position regarding the seriousness of the offence. While it would not be aided by the reverse onus provision where imprisonment was being sought, it would retain the assistance of

177 *Jenkins*, *supra* note 175 at para 31 [footnote omitted, emphasis in the original].
178 *Ibid* at para 32 [emphasis in the original].
179 *Ibid* at para 33.

the reverse onus in strict liability non-incarceration prosecutions. The restrictive circumstances resulting from a defendant's requirement to bear the burden of proof in non-imprisonment strict liability cases would be especially significant for the *Oakes* proportionality test.

E. The Law Commission of Ontario's 2011 Report on Modernizing the *Provincial Offences Act*

The *Provincial Offences Act* of Ontario was enacted over thirty years ago and came into force in 1980. Since that time, there have been a number of significant developments that have impacted the prosecution of provincial offences, such as: the *Charter*; the transfer of prosecutions to municipalities under Parts I and II of the *Provincial Offences Act*; the regulation of paralegal practitioners who are entitled to appear in provincial offences proceedings; and the escalating volume of penalty provisions for regulatory offences, the majority of which are strict liability in nature.

These changes, among others, prompted the Law Commission of Ontario in 2009 to undertake a study of modernizing the *Provincial Offences Act*, the first comprehensive analysis of the legislation since its inception. In contrast to its 1990 report on provincial offences,[180] which was approximately 60 pages in length, on this occasion the Law Commission of Ontario produced a consultation paper, interim report and final report. The final report was completed in August, 2011, and released on November 10, 2011.[181] Numerous issues concerning provincial offences proceedings are addressed in the final report, some of which are procedural in nature, while others involve substantive matters. Of particular note is the manner in which the Law Commission of Ontario proposes that the purpose of provincial offences proceedings be recast. This is most relevant to the debate concerning the significance of provincial strict liability offences that are punishable by imprisonment, as opposed to those that are not.

The statement of purpose within the *Provincial Offences Act* currently refers to the objective of setting out a procedure for the prosecution of provincial offences that "reflects the distinction between provincial offences and criminal offences."[182] The Law Commission of Ontario's final report comments that the underlying objectives to the statement of purpose were proportionality, efficiency and fairness; as opposed to simply providing a means to replace the summary conviction procedure for the prosecution of provincial offences.[183] As such, it recommended that these broader objectives be "properly reflected" in an amended purpose section of the *Provincial Offences Act*.[184] As stated in the final report:

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180 Ontario Law Reform Commission, *Report on the Basis of Liability*, *supra* note 70.
181 Law Commission of Ontario, *Modernizing the Provincial Offences Act*, *supra* note 136.
182 *Provincial Offences Act*, *supra* note 135, s 2(1).
183 Law Commission of Ontario, *Modernizing the Provincial Offences Act*, *supra* note 136 at 38.
184 *Ibid* at 39.

> A purpose section provides insight into the legislator's true intent for the enactment. Not only does it guide the judiciary in the interpretation and application of the statute, but it also directs prosecutors and defendants to govern themselves in a manner consistent with this legislative objective. The drafting of subordinate POA rules, regulations and forms would similarly be guided by the overarching purpose of the statute. To date, it has been left to the judiciary and rules committee to interpret the true underlying objective of the POA.
>
> A POA purpose section that incorporates concepts of proportionality, efficiency, fairness, accessibility and responsiveness to the offence-creating statute's objectives will, in our view, create a dynamic and flexible procedural code. It will create opportunities for a living and evolving procedure (or procedures) that can best respond to the volume and diverse nature of POA offences today and in the future. It will establish the guiding principles upon which any POA procedure, rule or regulation is to be developed, interpreted and applied.[185]
>
> Moreover, the Law Commission of Ontario recommended that:
>
> The purpose section of the POA be amended to advance a procedure for the trial or resolution of provincial offence cases and to inform the development of any rules, forms or other subordinate authority or practice that is:
> a. fair;
> b. accessible;
> c. proportionate to the complexity and seriousness of the provincial offence;
> d. efficient;
> e. responsive to the offence-creating statute's objective; and
> f. reflective of the distinction between provincial offences and criminal offences.[186]

It can be seen that proportionality plays a central role in the reformulated purpose section of the *Provincial Offences Act*. Differentiating between strict liability provincial offences—that is, the category in which regulatory offences are presumed to belong according to *Sault Ste Marie*, by virtue of their punishment provisions—

185 *Ibid* at 38 [footnote omitted].
186 *Ibid* at 39.

is consistent with this new statement of purpose section. In other words, those strict liability offences that expose the defendant to imprisonment may properly be viewed in a different manner than ones that do not. This focus on proportionality, while grounded in punishment concerns, is highly relevant for the *Oakes* criteria as it examines the impact of the *Charter* breach on the defendant and the alternatives that are available in its place.

V. CONCLUSION

It is clear that the reverse onus mandated by the doctrine of strict liability—requiring the defendant to establish, on the balance of probabilities, that due diligence was exercised—is constitutionally offensive to the presumption of innocence as guaranteed by section 11(d) of the *Charter*. It exposes the defendant to conviction, notwithstanding a reasonable doubt as to whether the defendant was duly diligent. In *Wholesale Travel*, a bare majority of the Court accepted that this *Charter* infringement could be saved by section 1. What may not be so clear, however, is whether the Court would remain persuaded that this section 1 application of the *Oakes* test ought to produce the same result, should it decide to reconsider its ruling in *Wholesale Travel*. Indeed, the one remaining member of the Court from the time it rendered its decision is now Chief Justice McLachlin, who was one of the dissenting judges.

Developments subsequent to *Wholesale Travel* support the contention that the Court's holding, regarding the constitutionality of a reverse onus provision for strict liability offences carrying imprisonment penalties, merits reconsideration. The growing number of regulatory offences that result in incarceration sentences and million-dollar fines have been likened to "a wolf in sheep's clothing," since they seem closer to true crimes than minor offences, in terms of nomenclature and potential penalty—despite being negligence-based strict liability offences.[187] Indeed, the fact that corporations now face potential criminal prosecution for negligent conduct under the new organization provisions—for actions or omissions that are essentially the same as strict liability prosecutions, where the corporate defendant carries the burden of proof of disproving negligence, albeit on a lesser legal standard—is likely to bring renewed attention to the alternative of the regulatory offences paradigm. Thus, although two decades have passed since *Wholesale Travel* was decided, the Supreme Court of Canada may be asked to hear another *Charter* challenge against regulatory offences that are strict liability in nature.

The section 1 justification should be re-evaluated in light of the manner in which regulatory offences that are strict liability in nature result in different penalties. For example, a discrete category of strict liability offences could be enacted where the prosecution would be required to prove the defendant's *mens rea* to justify a sentence of imprisonment. In such cases, precursors would be required

187 Archibald, Jull & Roach, *supra* note 26 at 9-3.

for the prosecution to announce its intention before the start of the proceedings—should the prosecution seek a penalty of imprisonment, the reverse onus would not apply. Creating a separate category of aggravated strict liability offences that are punishable by imprisonment is another means of accomplishing this objective. In the absence of such a new paradigm, the section 1 *Oakes* analysis will continue to run the risk of striking down strict liability offences given the possibility of imprisonment. However, eliminating the use of imprisonment as punishment for those who commit negligence-based regulatory offences would go a long way in preserving the constitutionality of the doctrine of strict liability.