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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

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1. In the case at bar the decision of the British Columbia Court of Appeal was handed down on February 3, 1983. The Case on Appeal was filed on or about June 17, 1983. The Appellant's Factum was filed on or about July 11, 1983. The Respondent's Factum was filed on or about September 6, 1983. The appeal was inscribed for hearing at the session of the Court scheduled to commence September 20, 1983. The anticipated hearing date is now October 29, 1984.

2. It is submitted that this Court's rules do not contemplate a situation in which the Appellant's Factum will be 15 months stale by the date the appeal is heard. In some cases such a delay can make little difference. In the case at bar, however, the "lost" 15 months represents one-half of the time that the Courts of this country have had to wrestle with the issues that arise under the Charter.

3. It is submitted therefore that it is appropriate for the appellant to assist this Court by filing this memorandum. This is <u>not</u> in the form of a reply to the arguments made by the respondent. The Court's rules do not provide for a factum in reply.

This document is intended simply to update the material placed before this Court in the Appellant's Factum and bring that factum into line with what is stated in the relevant case law that has developed since July of 1983.

4. It is submitted that the Court should note that the following cases, referred to in their unreported form in the Appellant's Factum, have now been reported and are readily available to the Court.

Case	Factum Reference	Reported At
R. v. Stevens (O.C.A. Feb. 14, 1983)	p. 23	3 C.C.C. (3d) 198
R. v. Carter (O.C.A. Nov. 16, 1982)	p. 28	2 C.C.C. (3d) 412
The Queen v. Currie (N.S.C.A. Feb. 15, 1983)	p. 18	4 C.C.C. (3d) 217
R. v. Holmes (O.C.A. Mar. 3, 1983)	p. 31	32 C.R. (3d) 322

5. It is submitted that the following cases are of sufficient interest that they should be brought to this Court's attention.

6. In Re United States of America and Smith (Jan. 27 1984) 44 O.R. (2d) 705 (leave to appeal to the Supreme Court of Canada refused May 17, 1984), the Ontario Court of Appeal, at 719, followed its earlier decision in Re Potma and The Queen (factum p. 23) and rejected an argument to the effect that the ability of an extradition judge to act on the basis of affidavits which are not subject to cross examination is contrary to Section 7 of the Charter.

7. In R. v. Langevin (April 13, 1984) 45 O.R. (2d) 705 at 721-727, the Ontario Court of Appeal followed its earlier decision in Re Potma and The Queen (factum p. 23) in rejecting a submission to the effect that preventive detention under Section 688 of the Code is in conflict with Section 7 of the Charter.

8. It is to be noted, however, that in The Queen v. Young (June 27, 1984) the Ontario Court of Appeal at 39-40 stated that the decision of the Ontario Court of Appeal in Re Potma and The Queen (factum p. 23) should not be read

> as confining the principles of fundamental justice set forth in Section 7 of the Charter

to the procedural aspects of a fair trial as was the case in the Bill of Rights.

9. In R. v. Hayden 8 C.C.C. (3d) 33 (October 5, 1983) at 35, Mr. Justice Hall, delivering the judgment of the Court, stated that the phrase "principles of fundamental justice" in Section 7 does not go beyond a requirement of fair procedure and was not intended to cover substantive requirements as to the policy of the law in question. He then went on to state (36) that he did not regard his opinion as being in conflict with the decision of the Court of Appeal of British Columbia in the case at bar.

10. In Poirier v. Simmonds (July 6, 1983) Mr. Justice Mahoney of the Federal Court of Canada (Trial Division) cited the decision of the Ontario Court of Appeal in Potma v. The Queen (factum p. 23) with approval and ruled that "'fundamental justice' is to be equated to 'natural justice'".

11. In Latham v. The Solicitor General of Canada 39 C.R. (3d) 78 (Federal Court)(Trial Division) March 28, 1984) Mr. Justice Strayer, at 93, stated that it is clear from the legislative history of Section 7 that it was

intended to guarantee only procedural justice or fairness. He stated that the words "fundamental justice" have the meaning ascribed to them in Duke v. The Queen 1972 S.C.R. 917.

12. In R. v. Bezanson 8 C.C.C. (3d) 493 (December 6, 1983 Nova Scotia Supreme Court, Appeal Division), Mr. Justice Jones stated (on behalf of the Court) that the Court did not have to deal with whether or not Section 7 applies to the substantive content of legislation (509). However, having said that, he then went on to state at 510 that legislation eliminating any necessity for mens rea in the definition of a criminal offence may violate Section 7.

13. In Re Mason 35 C.R. (3d) 393 (O.S.C., Sept. 15, 1983) Mr. Justice Ewaschuk stated, at 397:

> Section 7 of the Charter provides minimal procedural safeguards, in relation to federal and provincial legislation and conduct. It is undoubted that the phrase "fundamental justice" was borrowed from the Canadian Bill of Rights, R.S.C. 1970, App. III, and that s. 7 is an amalgam of ss. 1(a) and 2(f) of that statute. It is also undoubted that s. 7 was intended to guarantee procedural due process (i.e., natural justice) and not substantive due process: see, generally, the testimony of Dr. B. Strayer (now Strayer J. of the Federal Court) before the Joint Committee on the Repatriation of the Constitution, Minutes of Proceedings and Evidence of the Special

Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 27th January 1981, No. 46:32, 32nd Parl., 1st Sess., 1980-81.

14. In The Law Society of Upper Canada v. Skapinker (May 3, 1984) this Court made a series of statements at pages 9 - 11, 14, which deal with the broad issue as to the way in which the Charter should be approached by the Courts. It is submitted, without in any way attempting to ignore or avoid any of the above-noted statements made by this Court, that the points which bear directly on the issues in the case at bar are:

(a) The Courts must allow the legislative branch to do its job (Reasons p. 14). It is submitted that unless it is clear that impugned legislation is in conflict with a specific provision of the Constitution, the opinion of the elected representatives of the people as to the fairness of legislation must hold sway over the opinion of an appointed court. The wisdom of legislation is a proper consideration for legislators who are answerable to the people at the polls.

(b) Narrow and technical interpretations must not be allowed to stunt the growth of the law. (p. 11). On the other hand, the Charter cannot be readily amended and what is needed is flexibility balanced with certainty. (p. 11). It is submitted that in the absence of a clear mandate to extend Section 7 to the content of offence creating legislation, this Court can only view the Court of Appeal's decision as an invitation to chaos.

15. In R. L. Crain Inc. v. Couture (Dec. 1, 1983) 10 C.C.C. (3d) 119 @ 142, Mr. Justice Scheibel of the Saskatchewan Court of Queens Bench deals with the relationship between Section 7 and Sections 8 - 14 of the Charter - a subject matter dealt with at pages 12 - 14 of the Appellant's Factum. However, Mr. Justice Scheibel appears to approach the issue in a way that is not helpful to the resolution of the issues at the case at bar. He appears to rule that the rights set out in Sections 8 - 14 are not aspects of the "principles of fundamental justice" but of the secured interests referred to in Section 7 i.e. life,

liberty, and security of the person. His analysis was adopted by Associate Chief Justice Parker in The Queen v. Morgentaler (O.S.C., July 20, 1984) at p. 75.

16. In Dolphin Delivery Ltd. v. Pe_ rson (March 5th, 1984) 1984 3 W.W.R. 481 (leave to appeal granted May 22nd, 1984) at 491 - 493, 500, a majority of the Court of Appeal emphasizes that the "rule of liberal construction" does not mean that a court can ignore the words used in a section of the Charter. In addition, at 493, the majority points out that "international obligations" are of interest only if on one of the reasonable interpretations of the legislation in question the impugned legislation appears to be in breach of a treaty. In the case at bar, the only international obligations of interest are those contained in Articles 9 (1) and 9 (2) of the International Covenant On Civil And Political Rights and they state only that Canada will enact "measures" providing that no one shall be deprived of his liberty except on grounds and procedures established by law. Similar thoughts on the need to look at the Charter calmly and realistically and resist the temptation to "judicially legislate" appear in the decision of Mr. Justice Ewaschuk in Regina v. Boron

8 C.C.C. (3d) 25 (November 10, 1983), (Ont. H.C.) and of Mr. Justice Scollin in Regina v. Yellowquill (Manitoba Queen's Bench March 5th, 1984). At page 6, Mr. Justice Scollin stated:

> The Charter is not the panacea for all the ills of law, nor is it a tool for tinkering with questionable law, for filling gaps or for attempting detailed law reform of a regulatory sort. Many offensive, stringent and unpleasant laws will pass the basic tests of constitutionality. There are now and there will continue to be situations untouched by the Charter which must be dealt with by the traditional process whereby elected and accountable representatives publicly debate the principles of the law and the exceptions and then enact legislation.

17. In Hunter and Southam Inc. (September 17, 1984), this Court stated that the Charter must be interpreted so as to be capable of growth and development (p. 13); that the courts must interpret the Charter from a broad perspective (14); that a "purposive" analysis should be applied to the Charter and the purpose of the Charter is to, within reason, protect the rights and freedoms enshrined in the Charter. (15).

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

J. M. Stewart, Counsel for the Appellant

Sept 25 1984

Date

LIST OF AUTHORITIES

R. v. Stevens (O.C.A. Feb. 14, 1983) 3 C.C.C. (3d) 198 (p. 2).

R. v. Carter (O.C.A. Nov. 16, 1982) 2 C.C.C. (3d) 412 (p. 2).

The Queen v. Currie (N.S.C.A. Feb. 15, 1983) 4 C.C.C. (3d) 217 (p. 2).

R. v. Holmes (O.C.A. Mar. 3, 1983) 32 C.R. (3d) 322 (p. 2).

Re United States of America and Smith (Jan. 27, 1984) 44 O.R. (2d) 705 (p. 3).

R. v. Langevin (April 13, 1984) 45 O.R. (2d) 705 (p. 3).

The Queen v. Young (June 27, 1984) O.C.A. (p. 3).

R. v. Hayden 8 C.C.C. (3d) 33 (October 5, 1983) (p. 4).

Poirier v. Simmonds (July 6, 1983) Federal Ct. of Canada (Trial Division) (p. 4).

Latham v. The Solicitor General of Canada 39 C.R. (3d) 78 (Federal Court) (Trial Division) March 28, 1984 (p. 4).

Duke v. The Queen 1972 S.C.R. 917 (p. 5).

R. v. Bezanson 8 C.C.C. (3d) 493 (Dec. 6, 1983) Nova Scotia Supreme Court, Appeal Division) (p. 5).

Re Mason 35 C.R. (3d) 393 (O.S.C., Sept. 15, 1983) (p. 5).

The Law Society of Upper Canada v. Skapinker (May 3, 1984) (p. 6).

R. L. Crain Inc. v. Couture (Dec. 1, 1983) 10 C.C.C. (3d) 119 (p. 7).

The Queen v. Morgentaler (O.S.C., July 20, 1984) (p. 8).

Dolphin Delivery Ltd. v. Peterson (March 5th, 1984) 1984 3 W.W.R. 481 (p. 8).

Regina v. Boron 8 C.C.C. (3d) 25 (Nov. 10, 1983) (Ont. H.C.) (p. 8, 9).

Regina v. Yellowquill (Manitoba Queen's Bench March 5, 1984) (p. 9).

Hunter and Southam Inc. (September 17, 1984) (p. 9).