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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 THE ATTORNEY GENERAL FOR SASKATCHEWAN

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PART I

Statement of Facts

1. The Attorney General of Saskatchewan agrees with the statement of facts contained in the factum of the Appellant as modified in the factum of the Respondent.

PART II

Point In Issue

2. The point in issue in this appeal is:

(1) Is Section 94(2) of the Motor Vehicles Act, Revised Statutes of British Columbia, 1979, as amended by the Motor Vehicle Amendment Act, 1982 consistent with the Canadian Charter of Rights and Freedoms?

3. The position of the Attorney General of Saskatchewan is that this question ought to be answered in the affirmative.

PART III

Argument

A. Section 7 of the Charter and Section 94(2) of the Motor Vehicle Act

4. The position of the Respondent is that the decision made by the British Columbia Legislature in subsection 94(2) of the Motor Vehicle Act not to include mens rea as an element of the offence created by subsection 94(1) is contrary to "the principles of fundamental justice" referred to in section 7 of the Canadian Charter of Rights and Freedoms.

5. The Respondent's attack is upon the substance of the offence created by section 94. There is no suggestion that the procedures leading to a conviction under section 94 are not fair. It is true, of course, that the courts would likely not permit an accused charged under the section to lead evidence regarding his or her intent, but this is only because such evidence would not be relevent to the substance of the charge.

6. In order for the position of the Respondent to prevail, therefore, section 7 of the Charter must be demonstrated to have substantive as well as procedural

effect. In other words, it must be shown that the phrase "principles of fundamental justice" refers to substantive principles as well as procedural ones.

7. In support of a substantive interpretation of section 7 of the Charter, the Respondent states in paragraph 35 of his factum:

> 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 ["principles of natural justice" and "due process of law"].

8. The Attorney General of Saskatchewan submits that an examination of the history of section 7 and of previous judicial interpretation of the words "fundamental justice" indicates quite the opposite intent from that suggested by the Respondent.

(1) History of Section 7

9. There is no need to divine what the drafters of section 7 of the Charter intended by using the words "fundamental justice". Their intent was discussed openly before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada. Speaking before that Committee on January 27, 1981, B. L. Strayer,

then Assistant Deputy Minister, Public Law, Department of Justice, stated:

> Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.
>
> This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.
>
> Special Joint Committee on the Constitution of Canada, Proceedings, 32nd Parl., Sess. 1 (1980-81), No. 46 at 32. (see appendix)

10. What the above statement, and other statements made before the Committee by Dr. Strayer and the then Justice Minister, Jean Chretien, demonstrates is that the use of the words "fundamental justice" was intended to guarantee only procedural fairness.

11. In other words, the term "fundamental justice" was intended to be virtually synonymous with the term "natural justice". This was made clear by Dr. Strayer during an exchange with Committee member David Crombie, M.P.:

Mr. Strayer: The term "fundamental justice" appears to us to be essentially the same thing as natural justice.

It is interesting that this question was debated in 1960 when the Canadian Bill of Rights was before Parliament, as to whether to include the term "fundamental justice" or "natural justice". They finally settled on "fundamental justice".

But one of the leading commentators on the Bill of Rights, Professor Tarnopolsky, reviewing that debate at that time and the jurisprudence since has said that it appears to him that the two terms are essentially the same.

Mr. Crombie: What are they?

Mr. Strayer: Well, fundamental justice or natural justice both involve procedural fairness and that is the content of them.

Special Joint Committee on the Constitution of Canada, Proceedings, supra, at 38-39. (see appendix)

12. To the same point, it is significant to note that Mr. Chretien indicated to the Committee that, while he was advised that "fundamental justice" was "marginally" more appropriate than "natural justice", either term would be acceptable to the government.

Special Joint Committee on the Constitution of Canada, Proceedings, supra, at 38. (see appendix)

(2) Previous Judicial Interpretation

13. It is also significant to note that the words "fundamental justice" have been the subject of judicial comment. Speaking for this Court in Duke v. The Queen, [1972] S.C.R. 917 at 923, Fauteux, C.J.C. made reference to the phrase "a fair hearing in accordance with the principles of fundamental justice" in section 2(e) of the Canadian Bill of Rights:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give him an opportunity to state his case.

14. It is true, of course, that the context in which the words "fundamental justice" are used in the Bill of Rights is different from the context in which they are used in the Charter. The point is, however, that the framers of the Charter were well aware of the Duke decision.

> Special Committee on the Constitution of Canada, Proceedings, supra, at 32-33. (see appendix)

Had they intended section 7 to have substantive effect, they certainly would not have chosen words which this Court had interpreted as having solely procedural content, albeit in a somewhat different context.

(3) Giving Effect to Section 52

15. The main reason given in the judgment of the British Columbia Court of Appeal for interpreting section 7 as requiring courts to review the substantive adequacy of legislation was that, otherwise, no effect would be given to section 52 of the Constitution Act, 1982 (the section which renders "of no force and effect" legislation which is inconsistent with the Charter) in relation to section 7.

Case on Appeal, p. 30.

16. The Attorney General of Saskatchewan respectfully submits that this simply is not the case. The entrenchment of "fundamental justice" in the Charter elevated that concept from a mere common law presumption, subject to a contrary legislative intent, to a fully protected constitutional doctrine. Thus section 7 in combination with section 52 enables courts to strike down adjectival laws which would result in persons being deprived of their life, liberty or security of their persons without being afforded procedural due process. Full effect can be given to section 52, therefore, without infusing substantive content into the words "fundamental justice".

(4) Policy Considerations

17. Finally, the Attorney General of Saskatchewan submits that there are serious policy considerations which arise if the courts are able to examine the substantive adequacy, as well as the procedural adequacy, of legislation under section 7. In particular, a substantive interpretation of section 7 would effectively transform the courts from constitutional adjudicators to legislative policy makers. This is nowhere better illustrated than in the judgment of the British Columbia Court of Appeal. According to that Court, it is for the courts to choose "where the public interest requires that the offences be absolute liability offences".

Case on Appeal, p. 36.

18. Thus, if the British Columbia Court of Appeal were correct, the function of determining whether a vast array of criminal and quasi-criminal provisions are substantively adequate would be transferred from Parliament and the legislatures to the courts. For example, sections of the Criminal Code which include some element of absolute liability, such as those relating to statutory rape (s. 146(2)), obscence publication (s. 159(6)) and driving with a blood-alcohol reading of over .08 (s. 236), could be challenged on substantive grounds before the courts.

19. This is not to say that the Charter does not allow any substantive review of legislation. Certain sections of the Charter, such as sections 12 and 15, enable the courts to strike down legislation which authorizes cruel and unusual treatment or punishment or which is discriminatory. But these are specific substantive standards that the courts have been asked to enforce. It is one thing for the courts to review legislation on the basis of a number of clearly defined substantive criteria. It is quite another to have judicial review of legislation on the basis of a general, undefined notion of what is substantively just.

B. Section 11(d) of the Charter and Section 94(2) of the Motor Vehicle Act

20. The Attorney General of Saskatchewan adopts the submissions of the Appellant with respect to section 11(d) of the Charter, but adds the following comments.

21. Subsection 94(2) of the Motor Vehicle Act does not concern itself with whether an accused is to be presumed innocent; rather it assists in defining the substantive elements of the offence created by subsection 94(1). The purpose of subsection 94(2) is to make clear that the

intent to drive a motor vehicle while one is prohibited or while one's license has been suspended is not an element of the offence.

22. In other words, the purpose of subsection 94(2) is to establish that the conduct being proscribed by subsection 94(1) is the driving itself, not the intent to drive. Given that this is so, there can be no question that the onus falls on the Crown to prove each and every element of the offence: (a) that the accused was driving a motor vehicle; (b) that the vehicle was driven on a highway or industrial road; and (c) that the accused was prohibited from driving a motor vehicle or that his license was suspended.

23. There is no basis for suggesting, therefore, that a person charged under subsection 94(1) would not be presumed innocent until proven guilty.

PART IV

Nature of Order Sought

24. That this appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Andrew Petter

James C. MacPherson

Counsel for the Attorney
General of Saskatchewan

PART V

Table of Authorities