
Ellis Don and Strict Liability for Provincial Offences: Where has *Sault Ste. Marie* Gone?

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Introduction

In *R. v. Ellis Don*,¹ the Ontario Court of Appeal held that the principle of strict liability approved by the Supreme Court of Canada in *R. v. Sault Ste. Marie*² violates the presumption of innocence in s. 11(d) of the *Canadian Charter of Rights and Freedoms*.³ The strict liability standard, as defined in *Sault Ste. Marie*, operates to relieve the Crown of proving *mens rea* beyond a reasonable doubt in prosecuting regulatory offences, and instead places the persuasive burden on the accused to prove due diligence on a balance of probabilities. After finding a violation of s. 11(d), a majority of the Court in *Ellis Don* went on to

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¹(1990), [1991] 1 O.R. (3d) 193 (C.A.) [hereinafter *Ellis Don*].

²[1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161 [hereinafter *Sault Ste. Marie* cited to S.C.R.].

The values and principles enunciated by a unanimous Court in *Sault Ste. Marie* are best summarized in the judgment of Dickson J., as he then was. Mr. Justice Dickson set out three categories of offences: *mens rea* offences, strict liability offences and absolute liability offences. Only the first two categories were examined in *Ellis Don*. The first category encompasses those offences which are criminal in the true sense, where the prosecution must prove "some positive state of mind such as intent, knowledge or recklessness" (*supra* at 1325). Public welfare offences, such as the provision at issue in *Ellis Don*, would *prima facie* fall into the second category: strict liability offences. Here, the prosecution need not prove *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 ... The defence will be available if the accused reasonably believed in a mistaken set of facts, which if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event (*supra* at 1326).

The Court adopted the strict liability standard in *Sault Ste. Marie* because, as Dickson J. wrote (*supra* at 1325) "[p]ublic welfare offences obviously lie in a field of conflicting values." The conflicting values were stated as follows:

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 a generally held revulsion against punishment of the morally innocent (*supra* at 1323-24).

³Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

find that the regulatory provision at issue⁴ could not be justified under s. 1 of the *Charter*.

By removing the persuasive burden on the accused, and replacing it with the evidential burden of raising a reasonable doubt, the *Ellis Don* decision has the potential to dramatically affect the manner in which the vast majority of provincial prosecutions are conducted. More importantly, it may affect the degree of vigilance and attention accorded to safety standards by those subject to particular regulatory schemes, including occupational health and environmental protection measures.

The decision in *Ellis Don* follows the Ontario Law Reform Commission's recent *Report on the Basis of Liability for Provincial Offences*.⁵ The *Liability Report* recommended that the persuasive burden on the accused be dropped from many provincial offences, and be replaced with the evidential burden of raising a reasonable doubt (mandatory presumption).⁶ Both the *Liability Report* and the *Ellis Don* decision are examples of the mechanical application of criminal law principles to provincial regulatory schemes. Neither the Commission nor the Court of Appeal made any substantive attempt to examine whether the purpose behind the presumption of innocence, or the notion of fault itself, may be different in the context of provincial regulatory offences than in the case of true crimes. Nor did either body point to significant changes in these notions since the *Sault Ste. Marie* decision with the advent of the *Charter*, so as to warrant such a major shift in our understanding of the operation of the presumption of innocence in the regulatory context.

This Comment will critically examine the character of judicial scrutiny evident in *Ellis Don*, and analyze those portions of the *Liability Report* which are relevant to the constitutionality of reverse onus provisions in strict liability offences. The reasoning of the Court of Appeal in *Ellis Don*, particularly if it is accepted by other courts in the country,⁷ has the potential to dramatically affect a large number of regulatory offences in Canada. The strict liability standard with a reversal of the burden of proof is a measure adopted frequently by legislatures across the country in dealing with regulatory offences. Environmental legislation, which often contains the type of provision under attack in *Ellis Don*, is particularly vulnerable. All such provisions risk being altered or struck down if *Ellis Don*-type reasoning prevails. The final section of this comment

⁴The provision in question was s. 37(2) of the *Occupational Health and Safety Act*, R.S.O. 1980, c. 321 [hereinafter *O.H.S.A.*], which contains a reversal of the burden of proof: "it shall be a defence for the accused to prove that every precaution reasonable in the circumstances was taken."

⁵(Toronto: Ontario Law Reform Commission, 1990) (Chair: R.S. Abella) [hereinafter *Liability Report*].

⁶*Ibid.* at 53-54.

⁷Leave to appeal the *Ellis Don* decision to the Supreme Court of Canada was granted June 14, 1991 (no. 22297).

will address the specific situation confronting environmental legislation in Canada.

I. The *Ellis Don* decision

A. *The Facts and Issues*

The respondent, Ellis Don Limited, was the general contractor in charge of construction of the building where the accident occurred, and fell within the definition of “constructor” in s. 1 of the *Occupational Health and Safety Act*.⁸ The accident occurred when an elevator installation worker attempted to start preliminary work in the elevator shaft on the thirteenth floor. After removing a protective barrier, the worker stepped onto a wooden “platform”⁹ erected inside the shaft. On the date in question, the structure was only temporarily supported; it could not sustain the worker’s weight and he fell thirteen floors to his death. The respondents were charged under the *O.H.S.A. Regulations* with failure to “ensure” that the structure erected in the shaft was capable of supporting the weight required for a “platform.”

The specific issue in the case concerned whether s. 37(2) of the *O.H.S.A.*, which requires employers and “constructors” to prove that all reasonable precautions have been taken, violates s. 11(d) of the *Charter*, and whether it can be justified under s. 1.

B. *Section 11(d) and the Presumption of Innocence*

The Court of Appeal, consisting of Houlden, Galligan and Carthy JJ.A., unanimously held that the reverse onus placed on the accused by s. 37(2) of the *O.H.S.A.* infringes s. 11(d) of the *Charter*. The Court based its conclusions on its own prior decision in *R. v. Wholesale Travel Group and Cheodre*.¹⁰ Mr Jus-

⁸*Supra*, note 4.

⁹Ellis Don argued at first instance that the structure was not a “platform” within the meaning of the *O.H.S.A. Regulations*, R.R.O. 1980, Reg. 691, s. 61 [hereinafter *O.H.S.A. Regulations*], which provides:

61 A runway, ramp or platform other than a scaffold platform shall
 (a) be designed, constructed and maintained to support...all loads that may be expected to be applied to it ...; and
 (c) be securely fastened in place.

Ellis Don therefore submitted in oral argument before the Court that the structure was never intended to support the weight of a worker, but was merely a debris catcher. See, *supra*, note 1 at 206, Galligan J.A.

¹⁰(1989), [1990] 70 O.R. (2d) 545, 63 D.L.R. (4th) 325 [hereinafter *Wholesale Travel*]. *Wholesale Travel* involved a prosecution under ss 36 & 37 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 [hereinafter *Competition Act*], which make false advertising an offence. S. 37, which contains a complex reverse onus provision and a statutory defence, was challenged under s. 11(d) of the *Charter*. The Ontario Court of Appeal held two to one, Zuber J.A. dissenting, that the pro-

tice Galligan, who gave the fullest discussion of the s. 11(d) issue in *Ellis Don*, found that the presumption of innocence will be violated whenever an accused must establish a defence on a balance of probabilities. Describing the distinction between true crimes and regulatory offences as a "distinction without a legal difference,"¹¹ he found that a reverse onus clause violates s. 11(d) even in the regulatory context, because a court could be required to convict an accused despite the existence of a reasonable doubt.¹²

With nothing more than a mechanical application of recent *Charter* decisions, the Court of Appeal overruled a long-standing and well accepted common law standard, which had been sanctioned by the Supreme Court of Canada in *Sault Ste. Marie*. The Court did not engage in the type of substantive analysis necessary to explain the basis for such a significant departure in the law.

What is most unsettling is that the only statement made by Galligan J.A. with respect to the scope of the right is made not in his discussion of s. 11(d) of the *Charter*, but rather in his analysis under s. 1. While discussing the possible justification of s. 37(2) of the *O.H.S.A.* under the minimal impairment test,¹³ Mr Justice Galligan states:

[I]t is now settled that s. 11(d) of the *Charter* implies proof of guilt beyond a reasonable doubt ... It is a common place that it is unacceptable for someone to be convicted of an offence when there is a reasonable doubt.¹⁴

This statement is puzzling as a proposition under the minimal impairment test, as it would be more appropriately discussed with respect to the scope of the right to be presumed innocent under s. 11(d). The words of Galligan J.A. seem to imply that since the enactment of the *Charter*, a complete shift in our conception of the appropriate burden of proof has occurred. While the statement that no one is to be convicted where there is a reasonable doubt as to guilt is

vision violated s. 11(d) because the accused could be convicted despite a reasonable doubt as to its innocence.

Wholesale Travel was heard on appeal by the Supreme Court of Canada on February 18, 1991. Judgment is forthcoming.

¹¹*Supra*, note 1 at 200.

¹²*Ibid.* at 202.

¹³*R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.] sets out the well-known test for determining whether a legislative provision is "reasonable" and "demonstrably justified in a free and democratic society" (*Charter*, s. 1). In brief, the test involves two branches. The government must prove first, that the limiting measure is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (*Oakes, supra* at 138, quoting *R. v. Big M DrugMart Ltd.*, [1985] 1 S.C.R. 295 at 352, [1985] 3 W.W.R. 481), and second, that the effects of the impugned measure on the protected right are proportional to the objective sought. Under the second branch, the impugned provision must pass the rational connection test (*see infra*, note 47 and accompanying text), the minimal impairment test (*see infra*, note 51 and accompanying text), and the proportionality test.

¹⁴*Supra*, note 1 at 202.

obviously correct in the context of true crimes, it is not as clearly applicable to regulatory offences. In the latter case it is instead a "common place," through the operation of *Sault Ste. Marie* and subsequent provincial legislation, that regulatory offences are prosecuted under a strict liability standard with a persuasive burden on the accused.

Houlden J.A. also briefly remarks upon the distinction between true crimes and regulatory offences in his discussion of s. 1. In addressing the issue of proportionality,¹⁵ Houlden J.A. adopts a large passage from the Ontario Law Reform Commission *Liability Report*.¹⁶ That passage rejects what it terms the "rigid distinction"¹⁷ between true crimes and regulatory offences, thus refusing to accept the *Sault Ste. Marie* approach to categorization. The *Liability Report* concludes that the seriousness of some provincial offences and of the possible penalties faced by an accused upon conviction, make it too difficult to distinguish such offences from crimes. The reasons why this difficulty is viewed as insurmountable remain virtually unexplained.¹⁸ The only comment offered by the Commission as to why the *Sault Ste. Marie* approach is no longer appropriate is simply that the case was decided in an era of parliamentary supremacy, when courts were compelled to acknowledge that a legislature could insist on absolute liability;¹⁹ its right to implement a strict liability regime could not be denied.

Others argue that the Commission has confused the analysis. Kent Roach accuses the *Liability Report* of losing its focus "in a forest of abstraction."²⁰ He faults the Commission for misapplying "criminal law orthodoxy and abstract analysis of sections 7 and 11(d) of the *Charter*"²¹ to provincial regulatory offences.

The Ontario Court of Appeal in *Ellis Don* can be similarly faulted for misapplying their reasoning in *Wholesale Travel* to a case involving a very different regulatory context.²² The Court made no concrete attempt to examine the distinctions between the federal competition legislation at issue in *Wholesale*

¹⁵See *Oakes*, *supra*, note 13.

¹⁶*Supra*, note 1 at 211-12, quoting the *Liability Report*, *supra*, note 5 at 3.

¹⁷*Ibid.*

¹⁸This question is, in part, addressed in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 at 560-62, 45 D.L.R. (4th) 235, Wilson J. [hereinafter *Wigglesworth* cited to S.C.R.].

¹⁹*Supra*, note 5 at 12.

²⁰K. Roach, "Report on the Basis of Liability for Provincial Offences" (1990) 69 Can. Bar Rev. 802 at 802.

²¹*Ibid.*

²²It is to be noted that the history of the impugned provision in *Wholesale Travel* differs significantly from the *O.H.S.A.* section at issue in *Ellis Don*. While the *O.H.S.A.* is clearly regulatory in nature, the false advertising provisions were only recently added to the *Competition Act*, having originated in the *Criminal Code*, R.S.C. 1927, c. 36. For further discussion of this issue, see *infra*, note 26 and accompanying text.

Travel and the provincial worker safety legislation in *Ellis Don* in terms of how the scope of protection afforded under s. 11(d) might vary in different contexts.

In some respects, the challenged provision in *Wholesale Travel* more closely resembles a true crime than a regulatory provision. The case of *Thomson Newspapers Inc. v. Canada*²³ confirms that regulatory offences are different from true crimes, in terms of both the nature of the conduct regulated and the purposes behind its regulation. The typical concern of the criminal law system is to reinforce society's fundamental values. The activities which it prohibits, such as violence or dishonesty, are viewed as violations of "common sense standards of humanity"²⁴ meriting society's disapproval and punishment. Regulatory offences, in contrast, are not generally designed to address conduct which is by its very nature morally or socially reprehensible, and therefore worthy of criminal sanction. Such offences relate instead to activities with respect to which society wishes to maintain a minimum standard of conduct, and they aim to ensure that the maintenance of a productive economic system remains consistent with the values of individual liberty.²⁵

The offence at issue in *Wholesale Travel* was false advertising,²⁶ an offence which is premised upon dishonesty, involving the perpetration of a fraud against an unsuspecting buyer. It is therefore closely associated with criminal conduct, and carries with it substantial stigma upon conviction. In fact, until 1968, the offence of false advertising was to be found in the *Criminal Code*.²⁷ The social concerns which prompted s. 37(2) of the *O.H.S.A.*, as well as the level of stigma to which an accused may be subject upon conviction, make the impugned provision in *Ellis Don* clearly distinct from that in *Wholesale Travel*.²⁸ These dis-

²³[1990] 1 S.C.R. 425 at 509-11, 67 D.L.R. (4th) 161 [hereinafter *Thomson* cited to S.C.R.]. At issue in the case was whether an accused enjoys the same right to protection against unreasonable search and seizure provide by s. 8 of the *Charter* when charged under s. 17 of the *Competition Act*, as under a criminal offence.

In distinguishing regulatory from criminal offences, La Forest J. quotes from the Law Reform Commission of Canada, *Criminal Responsibility for Group Action* (Working Paper No. 16) (Ottawa: Law Reform Commission of Canada, 1976) at 12.

²⁴*Thomson*, *ibid.* at 509. La Forest J. is quoting from the Law Reform Commission of Canada, *Our Criminal Law* (Report No. 3) (Ottawa: The Law Reform Commission of Canada, 1976) at 3, 5 & 7.

²⁵*Thomson*, *ibid.* at 510.

²⁶*Competition Act*, s. 37.

²⁷Trade offences can be traced back to the *Criminal Code*, *supra*, note 22, ss 498-498A. A specific prohibition with respect to false advertising was added in a later revision of the *Criminal Code*, S.C. 1953-1954, c. 51, s. 306, which remained in the *Code* until 1960. S. 306 was subsequently repealed, and was added as an amendment to the *Combines Investigation Act*, S.C. 1968-69, c. 38, s. 116 as s. 33D. In all versions, false advertising was an indictable offence punishable by imprisonment.

²⁸Carthy J.A. in *Ellis Don*, drew a further distinction between criminal and regulatory offences. He stated that while criminal cases focus on the question of "did the accused do it," regulatory prosecutions examine "what standard of conduct is acceptable" (*supra*, note 1 at 224). Although

inctions could and should have been taken into account by the Court of Appeal when it considered the scope of the operation of the presumption of innocence in *Ellis Don*. The result of this cursory treatment is sterile jurisprudence in an area of the law crucial both to the provinces, and to the people whom the regulatory provisions are designed to protect.

Without rigorous analysis, the Court in *Ellis Don* has mechanically extended classic British criminal law principles of the presumption of innocence²⁹ to regulatory offences, thus ignoring strong legislative and judicial precedent according to which different standards are to be applied.³⁰ The differences between regulatory offences and the criminal law were carefully reviewed in *Sault Ste. Marie* before the Supreme Court decided to adopt the strict liability standard, and further support for the distinction is to be found in cases decided since the *Charter*. The Court in *Ellis Don* nevertheless failed to consider the *Charter* case law which had approved *Sault Ste. Marie* reasoning with respect to strict liability.³¹

The Ontario Law Reform Commission falls into the same trap as the majority in *Ellis Don*, adopting criminal law principles and applying them to

in the case of false advertising the community is concerned to some extent with the "acceptable standard of conduct" of its merchants, of greater concern in this type of prosecution is "did the accused do it" deliberately (*supra*).

²⁹The classic British case defining the presumption of innocence in the criminal law context is *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462 at 481-82 (H.L.) [hereinafter *Woolmington*]. It requires the Crown to prove every element of the offence beyond a reasonable doubt. The Supreme Court in *Sault Ste. Marie* expressly rejected the argument that the criminal law notion of the presumption of innocence in *Woolmington* precluded it from adopting the strict liability standard. The Chief Justice wrote (*supra*, note 2 at 1316):

There is nothing in *Woolmington's* case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with a burden of proof resting on the accused to establish the defence on the balance of probabilities.

³⁰Although the "halfway house" of strict liability was expressly adopted in *Sault Ste. Marie*, its development had begun centuries before, increasing rapidly in importance toward the end of the nineteenth century. See generally, *R. v. Stephens* (1866), L.R. 1 Q.B. 702; *Fitzpatrick v. Kelly* (1873), L.R. 8 Q.B. 337; *Sherras v. de Rutzen*, [1895] 1 Q.B. 918. From this period on, a distinction has been recognized between true crimes and conduct prohibited in the public interest. Many of the early public interest provisions developed in response to abuses relating to unsafe conditions in the workplace, the contamination of food, and pollution. These first statutes provided for absolute penal liability. Strict liability was first recognized in Ontario in *R. v. Hickey* (1976), 29 C.C.C. (2d) 23, 68 D.L.R. (3d) 88 (Div. Ct.), rev'd on other grounds 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 (C.A.).

³¹The strict liability standard was implicitly approved in the *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 and *Vaillancourt v. R.*, [1987] 2 S.C.R. 636, 47 D.L.R. (4th) 399. The standard was expressly adopted in *R. v. Lee's Poultry Ltd.* (1985), 17 C.C.C. (3d) 539 at 542-45, 43 C.R. (3d) 289 (Ont. C.A.) [hereinafter *Lee's Poultry*]; *R. v. Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295, 52 C.R. (3d) 188 (Ont. C.A.); *R. v. Gray* (1988), 44 C.C.C. (3d) 222, [1989] 1 W.W.R. 66 (Man. C.A.); *R. v. Sutherland* (1990), 55 C.C.C. (3d) 265 (N.S.C.A.).

regulatory provisions without substantive analysis. Although the *Liability Report* did find some authority that the *Woolmington* criminal law principle of the presumption of innocence had been extended to provincial offences, a 1971 New Brunswick County Court decision³² is weak support for such a startling proposition. The *Liability Report* expressly rejected “the *Sault Ste. Marie* compromise,”³³ reasoning that because proof of a “lack of fault is squarely placed on the accused, there can be little doubt that under the *Charter*, the reverse onus is *prima facie* unconstitutional.”³⁴ The Commission treated *Whyte v. R.*,³⁵ a criminal case, as governing authority in the application of s. 11(d) to both the due diligence defence and the burden of proof in provincial regulatory offences. The *Liability Report* declares:

Whyte now makes it clear that it is not possible to argue, as some have, that this reversal of the onus of proof does not involve a violation of the presumption of innocence since it is merely the creation of a defence. *Prima facie*, the reversal of the burden of proof in strict liability offences infringes section 11(d) of the *Charter*.³⁶

The majority of the cases discussed by the Commission in dealing with the reverse onus in the regulatory context are in fact criminal cases.³⁷ Despite its express rejection of the distinction between true crimes and regulatory offences with respect to s. 11(d), the Commission makes no decided effort to explain why criminal law principles ought to govern.

Neither the Commission nor the Court of Appeal in *Ellis Don* developed a flexible approach to the determination of appropriate standards of fault and

³²*R. v. Vincent* (1971), 4 N.B.R. (2d) 289 (Co. Ct.), cited in the *Liability Report*, *supra*, note 5 at 23.

³³*Liability Report*, *ibid.* at 47.

³⁴*Ibid.* It should be noted that this report stands alone in the face of several other Law Reform Commission reports in Canada, which concluded that placing the burden on the accused is appropriate in the context of regulatory offences. See Law Reform Commission of Canada, *The Meaning of Guilt: Strict Liability* (Ottawa: Law Reform Commission of Canada, 1974); Law Reform Commission of Canada, *Our Criminal Law*, *supra*, note 24 at 32-33; University of Alberta, Institute of Law Research and Reform, *Defences to Provincial Charges* (Edmonton: Institute of Law Research and Reform, 1984) at 38; Law Reform Commission of Saskatchewan, *Proposals for Defences to Provincial Statutes* (Saskatoon: Law Reform Commission of Saskatchewan, 1986) (Cbair: D.A. Schmeiser) at 13.

³⁵[1988] 2 S.C.R. 3, 64 C.R. (3d) 123 [hereinafter *Whyte* cited to S.C.R.], quoted in the *Liability Report*, *supra*, note 5 at 27.

³⁶*Liability Report*, *ibid.*

³⁷In its examination of reverse onus provisions in the provincial regulatory context, the Commission discusses the following criminal cases (*ibid.* at 19-39): *Woolmington*, *supra*, note 29; *Oakes*, *supra*, note 13; *Whyte*, *supra*, note 35; *Vaillancourt*, *supra*, note 31; *Re Boyle and the Queen* (1983), 41 O.R. (2d) 713, 35 C.R. (3d) 34 (C.A.); *Schwartz v. R.*, [1988] 2 S.C.R. 443, 55 D.L.R. (4th) 1 [hereinafter *Schwartz* cited to S.C.R.]; *R. v. Nagy* (1988), 67 C.R. (3d) 329 (Ont. C.A.). The only non-criminal cases discussed in the chapter are: *Sault Ste. Marie*, *supra*, note 2; *Wholesale Travel*, *supra*, note 10; *Lee's Poultry*, *supra*, note 31; and *Wigglesworth*, *supra*, note 18.

burdens of proof under s. 11(d) which could be adapted to different categories of offences. The Crown argued in *Ellis Don* that the principles pronounced by the Supreme Court in *Sault Ste. Marie* could be constitutionalized under s. 11(d), and become part of the substantive understanding of the presumption of innocence. There may be certain problems of uncertainty in such an approach.³⁸ Nevertheless, if the *Charter* is to reflect community values while at the same time protecting the rights of vulnerable individuals and groups in society, it must be flexible enough to respond to different social goals and objectives in different regulatory contexts. Sound and fair principles have been developed by provincial legislatures applying the strict liability standard to regulatory offences in the years following *Sault Ste. Marie*. The values articulated in that case with respect to the operation of strict liability and the presumption of innocence in regulatory offences continue to be valid today. At minimum, they deserve a full and complete hearing before being expunged entirely from our notions of the presumption of innocence.³⁹

C. Reasonable Doubt and Section 11(d)

According to Galligan J.A. in *Ellis Don*, placing a persuasive burden upon the accused to prove due diligence on a balance of probabilities is a violation of s. 11(d), under any circumstances. The *Charter* would not be infringed, however, by requiring the accused to satisfy an evidential burden by raising a reasonable doubt.⁴⁰ The operation of this standard is described by Galligan J.A.:

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.⁴¹

³⁸The Ontario Law Reform Commission points out that it may be difficult at times to determine whether a particular offence constitutes a true crime or a regulatory offence (*supra*, note 5 at 3). These cases are not the norm, however, and a principled approach to discerning these differences could be worked out if the courts retain the categories set out in *Sault Ste. Marie*. On this point, the *Wigglesworth* case, *ibid.* at 558, requires "reasonable consistency" in the application of rights under s. 11 in the range of "offences" to which it applies.

³⁹The move away from *Sault Ste. Marie* principles is particularly puzzling given that academics in other jurisdictions are trying to convince their own governments to adopt the strict liability standard for regulatory offences. A recent article in the United States advocated the adoption of a *Sault Ste. Marie*-style offence categorization system in public interest legislation. See, W. Tilleman, "It's a Crime: Public Interest Laws (Fish and Game Statutes) Ignore Mens Rea Offences — Towards a New Classifications Scheme" (1989) 16 Am. J. Crim. L. 279 at 306. In New Zealand, the Court of Appeal adopted the idea in *Civil Aviation Department v. Mackenzie*, [1983] N.Z.L.R. 78.

⁴⁰*Supra*, note 1 at 200.

⁴¹*Ibid.* at 200-01.

In discussing what standard of judicial scrutiny should be attached to this evidential burden on the accused, Galligan J.A. concluded that s. 11(d) is not infringed by requiring the accused to adduce sufficient evidence to give "an air of reality" to the defence of due diligence. On this point, he writes:

In such a case, if the accused does not come forward with evidence showing that it took every reasonable precaution ... 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* [emphasis added].⁴²

While Galligan J.A. does not name the source of the "air of reality" notion, it may have been drawn from the criminal case of *Pappajohn v. R.*,⁴³ in which McIntyre J. commented that a defence of mistake of fact in the criminal law may only be left to the jury when there is an "air of reality" to the defence.⁴⁴ In regulatory matters such as *Ellis Don*, the "air of reality" criterion would mean that an accused might not be required to present affirmative proof of due diligence, as long as it could adduce sufficient evidence to suggest that it might have so acted. While it may be reasonable to leave such wide discretion to a judge deciding when a defence may appropriately be left to a jury, in regulatory prosecutions the judge often sits alone as trier of fact. Under those circumstances, the term "air of reality" is insufficiently precise to provide a workable legal standard for determining evidentiary requirements. Further, the expression offers little guidance to lower courts, who will find it difficult to apply with any degree of consistency.

In addition, the "air of reality" standard does not articulate how the evidential burden would operate in practice. It remains unclear, for example, whether an accused who is required by law to take particular safety measures must raise a reasonable doubt as to each individual precaution, or whether it will be sufficient to raise doubt with respect to a single precaution on the totality of the evidence. The standard set by the Court of Appeal leaves room for substantial uncertainty. Galligan J.A. nevertheless considers the burden to be a practical one in cases where the "probable" result is conviction if the accused fails to put forward any evidence of due diligence.⁴⁵ In the context of important regulatory statutes such as the *O.H.S.A.* or the *Ontario Environmental Protection Act*,⁴⁶ the uncertainty of this standard may be a haunting spectre making successful prosecutions increasingly difficult.

⁴²*Ibid.* at 201.

⁴³[1980] 2 S.C.R. 120, [1980] 4 W.W.R. 387 [hereinafter *Pappajohn* cited to S.C.R.].

⁴⁴*Ibid.* at 128.

⁴⁵*Supra*, note 1 at 200.

⁴⁶R.S.O. 1980, c. 141.

D. Section 1

The Court in *Ellis Don* was asked whether s. 37(2) of the *O.H.S.A.* could be justified under s. 1 of the *Charter*. All three justices addressed the issue in separate reasons. Galligan and Houlden JJ.A. decided that the legislation could not be justified under s. 1; Carthy J.A. held that it could.

If the Court considered a full review of *Sault Ste. Marie* to be unsuitable in its discussion of the scope of the right in s. 11(d) in *Ellis Don*, it should have been an essential part of their s. 1 analysis. A complete reconsideration was particularly important given the fact that the Court found the strict liability standard approved in *Sault Ste. Marie* to be not only a violation of the presumption of innocence under s. 11(d), but also not to be justifiable in a free and democratic society. The Supreme Court in *Sault Ste. Marie* had pointed to a necessary balance between the interests of society in regulating dangerous activities, and the rights of the accused facing prosecution, which should condition the operation of the presumption of innocence in the regulatory context.

Carthy J.A. in *Ellis Don* found the reasoning of Dickson J., as he then was, in the *Sault Ste. Marie* decision to be "as sensible today as when it was written."⁴⁷ Galligan and Houlden JJ.A. for the majority did not confront the reasoning in *Sault Ste. Marie* squarely, and thus offered no clue as to why the principles raised in that case were no longer considered persuasive in 1991. The majority should have explained clearly how and why Canadian values have changed so substantially since the *Sault Ste. Marie* decision so as to warrant such a radical change in the law.

1. The Rational Connection Test

In applying the *Oakes* test, all three judges agreed that the legislative objective of the *O.H.S.A.* was sufficiently important to warrant overriding a *Charter* right. Galligan and Carthy JJ.A. agreed that the strict liability standard in the *O.H.S.A.* had a rational connection to the objective of safety in the workplace. In contrast, Houlden J.A. found no rational connection between strict liability, which places a persuasive burden on the accused, and the objective of safety in the workplace. Specifically, he found no connection between the "proved fact" (breach of the statute) and "the presumed fact" (negligence of the accused).⁴⁸

If Houlden J.A.'s analysis is correct, all regulatory offences would fail the test of s. 1: negligence is always imported into the offence once the Crown proves a breach of a regulatory provision. It is suggested that Houlden J.A. mis-

⁴⁷*Supra*, note 1 at 218.

⁴⁸*Ibid.* at 211.

applied the rational connection test, confusing the need for a "rational connection" with an "inexorable" connection. Both the "proved fact" and the "presumed fact" are integral, rationally connected parts of the measures adopted by the legislature, which chose to use a strict liability standard to address this particular problem. Houlden J.A. does not discuss whether the measures adopted are arbitrary in relation to the stated or apparent legislative objectives. This misapplication of the rational connection test is further exacerbated by his complete disregard for the due diligence defence, which is also an essential part of the measures adopted. His analysis leaves the legislature with little flexibility for the creation of effective regulatory schemes.

The better approach to the rational connection test is to be found in the judgments of Galligan and Carthy J.J.A. Galligan J.A. found that reversing the burden of proof facilitates the conviction of the guilty, which will make employers more safety conscious, and result in a reduction of dangers to workers in the workplace.⁴⁹ Carthy J.A. similarly found that a due diligence standard fosters care and attention on the part of employers, and "a balance is thereby created between the interests of society in regulating industrial safety and the accused in facing prosecution."⁵⁰ In terms of the burden imposed on the accused, Carthy J.A. also found a "rational sense and purpose in having a different onus apply to the defence than that which applies to the prosecution in proving the *actus reus*."⁵¹

2. The Minimal Impairment Test

Both Galligan and Houlden J.J.A. found that s. 37(2) of the *O.H.S.A.* impaired the *Charter* rights of the accused more than was necessary to achieve the legislative objective. In reaching this conclusion Galligan J.A. stated:

I am seriously troubled about how it could be said that the objective of this Act is so pressing important that a risk should be taken of convicting someone who might be innocent. Important as the protection of workers' health and safety in the workplace may be I am unable to say that it is more important than protecting innocent citizens from homicide. Yet the law does not permit the conviction of a person charged with murder if the court has a doubt about his guilt.⁵²

In this passage, Galligan J.A. is expressly applying criminal law principles to a regulatory context.⁵³ He finds no distinction between a corporation being pros-

⁴⁹*Ibid.* at 202.

⁵⁰*Ibid.* at 220-21.

⁵¹*Ibid.* at 221.

⁵²*Ibid.* at 202.

⁵³Indeed, the case upon which Galligan J.A. bases his conclusions with respect to minimal impairment is an inappropriate analogy to the situation of *Ellis Don*. In *R. v. Ireco Canada II Inc.* (1988), 43 C.C.C. (3d) 482, 65 C.R. (3d) 160 [hereinafter *Ireco*], the Ontario Court of Appeal struck down a reverse onus provision under the *Customs Act*, R.S.C. 1970, c. C-40, s. 205. The

ecuted for causing or permitting an occupational accident or environmental spill, and an individual being tried for homicide.⁵⁴ This effectively results in the application of a uniform standard of the presumption of innocence to both true crimes and regulatory offences.

In a review which could apply equally to the reasoning of the Court of Appeal in *Ellis Don*, Kent Roach criticizes the *Liability Report* for failing to consider the contextual data that might influence legislators to make exceptions from general principles, in order to deter and successfully prosecute social and corporate misconduct.⁵⁵ The Commission used ss 7 and 11(d) to reinforce abstract criminal law principles, but “did not attempt to break down the wide array of regulatory offences into functional categories.”⁵⁶ Roach thus finds the *Liability Report* to be “symptomatic of the distorting influence *Charter* abstractions can have on tangible policy issues.”⁵⁷

Roach correctly points out that the Commission did not attempt to determine whether the strict liability standard can survive *Charter* scrutiny. The objective of this standard⁵⁸ in the context of environmental protection legislation, for example, is to balance the society’s need for protection from hazardous pollution and the right of the accused corporation to exculpate itself by showing that it acted reasonably in the circumstances. As expressed by the Supreme Court in *Sault Ste. Marie*, the reasonable doubt standard is simply not appropriate in the context of regulatory offences, because it does not provide sufficient protection for society from the potentially harmful consequences of hazardous

Court stated clearly that while s. 205 did contain some of the features of a strict liability offence, it was not truly regulatory in nature, as it was an indictable offence punishable by imprisonment. In addition, the Court in *Ireco* based its reasoning exclusively on criminal cases, and adopted the strict criminal law standard (see *Woolmington, supra*, note 29, and *R. v. Holmes*, [1988] 1 S.C.R. 914, 41 C.C.C. (3d) 497) to find the provision to be unjustifiable under s. 1 of the *Charter*. The case is thus clearly distinguishable from *Ellis Don*, which involved a true regulatory offence.

Interestingly, the Court in *Ireco* distinguished *Whyte, supra*, note 35, a criminal case which had upheld an impaired driving provision under s. 1. The Court said that the unique facts in that case, because the provision dealt with a pressing social problem, justified saving it under s. 1. It could just as easily be argued that the protection of the environment, for instance, is a pressing social problem.

⁵⁴*Supra*, note 1 at 202.

⁵⁵*Supra*, note 20 at 805, n. 17.

⁵⁶*Ibid.* at 805.

⁵⁷*Ibid.* at 801.

⁵⁸See *R. v. Cotton Felts Ltd.* (1982), 2 C.C.C. (3d) 287 at 294 (Ont. C.A.), where Blair J.A. stated for the court:

The *Occupational Health and Safety Act* is part of a large family of statutes creating what are known as public welfare offences ... Examples of this type of statute are legion and cover all facets of life ranging from safety ... to ecological conservation. In our complex interdependent society such regulatory statutes are accepted as essential in the public interest. They ensure standards of conduct, performance and reliability by various economic groups and make life tolerable for all.

activities, and because of the tremendous difficulties encountered by the Crown in proving *mens rea* in the prosecution of many regulatory offences.⁵⁹

The reasonable doubt standard was designed to offer the greatest protection to the accused in the criminal context, because of the severity of the potential penalties and the often permanent stigma faced by an individual upon conviction. In contrast, the potential stigma flowing from conviction for a regulatory offence is different in kind and in degree from that associated with criminal activity. In addition, while severe penalties such as imprisonment are occasionally available under regulatory offence legislation, such penalties are almost never imposed in practice.⁶⁰

As Carthy J.A. points out in *Ellis Don*, “regulatory statutes perform very different functions in society than purely penal ones and the balancing of rights and protection under section 1 of the *Charter* must reflect that distinction.”⁶¹ Despite these clear distinctions, the Court of Appeal based its finding with respect to the presumption of innocence in the regulatory context on criminal law principles,⁶² as did the Ontario Law Reform Commission in the *Liability Report*. That report recommended that the general reverse onus provision in s. 48(3) of the *Provincial Offences Act*⁶³ be repealed as a violation of s. 11(d).⁶⁴ This section is the primary basis for the reversal of the burden of proof in the prosecution of many provincial offences. If the Legislature were to adopt the recommendation of the Commission, the repercussions upon a large number of regulatory offences would be substantial, and perhaps final.

3. Minimal Impairment and Reasonable Alternatives

Galligan J.A. found that the strict liability standard in s. 37(2) of the *O.H.S.A.* could not pass the minimal impairment branch of the *Oakes* test, because the legislature could have imposed upon the accused the lesser burden of raising a reasonable doubt, rather than requiring proof of due diligence on a balance of probabilities.⁶⁵

⁵⁹*Sault Ste. Marie, supra*, note 2 at 1325, Dickson J.:

The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, ... [having regard] to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation.

⁶⁰See *infra*, note 72 and accompanying text.

⁶¹*Supra*, note 1 at 218.

⁶²The Court drew these principles from *Whyte, supra*, note 35 and *Schwartz, supra*, note 37.

⁶³R.S.O. 1980, c. 400.

⁶⁴*Supra*, note 5 at 54, recommendation 4(b).

⁶⁵*Supra*, note 1 at 202-03. This statement is drawn from *Ireco, supra*, note 53 at 501.

The Court in *Ellis Don* did not inquire into the impact which the adoption of a reasonable doubt standard might have on other *Charter* rights of the accused. The differences between regulatory and criminal prosecutions are crucial in this area, and should have been taken into account by the Court in determining the scope of the presumption of innocence in the context of regulatory offences. In almost any regulatory prosecution, the preliminary investigation necessary to prepare the Crown's case to meet the additional burden of a reasonable doubt standard would almost certainly intrude to some extent upon other interests and rights of the accused. Particularly complex investigations such as environmental spills, for example, may force the Crown to trample on privacy interests, and may require an accused to release potentially self-incriminating evidence to allow the Crown to properly prepare its case. The Court of Appeal in *Ellis Don* thus did not weigh all relevant factors when it concluded, in a regulatory context, that the reasonable doubt standard constituted the minimal impairment of the rights of the accused. Another point to be taken into account in ensuring minimal impairment of the rights of the accused, is whether a less intrusive method could achieve substantially the same objective. According to the Court in *Ellis Don*, an important aspect of the due diligence defence was that it forced corporations and individuals to maintain thorough records and reporting procedures.⁶⁶ Requiring the accused to prove due diligence on a balance of probabilities helps maintain persistence or vigilance in workplace safety measures to prevent accidents.⁶⁷ One study of the issue concluded that the reintroduction of a *mens rea* proof requirement would not result in any greater fairness to the accused.⁶⁸

If all that a corporation or employer were required to do in order to show its innocence was to raise a reasonable doubt by poking holes in the case presented by the Crown, it might be inclined to save expense and time by simply relying upon an "inspector's natural inclination to defend his or her conduct in

⁶⁶See M. Smith & A. Pearson, "The Value of Strict Liability" (1969) *Crim. L. Rev.* 1 at 17. The Law Reform Commission of England, *Codification of the Criminal Law* (Working Paper No. 17) (London: The Commission, 1969) concluded that there would be a real difficulty in disproving an argument by a corporation that reasonable care had been taken.

⁶⁷See, *supra*, note 1 at 221-22, Carthy J.A. On the question of the importance of records, he wrote:

Vigilance, expense, effort, attention and record keeping are an absolute mandate to keep such incidents to a minimum ... Life in the workplace is planned and the Act, including the balance of probabilities test in s. 37(2), directs itself to assurance that the planning will include all reasonable steps for avoiding accidents and, where the inevitable occurs, it permits the employer to satisfy a court that those steps were taken. The health and safety of a large portion of the populace depends upon the efficacy of the Act and that purpose is served when those responsible ensure in advance that they can answer for their conduct.

⁶⁸I. Paulus, "Strict Liability: Its Place in Public Welfare" (1977-78) 20 *Crim. L.Q.* 445 at 460.

the court to raise a reasonable doubt."⁶⁹ Mere oral testimony by an inspector could often be sufficient to raise such a doubt, without the accused having to lift a finger. By removing the persuasive burden on the accused to show due diligence on a balance of probabilities, the Court in *Ellis Don* has neutralized the incentive to establish, maintain and monitor systems that would prove to a court that the corporation had complied with the required regulatory standards.⁷⁰

4. Imprisonment

The issue of possible penalties flowing from conviction⁷¹ remains a particularly thorny one for the courts, causing a reluctance to draw broad distinctions between regulatory and criminal offences with respect to standards of proof and the presumption of innocence.⁷² Although the possibility of imprisonment in a regulatory context presents a problem, the Court in *Ellis Don* appears to have placed a disproportionate emphasis upon it. Only in one case has anyone ever been imprisoned under the *O.H.S.A.*, and that only occurred as a result of extreme belligerence on the part of the accused.⁷³ The actual frequency of resort to imprisonment is relevant to the balancing of rights and values. The question of imprisonment involves a balancing of the right of the accused to a fair trial against the interest of society as a whole in the regulation of dangerous activities. If the possibility of imprisonment is truly the decisive factor in finding a violation of the presumption of innocence, *Charter* remedies should permit the severing of penalty provisions calling for imprisonment so that other portions of the offence may be upheld. This would represent a fair balancing of individual and community values. The *Liability Report* suggested that whenever there is a potential for imprisonment, the courts should require proof by the prosecution of either an aware state of mind or a marked and substantial departure from the conduct of a reasonable person in similar circumstances.⁷⁴ The rarity of imprisonment in the actual sentencing of provincial regulatory offences must be kept in mind. The Commission's recommendation should therefore not be accepted, as it would alter the burden on the accused even in cases where there is no real chance of imprisonment.

⁶⁹*Supra*, note 1 at 222, Carthy J.A.

⁷⁰*Ibid.*

⁷¹As Carthy J.A. points out, *ibid.* at 200, the possibility of imprisonment under a regulatory provision is most appropriately dealt with under s. 1 of the *Charter*, and should not be a consideration in determining the scope of the right to be presumed innocent in s. 11(d).

⁷²*Ibid.* at 223. During oral argument in the appeal of *Wholesale Travel* at the Supreme Court on February 18, 1991, the Court appeared to be particularly concerned with the issue of whether imprisonment was even remotely possible if a reasonable doubt existed as to the guilt of the accused.

⁷³*Ellis Don*, *ibid.*

⁷⁴*Supra*, note 5 at 53-54.

5. A New Standard under the Minimal Impairment Test?

Future challenges to regulatory offences may receive different treatment under the minimal impairment branch of the *Oakes* test following two recent Supreme Court decisions upholding reverse onus provisions. With its decisions in *Chaulk and Morrisette v. R.*⁷⁵ and *R. v. Keegstra*,⁷⁶ the Court has made it easier for governments to justify legislation under the minimal impairment portion of the s. 1 test. In the past, the government was required to show that the statutory provision at issue impaired an individual's *Charter* right as little as possible. In *Chaulk*, however, Chief Justice Lamer stated that

Parliament is *not* required to search out and adopt the absolutely least intrusive means of attaining its objective ... [W]hen assessing the alternative means that were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the objective as effectively.⁷⁷

In *Keegstra*, Chief Justice Dickson, as he then was, recognized the delicate balance achieved by reverse onus provisions between the right of society to regulate and successfully prosecute dangerous activities, and the right of an accused to fair treatment. Dickson C.J. found that the imposition of a reverse onus upon an accused could be justified under the minimal impairment portion of the s. 1 test in *Oakes*:

Parliament has used the reverse onus provision to strike a balance between two legitimate concerns. Requiring the accused to prove on the civil standard that his or her statements are true is an integral part of this balance, and any less onerous burden would severely skew the equilibrium.⁷⁸

In setting out the standard to be met under the minimal impairment branch of the test, Dickson C.J. wrote:

[S]ection 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In the circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in

⁷⁵(1991), 62 C.C.C. (3d) 193, 119 N.R. 161 (S.C.C.) [hereinafter *Chaulk*]. This case considered the validity of the reverse onus aspect of the defence of insanity in s. 16(4) of the *Criminal Code*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

⁷⁶[1991] 2 W.W.R. 1, 61 C.C.C. (3d) 1 (S.C.C.) [hereinafter *Keegstra*]. The case concerned a challenge to s. 319(3)(a) of the *Criminal Code*, R.S.C. 1985, c. C-46 under s. 11(d) of the *Charter*. The section requires that the defence of truth with respect to the charge of wilful promotion of hatred against identifiable groups (s. 319(2)) be established by the accused on a balance of probabilities.

⁷⁷*Supra*, note 75 at 36.

⁷⁸*Supra*, note 76 at 101.

ways that alternative responses could not, and is in all other respects proportionate to a valid section 1 claim.⁷⁹

Thus, the government may employ more restrictive measures than the absolute minimal impairment of *Charter* rights would require, as long as the measures are not redundant and otherwise fulfil the requirements of the *Oakes* test. The new standard enunciated in *Keegstra* and *Chaulk* implicitly recognizes that legislatures require greater flexibility to effectively regulate the wide array of subject matters for which they are responsible. A reverse onus in the provincial regulatory context might thus be found to fulfil the minimal impairment requirement under the modified s. 1 test in *Chaulk* and *Keegstra*. If the courts nevertheless find that reverse onus provisions in regulatory offences cannot be justified even under the modified test, the provinces should brace themselves for wholesale carnage to be visited upon their regulatory schemes by the courts.

II. Environmental Legislation

A. *Strict Liability and Provincial Environmental Offences*

Despite the fact that the environment has attracted increasing public attention in recent years, and has been declared a matter of great public concern by the Supreme Court of Canada,⁸⁰ environmental legislation will certainly not escape the chopping block if strict liability and reverse onus provisions fall under s. 11(d). There is nothing in *Ellis Don*, nor in the Ontario Law Reform Commission report, to indicate that different legislative contexts will receive different treatment. Galligan J.A. stated in *Ellis Don* that the protection of worker safety does not differ in any significant respect from the prevention of homicide.⁸¹ He thus explicitly refused to draw a distinction between the principles to be applied in the regulatory context and those which are appropriate in the case of true crimes. A substantial amount of environmental legislation⁸² risks being subjected to the same kind of mechanical scrutiny received by the *O.H.S.A.* provisions in *Ellis Don*.⁸³ Like the *O.H.S.A.*, environmental legislation is heavily dependent upon the strict liability standard and often rests the persuasive burden on the accused.⁸⁴ This makes it particularly vulnerable to attack.

⁷⁹*Ibid.* at 91.

⁸⁰*Sault Ste. Marie, supra*, note 2 at 1327; see also *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161.

⁸¹*Supra*, note 1 at 202.

⁸²*E.g.*, *Ontario Water Resources Act*, R.S.O. 1980, c. 361; *Environmental Protection Act, supra*, note 46; *Health Protection and Promotion Act*, S.O. 1983, c. 10; *Lakes and Rivers Improvement Act*, R.S.O. 1980, c. 227; *Mining Act*, R.S.O. 1980, c. 268; *Conservation Authorities Act*, R.S.O. 1980, c. 85; *Pesticides Act*, R.S.O. 1980, c. 376; *Environmental Assessment Act*, R.S.O. 1980, c. 268; *Dangerous Goods Transportation Act*, S.O. 1981, c. 69.

⁸³*Supra*, note 1 at 202, Galligan J.A.

⁸⁴See generally, D. Estrin, *Environmental Law* (Toronto: Carswell, 1984).

Some hope remains. Environmental legislation may be distinguished from occupational health and safety legislation in at least one important respect. Worker safety legislation is designed to regulate industrial activities, which are viewed as normal or ordinary activities in the community. The risk of danger is generally confined to those within a particular workplace. Environmental legislation, in contrast, is designed with environmental accidents in mind, which have the potential to affect vast numbers of people in society as a whole. As Linden has pointed out in the context of tort law:

[Anyone] who in any community pursues his own advantage by activities which are "extraordinary" in that community, is liable for damage caused to the interest of others who are held to consent only to normal risks.⁸⁵

Thus if the conduct, although not wrongful in a criminal sense, is "so fraught with danger" or so "unusual in a given community," it may be justifiable to shift the risk of loss and the burden of proof from the person injured to the person who created the risk.⁸⁶ The courts may be willing to recognize the need for added protection for the public from environmental disasters. The "extraordinary" nature of the danger to the community created by environmental accidents may allow a reverse onus provision to satisfy the minimal impairment test under s. 1 of the *Charter*.

The Supreme Court itself recognized in *Sault Ste. Marie* the difficulties encountered in carrying out successful prosecutions in the environmental context if the Crown is required to prove negligence beyond a reasonable doubt.⁸⁷ Other jurisdictions have also experienced difficulty in obtaining convictions under a civil standard of proof where the plaintiff must prove actual harm.⁸⁸ If the reasoning in *Ellis Don* is accepted, and defendant corporations are no longer to be required to prove due diligence on a balance of probabilities, it does not seem likely that their reports with respect to their environmental procedures will be maintained with the same vigour as before. A corporation would have nothing to gain by maintaining detailed records, particularly when these same records could potentially be used against them. There is a good chance that they can avoid conviction without them because they will no longer be required to show due diligence. Crown access to even those limited records could be severely restricted by claims of privilege and non-disclosure based on the possibility of self-incrimination. These factors combined would make complex investigations of environmental violations even more difficult for provincial investigators than they already are. Despite the fact that prosecutorial difficulty was accepted as a valid reason for shifting the onus to the accused in *Sault Ste.*

⁸⁵A.M. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988) at 481.

⁸⁶*Ibid.* at 480.

⁸⁷*Sault Ste. Marie*, *supra*, note 2 at 1325, Dickson J.

⁸⁸See R.A. Milne, "The *Mens Rea* Requirements of the Federal Environmental Statutes: Strict Criminal Liability in Substance But Not in Form" (1988-1989) 37 *Buffalo L. Rev.* 297 at 308.

Marie, Mr Justice Galligan rejected this argument in *Ellis Don*. He found that courts have always been able to distinguish “spurious defences from legitimate ones ... to separate the wheat from the chaff.”⁸⁹

Corporate compliance with environmental standards is thus determined on a cost-benefit basis.⁹⁰ The vigilance with which corporations will ensure their own compliance with environmental regulations will decrease if they see that there is less benefit to be gained from the maintenance of detailed records. A shift to a less stringent burden of proof could clearly be a significant factor precipitating such a change, and might encourage potential law breakers to turn a blind eye to environmental standards.

B. Weil's Food⁹¹ and the Future of Environmental Legislation — Concluding Remarks

One example of what may lie ahead for environmental legislation in this country if *Ellis Don* is followed is currently working its way through the courts of Ontario. *Weil's Food*⁹² involves two charges relating to the discharge of contaminants and the failure to give notice under s. 16(2) of the *Ontario Water Resources Act*⁹³ and s. 14(1) of the *Environmental Protection Act*,⁹⁴ respectively. Each of the sections contains a strict liability standard with a reverse onus pro-

⁸⁹*Supra*, note 1 at 203.

⁹⁰A 1988 report by the Department of Justice found that corporate heads and middle managers of large multi-national corporations will ignore environmental regulations to meet production targets. Canada, Department of Justice, *From Sawdust to Toxic Blobs – A Consideration of Sanctioning Strategies to Combat Pollution in Canada (Studies in Compliance and Regulation)* by Dr. D. Chappell (Ottawa: Supply & Services, 1988) at 26.

⁹¹*Weil's Food Processing Ltd. v. Weil* (4 December 1990) (Ont. C.J., Gen. Div.), Browne J. [unreported] [hereinafter *Weil's Food*].

⁹²The section 11(d) issue in *Weil's Food* was decided prior to the Ontario Court of Appeal decision in *Ellis Don*. Browne J. of the Ontario Court of Justice (General Division) based his decision on the reasoning in *Wholesale Travel*. Undoubtedly, when the s. 1 argument is put before the Court at the appeal level, the *Ellis Don* reasoning will figure prominently.

⁹³*Supra*, note 82.

⁹⁴*Supra*, note 46. S. 16(2) of the *Water Resources Act* and s. 14(1) of the *Environmental Protection Act* operate as strict liability offences by virtue of the *Sault Ste. Marie* decision and s. 48(3) of the *Provincial Offences Act*, *supra*, note 63. Dickson J. held in *Sault Ste. Marie*, *supra*, note 2 at 1326 that “[p]ublic welfare offences would, *prima facie*, be in the second category [i.e. strict liability offences]. They are not subject to the presumption of full *mens rea*.” S. 48(3) reads as follows:

The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

This provision transforms the two sections at issue in *Weil's Food* into strict liability offences, with the persuasive burden resting on the accused.

vision. Weil's Food challenged the statutory provisions under s. 11(d) of the *Charter*. No s. 1 argument was brought at first instance, although the Crown requested permission to bring forward such evidence if the Court found that the provisions in question violated s. 11(d).

Browne J. contemplated distinguishing the legislative provisions at issue in *Wholesale Travel* from those in *Weil's Food* on the basis of their similarity to true crimes, but in the end decided they were regulatory in nature.⁹⁵ He therefore found that he was bound by the majority reasoning in that case, and held that the two provisions under which Weil's Food had been charged constituted violations of s. 11(d) of the *Charter*.⁹⁶ The Court reserved final judgment on the constitutionality of the two sections pending s. 1 argument by the Crown.⁹⁷

If the courts continue to refuse to undertake a substantive review of community notions of the presumption of innocence in the provincial regulatory context, *Weil's Food* represents the rather bleak future of significant pieces of environmental legislation in Ontario, and perhaps the rest of Canada. The lower courts, although reluctantly, are finding themselves bound by the mechanical approach taken to strict liability offences by the Ontario Court of Appeal. The Court has thus brought about a fundamental change in the law, without providing any articulation of a better alternative. The change could result in tremendous chaos at the lower court level as courts find themselves forced to strike down regulatory offences merely because they contain reverse onus clauses. The strict liability standard with a persuasive burden on the accused is part of the fabric of our legal system. It has worked well in the past, and if it is going to be altered, we must demand from our courts compelling reasons as to why the principles enunciated in *Sault Ste. Marie* are no longer appropriate in the provincial regulatory context.

⁹⁵*Supra*, note 91 at 7.

⁹⁶*Ibid.* at 8-9.

⁹⁷The s. 1 argument by the Crown in *Weil's Food* is scheduled to be made before Browne J. on June 24, 1991.