

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 ONTARIO

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1. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART I
STATEMENT OF FACTS

PART I

STATEMENT OF FACTS

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1. The Intervener (Attorney General for Ontario) adopts the Statement of Facts set out in paragraphs 1 - 16 of the Appellant's Factum as corrected in paragraph 1 of the factum of those contending for a negative answer.

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2. By Notice of Intervention dated June 15th, 1983, the Attorney General for the Province of Ontario gave notice of his intention to intervene in the constitutional issue as stated by Chief Justice Laskin on May 12th, 1983.

Reference:

Notice of Intervention dated June 15th, 1983
(Copy attached as Appendix A to this factum)

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2. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART II
INTERVENER'S POSITION WITH RESPECT TO POINTS IN ISSUE

PART II

INTERVENER'S POSITION
WITH RESPECT TO POINTS
IN ISSUE

A. INTRODUCTION

3. Chief Justice Laskin stated the following constitutional question:

"Is Section 94(2) of the Motor Vehicle Act,
R.S.B.C. 1979, as amended by the Motor
Vehicle Amendment Act, 1982 consistent
with the Canadian Charter of Rights and
Freedoms?"

4. The legislation referred to in the question has two significant features. First, it imposes absolute liability, that is it expressly excludes from the definition of the offence, the offender's mental state at the time he committed the prohibited act. Secondly, it imposes a minimum jail term of seven days on those who commit the offence. It will be argued that these two features give rise to separate considerations insofar as the constitutional validity of the legislation is concerned. The question stated by the late Chief Justice may in the context of this case, be seen as involving two distinct questions. They are:

Question 1:

Does the creation of an absolute
liability offence by a legislature
as part of a regulatory scheme which
is within the competence of the

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INTERVENER'S POSITION WITH RESPECT TO POINTS IN ISSUE

legislature, infringe s.7 or
s.11(d) of the Canadian Charter
of Rights and Freedoms?

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Question 2:

Does the imposition of a penalty
which provides for a minimum jail
term of 7 days upon conviction
for the absolute liability offence
referred to in question #1 infringe
s.7 or s.12 of the Canadian Charter
of Rights and Freedoms?

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Reference:

Appeal Case: Schedule A to Order-in-Council
1550/82, pp. 2-5

B. POSITION WITH RESPECT TO QUESTIONS
AS FRAMED BY THE INTERVENER

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Question 1:

Does the creation of an absolute
liability offence by a legislature
as part of a regulatory scheme which
is within the competence of the
legislature, infringe s.7 or s.11(d)
of the Canadian Charter of Rights
and Freedoms?

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(i) Section 7

5. With respect to the scope of s.7 of the Charter,
the Attorney General for Ontario supports the conclusion argued for
by the Appellant. It will be argued that the right not to be

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10 deprived of one's liberty except in accordance with the
principles of fundamental justice does not limit the
legislature's power to define offences. Section 7 does,
however, where conviction for that offence involves a potential
loss of liberty, impose constitutional limits on the procedures
which may be employed in determining liability for the offence
as defined by the legislature. Those procedures must accord
with the principles of fundamental justice. Section 94 of the
Motor Vehicle Act does not speak to the procedures to be employed
20 in determining liability, but rather to the definition of the
conduct which attracts liability. Section 94 cannot infringe on
the constitutional guarantee to procedural fairness described in
s.7 of the Charter.

6. In the alternative, it will be argued if the manner
in which the legislature defines prohibited conduct can be
reviewed by the Court by virtue of s.7, that the creation of the
30 absolute liability offence described in s.94 of the Motor
Vehicle Act does not offend the principles of fundamental justice.

(ii) Section 11(d)

7. With respect to the right to be presumed innocent
until proven guilty according to law, contained in s.11(d) of
the Charter, it will be argued that the presumption of innocence
40 is not affected by the manner in which the crime is defined.
The relevant part of s.11(d) presumes that a crime has been
defined, and a person charged with that crime. The section
imposes certain constitutional limits on the burden and standard
of proof to be used in determining whether a person can be
convicted of that offence. Section 94 of the Motor Vehicle Act

5. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART II
INTERVENER'S POSITION WITH RESPECT TO POINTS IN ISSUE

is not concerned with onus or burden of proof and cannot therefore run afoul of the part of s.11(d) of the Charter relied on by the Respondent.

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Question 2:

Does the imposition of the penalty which provides for a minimum jail term of 7 days upon conviction for the absolute liability offence referred to in question #1 infringe s.7 or s.12 of the Canadian Charter of Rights and Freedoms?

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(i) Section 7

8. It will be argued that s.7 of the Charter is germane to a punishment provision only to the extent that the provision speaks to the procedural processes involved in the post conviction determination and imposition of the punishment. Those matters are not at issue in this case.

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(ii) Section 12

9. It will be argued that the real issue in this case is, can the legislature impose a minimum jail term on all persons convicted of an absolute liability offence? That question is essentially one of the suitability or acceptability of the punishment prescribed by the legislature. Section 12 speaks specifically to the imposition of punishments and provides a standard whereby their acceptability can be measured. When combined with s.52 of the Charter, s.12 provides for a constitutional review of punishment provisions. The constitutionality of the penalty provision found in s.94 of the Motor Vehicle Act should stand or fall based on an assessment of its compatibility with s.12 of the Charter.

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6. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART II
INTERVENER'S POSITION WITH RESPECT TO POINTS IN ISSUE

10. As s.12 was not considered in the judgment of the Court below, and is not referred to by the principal parties to this appeal, the Intervenant does not propose to make any submissions as to whether the minimum jail term created by s.94 of the Motor Vehicle Act constitutes cruel and unusual punishment.

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PART III

MEMORANDUM OF ARGUMENT

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A. THE SCOPE AND EFFECT OF S.7 OF THE CHARTER

(i) Narrowing the Issue

11. Section 7 of the Charter does two things. It begins
by setting out the right (or perhaps the three rights) to
20 "life, liberty and security of the person." A conviction
under s.94 of the Motor Vehicle Act results in imprisonment,
a deprivation of liberty in the strictest sense of that word.
There is, therefore, no need to consider the meaning of the
word "life" or the phrase "security of the person" as they
appear in s.7. Nor is there any need to consider whether the
phrase "life, liberty and security of the person" refers to a
single right or three distinct rights. Lastly, there is no
30 need to consider the scope of the word "liberty" as it
clearly encompasses freedom from imprisonment.

Reference:

Operation Dismantle Inc. et al v. Government
of Canada et al (1983) 49 N.R. 363, per
Pratte J. at 368; currently reserved in this Court.

12. Section 7 provides a further right. It provides
40 that everyone has the right not to be deprived of their
liberty except in accordance with the principles of
fundamental justice. It is the meaning of this second right
created by s.7 which is put in issue by this Appeal. For
ease of reference, this second right will be referred to
below as the "fundamental justice" requirement.

8. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
MEMORANDUM OF ARGUMENT

(ii) The Judgment of the British Columbia
Court of Appeal

10 13. The British Columbia Court of Appeal held that it
was necessary to give meaning to the phrase "the principles
of fundamental justice" in order to determine the scope of
the second right created by s.7. The British Columbia Court
of Appeal further held that s.52 of the Charter empowered
the Court to consider the content of legislation, and to
measure that content against the constitutional requirements
20 of the Charter including the "fundamental justice" require-
ment in s.7 of the Charter. It is submitted that the Court
was correct in both respects.

Reference:

Case on Appeal: Judgment of the British
Columbia Court of Appeal p.28

30 NOTE: The Judgment of the British Columbia Court
of Appeal is now reported at (1983) 4 C.C.C.
(3d) 243; 147 D.L.R. (3d) 539; 33 C.R. (3d)
22; 19 M.V.R. 63; [1983] 3 W.W.R. 756.

14. The Court of Appeal went on to hold that its mandate
to review the content of legislation was irreconcilable with
the Attorney General for British Columbia's position that the
"fundamental justice" requirement referred to matters of
procedure. The Court held:

40 ... "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

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but to go further and consider the
content of the legislation ..."

Reference:

Case on Appeal: Judgment of British Columbia Court
of Appeal p.28 at p.30

15. Having decided it must review "the content" of the
legislation, the Court of Appeal then gave certain rules of
statutory interpretation, set out by this Court in R. v. City
of Sault Ste. Marie, [1978] 2 S.C.R. 1299, the status of
constitutional criteria to be used in determining whether
legislation met the "fundamental justice" requirement of s.7.
The Court also indicated that its duty to judicially review
legislation pursuant to s.7 went beyond a measuring of the
legislation against the criteria found in Sault Ste. Marie.
In rejecting an argument that all absolute liability offences
offended s.7 of the Charter, the Court said:

"We ... do not think it necessarily
follows that because of s.7 of the
Charter this category of offence can
no longer be legislated. To the
contrary, there are, and will remain,
certain public welfare offences, e.g.
air and water pollution offences,
where the public interest requires
that the offences be absolute
liability offences." [emphasis added]

The Court of Appeal implies that only those
absolute liability offences which are in the public interest
are constitutional, and that it is for the courts to make

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that assessment as part of their consideration of "the content" of the legislation.

Reference:

10 Case on Appeal: Judgment of British Columbia Court of Appeal p.28 at p.36

16. The Court of Appeal advanced no other reason for rejecting the argument of the Appellant other than to assert that its obligation to review the content of legislation precluded an interpretation of the "fundamental justice" requirement that limited it to procedural matters. It is submitted that the conclusion that s.7 required review of the content of legislation is in no way determinative of the scope of that review. Even if the "fundamental justice" requirement is concerned only with procedural matters, the Court must review the content of the challenged legislation to determine whether the procedural requirements of s.7 have complied with the legislation. The conclusion that the Charter mandates judicial review of the content of legislation is neutral insofar as the question of the scope of the review by a particular provision of the Charter is concerned.

Reference:

L. Trembley, Section 7 of The Charter: Substantive Due Process (1984) 18 U.B.C.L.R. 201 at 203-213.

17. It is submitted that having properly determined that the Charter demanded review of the content of legislation, the Court of Appeal should then have turned to a consideration of the scope of that review required by the "fundamental justice" requirement. This consideration requires a determination of the meaning of the words "except in accordance with the principles of fundamental justice" as they appear in s.7 of the Charter. Instead, the Court of Appeal assumed that the power of review necessitated a review of the propriety of

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the legislature's decision to define the offence of driving while suspended in a manner which excluded a due diligence defense.

(iii) The Meaning of the Phrase "the principles of fundamental justice"

18. As set out above, it is acknowledged that a challenge to the validity of legislation based on an alleged infringement of s.7 requires judicial review of the impugned legislation. Section 7, like most of the other sections in the Charter, limits the bounds of legislative action. It is the function of the Court to determine whether the challenged legislation has honoured those boundaries. This process necessitates judicial review of the content of the legislation.

Reference:

Law Society of Upper Canada v. Skapinker (1984),
11 C.C.C.(3d) 481, per Estey J. for the Court
490 at pp. 487-490

19. The scope of the review will, however, vary depending on which provision in the Charter is being invoked. Insofar as this case is concerned with s.7, the scope of that review depends upon a determination of the purpose underlying the "fundamental justice" requirement. That purpose is disclosed by an examination of the words used to enshrine the requirement in the Charter. Where the words do not provide a clear indication of that purpose, they must be interpreted by the Court.

Reference:

Law Society of Upper Canada v. Skapinker, supra, per
Estey J. at pp.490-491, 497-499

Lawson A.W. Hunter et al v. Southam Inc., a
judgment of this Court released September
17th, 1984, per Dickson J. for the Court
at pp.12-16

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20. The Intervener acknowledges that when one reads the phrase "the principles of fundamental justice," a single incontrovertible meaning is not apparent; nor does reference to the heading "Legal Rights," which precedes Section 7, provide a clear meaning for the phrase. The Court must therefore go beyond the face of the document to give the phrase concrete meaning. Where this task involves interpretation of a constitutional document, the Court should be guided by

... "the language which has been used, and to the traditions and usages which have given meaning to that language."

Reference:

Minister of Home Affairs v. Fisher, [1980]
A.C. 319, per Lord Wilberforce at p.329
(P.C.)

21. In addition, the words of Mr. Justice Pratte in Operation Dismantle et al v. Government of Canada et al supra are apposite. He said:

"In interpreting that provision, it should not be forgotten that, if the enactment of the Charter brought an important change in our Constitution, it nevertheless did not modify our whole system of government. We continue to be governed by a Constitution "similar in principle to that of the United Kingdom" under which the laws are made by the elected representatives of the people to whom the Cabinet and ministers are

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answerable for their decisions.

10 The words used in the Charter and,
particularly, in s.7, should not,
therefore, be given so wide an
interpretation that the courts would,
as a result, be invited to substitute
their opinions to those of Parliament
and the Executive on purely political
questions. The Charter was enacted
for the purpose of protecting certain
20 fundamental rights and freedoms. It
was not meant to confer legislative
and executive powers on the judges."

Reference:

Operation Dismantle et al v. Government
of Canada et al, supra, per Pratte J.
at pp.367-368

22. It is submitted that an examination of the
30 traditions of judicial review associated with the phrase
"principles of fundamental justice" and analogous terms
suggests a review limited to the adequacy of the procedures
used to reach decisions which affect the rights or
privileges of individuals. Insofar as the phrase "the
principles of fundamental justice" has been used in cases
dealing with the judicial review of the exercise of authority
based on legislative enactments, the phrase has been linked
40 with phrases like "natural justice" and "fair play." These
phrases have become part of the lexicon of the "fairness
doctrine." That doctrine has been invoked in cases where the
Courts have reviewed the procedures used in the decision-
making process. It has never encompassed a consideration of
the policy expressed in the substantive law with respect to
which the procedures were invoked.

Reference:

14. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
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S.A. De Smith: Judicial Review of Administrative Action (4th Ed. 1980) at pp. 156-158

10 P. Garant: "Fundamental Freedoms and Natural Justice," The Canadian Charter of Rights and Freedoms: Commentary, ed. W. Tarnopolsky and G. Beaudoin (Carswell, 1982) 257 at p.278

W. Tarnopolsky: The Canadian Bill of Rights (rev. 2nd ed: McLelland and Stewart, 1975) at p.264

20 23. The fairness doctrine has developed rapidly in Canada in recent years. The doctrine as presently formulated has two central features. First, the types of decisions which are susceptible to judicial review have been expanded to include virtually all those which are authorized by legislation and effect rights or privileges. Secondly, the Court has adopted a flexible approach to considering what procedures are required to ensure the requisite degree of
30 fairness in a given case. The fairness doctrine, as developed and expanded in Canada remains, however, a means whereby the courts examine the procedures used to effect rights and privileges, not the policy behind the substantive legislation which creates or negates the rights or privileges at issue.

Reference:

40 Re Nicholson and Haldimand Norfolk Regional Board of Commissioners, [1979] 1 S.C.R. 311; 87 D.L.R.(3d) 671, per Laskin C.J.C. at 681
M.N.R. v. Coopers and Lybrand, [1979] 1 S.C.R. 495
Martineau and Matsqui Institution Disciplinary Board (No. 2), [1980] 1 S.C.R. 602; 50 C.C.C.(2d) 353, per Dickson J. 368-379 at p.378
A.G. Canada v. Inuit Tapirsat of Canada Ltd., [1980] 2 S.C.R. 735; (1980), 115 D.L.R.(3d) 1, per Estey J. at pp.9-14
McCarthy v. A.G. Canada, [1981] 1 F.C. 309 (Fed. C.A.)

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24. A closer examination of s.7 supports the conclusion that the "fundamental justice" requirement is a constitutionalization of the fairness doctrine complete with that doctrine's two key features, judicial review of procedures used in the making of a wide range of decisions, and flexibility in approach to the determination of the adequacy of the procedures employed. The wide scope of decisions susceptible to judicial review is maintained by the wording of s.7. The procedure used in any process, which results in a deprivation of liberty by the state, is reviewable regardless of how those processes are categorized (judicial, administrative, or quasi judicial). Also, the absence of any reference to "a hearing" in s.7 allows the Court to review the fairness of procedures which result in a deprivation of liberty even where there is no hearing required as part of the procedure.

Reference:

Re Howard and Presiding Officer of Inmate
Disciplinary Court (1983), 8 C.C.C.(3d) 557
at 567-569, Nitikman J. (Fed. Ct. T. Div.)

"Fundamental Freedoms and Natural Justice"
supra para. 22, at pp.285-290

25. Flexibility in s.7, like that found in the fairness doctrine, is achieved by the use of a phrase "the principles of fundamental justice" which has not been layered with so many coats of judicial paint so as to have achieved a specific and perhaps unchangeable meaning. Further, the absence of any phrase like "according to law" or "established by law" to describe the means by which rights may be deprived, avoids an interpretation which would "freeze" the meaning of the "fundamental justice" requirement by tying it to the state of the law as of proclamation

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10 of the Charter. By avoiding such phraseology, the
"fundamental justice" requirement, like the concept of
fairness under the fairness doctrine, is left to be defined
and developed by the process of judicial review.

Reference:

M. Friedland: "Criminal Justice and The
Charter," A Century of Criminal
Justice M. Friedland (Carswell,
1984) at pp.210-211

20 26. The Ontario Court of Appeal in Re Potma and the
Queen (1983), 2 C.C.C.(3d) 383 took a view of s.7 which is
consistent with that advanced above. Mr. Justice Robins
for the Court held at pp.391-392

30 "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
40 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."

Reference:

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Re Potma and The Queen (1983), 2 C.C.C.(3d) 383; 18 M.V.R. 133; 41 O.R.(2d) 43 (Ont. C.A.); leave to appeal to the S.C.C. refused 41 O.R. (2d) 43

Reference may also be made to:

R. v. Young, an unreported judgment of the Ontario Court of Appeal released June 27th, 1984, at pp.37-60

R. v. Stevens (1983) 3 C.C.C.(3d) 198; 145 D.L.R.(3d) 563 (Ont. C.A.); on appeal to this Court.

R. v. Langevin (1984), 11 C.C.C.(3d) 336 (Ont. C.A.); 45 O.R.(2d) 705 at p.723

27. It is further submitted that this Court may have regard to comments made during the parliamentary proceedings in which the meaning and effect of s.7 of the Charter was considered. These proceedings may shed light on the scope of judicial review contemplated by those who framed, and eventually approved of the language used in s.7 of the Charter.

Reference:

Law Society of Upper Canada v. Skapinker (1984), 11 C.C.C.(3d) 481, per Estey J. at 500-501 (and cases referred to therein) (S.C.C.)

A.G. Canada v. Canadian National Transportation Ltd. (1983), 7 C.C.C.(3d) 449, per Laskin C.J.C. (for the majority) at p.464; 38 C.R.(3d) 97 (S.C.C.)

Reference Re An Application For An Authorization (1983), 10 C.C.C.(3d) 1 (Alta. C.A.), per McGillivray C.J.C. (in dissent) at pp.10-11; per Stevenson J. (for the majority) at p.33

Re Federal Republic of Germany and Rauca (1983), 41 O.R.(2d) 225 at pp.244-245; 4 C.C.C.(3d) 385 (Ont. C.A.)

28. A consideration of the comments made by the drafters in the Special Joint Committee of the Senate and the House of Commons has led lower courts to conclude that the words were intended to implant rules of procedural fairness in our

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constitution through the phrase "the principles of fundamental justice." For example, the following exchange between Mr. Roger Tasse, one of the drafters of the Charter, and Senator Austin occurred on November 12th, 1980:

"Senator Austin: I would like to turn your attention to section 7 and the phrase "Principles of fundamental justice." Some time ago I had the privilege of taking courses in jurisprudence from Lorne Fuller and Julius Stone and Henry Hart and John Hart, and I do not think there was any concept more difficult to define or understand than the principles of fundamental justice.

How do you see a court beginning to examine the pleading of fundamental justice? Do you go back to St. Thomas Aquinas, that might be a good place to go, or Plato or Aristotle? Are the factums now going to be full of political philosophy?

Mr. Chretien: I would like to ask the drafter to make a comment.

Mr. Tasse: We assume that the Court would look at that much like a Court would look at the requirements of natural justice, and the concept of natural justice is quite familiar to courts and they have given a good deal

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10 of specific meaning to the concept
of natural justice. We would think
that the Court would find in that
phraseology principles of fundamental
justice a meaning somewhat like
natural justice or inherent fairness.

20 Courts have been developing the concept
of administrative fairness in recent
years and they have been able to give a
good deal of consideration, certainly
to these sorts of concepts and we would
expect they could do the same with this."

Reference:

30 Minutes of Special Joint Committee of the
Senate and House of Commons on the
Constitution of Canada, Nov. 18th, 1980
7:20; December 8th, 1980 21:20-21; Jan. 27th,
1981 46:32-39 (attached as Appendix B to this factum)

Reference may also be made to:

Re Jamieson and The Queen (1982), 70 C.C.C.(2d)
430 at 438 (Que. S.C., Durand J.)

R. v. Holman (1982), 28 C.R.(3d) 378 at 386-390;
16 M.V.R. 225 (B.C. Prov. Ct.); prohibition
refused (1982), 17 M.V.R. 306 (B.C.S.C.)

40 Public Service Alliance of Canada v. Her Majesty
The Queen In Right of Canada, unreported
judgment of Reed J. (Fed. Ct. T. iv.) released
March 21, 1984, at pp.37-41

Latham v. Solicitor General of Canada et al,
(1984), 12 C.C.C.(3d) 9 at 15-21 (Fed. Ct. T. Div.)

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29. It must be stressed that the Intervener in urging an equation of the "fundamental justice" requirement with the fairness doctrine is not suggesting that the two are identical. The fairness doctrine involves essentially an exercise in statutory interpretation to determine the intent of the legislature insofar as it relates to the procedural requirements which must be observed in reaching the particular decision. Since the fundamental justice requirement is part of our constitution and therefore, vested with the overriding authority of s.52, the Court's role when s.7 is involved becomes one of supervision, not merely interpretation. The Courts must reach their own conclusion as to the procedures which are necessary to ensure fairness. Absent those procedures, the legislation may be inoperative. This difference in the judicial function, however, does not detract from the submission that the "principles of fundamental justice" are concerned with procedural fairness and not the propriety of the substantive law to which the procedure relates.

Reference:

A.G. Canada v. Inuit Tapirsat of Canada Ltd.
supra

Latham v. Solicitor General of Canada et al,
supra at p.19

30. It is submitted that the Canadian Bill of Rights is also part of the tradition which has produced our Charter. Judicial interpretation of the provisions in that Act provide a helpful guide in the interpretation of the Charter, especially where similar language is used in the two documents.

Reference:

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10 Re Moore and The Queen (1984), 45 O.R. 3
at p.10 (O.H.C.)

R. v. Whyte (1983), 10 C.C.C.(3d) 277 (B.C.C.A.)
per Taggart J.A. at pp.288-289, per Esson J.A.
at 295; leave to appeal to S.C.C. granted.
10 C.C.C.(3d) 277

R. v. Therens (1983), 5 C.C.C.(3d) 409, per
Brownridge J.A. in dissent at p.417, per Tallis
J.A. at 423; 33 C.R.(3d) 204 (Sask. C.A.);
currently reserved in this Court.

20 31. The phrase "principles of fundamental justice"
appears in both documents. For convenience, the two
sections are set out below:

S.7 of The Charter

30 7. Everyone has the right
to life, liberty and
security of the person and
the right not to be
deprived thereof except in
accordance with the
principles of fundamental
justice.

S.2(e) of the Bill of Rights
No law of Canada shall be
construed or applied so as
to ... deprive a person of
the right to a fair hearing
in accordance with the
principles of fundamental
justice for the determination
of his rights and obligations.

40 32. This Court in Duke v. The Queen, [1972] S.C.R. 917
interpreted the phrase in s.2(e) of the Bill of Rights as
referrable to certain procedural requirements. The Intervener
adopts the arguments advanced by the Appellant (45-54) and
the Province of Saskatchewan (paras. 13-14) to the extent that
those arguments support the position that the use of the same
phrase in s.7 signals a review limited to the propriety of
procedures used to deprive individuals of their liberty.

Reference:

Duke v. The Queen, [1972] S.C.R. 917, per Fauteux
C.J.C. at 923; 7 C.C.C.(2d) 474; 18 C.R.N.S. 302

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33. Numerous lower courts have interpreted s.7 by reference to the meaning given to the same phrase in s.2(e) of the Bill of Rights. For example, Mr. Justice Ewaschuk in Re Mason (1983), 35 C.R.(3d) 393 at 397, a case concerned with the propriety of procedures used to revoke mandatory supervision, said:

"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 the 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." *

Reference:

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Reference may also be made to:

Re Potma and The Queen, supra

10 Minutes of the Proceedings of the Special
Joint Committee of the Senate and the
House of Commons on the Constitution of
Canada, Jan. 27, 1981, 46:32-34 (SEE
APPENDIX B TO FACTUM).

* Note: His Lordship's reference to s.2(f)
of the Bill of Rights would appear to be
in error as it is s.2(e) which employs
the words "the principles of fundamental
justice."

20 34. It is further submitted that assistance in giving
meaning to the words used can also be derived from a
consideration of other phrases which were available to the
drafters and which were not used. The phrase "due process
of law" appears in s.1(a) of the Bill of Rights. The words
in s.1(a) which precede that phrase are very close to the
opening words in s.7 of the Charter. "Due process,"
30 however, does not appear in the Charter. The words "due
process" have received different and conflicting
interpretations in other jurisdictions. Some courts have
interpreted the words as giving the Court the power to
review not only the suitability of procedures used in
giving effect to legislation which deprives one of liberty,
40 but also the policy behind that legislation. For example,
the Privy Council in interpreting the phrase "due process
of law" as it appears in s.1 of the Constitution of
Trinidad and Tobago, in a case involving certain taxing
legislation, held:

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10

"Their Lordships entertain not the slightest of doubt in respect of the scope of the principle of due process of law. It embraces both procedural law and substantive law."

Reference:

Mootoo v. A.G. of Trinidad and Tobago, [1979]
1 W.L.R. 1334, per Sir William Douglas at
p.1341

20

Reference may also be made to:

Abbott v. A.G. of Trinidad and Tobago, [1979]
1 W.L.R. 1342, per Lord Diplock at p.1347

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35. In the United States, the courts have wrestled for almost two hundred years with the phrase "due process of law" as it appears in the Fifth Amendment to their Constitution, and for some one hundred and twenty years with the meaning of the same phrase in the Fourteenth Amendment. At different stages in the constitutional history of that country "due process" has been construed as giving the courts the authority to examine the policies implicit in substantive law and to measure the suitability of those policies against the courts' conception of the policies implied by the phrase "due process."

40

Reference:

P. Bender: "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" 1983 28 McGill Law Journal, 811 at 841-847

J. Nowak et al: Handbook on Constitutional Law
(West Publishing, 1978) at pp.
385-410

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Curr v. The Queen, [1972] S.C.R. 889; 7 C.C.C.
(2d) 181, per Laskin J. for majority at 193

The American Bill of Rights: Amendment V;
Amendment XIV (see Appendix C to this factum)

36. At its high water mark, the "American" concept served to render inoperative state-enacted legislative schemes aimed at regulating matters within the legislative competence of the States. These provisions were struck down because they offended certain basic economic policies which the Court regarded as ingrained in the United States Constitution through the due process clause. Those contending for a negative answer in this case, seek to give the same scope to the "fundamental justice" requirement. If one substitutes criminal law policies for economic policies, one can see that the British Columbia Court of Appeal in this case engaged in a type of review which is identical to that employed under the "due process" clause by the United States Supreme Court in the late nineteenth and early twentieth centuries.

Reference:

Allgeyer v. Louisiana 165 U.S. 578 (1897)

Lochner v. State of New York 198 U.S. 45 (1905);
25 S. Ct. 589

Whitney v. California 274 U.S. 357 (1927), per
Brandois J. (concurring) p.373

37. More recent American jurisprudence drastically limits substantive review of economic policies under the "due process" rubric. An examination of cases dealing with other social policies, however, reveals that American courts continue to employ the "due process" clause to review the suitability of social policies promoted by acts of the

10 legislature, even where those policies do not offend any of
the specific provisions contained in the Bill of Rights.
The decisions of the United States Supreme Court dealing
with contraception and abortion provide a good example of
substantive review through the Fifth and Fourteenth Amendments.

Reference:

West Coast Hotel v. Parrish 300 U.S. 379 (1937)

Griswold et al v. State of Connecticut
381 U.S. 481 (1965), per Douglas J. (majority)
482-485, per Black J. (dissent) 511-526, per
Stewart J. (dissent) 528-531; 85 S. Ct. 1678

Roe v. Wade 410 U.S. 113 (1972), per Blackman
J. (majority) 154-166, Stewart J. (concurring)
168-169, Rehnquist J. (dissent) 173-177; 93
S. Ct. 705

City of Akron v. Akron Centre for Reproductive
Health Inc. et al 103 S. Ct. 2481 (1983), per
O'Connor J. (dissent) at 2504-2508

Moore v. City of East Cleveland 431 U.S. 494
(1977)

N. Karlin: "Substantive Due Process: A Doctrine
of Regulatory Control" (1983)
13 So. W. U.L.R. 479 at 479-488

J. Epstein: "Substantive Due Process By Any Other
Name: The Abortion Cases" 1973 Sup.
Ct. Rev. 159

38. It is submitted that the drafters of the Charter
knew full well that the enactment of a constitutionally
entrenched Charter of Rights would invite consideration by
Canadian courts of American case law, and decisions of the
Privy Council, insofar as those cases dealt with the
interpretation of similar constitutional provisions. Had
the drafters intended to import judicial review of the
substance of legislation through the use of a general phrase
in s.7, or had they intended to leave that option open to

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10 the courts by way of judicial interpretation, they would have used the phrase which has been given that scope in some American and Commonwealth jurisprudence. Comments made during the proceedings before the Joint Committee of the Senate and House of Commons demonstrate that the phrase "due process" was deliberately avoided because of the extended meaning it had been given in other jurisdictions.

Reference:

20 Minutes of the Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Nov. 18th, 1980, 7:20-21; 7:88-90; January 27th, 1981, 46:36-38 [set out in Appendix B to this factum]

Reference may also be made to:

B. Strayer: The Canadian Constitution and the Courts: 2nd ed. (Butterworths, 1983) at p.61

30 39. Further, had the drafters intended to leave it open to the courts to interpret s.7 as countenancing review of the substantive quality of legislation, they would have used the words "due process" since those words, to a degree at least, had been recognized by this Court as containing the potential for substantive review of the content of otherwise duly enacted laws. In Curr v. The Queen, [1972] S.C.R. 889, Laskin J., for the majority, referred to and did not foreclose an interpretation of s.1(a) which would make the due process clause "a brake on federal law-making apart from matters of procedural regularity." Indeed, he indicated that such an interpretation may well be appropriate if the Court were interpreting a constitutional document. Similarly, in Morgentaler v. The Queen, [1976] 1 S.C.R. 616, Chief Justice Laskin, speaking for himself (in dissent on other issues), again alluded to the possibility that the due

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10 process right in s.1(a) of the Bill of Rights might entitle the courts to "pass on the substantive quality of legislation." Instead of the phrase "due process," however, the drafters opted for another phrase from the Bill of Rights, "the principles of fundamental justice." That phrase had been limited to procedural matters by this Court in Duke v. The Queen, supra.

Reference:

20 Curr v. The Queen, [1972] S.C.R. 889; 7 C.C.C. (2d) 181, per Laskin J. (for the majority) at 190-194

Morgentaler v. The Queen, [1976] 1 S.C.R. 616; 20 C.C.C.(2d) 449, per Laskin C.J.C. (dissenting on other grounds) at 461-463

30 40. A further aspect of the Canadian tradition of judicial review also supports the interpretation of the "fundamental justice" requirement urged by the Appellant. This Court has repeatedly refused to enter upon a consideration of the wisdom of legislation as part of its determination of the constitutionality of challenged legislation. By the wisdom of the law one means whether in fact the legislation serves the public interest as perceived by the Court.

Reference:

40 Curr v. The Queen, supra, at p.194

Morgentaler v. The Queen, supra, at p.456

Amax Potash Ltd. v. Government of Saskatchewan, [1977] 2 S.C.R. 576 at 590; 71 O.L.R.(3d) 1

R. v. Holmes (1983), 4 C.C.C.(3d) 440 at 444-445; 32 C.R.(3d) 322 (Ont. C.A.)

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10 41. It is submitted that the judicial restraint described above in paragraph 40 flows from a recognition that the judicial process cannot provide the proper forum in which questions relating to the suitability of policies can be explored and determined. This restraint also stems from the realization that the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land. According to the norm, the legislature, not the courts, is 20 the appropriate forum for the determination of the public interest and what measures, if any, should be taken to create offences to reflect those interests. As Mr. Justice Dickson put it in 1982, discussing pre-Charter times:

"We have thought the supremacy of elected officials over appointed ones is fundamental to democracy."

30 Reference:

An Address by Mr. Justice B. Dickson to the Canadian Association of Provincial Court Judges: reported at (1982), 30 C.R.(3d) 371 at 372

40 42. It is acknowledged that in traditional constitutional cases involving the vires of legislation, the courts have been concerned to a degree with policy questions. In addition, the Charter strikes at the concept of absolute parliamentary supremacy. The overriding effect of the Charter requires judicial review of the content of legislation and that, with respect to some of the provisions of the Charter, this review will require a consideration of the policy objectives expressed in the legislation. In

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10 other cases the review will be more limited. The Court must determine by an examination of the words of the particular right or freedom in question whether they must abandon the tradition of judicial restraint and enter upon a consideration of the validity of the policy reflected in the legislation.

Reference:

Law Society of Upper Canada v. Skapinker
(1984), 11 C.C.C.(3d) 481, per Estey J.
at 488-490

20 An Address by Mr. Justice B. Dickson to the
Canadian Association of Provincial Court
Judges: reported at (1982), 30 C.R.(3d) 371
at 372-377

B. Strayer: The Canadian Constitution and
the Courts: 2nd ed. (Butterworths,
1983) at 52-56

Morgentaler v. The Queen, supra, at p.461

30 43. Certain passages in the majority judgment of Laskin J. (as he then was) in Curr, supra, provide guidance as to when the provisions of the Charter will require a departure from the Court's usual role and an examination of the policy objective contained in the substance of the challenged law. Those passages are set out below:

40 "Assuming that "except 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

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10 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.

20 Those reasons must relate to
objective 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
30 case to surmise what they might be.
[pp.191-192 C.C.C.)

...

0 The immediate issue is, however, the
wider one of the extent to which the
Fifth Amendment due process clause
has been used as a brake on federal
law-making, apart from matters of
procedural regularity or procedural
fairness. Here too there has been a
checkered history, involving such
questions as unreasonable discrimination,
the degree of immunity of private
business from public regulation, and

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10 the limits of permissible inter-
ference with freedom of contract.
It appears that so-called economic
due process has been abandoned
(see West Coast Hotel Co. v. Parrish
(1937), 300 U.S. 379) in the
realization that a Court enters the
bog of legislative policy-making in
assuming to enshrine any particular
theory, as for example, untrammelled
20 liberty to contract, which has not
been plainly expressed in the
Constitution.

30 This commends itself to me with
respect to due process in the Canadian
Bill of Rights. Parliament has spoken
clearly on certain types of
discrimination: it has used familiar,
albeit general, words in its
legislative guarantees of freedom of
religion, speech, assembly, association
and the press; and it has been even
more specific in what it has enumerated
in s.2, although even here there are
difficulties of interpretation. The
10 very large words of s.1(a), tempered
by a phrase ("except by due process of
law") whose original English meaning
has been overlaid by American
constitutional imperatives, signal
extreme caution to me when asked to
apply them in negation of substantive

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10 legislation validly enacted by
a Parliament in which the major
role is played by elected
representatives of the people.
Certainly, in the present case,
a holding that the enactment of
s.223 has infringed the appellant's
right to the security of his person
without due process of law must be
grounded on more than a substitution
20 of a personal judgment for that of
Parliament. There is nothing in the
record, by way of evidence or
admissible extrinsic material, upon
which such a holding could be
supported. I am, moreover, of the
opinion that it is within the scope
of judicial notice to recognize
30 that Parliament has acted in a matter
that is of great social concern, that
is the human and economic cost of
highway accidents arising from drunk
driving, in enacting s.223 and
related provisions of the Criminal
Code. Even where this Court is asked
to pass on the constitutional validity
40 of legislation, it knows that it must
resist making the wisdom of impugned
legislation the test of its
constitutionality. A fortiori is this
so where it is measuring legislation
by a statutory standard, the result of
which may make federal enactments
inoperative.

[pp.193-194 C.C.C.]

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10 44. It is submitted that although Justice Laskin in Curr took care to indicate that he was concerned with a constitutional, as opposed to a statutory, jurisdiction, his caution against judicial entry into "the bog of legislative policy making" applies with equal force to constitutional provisions. In either case, the Court suffers from the difficulties described above in paragraph 41.

Reference:

20 Borowski v. A.G. Canada (1983), 8 C.C.C.(3d) 392 at 406 (Sask. Q.B.)

W. Tarnopolsky: The Canadian Bill of Rights 2nd rev. ed. (McClelland and Stewart Limited, 1975) at 233-234

30 45. The "fundamental justice" requirement, unlike other provisions of the Charter (e.g. s.15, s.23, s.8), does not provide the "objective and manageable" standards for judicial review of a substantive content of legislation described by Justice Laskin as essential prerequisites to that kind of review. This is demonstrated by the judgment in the Court below. The British Columbia Court of Appeal held that absolute liability offences must be enacted in "the public interest" in order to be constitutional. This interpretation of s.7 makes the Court's assessment of the public interest and the appropriateness of the legislation as it relates to that perception of the public interest, the measuring stick for constitutionality. The British Columbia Court of Appeal's resort to "the public interest" test is, in essence, no different than the "substitution of a personal judgment for that of Parliament" warned against by Justice Laskin in Curr.

Reference:

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Case on Appeal: Reasons for Judgment of B.C.C.A.
p.28 at p.36

10 Curr v. The Queen, supra, at p.194

46. The open ended and entirely subjective review of substantive law provisions invited by the decision below can be seen in lower court decisions in British Columbia which have followed the judgment in the case at bar. In R. v. Watch (1983), 22 M.V.R. 179, the accused challenged the constitutionality of s.76 of the Motor Vehicle Act R.S.B.C. 1979 c.288 which imposed liability on the owner of a car for certain acts committed by a non-driver owner. His Honour Judge Maughan, following the Court of Appeal, held that s.7 permitted review of the substantive content of legislation. He then pronounced the following test for that review at p.185:

30 "The question is, then, would right-thinking members of the community at large believe it to be fair that in such circumstances one should be criminally liable for the misdeed of another? Certainly this is a subjective determination dependent upon the mores of the times. What is repugnant to all reasonably prudent and right-thinking members of the community at one time may not be so at another..."

Reference:

40 R. v. Watch (1983), 22 M.V.R. 179 (B.C. Prov. Ct.)

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10 47. Similarly, in R. v. Robson (unreported, released July 13, 1984) Mr. Justice Finch of the British Columbia Supreme Court, faced with the binding authority of the Court of Appeal in the case at bar, held, in effect, that a law was only fundamentally just if it was a reasonable exercise of the law-making power. He made the test set out in s.1 of the Charter, for determining the validity of a legislative infringement of rights and freedoms, the test for determining whether a law infringed the "fundamental justice" requirement. His Lordship's reasons seem a noble attempt to instil a measure of objectivity into the assessment demanded by the Court of Appeal's conclusion that s.7 mandated substantive review. They are, however, clearly at odds with the Charter itself, in that they make s.1, a section which validates certain infringements, the test to be used in determining whether there has been an infringement in the first place.

30 Reference:

R. v. Robson, unreported judgment of Finch J.
(B.C.S.C.) released July 13, 1984

40 48. The inevitable result of the position taken in the Court below, as seen in the cases referred to in paras. 46 and 47, is to make the judiciary a super-legislature sitting in review of the policy objectives selected by the legislature. The Manitoba Court of Appeal, in R. v. Hayden (1983), 36 C.R.(3d) 187, while, it is submitted, misunderstanding the ratio of the Court of Appeal's judgment in this case, properly concluded that s.7 did not dictate such a radical departure from the accepted role of the judiciary. Mr. Justice Hall, for the Court, held at pp.189-190:

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10 "With respect, it is my opinion
that the learned Provincial
Judge was in error in reviewing
the substantive justification for
deprivation of liberty. My reading
leads me to the conclusion that the
phrase "principles of fundamental
justice," in the context of s.7
and the Charter as a whole, does
20 not go beyond the requirement of
fair procedure and was not intended
to cover substantive requirements
as to the policy of the law in question.
To hold otherwise would require all
legislative enactments creating offences
to be submitted to the test of whether
they offend the principles of
fundamental justice. In other words,
30 the policy of the law as determined by
the legislature would be measured
against judicial policy of what offends
fundamental justice. In terms of
procedural fairness, that is an acceptable
area for judicial review but it should
not, in my view, be extended to consider
40 the substance of the offence created."

Reference:

R. v. Hayden (1983), 36 C.R.(3d) 187;
[1983] 6 W.W.R. 658 (Man. C.A.); rev. on
this point (1982), 33 C.R.(3d) 363 (Man.
Prov. Ct.)

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10 49. The merits of judicial restraint in this area are also evident upon an examination of the American experience. The present Chief Justice has said that in interpreting the Charter, courts should examine the American case law and

"learn not only the positive points
but also of the errors which have
been made"

20 Nowhere were the "errors" of the American constitutional jurisprudence written so large as when the Supreme Court invoked the due process clause of the Fourteenth Amendment to control legislative attempts to set economic and social policies. Guided by vague notions of natural law and nineteenth century economic philosophies as opposed to any clear constitutional language, the courts "vetoed" legislative attempts to implement laws aimed at achieving
30 certain policy objectives. The judiciary's unwarranted excursion into economic and social policy making precipitated a major constitutional crisis in the 1930's which abated only when the court all but abandoned its attempts to promote its view of the appropriate economic policies by invoking the due process clause to strike down legislation which was inconsistent with those views.

40 Reference:

B. Dickson: "An Address to the Canadian Association of Provincial Judges," Sept. 15, 1982, reported in (1982), 31 C.R. (3d) 371 at 372

Lochner v. New York 25 S. Ct. 539 (1905), per Peckham J. (majority) 541, 545; per Holmes J. (dissent) 547

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Adair v. U.S. 28 St. Ct. 277 (1908)

Adkins v. Children's Hospital 43 S. Ct. 394
(1923); 261 U.S. 525

Nebbra v. New York 54 S. Ct. 505 (1934)

West Coast Motel Co. v. Parrish 300 U.S. 379
(1932), per C.J. Hughes at 585; 57 S. Ct. 578

Williamson v. Lee Optical 348 U.S. 483; 75
S. Ct. 461 (1955)

J.H. Ely: Democracy and Distrust: A Theory
of Judicial Review (Harvard Press,
1980) at pp.14-21

50. The "abortion" cases in the United States Supreme Court referred to above in paragraph 37, provide a contemporary example of the negative effects of unwarranted judicial intervention into the realm of social policy-making. In those cases, the majorities found, in the shadows of certain specific enumerated rights, a constitutional right to an abortion and held that the state must justify, with compelling reasons, any limitation on the exercise of that right. The Court, without any clear constitutional mandate to do so, decided one of the crucial social issues of the day. The dissenting opinions properly characterize the majority view as the substitution by the judiciary of its opinion as to what the law should be, for that of the legislature, under the guise of constitutional adjudication.

Reference:

Griswold v. Connecticut (supra)

Roe v. Wade (supra)

City of Akron v. Akron Centre for Reproductive
Health Inc. (supra)

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10 51. Laws regulating abortions in the United States are now effectively made by the Supreme Court, through the cumbersome process of constitutional litigation. The Court is left to assess medical developments and social mores and to "amend" its prior decisions to accord with medical developments and social change. The dissent of Justice O'Connor in City of Akron v. Akron Centre For Reproductive Health Inc. 103 S. Ct. 2481 (1983) forcefully describes the difficulties inherent in the approach taken by the majority.

20 Reference:

City of Akron v. Akron Centre for Reproductive Health Inc. et al 103 S. Ct. 2481 (1983), per O'Connor (dissent) at pp.2506-2508

30 52. The United States Supreme Court has not encountered similar problems in invoking the due process clause to effect judicial review of the procedures used to deny an individual his liberty. That Court has developed an approach to judicial review of the procedure akin to that employed in Canada under the fairness doctrine.

Reference:

Goldberg v. Kelly, 90 S.Ct. 1011 (1970)

Perry Sindermann, 92 S.Ct. 2694 (1972)

Mathews v. Eldridge, 96 S.Ct. 893 (1976)

Bishop v. Wood, 96 S.Ct. 2074 (1976)

40 Roth v. Board of Regents, 92 S.Ct. 2701 (1972)

J.H. Ely: Democracy and Distrust, supra, at p.19

53. If the Court of Appeal is correct in the case at bar, then Canadian courts will, like the United States Supreme Court on the question of abortion, become the "super legislature" with respect to the definition of prohibited

10 conduct. In each case where an absolute liability offence
is challenged, the courts will have to decide a myriad of
questions, such as whether absolute liability serves as a
deterrent; the extent to which the imposition of absolute
liability serves to punish the morally innocent; the nature
and extent of the social evil aimed at by the legislation;
the possible effectiveness of less stringent methods in
controlling that evil; and the effect of the imposition of
absolute liability on the public perception of the
administration of justice. Nor will the process be limited
20 to cases where the offence is one of absolute liability.
Every exercise of the state's offence creating power will
necessitate the same kind of judicial scrutiny. The judicial
process is not equipped to make these decisions. Nor is the
process of constitutional adjudication, which of necessity
paints with a broad brush in bold long-lasting colours, the
appropriate method to use in making the subtle and constantly
changing assessments required in answering such policy-
30 oriented questions.

54. Further assistance as to the scope of judicial
review contemplated by the "fundamental justice" requirement
in s.7 can be found by examining that section in the context
of the entire Charter. Two observations can be made.

- 40 (i) where the Charter purports to render
certain policy objectives
unconstitutional, it uses specific
language to describe those policies
which cannot be promoted by the state,
e.g., s.15 (discrimination), s.23
(minority language educational rights).

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10 The phrase "fundamental justice," on
the other hand, is, insofar as is
said to be referrable to substantive
policies relating to the creation of
offences, has no meaning unless one
searches through the common law for
judge-made rules, none of which are
concerned with the validity of
legislation, and selects from those
rules those which one regards as
20 fundamental;

(ii) the drafters of the Charter have
specifically enshrined many of the
principles which have traditionally
been regarded as fundamental to the
state's power to define offences
[s.11(g)(h)(i)]. The drafters, by
30 imposing these specific restrictions
on the offence-creating power, have
designated those principles which they
regard as meriting constitutional
status.

40 55. It is submitted that an interpretation of the
"fundamental justice" requirement which denies review of
the policy objective of the offence-creating legislation,
but mandates extensive review of the procedures used to
determine liability for that offence, best provides

"... a continuing framework for the
legitimate exercise of governmental
power -- and ... for the unremitting

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protection of individual rights
and liberties."

Reference:

Lawson A. Hunter et al v. Southam Inc.
supra at p.13

B. ALTERNATE SUBMISSION: SUBSTANTIVE REVIEW
ACCORDING TO THE PRINCIPLES OF FUNDAMENTAL JUSTICE

56. In the alternative, it is submitted, if the
"fundamental justice" requirement in s.7 encompasses
substantive review like that engaged in by the Court of
Appeal in this case, the creation of an absolute liability
offence does not contravene the principles of fundamental
justice.

57. If the Respondent is correct, and s.7 permits
review of the exercise of the offence-creating power by the
state, it must be a review according to the principles which
are regarded as fundamental. Those are principles which lie
at the heart of our system of justice. Section 7 assumes
the existence of these principles; it does not create them.
Justice Cardozo referred to fundamental rights as those which
were "rooted in the tradition and conscience of our people"
and as being "the essence of ordered liberty."

Reference:

Palko v. State of Connecticut 302 U.S. 319
at 325-327 (1937); 58 S. Ct. 149

44. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
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10 58. To succeed, the Respondent must demonstrate that the Court of Appeal was correct in holding that there are limitations on the state's power to define the mental element of an offence which are fundamental, in the sense that they are part of "the essence of ordered liberty." There is nothing in the "tradition or conscious" of our law to support that proposition.

20 59. R. v. The City of Sault Ste. Marie, [1978] 2 S.C.R. 1299; the judgment of this Court so heavily relied on by the Court of Appeal, does not suggest any limitation in the legislature's power to define the requisite mental element of an offence. Indeed, it affirms the legislature's pre-eminent role as law maker, and recognizes the legislature's authority to define offences which do not have a mental element.

Reference:

30 R. v. The City of Sault Ste. Marie, [1978]
2 S.C.R. 1299; 40 C.C.C. (2d) 353; 3 C.R. (3d) 30

40 60. Sault Ste. Marie enunciates the principles which should govern judicial interpretation where the legislature, as is often the case, has not clearly defined the mental element of an offence. Mr. Justice Dickson, for the Court, made it clear that Sault Ste. Marie was in keeping with and part of the traditional judicial function of statutory interpretation. His Lordship acknowledges that the Court must begin with the words of the statute and interpret them if necessary. However, where "the legislature has made it clear that guilt would follow proof merely of the proscribed act," then the offence would be one of absolute liability. The legislature could make its intention clear either by

45. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
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express language, or by the overall thrust of the legislation.

10 Reference:

R. v. City of Sault Ste. Marie, supra, at pp.373-375

Reference may also be made to:

R. v. Prue and Baril, [1979] 2 S.C.R. 457;
46 C.C.C.(2d) 257, per Laskin C.J.C. (majority) at p.261

20 61. Cases which have followed, and which have applied Sault Ste. Marie, have all acknowledged the legislature's authority to define the mental element of offences and to eliminate that element entirely if so inclined, especially where the offence is enacted by a provincial legislature as part of a regulatory scheme. For example, Justice Dickson, in dissent, in Strasser v. Roberge, [1979] 50 C.C.C.(2d) 129 indicated, at p.135:

30 "The only constitutional limit upon the creation of provincial offences is that the offence must be for the purpose of enforcing a valid provincial law."

40 While spoken in dissent, it is submitted that the principle articulated in these words operates throughout the recent "mens rea" cases in this Court.

Reference:

Strasser v. Roberge, [1979] 2 S.C.R. 953: (1979), 50 C.C.C.(2d) 129, Dickson J. (dissent) pp.134-136, Beetz J. (majority) p.158

R. v. Chapin, [1979] 2 S.C.R. 121; (1979), 45 C.C.C.(2d) 333

R. v. MacDougall (1982), 1 C.C.C.(3d) 65, per Ritchie J. (majority) pp.67-68

46. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
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10 62. Nor can the words of Mr. Justice Dickson be dismissed as irrelevant to post-Charter judicial review of legislation. If s.7 mandates substantive review of the offence creating power, then, as the Respondents argue (paras. 22-28), one must look to the pre-Charter case law for assistance in determining what are the fundamental principles of our system of justice. The Respondent, however, looks past the most fundamental principle set out in Sault Ste. Marie, the state defines crime and the Court, where necessary, interprets that definition in accordance with certain principles.

20

30 63. The germane American case law also does not recognize any constitutional limit on the state's power to define, even to the point of exclusion, the mental element of offences. In U.S. v. Balint et al 58 U.S. 250 (1922) it was argued that a statute which prohibited the sale of certain drugs in certain situations, and which did not require proof that the accused knew that the substance was a drug, offended the due process requirement of the Constitution. Chief Justice Taft, for the Court, held at pp.251-252:

40 "While the general rule at common law was that the scienter was a necessary element in the indictment and proof of every crime, and this was followed in regard to statutory crimes even where the statutory definition did "not in terms include it (Rex v. Sleep, 8 Cox, 472), there

has been a modification of this
view in respect to prosecutions
under statutes the purpose of
which would be obstructed by
such a requirement. It is a
question of legislative intent
to be construed by the court.
It has been objected that
punishment of a person for an
act in violation of law when
ignorant of the facts making
it so, is an absence of due
process of law. But that
objection is considered and
overruled in *Shevlin-Carpenter*
Co. v. Minnesota, 218 U.S. 57,
69, 70, 30 Sup. Ct. 663, 666
(54 L. Ed. 930), in which it was
held that in the prohibition or
punishment of particular acts,
the state may in the maintenance
of a public policy provide "that
he who shall do them shall do
them at his peril and will not
be heard to plead in defense good
faith or ignorance." Many
instances of this are to be found
in regulatory measures in the
exercise of what is called the
police power where the emphasis
of the statute is evidently upon
achievement of some social better-
ment rather than the punishment

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48. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
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of the crimes as in cases of mala
in se."

10 He concluded at p.254:

"Congress weighed the possible
injustice of subjecting an innocent
seller to a penalty against the
evil of exposing innocent
purchasers to danger from the drug
and concluded that the latter was
20 the result preferably to be avoided."

Reference:

United States v. Balint et al 58 U.S. 250 (1922);
42 S.Ct. 301

Reference may also be made to:

Williams v. North Carolina 325 U.S. 226 (1945),
per Frankfurter J. (for the Court) at p.238

30 Morisette v. United States 342 U.S. 246 (1952),
per Jackson J. (for the majority) at p.254

Lambert v. California 355 U.S. 225 (1957), per
Douglas J. (majority) 228-230, Frankfurter J.
(dissent) 232

Powell v. Texas 392 U.S. 514 (1968), per Marshall
J. (majority) p.533

40 People v. Stewart 302 P. 2d. 5 (1956), per Trainor
J. pp.8-9 (Cal. S.C.)

64. The words of Justice Marshall in Powell v. Texas,
supra, clearly reveal the reasons behind that Court's refusal
to constitutionalize a particular theory of mens rea. He
said at pp.535-536:

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10 "... and in any event this Court has
never articulated a general
constitutional doctrine of mens rea.
We cannot cast aside the centuries-
long evolution of the collection of
interlocking and overlapping concepts
which the common law has utilized to
assess the moral accountability of an
individual for his antisocial deeds.
20 The doctrines of actus reus, mens rea,
insanity, mistake, justification, and
duress have historically provided the
tools for a constantly shifting
adjustment of the tension between the
evolving aims of the criminal law and
changing religious, moral, philosophical,
and medical views of the nature of man.
30 This process of adjustment has always
been thought to be the province of the
States."

Reference:

Powell v. Texas 392 U.S. 514 (1968); 88 S. Ct.
2145

40 NOTE: The United States Supreme Court's
refusal to impose certain limitations on the
state's power to exclude mental culpability
in defining crimes has been the subject of
academic criticism. See:

G.V. Dubin: "Mens Rea Reconsidered: A Plea for
a Due Process Concept of Criminal
Responsibility" (1966) Stanford
L.R. 3212

A. Saltzman: "Strict Criminal Liability and the
United States Constitution:
Substantive Criminal Law Due Process"
(1978) 24 Wayne St. L.R. p.1571

50. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART III
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Packer: "Mens Rea and the Supreme Court"
1962 Sup. Ct. Rev. 107

10 C. SECTION 11(d) OF THE CHARTER
The Presumption of Innocence

65. The Attorney General for Ontario adopts and relies on the submissions of the Appellant (paras. 58-64), and those Interveners who have intervened in support of the Appellant.

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D. SECTION 1 OF THE CHARTER

66. The Attorney General for Ontario makes no submissions as to the effect of s.1 of the Charter.

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E. SECTION 12 OF THE CHARTER
Cruel and Unusual Punishment

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67. When one examines the reasons for judgment of the Court of Appeal and the arguments of the Respondent and the supporting Intervener, it is apparent that it is the mandatory minimum jail term (seven days) which lies at the heart of the contention that s.94(2) is unconstitutional. No one argues that absent the penalty provision the section would be unconstitutional. The Intervener, the British Columbia Branch of the Canadian Bar Association, puts it plainly at paragraph 17:

"It is not necessary to decide ...
whether s.7 provides a vehicle for
monitoring the content or substance

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10 of the offence-creating legislation.
The reason s.94(2) infringes s.7 of
the Charter does not have to do with
the content or substance of the
offence of driving while suspended.
It has to do with the manner by which
mandatory imprisonment is imposed,
that is without any enquiry into fault."
[emphasis added]

20 Reference:

Case on Appeal: Respondent's Factum, paras.
22-27

Factum of the British Columbia
Branch of the Canadian Bar
Association, para. 17

30 68. It is the punishment provision which is the real
issue in this case. There is no need to pour content into
the general phrase "principles of fundamental justice" to
give the Courts jurisdiction to review the constitutionality
of the penalty provision. Section 12 speaks directly to
punishment provisions and provides the specific standard by
which the constitutionality of penalties are to be assessed.
Section 7 without any reference to punishment, cannot be
taken as adding to the constitutional requirements of s.12
40 insofar as punishments are concerned. Justice Laskin in
Curr v. The Queen, supra, rejected a similar argument. It
was argued that the general phrase "due process" in s.1(a)
of the Bill of Rights could be used to provide for an
assertion of the privilege against self incrimination at a
point in time not contemplated by s.2(f) which dealt
specifically with self incrimination. His Lordship held that

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the Bill did not take a "piecemeal approach to the privilege" and rejected the argument.

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Reference:

Curr v. The Queen, supra, at pp.202-203 (C.C.C.)

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69. The constitutionality of the penalty provision should be determined by reference to s.12, not s.7. Other cases since the proclamation of the Charter have considered the propriety of minimum sentences by reference to s.12 of the Charter. One of those cases is presently before this Court. The United States Supreme Court has also tested the constitutionality of offences which do not have a mental element but which resulted in imprisonment by measuring them against the 8th Amendment interdiction against cruel and unusual punishment.

Reference:

R. v. Smith (1984), 11 C.C.C.(3d) 411 (B.C.C.A.)
on appeal to this Court.

30

R. v. Konechny (1983), 10 C.C.C.(3d) 233; 6 D.L.R.
(4th) 350 (B.C.C.A.)

Robinson v. California 370 U.S. 660 (1962)

70. The Intervener will not make any submissions as to whether the section in fact offends s.12 of the Charter because

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- (i) it was not dealt with in the Court below;
- (ii) the principal parties to the Appeal have not argued the point;
- (iii) the operative legislation in Ontario

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10 (The Provincial Offences Act R.S.O.
 1980 Chap. 400 s.60(3)) gives the
 Court the jurisdiction to impose a
 fine even where the relevant
 provincial legislation provides for
 a mandatory minimum jail term.

Reference:

20 Provincial Offences Act R.S.O. 1980
 Chap. 400 s.60 (attached as Appendix D
 to this factum)

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PART IV

ORDER REQUESTED

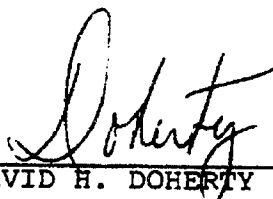
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It is respectfully submitted that the question posed by the late Chief Justice should be answered as follows:

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Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979 as amended is not inconsistent with s.7 or s.11(d) of the Charter.

30



DAVID H. DOHERTY
Of Counsel for the Attorney General
for the Province of Ontario,
the Intervener

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55. FACTUM OF THE ATTORNEY GENERAL FOR ONTARIO - PART V
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PART V

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