Regina v. Martin *

Indexed as: R. v. Joseph Martin
(C.A.)

2 O.R. (3d) 16
[1991] O.J. No. 161
Action No. 891/89

Court of Appeal for Ontario
Lacourciere, Finlayson and Griffiths JJ.A.
Heard: December 6 and 7, 1990.
Judgment: February 11, 1991

* An appeal from the following judgment of the Ontario Court of Appeal to the Supreme Court of Canada (Lamer C.J. and La Forest, L'Heureux-Dub, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.) was dismissed on March 30, 1992. See [1992] 1 S.C.R. 838 and 7 O.R. (3d) 319.

Charter of Rights -- Fundamental justice -- Section 13 of Export and Import Permits Act creating offence of strict rather than absolute liability -- Defence of reasonable diligence available -- Section 7 of Charter not violated -- Export and Import Permits Act, R.S.C. 1970, c. E-17, s. 13.

Charter of Rights -- Presumption of innocence -- Section 13 of Export and Import Permits Act creating offence of strict liability to which defence of reasonable diligence available -- Imposition on accused of evidential burden of raising reasonable doubt not violating presumption of innocence -- Export and Import Permits Act, R.S.C. 1970, c. E-17, s. 13.

The respondent was charged with violations of s. 13 of the Export and Import Permits Act, which provides that no person shall export or attempt to export any goods included in an Export Control List or any goods to any country included in an

Area Control List except under the authority of and in accordance with an export permit issued under the Act. He argued successfully that s. 13 of the Act created an offence of absolute liability coupled with a possible term of imprisonment, contrary to s. 7 of the Canadian Charter of Rights and Freedoms, and was of no force or effect; he was acquitted. The Crown appealed.

Held, the appeal should be allowed, the acquittal set aside and a new trial ordered.

Section 13 of the Act creates an offence of strict liability, not an offence of absolute liability. The Act is a public welfare statute. Public welfare offences are, prima facie, strict liability offences unless the legislature has indicated that absolute liability is to be imposed. An offence will be one of absolute liability only where the legislature had made it clear that guilt will follow proof merely of the proscribed act. The legislative history of the Act was of no assistance in displacing the prima facie classification of a public welfare offence created by s. 13 as one of strict liability; that prima facie classification should be displaced only where the language employed by the legislation clearly indicates an intention that the offence should be one of absolute liability. Nothing in the scheme of the Act indicated that offences of absolute liability were intended. Even if the offence created by s. 13 appeared to have the hallmarks of an absolute liability offence, it should be construed as an offence of strict liability to avoid conflict with the Charter.

A strict liability offence, even with the potential of imprisonment, does not per se violate s. 7 of the Charter where the legislature has made it clear that proof of mens rea is not required. An accused faced with a strict liability offence is, unless the legislation creating the offence provides otherwise, entitled to the defence of reasonable diligence, which places on him only the evidential burden of raising a reasonable doubt. In those circumstances, a strict liability offence does not offend s. 7 of the Charter, but imposes liability in accordance with accepted principles of fundamental justice. Moreover, that evidential burden on the accused does not offend

the presumption of innocence in s. 11(d) of the Charter.

R. v. Cancoil Thermal Corp. (1986), 27 C.C.C. (3d) 295, 11 C.C.E.L. 219, 52 C.R. (3d) 188, 14 O.A.C. 225 (Ont. C.A.); R. v. Feehan (1989), 43 C.R.R. 70, 49 C.C.C. (3d) 392, 79 Nfld. & P.E.I.R. 133, 246 A.P.R. 133 (P.E.I. T.D.); R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 85 D.L.R. (3d) 161, 21 N.R. 295, apld

Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 69 B.C.L.R. 145, 18 C.R.R. 30, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289, 24 D.L.R. (4th) 536, 36 M.V.R. 240, 63 N.R. 266, [1986] 1 W.W.R. 481 sub nom. Reference re Constitutional Question Act (British Columbia); R. v. Ellis-Don Ltd. (1990), 1 O.R. (3d) 193 (C.A.); R. v. Wholesale Travel Group Inc. (1989), 70 O.R. (2d) 545, 46 C.R.R. 73, 52 C.C.C. (3d) 9, 27 C.P.R. (3d) 129, 73 C.R. (3d) 320, 63 D.L.R. (4th) 325, 35 O.A.C. 331 (C.A.) [leave to appeal to S.C.C. granted (1990), 106 N.R. 79n, 37 O.A.C. 399n], distd

Other cases referred to

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 9 C.R.R. 355, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 N.R. 241, [1984] 6 W.W.R. 577 sub nom. Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.; R. v. Chapin, [1979] 2 S.C.R. 121, 45 C.C.C. (2d) 333, 8 C.E.L.R. 151, 7 C.R. (3d) 225 (English), 10 C.R. (3d) 371 (French), 95 D.L.R. (3d) 13, 26 N.R. 289

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d)
Competition Act, R.S.C. 1970, c. C-23, s. 37.3 [en. 1974-75-76, c. 76, s. 18(1)]
Criminal Code, R.S.C. 1985, c. C-46, s. 581 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 118]

Export and Import Permits Act, R.S.C. 1970, c. E-17 [now R.S.C. 1985, c. E-19], ss. 13, 15, 16, 17, 18, 19, 21
Food and Drugs Act, R.S.C. 1985, c. F-27, s. 5(1)
Marine Mammal Protection Act (United States)
National Emergency Transitional Powers Act, 1945, S.C. 1945, s. 25
Occupational Health and Safety Act, R.S.O. 1980, c. 321, ss. 14 [subsequently am. 1987, c. 29, s. 2; 1990, c. 7, s. 14], 37(2)
War Measures Act, 1914, S.C. 1914 (2nd Sess.), c. 2

Rules and regulations referred to

Migratory Bird Regulations, SOR/71-376, s. 14(1) [am. SOR/73-509, s. 3]

APPEAL by the Crown from the respondent's acquittal on charges under the Export and Import Permits Act.

D.D. Graham Reynolds, for the Crown, appellant.

Morris Manning, Q.C., and Theresa R. Simone, for respondent.

The judgment of the court was delivered by

GRIFFITHS J.A.:-- The issue raised in this appeal is whether s. 13 of the Export and Import Permits Act, R.S.C. 1970, c. E-17 [now R.S.C. 1985, c. E-19] creates an offence of absolute liability or an offence of strict liability. If the offence is one of absolute liability, s. 13, by creating an offence punishable by imprisonment, is unconstitutional and of no force and effect because it violates s. 7 of the Canadian Charter of Rights and Freedoms.

The Attorney General of Canada appeals against the acquittals of the respondent on September 6 and 11, 1989 by a District Court judge on four charges laid pursuant to the Export and Import Permits Act (the Act) as follows:

1. THAT he, the said JOSEPH MARTIN, unlawfully did, at the Township of Flamborough and the City of Hamilton, both in the said Judicial District of Hamilton-Wentworth in the Province of Ontario and elsewhere in the Province of Ontario, in the Northwest Territories and elsewhere in Canada and in the United States of America, between the 1st day of January, 1984 and the 31st day of December, 1984, both days included, conspire and agree together with Jaroslav Kanp, also known as Jerome Joseph Knap, Halina Knap, also known as Halina Ryszawy and Canada North Outfitting Incorporated, and with Louis Delhomme, the one with the other and with a person or persons unknown to commit an indictable offence, to wit: export goods, namely a species of the Family Ursidae, to wit: polar bear, included in an Export Control List, otherwise than under the authority of and in accordance with an Export Permit issued under the Export and Import Permits Act, R.S.C. 1970; Chapter E-17, as amended, contrary to Section 19 of the said Act and he did thereby commit an offence contrary to Section 423(1)(d) (now s. 465(1)(c)) of the Criminal Code.

2. AND FURTHER THAT the said JOSEPH MARTIN, unlawfully did, at the Township of Flamborough and the City of Hamilton, both in the said Judicial District of Hamilton-Wentworth in the Province of Ontario and elsewhere in the Province of Ontario and elsewhere in Canada, between the 1st day of September, 1984 and the 31st day of October, 1984, both dates inclusive, export to Louise Delhomme of the State of Texas, in the United States of America goods, to wit: a species of the Family Ursidae, to wit: Polar Bear, included in an Export Control List, otherwise than under the Export and Import Permits Act R.S.C. 1970, Chapter E-17, as amended, contrary to section 13 of the said Act and he did thereby commit an offence contrary to Section 19(1) of the said Act.

3. AND FURTHER THAT JOSEPH MARTIN, at the Township of Flamborough and the City of Hamilton, both in the said Judicial District of Hamilton-Wentworth in the Province of Ontario and elsewhere in the Province of Ontario and in the Northwest Territories and elsewhere in Canada and in the United States of America, between the 1st day of January,

1984 and the 31st day of December, 1985, both dates inclusive, conspired and agreed together with Halina Knap, Jerome Knap, Canada North Outfitting Incorporated and Carlos Nachon, the one with the other and with a person or persons unknown to commit an indictable offence to wit: Export goods, namely a species of the Family Ursidae, to wit: Polar bear, included in an Export Control List, otherwise than under the authority of and in accordance with an Export permit issued under the Export and Import Permits Act, R.S.C. 1970, Chapter E-17, as amended, contrary to Section 19 of the said Act and he did thereby commit an offence contrary to Section 423(1)(d) (now s. 465(1)(c)) of the Criminal Code.

4. AND FURTHER THAT JOSEPH MARTIN, unlawfully did, at the Township of Flamborough and the City of Hamilton, both in the said Judicial District of Hamilton-Wentworth in the Province of Ontario and elsewhere in the Province of Ontario and elsewhere in Canada, between the 1st day of November, 1984 and the 31st day of May, 1985, both dates inclusive, export to Carlos Nachon of the State of Florida in the United States of America goods, to wit: a species of the Family Ursidae, to wit: Polar Bear included in an Export Control List, otherwise than under the authority of and in accordance with an Export Permit issued under the Export and Import Permits Act, R.S.C. 1970, Chapter E-17, as amended, contrary to Section 13 of the said Act and he did thereby commit an offence contrary to Section 19(1) of the said Act.

Although Counts 1 and 3 of the indictment allege that the respondent conspired with others to commit an indictable offence contrary to s. 19 of the Act, essential to liability on these two counts is proof of a conspiracy to export contrary to the provisions of s. 13 of the Act. In substance then, the provisions of s. 13 of the Act form the cornerstone of liability on each of the four counts. The validity of the conspiracy counts depends on the constitutionality of the substantive offence under s. 13.

HISTORY OF PROCEEDINGS

On September 5, 1989, the respondent appeared in District

Court and was arraigned on the first count of the above four-count indictment. The respondent declined to enter a plea and submissions were made by counsel on a number of preliminary objections including the question of whether or not the indictment complied with the specific requirements of s. 581 [am. R.S.C. 1985, c. 27 (1st Supp.), s. 118] of the Criminal Code, R.S.C. 1985, c. C-46. The primary challenge raised by the respondent on the pre-plea motion and the one that ultimately led to the acquittals was that s. 13 of the Act created an absolute liability offence, coupled with a possible term of imprisonment, in violation of s. 7 of the Charter, and was therefore of no force or effect. The trial judge held that s. 13 of the Act did create an absolute liability offence and that Count 1 should be dismissed because it violated s. 7 of the Charter. On September 11, 1989, the respondent was arraigned on the remaining three counts and, after raising the same preliminary objection, was also acquitted on these counts.

FACTS

Overview

No evidence was called by either the Crown or defence because the case was determined on the basis of a pre-trial motion. The following are the facts as outlined on the motion by counsel for the Crown.

A company called Canada North Outfitters conducted guided bear hunts to the Northwest Territories permitting hunters, including an American named Louis Delhomme of Texas, to shoot a polar bear. The trips cost between $16,000 and $20,000. If the customer failed to kill a polar bear on the hunt, he was entitled to return and hunt again by paying only the air fare.

Delhomme was successful in shooting a polar bear. After the hunt, the bear skins were sent to the respondent in Hamilton from the Northwest Territories and the respondent completed the necessary taxidermy work. The Marine Mammal Protection Act in the United States prohibits the importation of polar bears. The Crown alleged that in order to permit Delhomme to circumvent this Act, the skins were smuggled into the United States and

the respondent provided an invoice which had been backdated to a date before the existence of the prohibition under the Marine Mammal Protection Act.

Polar bear skins were included in the Export Control List which forms part of the regulations to the Act. Hence, the skins could only legally be exported under the authority of an export permit issued pursuant to the Act. The Crown took the position that the respondent knowingly participated in a scheme to export the skins without obtaining a permit, contrary to s. 13 of the Act.

ABSOLUTE OR STRICT LIABILITY

The central issue in this appeal is whether s. 13 of the Act creates an offence of absolute or strict liability. Section 13 of the Act and related provisions provide as follows:

> 13. No person shall export or attempt to export any goods included in an Export Control List or any goods to any country included in an Area Control List except under the authority of and in accordance with an export permit issued under this Act.
>
> 14. No person shall import or attempt to import any goods included in an Import Control List except under the authority of and in accordance with an import permit issued under this Act.
>
> 15. Except with the authority in writing of the Minister, no person shall knowingly do anything in Canada that causes or assists or is intended to cause or assist any shipment, transhipment or diversion of any goods included in an Export Control List to be made, from Canada or any other place, to any country included in an Area Control List.
>
> 16. No person who is authorized under a permit issued under this Act to export or import goods shall transfer the permit to, or allow it to be used by, a person who is not so authorized.

17. No person shall wilfully furnish any false or misleading information or knowingly make any misrepresentation in any application for a permit, certificate ...

18. No person shall knowingly induce, aid or abet any person to violate a provision of this Act or the regulations.

19.(1) Every person who violates any of the provisions of this Act or the regulations is guilty of an offence and is liable

(a) on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding twelve months or to both; or

(b) on conviction upon indictment to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding five years or to both.

. . . . .

20. Where a corporation commits an offence under this Act, any officer or director of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

21. Where a permit under this Act is issued to a person who has applied for it for, on behalf of, or for the use of, another person who is not a resident of Canada and that other person commits an offence under this Act, the person who applied for the permit is, whether or not the non-resident has been prosecuted or convicted, guilty of the like offence and liable, on conviction, to the punishment provided for the offence, on proof that the act or omission constituting the offence took place with the knowledge or consent of the person who applied for the permit or that the person who applied therefor failed to exercise due diligence to prevent

the commission of the offence.

The respondent takes the position that s. 13 of the Act creates an absolute liability offence and that, because it may be punishable by way of imprisonment, it contravenes s. 7 of the Charter. In this respect, the respondent relies on the decision of the Supreme Court of Canada in Reference re s. 94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 18 C.R.R. 30, 69 B.C.L.R. 145, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289, 24 D.L.R. (4th) 536, 36 M.V.R. 240, 63 N.R. 266, [1986] 1 W.W.R. 481 sub nom. Reference re Constitutional Question Act (British Columbia). Lamer J., delivering the judgment of the majority, said at p. 515 S.C.R., pp. 54-55 C.R.R., p. 311 C.C.C.:

> In my view, it is because absolute liability offends the principles of fundamental justice that this Court created presumptions against Legislatures having intended to enact offences of a regulatory nature falling within that category. This is not to say, however, and to that extent I am in agreement with the Court of Appeal, that, as a result, absolute liability per se offends s. 7 of the Charter.
>
> A law enacting an absolute liability offence will violate s. 7 of the Charter only if and to the extent that it has the potential of depriving of life, liberty or security of the person.
>
> Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.
>
> I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the Charter and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

(Emphasis added)

The Supreme Court was speaking of an absolute liability offence in the sense that criminal liability is imposed regardless of fault considerations but follows on mere proof of the actus reus of the offence. Lamer J. held that a law that has the potential to convict a person in the absence of moral responsibility and makes imprisonment available as a penalty offends the principles of fundamental justice because it violates one's right to liberty under s. 7 of the Charter. Lamer J. did not address, however, the issue of whether absolute liability offences also offend s. 11(d) of the Charter which expressly protects the presumption of innocence.

PUBLIC WELFARE OFFENCES

The starting point of any discussion relating to the various categories of criminal or quasi-criminal offences in Canada is the Supreme Court of Canada decision in R. v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 85 D.L.R. (3d) 161, 21 N.R. 295. Dickson J. held that there were three categories of offences. At pp. 1325-26 S.C.R., pp. 373-74 C.C.C., he said:

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed

in a mistaken set of acts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or ''intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Section 13 of the Act does not contain words indicating that it is a mens rea offence. Accordingly, in this appeal we are concerned only with the second and third categories mentioned by Dickson J. These categories are strict and absolute liability offences, of which public welfare offences primarily fall into the former category.

In Sault Ste. Marie, supra, Dickson J. advocated a different approach to true criminal offences as opposed to the approach to public welfare offences. With true criminal offences, the object of the legislation is generally to protect individual interests whereas with public welfare offences, the object of the legislation is to regulate activities in the interests of

the public as a whole. Counsel for the respondent concedes that the Act under review is a public welfare statute regulating, as it does, the importing and exporting of a wide variety of goods.

With respect to public welfare offences, the decision in Sault Ste. Marie established that such offences are, prima facie, strict liability offences unless the legislature has indicated that absolute liability is to be imposed. In this respect, an offence will be one of absolute liability only where the legislature had made it clear that "guilt would follow proof merely of the proscribed act". The court also held that the other indicia of the imposition of absolute liability as opposed to strict liability include the overall regulatory pattern of the legislation, the importance of the penalty and the precision of the language of the legislation.

Counsel for the respondent submits that s. 13 of the Act should be construed as creating an absolute liability offence for two principal reasons.

First, it is submitted that the legislative history of the Act demonstrates Parliament's intention to establish an absolute liability offence for ss. 13 and 14 of the Act. The general prohibitions against the exportation or importation of goods not included on an approved list was first introduced in the War Measures Act, 1914, S.C. 1914 (2nd Sess.), c. 2, and later carried forward in the National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25. In both these instances the purpose of the legislation was to ensure that no goods which might assist a foreign power, or which might do damage to the vital interests of Canada, either left Canada or arrived here. It is submitted by the respondent that the provisions of these previous statutes, which were enacted in substantially the same terms as the present s. 13, were obviously intended to create absolute liability offences against anyone who imported or exported goods which might damage the vital interests of Canada.

Secondly, it is argued by the respondent that the omission in s. 13 of certain words and expressions found in other sections

of the Act indicates a clear intention by the legislature that s. 13 creates an absolute liability offence for which the defence of due diligence is not available. On this point it is emphasized that whereas ss. 15, 16, 17 and 18 of the Act use expressions such as "knowingly", "wilfully", "allow", "knowledge" or "consent", indicating that proof of mens rea is required to establish a conviction under those sections, no such expressions are found in s. 13. Further, it is asserted that because s. 21 of the Act expressly provides for the defence of due diligence when it uses the words "failing to exercise due diligence", the absence of those words in s. 13 indicates an intention that such a defence was not intended.

With respect to the first submission, it is my opinion that the legislative history of the Act is of no assistance in displacing the prima facie classification of a public welfare offence created by s. 13 as one of strict liability. I prefer to hold that this prima facie classification should only be displaced where the language employed by the legislation clearly indicates an intention that the offence should be one of absolute liability.

With regard to the second submission, I conclude that the words denoting the requirement of proof of mens rea for the offences under ss. 15, 16, 17 and 18 simply fortify the conclusion that the legislature did not intend s. 13 to create a mens rea offence. It is not a crime in the true sense. As to the argument that the provision for the defence of due diligence in s. 21 must lead to the conclusion that s. 13 was intended to be an absolute liability offence, I accept the proposition that contextual analysis of other sections of the statute may in some instances provide an aid to construction. In my view, however, such analysis should not be considered conclusive. The decision of Sault Ste. Marie mandates that a court start with the general proposition that public welfare offences are strict liability offences and that the common law defences of due diligence and mistake of fact are available to the accused. I am prepared to assume that the due diligence provision of s. 21 was inserted by the legislature without consideration of the implications to other offences. Section 21 addresses a very specific situation and, in my view, its

provision for the defence of due diligence was not intended to operate exclusively in the circumstances of that section.

I am of the view, then, that the express provision of due diligence in s. 21 does not manifest an intent of the legislature to preclude raising the defence under s. 13.

I am of the opinion that there is nothing whatsoever in the scheme of the Act to indicate that offences of absolute liability were intended. It is of some significance that s. 13 of the Act does not impose an absolute prohibition on exporting but only prohibits the exportation of goods found on certain prescribed lists. In R. v. Chapin, [1979] 2 S.C.R. 121, 45 C.C.C. (2d) 333, 8 C.E.L.R. 151, 7 C.R. (3d) 225 (English), 10 C.R. (3d) 371 (French), 95 D.L.R. (3d) 13, 26 N.R. 289, Dickson J. held that s. 14(1) [am. SOR/73-509, s. 3] of the Migratory Bird Regulations, SOR/71-376 which imposed limited restrictions on hunting birds, was a "classic example" of a strict liability offence. In my opinion, s. 13 of the Act falls into that same category.

As well, it seems to me that there is much to be said for the alternative position advanced by the Crown. To this end, the Crown contends that even if the offence created by s. 13 of the Act appears to have the hallmarks of an absolute liability offence, it should nevertheless be construed as an offence of strict liability to provide for a procedure consistent with the safeguards of s. 7 of the Charter. In R. v. Cancoil Thermal Corp. (1986), 27 C.C.C. (3d) 295, 11 C.C.E.L. 219, 52 C.R. (3d) 188, 14 O.A.C. 225 (C.A.), this court dealt with the constitutional validity of s. 14 [subsequently am. S.O. 1987, c. 29, s. 2; 1990, c. 7, s. 14] of the Occupational Health and Safety Act, R.S.O. 1980, c. 321, pursuant to which the respondent corporation had been charged with operating a piece of machinery without the required safety device. At pp. 299-300 C.C.C. Lacourciere J.A. said:

> The specific exclusion of this statutory defence [due diligence] in the case of offences under s. 14(1)(a) would suggest that the Legislature, as a matter of policy, had determined that the subsection creates an offence of absolute

liability, as defined in R. v. City of Sault Ste. Marie (1978), 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, [1978] 2 S.C.R. 1299. However, if s. 14(1)(a) were treated as creating an absolute liability offence, it would offend s. 7 of the Canadian Charter of Rights and Freedoms, the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Under s. 37(1), a violation of s. 14(1)(a) may attract a term of imprisonment. In Reference re s. 94(2) of Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, [1985] 2 S.C.R. 486, the Supreme Court of Canada held that the combination of absolute liability and the potential penalty of imprisonment was a violation of s. 7 of the Charter ...

. . . . .

To avoid a violation of s. 7 of the Charter, s. 14(1)(a) must be treated as creating a strict liability offence. The defence of due diligence was available to the respondents.

Counsel for the respondent submits that if s. 13 fails to provide for the minimal constitutional standard of proof of due negligence, then a court should not read such a safeguard into the section but the section should be struck down. Counsel relied on the decision of the Supreme Court of Canada in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, 9 C.R.R. 355, 33 Alta. L.R. (2d) 193, 55 A.R. 291, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 2 C.P.R. (3d) 1, 41 C.R. (3d) 97, 11 D.L.R. (4th) 641, 84 D.T.C. 6467, 55 N.R. 241, [1984] 6 W.W.R. 577 sub nom. Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc., where it was held (per Dickson J. at p. 169 S.C.R., p. 374 C.R.R., p. 115 C.C.C.) that the court should not read in or "fill in the details that will render legislative lacunae constitutional".

In the decision of R. v. Feehan (1989), 43 C.R.R. 70, 49 C.C.C. (3d) 392, 79 Nfld. & P.E.I.R. 133, 246 A.P.R. 133, MacDonald C.J.T.D. of the Prince Edward Island Supreme Court Trial Division held that s. 5(1) of the Food and Drugs Act, R.S.C. 1985, c. F-27, which had been interpreted as creating an

absolute liability offence prior to the enactment of the Charter, must now be interpreted as creating only a strict liability offence to avoid an infringement of the Charter. At p. 74 C.R.R., p. 396 C.C.C., he said:

> At the beginning I made reference to the fact that the respondent's case was based on the interaction of two cases, the first being Grottoli and the second, the above noted Reference re s. 94(2) of Motor Vehicle Act (1985), 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, [1985] 2 S.C.R. 486 (S.C.C.). The respondent states that following these two cases s. 5(1) should be declared of no force and effect. The substantial issue, therefore, becomes whether or not the decision in Cancoil is to be followed in so far as the court "read down" the offence from one of absolute liability to one of strict liability in order to make the provision under consideration constitutional. This leads to the issue of the presumption of constitutionality and to how far it extends.
>
> In Cancoil the court read down the statute in order to validate the legislation. The contention of the respondent is that Cancoil fails to consider the decision of the Supreme Court of Canada in Hunter v. Southam Inc. (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 6 W.W.R. 577, sub nom. Director of Investigation & Research, Combines Investigation Branch v. Southam Inc. (S.C.C.) in which he states the reading down canon of construction was rejected.
>
> I accept the contention of the appellant that the Hunter case does not apply to the present circumstances. Neither does Hunter impair the result reached in Cancoil. Hunter may be distinguished on the ground that it was specifically dealing with a situation of "reading in" rather than "reading down" which was done in Cancoil. The present case is one of reading down, not reading in and therefore the Cancoil decision may be followed.

I respectfully agree with the law as stated in Cancoil and Feehan, supra, that a court should interpret a public welfare statute in order to validate the legislation so that it is consistent with the provisions of the Charter.

DOES S. 13 VIOLATE S. 7 AND/OR S. 11(d) OF THE CHARTER?

The respondent submits that where the Crown proceeds by indictment under s. 13, exposing the respondent on conviction to imprisonment, then s. 13 violates the guarantee of fundamental justice contained in s. 7 of the Charter. The submission is that even as a strict liability offence, s. 13 imposes liability without proof of a blameworthy state of mind, thereby offending the principles of fundamental justice.

Section 7 of the Charter reads:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

I conclude on the authorities that a strict liability offence even with the potential of imprisonment does not per se violate s. 7 of the Charter, where the legislature has made it clear that proof of mens rea is not required.

The authorities, to which reference will be made later, establish that an accused faced with a strict liability offence is, unless the legislation creating the offence provides otherwise, entitled to the defence of reasonable diligence which places on him only the evidential burden of raising a reasonable doubt. In those circumstances, a strict liability offence does not offend s. 7 of the Charter, but imposes liability in accordance with accepted principles of fundamental justice.

The question remains whether that evidential burden on the accused offends s. 11(d) of the Charter, which reads:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and

impartial tribunal.

One of the circumstances under which s. 11(d) may be infringed by a statute imposing strict liability was dealt with by this court in the decision of R. v. Wholesale Travel Group Inc. (1989), 70 O.R. (2d) 545, 46 C.R.R. 73, 52 C.C.C. (3d) 9, 27 C.P.R. (3d) 129, 73 C.R. (3d) 320, 63 D.L.R. (4th) 325, 35 O.A.C. 331 (C.A.) [leave to appeal granted (1990), 106 N.R. 79n, 37 O.A.C. 399n]. In that case the court was concerned with a prosecution under the provisions of the Competition Act, R.S.C. 1970, c. C-23 dealing with false advertising. Section 37.3 [en. S.C. 1974-75-76, c. 76, s. 18(1)] of that Act provided for the defence of due diligence but expressly obliged the accused to establish it. In other words, the statute specifically placed the burden on the accused of establishing this defence. The majority (Lacourciere and Tarnopolsky JJ.A.) were of the opinion that placing such a burden on the accused violated the presumption of innocence in s. 11(d). As Lacourciere J.A. said at pp. 547-48 O.R., p. 92 C.R.R., p. 12 C.C.C.:

> ... it would be contrary to the presumption of innocence if a court, although entertaining a reasonable doubt as to the reasonable precautions taken by and the due diligence exercised by the accused to prevent the occurrence of an error, were obliged to convict the accused of a serious offence which may attract a heavy fine and/or a term of imprisonment of up to five years on indictment. The conviction would be entered because the accused had not established the statutory defence on a balance of probabilities. The governing authorities cited by Tarnopolsky J.A. show that the accused should bear only the evidential burden of adducing evidence sufficient to raise a reasonable doubt, and should not have to establish its statutory defences on a balance of probabilities.

(Emphasis added)

In R. v. Ellis-Don Ltd., Ont. C.A., Houlden, Carthy and Galligan JJ.A., December 3, 1990 [reported 1 O.R. (3d) 193 (C.A.)], this court followed Wholesale Travel Group, supra,

and the majority of the court (Houlden and Galligan JJ.A.) held that s. 37(2) of the Occupational Health and Safety Act, supra, which also expressly placed the burden on the accused of proving the defence of due diligence, was unconstitutional because it infringed s. 11(d) of the Charter and could not be justified under s. 1 of the Charter. Section 13 of the Act does not impose such a burden.

In Ellis-Don, supra, it was made clear that in the absence of a statutory provision imposing a positive burden on the accused to prove the defence of due diligence, the common law burden on the accused remains as simply an evidential burden to adduce evidence sufficient to raise a reasonable doubt. Galligan J.A. described this common law onus at p. 9 [pp. 200-01 O.R.] as follows:

> I have answered this question on the basis that it is the imposition upon an accused of an onus of proving the defence of due diligence upon a balance of probabilities which constitutes the infringement of s. 11(d). It does not seem to me that the imposition of an onus upon an accused merely to meet the evidential burden of showing some evidence that would raise a reasonable doubt about the defence would do so. That onus is a practical one which can arise in any criminal trial. The situation was explained by Martin J.A. in R. v. Lock (1974), 4 O.R. (2d) 178, 18 C.C.C. (2d) 477 (C.A.) at p. 186 O.R., p. 484 C.C.C.:
>
> Where the prosecution establishes a prima facie case, the accused runs the risk of being convicted unless he discharges the evidential burden of introducing evidence of lack of knowledge of a material element of the offence.
>
> That burden would also apply in this type of case. As a practical matter once the Crown proves each essential element of the offence charged the accused is likely to be convicted unless it can point to evidence in the Crown's case or adduce evidence to suggest that it used due diligence. This amounts to no more than the imposition of a practical evidential burden upon an accused at the end of the Crown's case which, if not met, will probably result in a conviction. In most

> cases the facts upon which the defence of due diligence could be based would be entirely within the knowledge of the accused. In such a case if the accused does not come forward with evidence showing that it took every reasonable precaution or that it took all reasonable steps to avoid the accident a court would be entitled to infer that the defence of due diligence was not available to it. A similar concept is found in those cases which say a defence need only be left to the jury if there is evidence which gives it an air of reality. If there is no evidence supporting a defence of due diligence in the Crown's case the practical consequence is that an accused who fails to produce some evidence of it does so at its peril.
>
> I am convinced that s. 11(d) is not infringed by an evidential burden placed upon an accused to adduce sufficient evidence to give an air of reality to the defence of due diligence.

(Emphasis added)

I have concluded that, in the present case, s. 13 of the Act creates an offence of strict liability. Therefore, the onus is on the Crown to prove each essential element of the offence under this section. Moreover, the accused is likely to be convicted following such proof unless he can point to evidence in the Crown's case, or is in a position to adduce evidence himself, which suggests that he used due diligence or raises a reasonable doubt in that respect. I agree with Galligan J.A. that s. 11(d) of the Charter is not infringed by placing the evidential burden on the accused.

GENERAL

Although I have dealt with this appeal on the merits, there is one further matter on which I wish to comment. At the opening of this appeal, all members of the court expressed their concern about the propriety of the lower court judge dealing with a challenge to the constitutionality of s. 13 of the Act, on a pre-motion hearing, before any plea had been entered or any evidence adduced. In my view, the court should

not, at this early stage, entertain or dispose of an application to enforce a remedy under the Charter, except in those cases where it is abundantly clear that a constitutional right has been infringed or threatened. In my opinion, this case does not fall into that category and it would have been preferable for the trial judge to decline to enter into the constitutional issue at the stage of a pre-trial motion and to leave such issue to be raised by the appellant by way of defence at the conclusion of the evidence at trial. It is, of course, quite possible that the appellant might have succeeded on some other line of defence at trial, rendering the Charter challenge entirely moot.

Whenever possible, the trial process should not be fragmented with appeals being launched at the conclusion of each stage. In my opinion, when an appeal is taken to this court, the trial record should be complete so that all grounds of appeal and not only those relating to Charter challenges may be completely and finally dealt with in one hearing.

DISPOSITION

I conclude that the trial judge erred in holding that s. 13 of the Act was of no force or effect. I would allow the appeal, set aside the acquittals and order a trial on the four counts of the indictment.

Appeal allowed.
MVRT