In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

IN THE MATTER OF THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1979, c. 63

AND IN THE MATTER OF THE REFERENCE RE SECTION 94(2) OF THE MOTOR VEHICLE ACT, R.S.B.C. 1979, c. 288, as amended by the MOTOR VEHICLE AMENDMENT ACT, 1982, S.B.C. 1982, c. 36

FACTUM OF THOSE CONTENDING FOR A NEGATIVE ANSWER

REGIONAL CROWN COUNSEL
#307 - 815 Hornby Street
Vancouver
British Columbia

Solicitor for the Appellant

A.M. STEWART, Esq.

BURKE-ROBERTSON, CHADWICK & RITCHIE
Barristers and Solicitors
130 Albert Street
Ottawa, Ontario

Ottawa Agents for Appellant

COUNSEL

C.G. STEIN
#305 - 140 West 15th Street
North Vancouver
British Columbia

Solicitor for those contending for a negative answer (Respondent)

CHARLES G. STEIN, Esq.

SOLOWAY, WRIGHT & HOUSTON
Barristers and Solicitors
170 Metcalfe Street
Ottawa, Ontario

Ottawa Agents for Respondent

COUNSEL

OFFICIAL COURT REPORTERS
BOX 34, COURTHOUSE
800 HORNBY ST.
VANCOUVER, B.C. V6Z 2C5

I N D E X

	PAGE
PART I	
Statement of Facts	1
PART II	
Points in Issue in the Appeal	2
PART III	
Argument	
A) The legal context in which the appeal arises	3
B) The supremacy of the Constitution Act, 1982	5
C) Section 7 - What it means	10
1. Omission of a frozen rights clause	10
2. R. v. Sault Ste. Marie & Section 7	11
3. Substance and Procedure	14
A. Choice of the words "principles of Fundamental Justice"	14
B. Section 7's position in the Charter	17
D) Section 11(d) fairness and the presumption of innocence	19
E) Section 1	22
PART IV	
Nature of the Order Sought	24
PART V	
List of Authorities	25
APPENDIX	
1. Canadian Charter of Rights & Freedoms	27
2. Motor Vehicle Act, R.S.B.C. 1979 c.288	28
3. Canadian Bill of Rights	31

PART I

STATEMENT OF FACTS

1. The Respondent accepts the facts as set out in paragraphs 1, 3, 4, 5, 6 of the Appellant's factum but says the various sections of the Motor Vehicle Act were proclaimed on August 12, 1982 (page 2, line 4), and section 94 of the Motor Vehicle Act was enacted as of September 1, 1982 (line 12, page 2) and not 1981.

PART II

POINTS IN ISSUE IN THE APPEAL

1) Is Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c. 288, as amended by the Motor Vehicle Act Amendment Act, 1982, in conflict with the Canadian Charter of Rights and Freedoms: Constitution Act, 1982 specifically Section 7 and Section 11(d), such that pursuant to Section 52 of the Charter it is of no force and effect.

2) If so, can Section 1 of the Charter be invoked to save Section 94(2) of the Motor Vehicle Act.

PART III

A R G U M E N T

A) The Legal Context in which the Appeal Arises

1. The Appellant in Part A of its factum argues that the decision of this Court in Regina v. MacDougall (1982) 44 N.R. 560 has changed the legal context of this appeal. As a result of Regina v. MacDougall, it is said, an accused charged with an offence contrary to S.94(1) of the Motor Vehicle Act would have no defence based on ignorance of the fact that his licence was suspended by operation of provincial law. The basis of this argument is that in Regina v. MacDougall, this court ruled that ignorance of an automatic suspension of a driver's licence by operation of provincial law is ignorance of law and therefore cannot provide a defence.

2. This court held in Regina v. MacDougall (page 564) the offence of driving while suspended created by the Nova Scotia Motor Vehicle Act is one of strict liability, not absolute liability. The defence of a reasonable belief in a mistaken set of facts rendering breach of the actus reus an innocent one would give rise to a defence to such a charge. Section 94(2) of the British Columbia Act does not allow for such a defence.

3. Section 90 of the Motor Vehicle Act (B.C.) grants the power to a Court to consider an accused's driving record and order a prohibition from driving. Clearly ignorance of this suspension or mistake as to its length, is one of fact, not of law, and differs from a suspension imposed by operation of law.

4. The position of the Appellant at page 8, paragraph 17 of its factum, implies that because only "some... individuals" (i.e. those suspended under the "old" act)

might be unjustly convicted under Section 94(2), such injustice is not abhorrent to the principles of fundamental justice. Imprisonment without fault of those individuals is, somehow, not sufficient to raise "the spector of injustice" - notwithstanding that the morally innocent would be incarcerated along with the morally culpable.

5. It is submitted it can be clearly seen the suspension provision considered by this Court in Regina v. MacDougall is fundamentally different from that created by Section 94(2) of the Motor Vehicle Act (B.C.) because of the latter's position of absolute liability. Furthermore, whereas Regina v. MacDougall dealt only with a suspension by operation of law, Section 94(2) encompasses Court imposed suspensions (Section 90(2)), suspensions arising under the "old act" in the absence of the accused, and suspensions imposed by administrative review by the Superintendent of Motor Vehicles requiring delivery of notice ("old" act Section 82(3)).

6. There are therefore at least three classes of morally innocent persons who are, by Section 94(2), deprived of the opportunity to present a defence of the type outlined by Dickson J. in Regina v. Sault Ste. Marie (1978) 2 S.C.R. 1299 at 1326.

> 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 it took all reasonable steps to avoid the particular event.

B) The Supremacy of the Constitution Act, 1982

7. The Constitution Act, 1982 changes the role of both courts and legislatures in Canada. Mr. Justice Smith in Reference Re: Constitutional Validity of Section 12 of the Juvenile Delinquents Act (1982) 38 O.R. 748; 70 C.C.C. (2d) 257; affirmed (1983) 41 O.R. (2d) 113 (Ont. C.A.) said, with regard to the status of the Charter:

> Nor can I accept the statement made to this court that the Charter changes nothing; that it merely recognizes existing rights. In my view, sovereignty of Parliament has been dealt a mild blow. The courts and Parliament are no longer the repositories of constitutional law rights. The Charter will prevail subject only to the non-obstante provisions embodied in Section 33 of the Charter....With the advent of entrenchment of basic rights and freedoms, the court now has a Constitutional responsibility to deny effect to a measure adopted by Parliament that contravenes the Charter. Such measure would very simply be unconstitutional and beyond its competence.
>
> Page 754 (O.R.)

8. The unanimous Report to Parliament of the Special Joint Committee of the Senate and House of Commons, including all parties in the Federal Parliament, declared that "to be effective, we believe a Charter must enjoy a clear supremacy over ordinary legislation" and its drafting must "ensure that the provisions of the proposed Charter are interpreted by the Courts as overriding other legislation" (as quoted by the Honourable Mark R. MacGuigan in Civil Liberties in Canada, page 244 and 245).

9. Section 52 of the Constitution gives the Charter the status argued for above.

> 52(1) "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of The Constitution is, to the extent of the inconsistency, of no force or effect".
>
> (3) Amendments to The Constitution of of Canada shall be made only in accordance with the authority contained in The Constitution of Canada.

10. The Honourable Mr. Justice David C. MacDonald of the Court of Queen's Bench Alberta in his recent text Legal Rights in the Canadian Charter of Rights and Freedoms identifies three consequences flowing from Section 52:

1. The interpretation of the rights guaranteed in the Charter "must be such as to give them vigour; they ought not to be interpreted so as to eviscerate or enfeeble them, for to do so would not be consonant with the concept of a supreme law." (p.7)

2. Unlike the Bill of Rights, the Charter renders "null and void...any law that is inconsistent with the provisions of the Charter."

3. Because it is a constitutional instrument the Charter is to be interpreted differently than an ordinary statute.

11. In Minister of Home Affairs v. Fisher (1980) A.C. 319 (P.C.), the Privy Council considered the Bermuda Constitution - Protection of Fundamental Rights and Freedoms of the individual. Lord Wilberforce said at page 329:

"the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordships' view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. ....The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.

It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of the Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

12. Recent judicial decisions in superior courts of Quebec and British Columbia apply this "radical approach"

of interpretation suitable to the character of the Charter referred to by Lord Wilberforce. In Quebec Association of Protestant School Boards et al v. Attorney General of Quebec, et al (1982) 40 D.L.R. (3d) 33, Deschenes, C.J.S.C. quotes the famous dictum of Lord Sankey in Edwards v. Attorney General for Canada (1930) A.C. 124 at 136:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. .... Their lordships do not conceive it to be the duty of this Board - it is certainly not their desire - to cutdown the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.
>
> (Page 55)

The Chief Justice of Quebec goes on to say:

> "Toute l'economie du droit constitutionnel vise a en assurer l'interpretation liberale et l'application genereuse et uniforme a travers le pays. (p. 54)
>
> Il ne faut donc pas hesiter a donner a la Charte l'interpretation large et liberale qu'elle reclame au titre d'un chapitre important de la Constitution du Canada." (p.57)

13. The Court of Appeal of British Columbia said, in their unanimous judgment:

> The Constitution Act, in our opinion, has added a new dimension to the role of the courts; the courts have been given constitutional jurisdiction to look at not only the vires of the legislation and whether the procedural safeguards required by natural justice are present but to go further and consider the context of the legislation.
> (Case p. 30)

14. This approach was also adopted in Regina v. Cook (1983) 56 N.S.R. (2d) 449 where Hart J.A. stated at page 468:

> I am of the opinion that the era of parliamentary legislative supremacy on the matter of human rights and freedoms has now passed and that by virtue of the Constitution of Canada, it will now be up to the courts to exercise the control that they have been given over these subjects.

15. It follows that in view of the unique position of the Charter as a constitutional document, it would be wrong to place too great a weight on the interpretation of apparently similar provisions in the Canadian Bill of Rights, 1960 which never achieved the status of a constitutional document.

16. Indeed, Hart J.A. in Regina v. Cook, supra, stated at p. 468:

> (I) would find little assistance in previous interpretation of Canadian Bill of Rights rendered under a different set of ground rules to the interpretation of the wording contained in the Constitution today...

17. In the Queen v. Therens (1983) Sask. R. 81; (1983) 4 W.W.R. 385 (leave to appeal to this Court granted June 6, 1983) (Sask. C.A.) Tallis, J.A. speaking for the majority reiterated this point when he said:

> While cases under statutes such as the Bill of Rights may be interpretative assistance, it must be remembered that the Charter stands on an entirely different basis. It is not mere canon of construction for the interpretation of federal legislation: vide Regina v. Drybones (1970) 3 CCC (2d) 355.
> page 86 (Sask R.)

C) Section 7 - What it means.

1. Omission of a Frozen Rights Clause

18. The Appellant at paragraph 19 of its factum states that in order for S.94(2) of the Motor Vehicle Act to be found inconsistent with section 7 of the Charter, there had to exist prior to April 17, 1982 a rule in Canadian law that no penal statute would be interpreted as providing for a complete offence upon proof of only the actus reus of the offence. This statement is not in accord with the principles with which the Charter should be interpreted. Edwards v. A.G. of Canada, supra.

19. It is submitted that the Charter does create new rights. The Charter does not have a provision, as in Section 1 of the Canadian Bill of Rights (1960) 8-9 Elizabeth C.44, which provides:

> S. 1 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion, or sex, the following human rights and fundamental freedoms, ...(emphasis added)

20. Morris Manning, in Rights Freedoms and the Courts argues at p. 231 paragraph 271

> This deliberate omission was designed not only to prevent a frozen law theory but also to show that certain new rights were in fact being created by the Charter. This being recognized, the scope of the right and freedom is not narrowed to the existing or prevailing law at the time of coming into force of the Charter....

21. It is submitted that the analysis of Section 7 of the Charter by Paradis, P.C.J. in Regina v. Campagna,

June 25, 1982, should be approved and adopted by this Honourable Court. In particular, Paradis, J. neatly and accurately identified the nub of the issue at Case page 24.

> In my view, to automatically deprive a citizen of his liberty by a process of absolute liability can only be seen as a "departure from the norm of living tradition.
>
> If it can be said that absolute liability offences in themselves "violate fundamental principles of penal liability", one which causes a minimum term of imprisonment must be said to be in violation of principles of fundamental justice.

2. Regina v. Sault Ste. Marie and Section 7

22. The concept that there should not be punishment without fault is a principle broadly recognized in our society, based on commonly held views that laws should be fair and equitable. Dickson, J. in Regina v. City of Sault Ste. Marie, (1978)2 SCR 1299 said:

> There is a generally held revulsion against punishment of the morally innocent. (p. 1310)
>
> The principle that punishment should in general not be inflicted on those without fault applies. (p. 1326)
>
> Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. (p.1311)

23. In Regina v. Chapin (1979) 2 SCR 121 this Court reiterated the factors to be considered in categorizing an offence as either mens rea, strict liability, or

absolute liability. As to public welfare offences, Dickson J. included, inter alia,

> ...The over-all regulatory pattern, subject matter of the legislation, the importance of the penalty.... (page 131, emphasis added).

24. Applying these criteria, Dickson J. commented that the penalties in that case, including a fine of $10.00 to $300.00 and possible imprisonment up to six months, could hardly be termed minimal.

> Difficulty of enforcement is hardly enough to dislodge the offence from the category of strict liability, particularly when regard is had to the penalties that may ensue from conviction. I do not think that the public interest, as expressed in the Convention, requires that s. 14 of the Regulations be interpreted so that an innocent person should be convicted and fined and also suffer the mandatory loss of his hunting permit and the possible forfeiture of his hunting equipment, merely in order to facilitate prosecution.
>
> ...We should not assume that punishment is to be imposed without fault. (page 134).

25. At page 10 of its factum, the Appellant submits that the Supreme Court of Canada has failed to require a legislature to categorize expressly an absolute liability offence involving serious repercussions. It is said that the nature of the penalty is one of the aspects to consider in deciding if an absolute liability offence has been created. Section 94(2) of the Motor Vehicle Act undoubtedly creates an absolute liability offence. The question is not whether it is capable of being categorized as such, but whether such a categorization, resulting in severe punishment without

moral fault, is abhorrent to the fundamental concept of fairness and justice guaranteed by Section 7 of the Charter.

26. The effect of a conviction under section 94(2) of the Motor Vehicle Act is that of possible moral innocence yet a mandatory term of incarceration of seven (7) days. It is submitted that the presumptions of statutory interpretation adduced in R. v. Sault Ste. Marie are based upon principles of fundamental justice, and that these include the fundamental principles of penal liability.

27. R. v. Sault Ste. Marie was decided before April 17, 1982; when Parliament and the legislatures were the supreme law making bodies in Canada. Effect was given in R. v. Sault Ste. Marie to the principle of Parliamentary supremacy by way of recognition by this court of absolute liability offences. However, certain criteria were set out in the decision in order that a determination could be made by the courts as to whether offences could fall into the category of being absolute liability offences. At page 1326, Mr. Justice Dickson said:

> 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.

It was by these criteria that this court decided that offences of absolute liability could co-exist with a fundamental principle of penal liability: namely, no

punishment without fault.

28. The Constitution Act, 1982 is now the supreme law of Canada by virtue of Section 52(1). It is submitted that S. 94(2) is inconsistent with a fundamental principle of penal liability: that of no punishment without fault, and, therefore, since a S. 94(2) conviction deprives a person of liberty not in accordance with the principles of fundamental justice, it violates S. 7 of the Charter.

3. Substance and Procedure

A. Choice of the words "principles of Fundamental Justice"....

29. The Court of Appeal of British Columbia at case page 31 quoted Chief Justice Laskin's dissent in Morgentaler v. The Queen (1976) 1 SCR 616 recognizing judicial "interference" with substantive legislation in ruling on the vires of legislation. Not only is such "interference" not precluded under the Bill of Rights, it is anticipated "there can be a proper invocation of due process of law in respect of federal legislation as improperly abridging a person's right to life, liberty and security and enjoyment of property" (emphasis added).

30. It should be also noted that in Curr v. The Queen, 7 CCC (2d) 181, (S.C.C.) Laskin J. at page 191 recognized, without deciding, that "except by due process of law" could provide a means of controlling substantive federal legislation and intimated that the standard of justification for the Court to deny

operative effect to a substantive legislative measure would be different where the Court employs a constitutional rather than a statutory jurisdiction.

31. With this in mind, the effect of Section 7 of the Charter and what it is intended to protect can be seen by analogy to what the Supreme Court of the United States has said of the Due Process Clause of the 14th Amendment which "inescapably imposes upon this Court an exercise in judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offences". (emphasis added). Maliniski v.New York 324 U.S. 401

32. If it had been intended to limit the rights in Section 7 of the Charter to issues of procedure, the words "except in accordance with the principles of natural justice" instead of the phrase "except in accordance with the principles of fundamental justice" would have been used. Natural justice has been defined as having two principles:

> (t)hat an adjudicator be disinterested and unbiased and that the parties be given adequate notice and an opportunity to be heard.
> (p. 156, de Smith's Judicial Review of Administrative Action, (4th ed.))

33. "Principles of natural justice" has achieved a recognized definition through numerous Canadian Judicial decisions. Had Parliament intended to restrict Section 7

to procedural matters it would surely not have chosen a phrase of wider scope and little or no prior judicial consideration.

34. Similarly had it been intended that rights in section 7 be limited with respect to laws passed by Parliament or the legislature then the phrase "due process of law" would have been used. This phrase, as used in S. 1.(a) of the Canadian Bill of Rights was interpreted in Curr v. The Queen, (1972) SCR 889 by Ritchie J. at p. 915 as meaning: "according to the legal processes recognized by Parliament and the courts in Canada". As noted in the Appellant's factum at page 21, the interpretation of "due process of law" has been applied in other Canadian court decisions.

35. It is submitted that the choice of the term "principles of fundamental justice" is a clear indication of the intent of the Constitution Act to allow for a broader meaning than either of the two phrases referred to above.

36. The Appellant has relied upon Duke v. The Queen (1972) S.C.R. 917 as being the conclusive authority by which the term "principles of fundamental justice" should be interpreted (pages 22-26 of the Appellant's factum). These words were interpreted by Chief Justice Fauteux in the context of a fair hearing under Section 2(e) of the Canadian Bill of Rights. It is important to note that this interpretation was qualified by a statement that it was not an attempt to formulate any final definition of the words. Section 7 contains no such qualifications as to the context of the words

"principles of fundamental justice".

B. Section 7's Position in the Charter

37. It is submitted that some guidance as to the interpretation of "principles of fundamental justice" may be adduced by an examination of the relationship between section 7 and sections 8-14 of the "Legal Rights" provision of the Charter.

38. Sections 8-14 of the Charter set out the principles governing rights regarding search, seizures, detention and imprisonment of the individual, as well as a person's rights once arrested and charged with an offence. It is submitted that these rights can be regarded as procedural examples of the principles of fundamental justice. If section 7 is not to be considered redundant it must be interpreted in a different fashion.

39. The Respondent submits that in order to protect the rights set out in Section 7 it was intended to allow for a broad scope of policy development of Section 7. It does not fall to this court in this case to fully and completely define the phrase "principles of fundamental justice". Indeed, it would not be consistent with the interpretation of a constitutional document to define S.7 in a conclusive manner now. The dictum of Lord Sankey in Edwards v. A.G. of Canada, supra, is authority for this point. Section 7, however, must embrace both the procedural and substantive context of legislation in order to give everyone the protection of their rights to life, liberty and security of the person.

40. In Winterwerp v. The Netherlands (1979) 2E.H.R.R. 387, the European Court of Human Rights interpreted Article 5(1)(e) of the European Convention. It reads:

> Everyone has the right to life, liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:....
>
> (e) the lawful detention...of persons of unsound mind.

Although the wording of the above Article is different than that used by Section 7 of the Charter, the European Court held at page 407 that "the lawful detention" of a person so that his liberty is deprived embraces both the procedural and substantive context of law.

41. In The Queen v. Caddedu (1982) 40 O.R. (2d) 128 (Ont. H.C.) Potts J. stated that:

> (the) rights protected by Section 7 are the most important of all those enumerated in the Charter, that deprivation of those rights has the most severe consequences upon an individual, and that the Charter establishes a constitutionally protected enclave for protection of rights into which the government intrudes at its peril.
> (page 138).

42. It is submitted the above cases embody the broad policy basis with which section 7 was intended to be developed. It would be inconsistent with this policy to restrict Section 7 to the review of procedural issues arising from the deprivation of one's right to life, liberty and security of the person.

D) Section 11(d). Fairness and the Presumption of Innocence

43. The Canadian Bill of Rights, S.2(f) reads:"no law of Canada shall be construed or applied so as to... (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proven guilty according to law...."

44. The Charter of Rights, S.11(d) reads: "any person charged with an offence has the right (d) to be presumed innocent until proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal".

45. Laskin J. in Regina v. Appleby (1972) S.C.R.303 at 318 in considering a reverse onus clause under the current Section 237 of the Criminal Code requiring the accused to establish on a balance of probabilities that he did not enter or mount the vehicle for the purpose of setting it in motion to rebut the presumption of care and control, recognized that the Bill of Rights Section 2(f) presumption of innocence test "is whether the enactment against which it is measured calls for a finding of guilt of the accused, when, at the conclusion of the case, and upon the evidence, if any, adduced by Crown and by accused....there is a reasonable doubt of culpability". (emphasis added)

46. Culpable is defined by the Shorter Oxford English Dictionary as "fault, blame 1. Guilty, criminal deserving punishment 2. Blameworthy" (emphasis added)

47. There is no presumption of innocence where the

right to adduce evidence of lack of fault or blameworthiness by the accused, at least by the exercise of due diligence, is abrogated as in Section 94(2) of the Motor Vehicle Act.

48. This court held that a law reversing the onus of proof with respect to one or more ingredients of an offence does not contravene Section 2(f) of the Bill of Rights (presumption of innocence).

e.g. Regina v. Appleby

49. Implicit in cases decided by the Supreme Court of Canada with regard to the presumption of innocence is a recognition that

> "(a) reverse onus provision, which goes no further than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under Section 2(f)".
> (emphasis added)
>
> Regina v. Shelley (1981) 2 S.C.R. 196 at 200.

50. It is submitted that Section 94(2) of the Motor Vehicle Act in declaring an accused to be guilty whether or not (he) knew of the prohibition or suspension or that he took all reasonable steps to avoid driving under suspension goes beyond the bounds set out in Shelley.

51. The effect of the decision in the Shelley case was considered by Veit J. of the Court of Queen's Bench of Alberta in Regina v. Stanger, (1982) 70 C.C.C. (2d) 247:

> It seems to me that the majority in the Shelley case was arguing for a proposition that a reverse onus proposition, while not by its very nature

> opposed to the rights granted at that time by the Canadian Bill of Rights, must be a reasonable reversal in light of the rights granted at that time by the Bill of Rights.
>
> I find some comfort in that decision because the language in the statute which was being considered by the Supreme Court of Canada in that case was very clear, clearer perhaps even than the language which we are facing, and despite the clarity of the language in the Customs Act, the Supreme Court of Canada was able to find that there was an obligation of the prosecution to lead evidence which I would describe as pointing to knowledge at least of unlawful importation, despite the clear language of the Act to the contrary.
>
> The majority in the Shelley case did insist in that case, on those facts, that it was against the Bill of Rights to presume an accused guilty unless he could prove something on the balance of probabilities which was beyond his knowledge or beyond what he might reasonably be expected to know. That aspect of the decision of the majority ought not to be overly emphasized in the sense that in almost every criminal prosecution, except situations in which there would be a defence of automatism for example, or of mental problem, the accused would always have knowledge of the circumstances of the crime which he is alleged to have committed. So it seems to me therefore that the Shelley case must not be restricted to those situations where satisfaction of the reverse onus would be beyond the possible knowledge of the accused. (p. 250).

52. It therefore follows that the decisions in Shelley and Stanger, together with the broad interpretation which the Charter invites, (including the requirement of fairness in Section 11(2) of the Charter), that Section 94(2) of the Motor Vehicle Act is a paradigm for the impugned legislation under the Customs Act in

the Shelley case and in violation of Section 11(d) of the Charter.

E) Section 1

53. The burden of proving that legislation in conflict with the Charter meets the saving conditions of Section 1 of the Charter rests on the party seeking to invoke Section 1.

> Quebec Association of Protestant School Boards v. Attorney General of Quebec (No. 2) (1982) 140 D.L.R. (3d) 33 @ 54;
> Re Southam Inc. and the Queen (No. 1) (1983) 41 O.R. (2d) 113 @ 125 (Ont.C.A.)

54. One method of ascertaining whether Section 94(2) of the Motor Vehicle Act sets a limit that may be demonstrably justified in a free and democratic society is to look at other free and democratic societies with similar legal histories to that of Canada to ascertain whether they impose absolute liability for driving under suspension combined with a mandatory jail term. This is the approach taken in Re Southam Inc. v. The Queen (No. 1) (1983) 41 O.R.(2d) 113 @ 131 et. seq.

55. It should be noted that Paradis J. in Regina v. Campagna stated that he searched in vain for any offences carrying a minimum mandatory jail term imposing a burden of absolute liability. (Case, page 23).

56. In Regina v. City of Sault Ste. Marie, supra, Dickson J. said at 1311 that arguments in favour of absolute liability offences

> ...rests upon assumptions which have not been, and

> cannot be, empirically established. There is not evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others?

57. It is submitted that there is nothing before this Court to indicate Section 94(2) of the Motor Vehicle Act is a reasonable limit of the rights guaranteed by Sections 7 and 11(d) of the Charter, nor that any such limit has been demonstrably justified.

PART IV

NATURE OF ORDER SOUGHT

58. A declaration that Section 94(2) of the Motor Vehicle Act is inconsistent with the provisions of Section 7 and 11 (d) of the Charter of Rights and is of no force or effect.

C.G. Stein
Counsel for those contending
for a negative answer

PART V

LIST OF AUTHORITIES

	Page
Regina v. Appleby (1972) S.C.R. 303; (1972) 3 C.C.C. (2d) 354	19, 20
The Queen v. Caddedu (1982) 40 O.R. (2d) 128 (Ont. H.C.)	18
Civil Liberties in Canada, MacGuigan	5
Regina v. Chapin (1979) 2 SCR 121	11
Regina v. Cook (1938) 56 N.S.R. (2d) 449 (N.S.S.C. App. Div.)	9
Curr v. The Queen (1972) S.C.R. 889, (1972) 7 C.C.C.) (2d) 181	14, 16
Duke v. The Queen (1972) S.C.R. 917	16
Edwards v. The Attorney General for Canada (1930) A.C. 124 (P.C.)	8, 10, 17
- de Smith's Judicial Review of Administrative Action (4th Ed.)	15
Legal Rights in the Canadian Charter of Rights & Freedoms (1982) Macdonald	6
Regina v. MacDougall (1982) 44 N.R. 560	3
Minister of Home Affairs v. Fisher (1980) A.C. 319 (P.C.)	6
Maliniski v. New York 324 U.S. 401	15
Morgentaler v. The Queen (1970) 1 S.C.R. 616, 20 C.C.C.(2d) 444	14
Quebec Association of Protestant School Boards et al v. Attorney General of Quebec et al (No. 2) (1982) 140 D.L.R. (3d) 33.	8, 22

	Page
R. v. S.B. (1982) 40 B.C.L.R. 273, 1 C.C.C.(3d) 73, (1983) 1 W.W.R. 512 (B.C.S.C.)	
Regina v. Sault Ste. Marie (1978) 2 S.C.R. 1299	4, 11, 13, 22
Regina v. Shelley (1981) 2 S.C.R. 196	20, 21
Regina v. Stanger (1982) 70 C.C.C. (2d) 247	20, 21
Shorter Oxford English Dictionary	19
Re: Southam Inc. and the Queen (No.1) sub nom. Reference re: Constitutional Validity of Section 12 of the Juvenile Delinquents Act (1982) 38 O.R. 748; 70 C.C.C. (2d) 257 (Ont.H.C.)	5
Re Southam Inc. and the Queen (No.1) (1983) 41 O.R. (2d) 113 (Ont.C.A.)	22
The Queen v. Therens (1983) Sask. R. 81, (1983) 4 W.W.R. 385	9
Winterwerp v. The Netherlands (1979) 2 E.H.R.R. 387	18