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 OF CANADA

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I N D E X

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FACTUM OF THE ATTORNEY GENERAL OF CANADA

PART I

STATEMENT OF FACTS

1. The facts for the purposes of this appeal are as stated in the factum of the Appellant, the Attorney General of British Columbia, as modified in the factum of the Respondent.

PART II
POINTS IN ISSUE

2. By order dated May 12, 1983, the following constitutional question was stated:

> "Is Section 94(2) of the Motor Vehicle 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?"

10 The Attorney General of Canada submits that this question should be answered in the affirmative.

PART III
ARGUMENT

A. The Judgment in Appeal

3. The judgment of the Court of Appeal for British Columbia turns on the conclusion that the phrase "except in accordance with the principles of fundamental justice" in s.7 of the *Canadian Charter of Rights and Freedoms* should be taken as importing into Canadian law a substantive, rather than a procedural, standard for judicial review of legislation. As appears from the Court's reasons for judgment, this construction rests solely on the determination that the nature of the rights guaranteed in the Charter must be assessed in light of the "supremacy clause" found in s.52(1) of the *Constitution Act, 1982*. In the Court's view, an interpretation which equated "the principles of fundamental justice" only with the rules of natural justice would not

> "...give any effect to s.52 of the Constitution Act which can be viewed as effecting a fundamental change in the role of the courts...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 content of the legislation."
>
> Case on Appeal, p. 30, lines 11-32

4. It is respectfully submitted that this expansive interpretation of the constitution is flawed in two essential respects: (1) it erroneously assumes that the phrase "the principles of fundamental justice" has no previously ascertained meaning in Canadian law and that the framers of the Charter, by employing words of unsettled import, intended some unpredictable, yet basic, change in the law; and (2) it confuses the nature of the right guaranteed by the Charter with the mechanism provided for enforcement of the right.

B. Principles of Constitutional Interpretation

5. To ignore the possibility that words in the Charter might have been deliberately chosen because their meaning was well known is to depart from one of the cardinal principles of constitutional interpretation enunciated by this Court. As was observed Sedgewick, J. in *Re Provincial Jurisdiction to Pass Prohibitory Liquor Laws*, (1894) 24 S.C.R. 170, at p. 231:

> "Another principle of construction in regard to the British North America Act must be stated viz., it being in effect a constitutional agreement or compact, or treaty, between three independent communities or commonwealths, each with its own parliamentary institutions and governments, effect must, as far as possible, be given to

> the intention of these communities, when entering into the compact, to the words used as they understood them, and to the objects they had in view when they asked the Imperial Parliament to pass the Act. In other words, it must be viewed from a Canadian standpoint. Although an Imperial Act, to interpret it correctly reference may be had to the phraseology and nomenclature of pre-Confederation Canadian legislation and jurisprudence, as well as to the history of the union movement and to the condition, sentiment and surroundings of the Canadian people at the time. In the British North America Act, it was in a technical sense only that the the Imperial Parliament spoke; it was there that in a real and substantial sense the Canadian People spoke, and it is to their language, as they understood it, that effect must be given."

6. More recently, in *Harrison v. Carswell*, [1976] 2 S.C.R. 200, at p. 218, Dickson, J. (as he then was), speaking for the majority, stated that the duty of this Court under the constitution was to "proceed in the discharge of its adjudicative function in a reasoned way from principled decision and established concepts." Cited with approval in support of this view was an extract from an address delivered by the former Chief Justice of the Australian High Court, Sir Owen Dixon:

> "But in our Australian High Court we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend

> the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is improved in content. The latter means an abrupt and almost arbitrary change."

7. Accordingly, it is submitted that an inquiry into the meaning of words used in the Charter does not begin with an assumption that the document is replete with neologisms intended to revolutionize the legal system, but rather with a determination of whether the framers, being cognizant of the prior state of the law, sought by their choice of particular words to confirm or to change the law. As this Court has made clear, even when considering the nature of constitutional rights that appeared for the first time in April, 1982, one must start by reading the language employed by the legislator in the historical context from which it emerged:

"This set of constitutional provisions was not enacted by the legislator in a vacuum. When it was adopted, the legislator knew, and clearly had in mind the regimes governing the Anglophone and Francophone linguistic minorities in various provinces in Canada so far as the language of instruction was concerned. It also had in mind the history of these regimes, both earlier ones such as Regulation 17, which for a time limited instruction in French in the separate schools of Ontario - *Ontario Separate Schools Trustees v. Mackell*, [1917] A.C. 62 - as well as more recent ones such as Bill 101 and the legislation which preceded it in Quebec. Rightly or wrongly, - and it is not for the courts to decide, - the framers of the Constitution manifestly regarded as inadequate some - and perhaps all - of the regimes in force at the time the Charter was enacted, and their intention was to remedy the perceived defects of these regimes by uniform corrective measures, namely those contained in s.23 of the Charter, which were at the same time given the status of a constitutional guarantee. The framers of the Constitution unquestionably intended by s.23 to establish a general regime for the language of instruction, not a special regime for Quebec: but in view of the period when the Charter was enacted, and especially in light of the wording of s.23 of the Charter as compared with ss. 72 and 73 of Bill 101, it is apparent that the combined effect of the latter two sections seemed to the drafters like an archetype of the regimes needing reform, or which at least had to be affected, and the remedy prescribed for all of Canada by s.23 of the Charter was in large part a response to these sections."

Attorney General of Quebec v. Quebec Association of Protestant School Boards et al., (unreported, S.C.C., July 26, 1984), at p. 15

C. Section 7 of the Charter

8. The phrase "the principles of fundamental justice" was certainly not unknown to the common law. As Professor Patrice Garant explains:

> "These principles, arising from the common law, consist of a body of rules which are qualified as being 'rules of natural justice' in their modern formulation. They were first developed in England in the seventeenth century, and took on considerable significance around the middle of the nineteenth century.
>
> The terms 'fundamental justice', 'natural justice' or even 'British justice' have always been considered as synonymous. They signify an attachment to fundamental values of the juridical system known as the 'common law'".

Patrice Garant, *Fundamental Freedoms and Natural Justice*, in Tarnopolsky & Beaudoin (eds.), *The Canadian Charter of Rights and Freedoms: Commentary*, Toronto: Carswell (1982), at p. 278.

See also: S. A. de Smith, *Judicial Review of Administrative Action*, (4th ed., J.M. Evans ed.), London: Stevens (1980), at pp. 156-157.

9. As well, the phrase received statutory expression in s.2(e) of the *Canadian Bill of Rights*, and that provision was construed by this Court in *Duke v. The Queen*, [1972] S.C.R. 917, per Fauteux, C.J. at p. 923, as follows:

> "Under s.2(e) of the Bill of Rights no law in Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice.' 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 to him the opportunity adequately to state his case."

10. The great majority of courts that have to date considered s.7 of the Charter have come to the conclusion that the framers, by making specific reference to "the principles of fundamental justice", plainly intended to entrench the same concept which had been previously articulated and which had been the subject of an authoritative interpretation by this Court. Far from concluding, as the Court of Appeal for British Columbia did in this case, that the use of familiar and well understood language nevertheless signalled an intention to bring about some profound, yet ill-defined, change in the law, the majority of courts have instead accepted that s.7 was not enacted in a vacuum and that its precise wording was apparently chosen with due regard for its antecedents. Thus, for example, in *Re Potma and The Queen*, (1983) 41 O.R. (2d) 43 (C.A.); leave to appeal refused, (S.C.C., May 17/83), an argument to the effect that the decision in *Duke v. The Queen* was no longer good law in light of the enactment of ss. 7 and 11(d) of the Charter was rejected, Robins, J.A. stating, at p.52:

"The concepts of 'fundamental justice' and 'fair hearing' relevant here are the same whether considered under ss. 7 and 11(d) of the Charter, under s.2(e) and (f) of the *Bill of Rights*, or under the common law. Insofar as this case is concerned, while the Charter accords recognition to the well-established rights asserted by the appellant, it effects no change in the law respecting those rights. Sections 7 and 11(d) cannot be construed to operate so as to reverse the decision reached in the like circumstances of *Duke* that non-production of evidence of this kind does not infringe the right to a fair trial in accordance with fundamental justice.

This is not to suggest that 'the principles of fundamental justice' now recognized by the Charter of Rights and Freedoms are immutable. 'Fundamental justice', like 'natural justice' or 'fair play', is a compendious expression intended to guarantee the basic right of citizens in a free and democratic society to a fair procedure. The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust."

See also: *R. v. Hayden*, (1983) 8 C.C.C. (3d) 33 (Man. C.A.), per Hall, J.A. at pp. 35-36; leave to appeal refused (S.C.C., December 19, 1983);

Re U.S.A. and Smith, (1984) 44 O.R. (2d) 705 (C.A.), per Houlden, J.A. at pp. 718-719; leave to appeal refused (S.C.C., May 17, 1984);

R. v. Langevin, (1984) 45 O.R. (2d) 705 (C.A.), per Lacourciere, J.A. at p.723.

11. In reaching a conclusion contrary to that of the court below in this case, most courts have recognized that the entrenchment of a pre-existing right should not be regarded as a process of transubstantiation merely because provision is made for enforcement of the right. To make a right effective is not to alter its essential nature. Instead, the creation of an enforcement mechanism ensures that a pre-existing right will have a uniform impact within its known realm of application. Thus, the supremacy accorded by s.52(1) of the *Constitution Act, 1982* to "the principles of fundamental justice" now eliminates, or at the very least (having regard to s.1 of the Charter) limits, the previously unfettered ability of Parliament or a legislature to suspend the operation of procedural safeguards implied by the courts in particular circumstances. It does not in any sense amount to a redefinition of the subject matter encompassed by the phrase.

Re Potma and The Queen, supra, at pp. 51-52;

R. v. Langevin, supra.

12. A consideration of the legal context from which the Charter emerged also reveals that s.7 bears a close similarity to s.1(a) of the *Canadian Bill of Rights,* with the obvious omission of the concluding words of s.1(a) - "except by due process of law" - and the substitution therefor of words evidently taken from s.2(e) of the *Bill of Rights:* "except in accordance with the principles of fundamental justice." In *Attorney General of Quebec v. Quebec Association of Protestant School Boards et al., supra,* this Court

noted that the provisions of the Charter governing minority language education were largely, but not entirely, modelled on a previously existing statutory regime, and as a consequence it was determined that controlling significance should be attached to the apparent preference of the framers for a different approach from that employed in the prior statute. So too in the present case, it is submitted, should enquiry be directed, and appropriate weight assigned, to the reasons underlying the framers' obvious preferment of "fundamental justice" over "due process" in s.7.

13. While the expression "the principles of fundamental justice" has been understood, both at common law and under statute, as relating to the requirements of procedural fairness, the thrust of the phrase "except by due process of law" in s.1(a) of the *Canadian Bill of Rights* has never been conclusively settled. Although in *Curr v. The Queen*, [1972] S.C.R. 889, this Court declined to monitor the substantive content of legislation by reference to s.1(a), the possibility that such an exercise might be undertaken in certain circumstances was not, in the final analysis, rejected. As Laskin, J. noted, at p. 899:

> "Assuming that 'except by due process of law' provides a means of controlling substantive federal legislation - a point that did not directly arise in *R. v. Drybones* - compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as

> contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the *British North America Act, 1867*. Those reasons must relate to object and manageable standards by which a Court should be guided if scope is to be found in s.1(a) due process to silence otherwise competent federal legislation. Neither reasons nor underlying standards were offered here. For myself, I am not prepared in this case to surmise what they might be."

14. The merely statutory nature of s.1(a) was again underlined by Laskin, C.J.C. (Judson and Spence, JJ. concurring) in his dissenting judgment in *Morgentaler v. R.*, [1976] 1 S.C.R. 616, and, at p. 633, His Lordship indicated clearly that in his view "due process" might well embrace something more than procedural concerns (but the majority did not address the issue). In *Miller and Cockriell v.R.*, [1977] 2 S.C.R. 680, however, Ritchie, J. (Martland, Judson, Pigeon and de Grandpré, JJ., concurring) in the course of considering whether the death penalty constituted "cruel and unusual punishment" within the meaning of s.2(b) of the *Bill of Rights*, suggested that the right to life recognized in s.1(a) thereof could not be regarded as absolute since it was

> "...clearly qualified by the words 'except by due process of law,' which appear to me to contemplate a process whereby an individual *may* be deprived of life. At the time when the *Bill of Rights* was enacted there did not exist and had never existed in Canada the right not to be deprived of life in the case of an individual who had been convicted of 'murder punishable by death' by the duly recorded verdict of a properly instructed jury and, in my view, the 'existing right' guaranteed by s.1(a) can only relate to individuals who have not undergone the process of such a trial and conviction."

It seems reasonably clear that Ritchie, J. was not purporting to lay down an exhaustive definition of "due process", but in any event there can be no doubt that this assessment depends entirely upon the nature of the "existing right", that is, on the attributes of the non-constitutional, "frozen" right which pre-dated and was incorporated into the *Canadian Bill of Rights*.

15. Consequently, the state of the law at the time when the Charter was drafted was such that there were no well-settled boundaries to the "due process of law" prescribed by the *Bill of Rights* , and the possibility that it might be taken as a standard for the substantive assessment of the content of legislation could not have been discounted. Since the framers of the Charter were faced with the implicit suggestion in *Curr v. The Queen* that a constitutional guarantee of

"due process" might well provide a basis for substantive assessment, and were presumably cognizant of the fact that a procedural interpretation of the concept had, in *Miller and Cockriell*, been grounded on the non-constitutional, "frozen" status of the right as it stood in the *Canadian Bill of Rights*, it is a matter of considerable significance that they declined to entrench "due process of law" in the Charter. It is submitted that a proper understanding of their motive for preferring "the principles of fundamental justice" is evinced by Strayer, J. in *Latham v. Solicitor General*, (1984) 39 C.R. (3d) 78 (F.C.T.D.), at p. 93:

> "It is clear from the legislative history of s.7 that it was intended to guarantee only procedural justice or fairness. The potentially broader language of the comparable provision in the Canadian Bill of Rights, R.S.C. 1970, App. III, s.1(a), which referred to "due process of law", was obviously deliberately avoided. The language employed in s.2(c) of the Bill, which referred to "fundamental justice" was used instead. Those words had been interpreted by the Supreme Court *(Duke v. R.*, [citations omitted]) to have a procedural content and it can be assumed that the words were subsequently employed in the Charter in this sense. Indeed, to give them a substantive content would be to assume that those legislative bodies and governments which adopted the Charter were prepared to commit to initial determination by the courts issues such as the propriety of abortion or capital punishment or the proper length of prison sentences. This flies in the face of history."

16. It should be mentioned that a panel of the Ontario Court of Appeal has recently suggested *(R. v. Young*, unreported, June 27, 1984) that the omission in s.7 of the Charter of the words "fair hearing", which had preceded the phrase "in accordance with the principles of fundamental justice" in s.2(e) of the *Canadian Bill of Rights*, is a factor supporting the conclusion that the Charter guarantee is not confined to the procedural aspects of a fair trial (although the court did not go so far as to hold that s.7 authorized judicial review of the substantive content of legislation). It is submitted, however, that the omission of two words, particularly where the omission appears to have resulted from an effort to combine two statutory provisions (ss. 1(a) and 2(e) of the *Canadian Bill of Rights)* into a single constitutional guarantee, should not be taken as signalling an unequivocal intention to effect an abrupt and fundamental alteration in the law. Indeed, to place undue emphasis on the fact that certain words do not appear in the Charter is to fail to understand that

> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients

> which compose those objects be deduced from the nature of the objects themselves."
>
> Per Marshall, C.J., in *M'Culloch v. State of Maryland*, (1819) 17 U.S. (4 Wheaton's) 316, quoted in *Skapinker v. Law Society of Upper Canada*, (1984) 53 N.R. 169 (S.C.C.), per Estey, J. at p. 182.

17. Instead, it is submitted that a more likely rationale for the omission of "fair hearing" emerges when it is considered that the framers obviously intended that s.7 should apply in all situations in which "life, liberty or security of the person" might be affected - hence the avoidance of a reference to "the rules of natural justice" which, in its traditional meaning, would have invoked a limitation based on the character of the particular decision-making authority (judicial or quasi-judicial, as contrasted with administrative). Since the guarantee of procedural fairness was to have universal application, it appears that the legislator at the same time sought to avoid the introduction of rigidity in the constitutional prescription, for as noted in de Smith, *Judicial Review of Administrative Action*, *supra*, at p. 201,

> "...when the words 'hearing' or 'opportunity to be heard' are used in legislation, they nearly always denote a hearing at which oral submissions and evidence may be tendered."

Thus, by the simple expedient of avoiding an express reference to a "hearing", the legislator has provided a flexible criterion, under the rubric of "fundamental justice", by which the courts will be able to ensure

that the degree of procedural fairness appropriate to particular circumstances is accorded.

18. In sum, therefore, it is submitted that the Court of Appeal erred in its interpretation of s.7 of the Charter by concluding that its provisions amounted to a standard by which the substantive content of legislation could be monitored by the courts. Had it been the intention of the legislator to empower the judiciary to decide whether legislation was required in the public interest (as the Court of Appeal seems to suggest is now the case, at Case on Appeal, p. 36, lines 4-24), it is likely that a transference of such an essentially legislative function would have been accomplished by express words to that effect. The use of terminology which has traditionally been associated with procedural guarantees is against the implication of any intention to effect a profound change in the law.

D. Section 11(d) of the Charter

19. Since the words of s.11(d) of the Charter closely follow those used in s.2(f) of the *Canadian Bill of Rights*, it is again submitted that the intention of the legislator to entrench a known concept (albeit with added impact, owing to its supremacy) is evident.

20. The presumption of innocence as guaranteed under the *Canadian Bill of Rights* was examined by this Court on two occasions, *R. v. Appleby*, [1972] S.C.R. 303, and *R. v. Shelley*, (1981) 123 D.L.R. (3d) 748. In *Appleby*, Ritchie, J. (at p. 315) assumed that s.2(f) constituted "statutory approval" of the principles of

the common law, as outlined by Lord Sankey in *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, at pp. 481-482:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt [beyond a reasonable doubt]...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

21. No different view of s.2(f) was taken in *Shelley*, in which it was ultimately determined that a legislative reversal of the onus of proof which amounted to an "irrebuttable presumption of guilt" (per Laskin, C.J.C., at p. 753) would deprive an accused of the right to be presumed innocent.

22. Thus, in the meaning which had been established at common law and under the *Canadian Bill of Rights*, the "right to be presumed innocent" was understood to speak to the burden and standard of proof in criminal and penal cases. It had never been known to affect in any way the manner in which Parliament or a legislature might define an offence. Had there been an intention to expand the reach of the right which was elevated to constitutional status in s.11(d) of the Charter, one would logically expect to find the right formulated in terms different from those previously employed.

23. In the present case, therefore, although the legislature has limited the possible range of inquiry at trial by expressly providing that "guilty knowledge" on the part of an accused is not an essential element of the offence, there is nevertheless no inconsistency with the provisions of s.11(d) of the Charter. The legislature has not sought by any means to lower the standard of proof which must be met by the Crown or to shift to the accused the onus of establishing any facts. While it may well be that the restriction on the number of issues that might otherwise be raised at trial is evidence that the policy of the law in this regard is rather severe, such a concern is not within the ambit of the right to be presumed innocent.

PART IV
ORDER SOUGHT

24. The Attorney General of Canada respectfully submits that the constitutional question should be answered in the affirmative.

ALL OF WHICH is respectfully submitted.

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Of Counsel for the Attorney
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PART V

LIST OF AUTHORITES