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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PART I

STATEMENT OF FACTS

1. The Attorney General for Alberta adopts the Statement of Facts contained in the Appellant's Factum, as modified in the Respondent's Factum.

PART II

POINTS IN ISSUE

1. The Attorney General for Alberta respectfully submits that s. 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 is not in conflict with ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

PART III

ARGUMENT

The Attorney General for Alberta respectfully submits that s. 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 is not in conflict with ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

(a) Section 7

1. As seven day's imprisonment is the minimum sentence prescribed by the statute for conviction under s. 94, there can be no doubt that the statute results in a deprivation of the "liberty" of a person convicted thereunder. The sole question, then, with respect to s. 7 is whether, under the impugned statute, such deprivation occurs "in accordance with the principles of fundamental justice" for, if it does not, the statute is, to the extent of its inconsistency with such principles, "of no force or effect" under s. 52 of the Constitution Act, 1982.

2. The only inconsistency with the principles of fundamental justice alleged with respect to the impugned provision by the Respondent (and, for that matter, by the Intervener, B.C. Branch of the Canadian Bar Association) is that s. 94 creates an "absolute liability offence" in which the mens rea element does not include knowledge of the prohibition or suspension in question, and for which a seven day minimum jail

sentence is imposed upon conviction. The Attorney General for Alberta submits that same is not inconsistent with the principles of fundamental justice (within the meaning of that term as used in the Charter) and, accordingly, the appeal must succeed.

3. In interpreting the Charter, it is submitted that one must have regard to the intention of its draftsmen (and the legislatures which adopted it): Attorney General for Quebec v. Quebec Association of Protestant School Boards et al (unreported, July 26, 1984 S.C.C.). While the Charter should be interpreted liberally, it is submitted that it is not proper to read into its words meanings completely alien to what was intended.

4. With this principle in mind, it is submitted that the drafters of the Charter believed that the phrase 'principles of fundamental justice' had an established meaning at the time of the drafting of the Charter, and that the meaning of this phrase was (as per Duke v. The Queen [1972] S.C.R. 917 at 928) essentially the same as 'natural justice' that is, that the requirement therein contained was procedural in nature. In any event, it is submitted that the drafters of the Charter clearly intended that the American concept of 'substantive due process of law' not be included in the Charter, by the words 'principles of fundamental justice' or otherwise.

Special Joint Committee on the Constitution of Canada, Proceedings, 32nd Paul, Sess. 1 (1980-81), No. 46 at 30-55 particularly at pp. 32-33, 38-39.

5. The judgment in the court below was considered by the Manitoba Court of Appeal in R. v. Hayden [1983] 6 W.W.R. 655 (Man. C.A.), leave to appeal to the Supreme Court of Canada refused December 19, 1983. In that case Hall, J.A. (for the court) said at p. 657:

> 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 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, 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 the substance of the offence created.

6. The Attorney General for Alberta submits that, thus far, the decision of the Manitoba Court of Appeal is essentially correct. The court went on to find the legislation impugned in that case was contrary to the "equality before the law" provision in s. 1(b) of the Canadian Bill of Rights, which does not concern us here.

7. However, the Manitoba Court of Appeal felt it necessary to comment upon the judgment of the British Columbia Court of

Appeal in the case at bar, which it did in the following terms (also at p. 657):

> It is here appropriate to comment on the per curiam judgment of the British Columbia Court of Appeal in Ref. Re S. 94(2) of Motor Vehicle Act, R.S.B.C 1979, c. 288, 42 B.C.L.R. 364, 33 C.R. (3d) 22, [1983] 3 W.W.R. 756, 19 M.V.R. 63, 4 C.C.C. (3d) 243, 147 D.L.R. (3d) 539, now under appeal to the Supreme Court of Canada. What the court decided in that case was that it was contrary to the principles of fundamental justice to enact a limitation on a substantive offence of driving while suspended by taking away the defences of honest or reasonable mistake of fact and lack of guilty intent. The court did not decide that it was unconstitutional to create an offence with penal consequences of driving while suspended. In the present case, the learned Provincial Judge decided that it was contrary to the principles of fundamental justice to create an offence of simply being intoxicated with its actual and potential consequences for deprivation of liberty. So, I do not regard the opinion here expressed as in conflict with the British Columbia Ref. case.

8. The Attorney General for Alberta submits that the obiter in the preceding passage is wholly incorrect. It is submitted that it is improper to characterize s. 94(2) as "procedural" in the sense of taking away defences which would otherwise be available to the accused; rather, the matter of the elements of an offence, and the defences available to an accused charged with a particular offence, are matters of substantive law. It is submitted that the Hayden case, insofar as its ruling on s. 7 of the Charter is concerned, cannot logically be reconciled with the decision of the British Columbia Court of Appeal in this case,

either as attempted by Hall, J.A. in the passage quoted in the preceding paragraph, or at all.

9. In the course of his dissenting judgment in R. v. Hauser [1979] 1 S.C.R. 984 at 1027, Dickson, J. (as he then was) discussed the difference between substantive and procedural law (in the context of s. 91(27) of the Constitution Act, 1867) in the following terms:

> Criminal law is concerned with the statement of the legal principles which constitute the substance of the law. The criminal law gives or defines rights and obligations. Criminal procedure, on the other hand, in its broadest sense, comprehends the mode of proceeding by which those rights and obligations are enforced ...

10. It is submitted that the aspects of s. 94 which are impugned in the case at bar (the lack of mens rea as an element of the offence, and the seven day minimum jail sentence upon conviction) are substantive rather than procedural in nature. There is no doubt that if legislation leading to a deprivation of liberty prescribed procedures which were inconsistent with the principles of natural justice in the eyes of a court, s. 52 of the Constitution Act, 1982 would permit a court to declare same to be of no force or effect (a radical change in the status of the rules of natural justice, which heretofore were always subject to being overridden by legislation). However, for the reasons set forth in paragraphs 1-4 hereof, it is submitted that such power as is bestowed by ss. 7 and 52 of the Charter does not extend to substantive as opposed to procedural content of

impugned laws, and that contrary to the dicta in Hayden quoted in paragraph 8 hereof, the provisions in question on this appeal are not properly characterized as being procedural in nature.

11. The passage in which the court below decided that s. 7 of the Charter does permit review of the substantive (as opposed to procedural) content of legislation is found at p. 30 of the Case on Appeal. The material portion of that passage reads as follows:

> Upon this view of the matter the effect of s. 7 is to enshrine in the Constitution the principles of natural justice. That is certainly one view of the matter. It does not, however, give any effect to s. 52 of the Constitution Act wich can be viewed as effecting a fundamental change in the role of the courts. The Bill of Rights allowed the courts to test the content of federal legislation, but because the Bill was merely a statute, its effectiveness was hampered by the equally persuasive "presumption of validity" of federal legislation. 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...

12. With the greatest respect to the court below, it is submitted that the foregoing is illogical. The fact that s. 52 of the Constitution Act, 1982 provides that laws which are inconsistent with (amongst other parts of the Constitution) the Charter are "of no force or effect to the extent of the inconsistency" is (it is submitted) irrelevant to the question as to whether s. 7 of the Charter empowers a court to review the

substantive (as opposed to procedural) content of legislation. All that s. 52 implies with respect to the interpretation of s. 7 (it is submitted) is that the court can now look "at whether the procedural safeguards required by natural justice are present" in a statute which, under the rules of natural justice before the Charter, a court could not do.

13. It is accordingly submitted that s. 52 is irrelevant to the interpretation of s. 7 and that, accordingly, even if the decision of the court below were correct, the reasoning of same is incorrect. It is, of course, submitted that the question of whether s. 7 empowers a court to examine the substantive (as opposed to procedural) content of legislation must be answered by interpreting the words "principles of fundamental justice" in s. 7 itself. As previously noted, it is submitted that these words are limited, and were intended to be limited, to incorporating into the Constitution the concept of "procedural due process" only.

14. In R. v. Young (unreported June 27, 1984 Ont. C.A.), the Ontario Court of Appeal ruled that s. 7 permits review of the substantive content of a law, as opposed to the procedural content of a law. It is respectfully submitted that this case is wrongly decided as the court failed to give proper or any weight to the intention of the drafters of the Charter. In this respect, see pages 42-43 of that decision.

15. To summarize the preceding, then, it is submitted that:

(a) the argument of the Respondent as to the validity of s. 94(2) goes to matters of substantive (as opposed to procedural) content of the legislation, and

(b) as s. 7 does not permit a court to review the substantive content (as opposed to the procedural content) of legislation, and since no fault with the procedural content of the legislation is either alleged or can be found, the s. 7 challenge to s. 94(2) must be rejected and the appeal allowed on this point.

16. In the alternative, if s. 7 does incorporate the concept of "substantive due process" into the Constitution, then it is submitted that there is not and has never been a blanket requirement that "mens rea" be an element of every offence. The presumptions contained in the judgment of this court in R. v. City of Sault Ste. Marie [1978] 2 S.C.R. 1299 are, it is submitted, merely rebuttable rules of statutory construction rather than a statement of principles of fundamental justice. Not even in R. v. Prue; R. v. Baril [1979] 2 S.C.R. 547 did this court go so far as to say that mens rea was an essential ingredient of even every criminal offence.

17. Given that the foregoing is correct, and assuming this court is prepared to review the substantive content of the law, ought mens rea be an element of this particular offence, that is, the one created by s. 94 of the impugned statute?

18. Section 94(2) provides that s. 94(1) creates "an absoute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension". The offence in s. 94(1) has two branches.

19. The branch in s. 94(1)(a) involves a person who drives while prohibited from driving under ss. 90, 91, 92 or 92.1.

(i) Section 90 empowers a court to impose a suspension, but not 'where neither the defendant nor his agent or counsel appears before the court at the time of conviction' (subsection (3)(a)). It is submitted that this provision guarantees that the defendant will know of such suspension, and justifies his not being able to deny same at a trial of a charge under s. 94(1)(a).

(ii) Section 91 also involves a court-imposed suspension and appears to also require the defendant to appear in court (see subsection (1)).

(iii) Section 92 involves a suspension which follows by operation of law as a consequence of conviction of certain offences. Ignorance of the law is not (R. v. MacDougall (1982) 44 N.R. 560 (S.C.C.)) and ought not to be a defence to a charge under s. 94 and, in any event, the suspension does not apply 'where neither the defendant nor his agent or counsel appear before the court at the time of conviction' (s. 92(3)).

(iv) Section 92.1 requires a court to impose a suspension when sentencing following conviction for certain offences. Again, though, this does not apply 'where neither the defendant nor his agent or counsel appears before the court at the time of conviction' (s. 92.1(5)).

20. It is therefore submitted that, at least insofar as the branch of the offence created by s. 94(1)(a) is concerned, s. 94(2) is not in any way inconsistent with any principle of fundamental justice.

21. The second branch of the offence, created by s. 94(1)(b), concerns suspensions resulting under previously

existing (but no longer existing) statutory provisions. Section 94(1)(b) is, in essence, a transition provision. Even if there are still, in the province of British Columbia, suspensions under the former ss. 82 or 92, these will grow less in numbers over time and eventually become extinct.

22. It is submitted that even if it could be said that s. 94(2) might offend some principle of fundamental justice insofar as it applies to offences under the former ss. 82 or 92 (in that suspensions under those provisions could be extended administratively if notice was sent to the driver, perhaps thereby raising, but for s. 94(2), the issue of the driver's receipt or non-receipt of the notice when being prosecuted under s. 94(1)(b)), s. 94(2) need not be ruled wholly inconsistent with the Charter and thus wholly "of no force or effect".

23. Section 52(1) of the Constitution Act, 1982 provides that laws which are inconsistent with the provisions of the Constitution are "to the extent of the inconsistency" of no force or effect. Since it is submitted there is no constitutional difficulty with s. 94(2) applying to an offence under s. 94(1)(a), it is submitted that s. 94(2) should not be held to be totally of "no force or effect" but only, at worst, of no force or effect in respect of offences under s. 94(1)(b).

24. It is submitted that to apply s. 52(1) in this way, in these circumstances would not amount to the court "legislating". This is because it is submitted that the structure of s. 94 is such that the B.C. legislature would have intended s. 94(2) to

apply to s. 94(1)(a) and would have enacted same, even if this court holds that s. 94(2) cannot apply in respect of s. 94(1)(b).

25. It is submitted that the argument in paragraph 24 hereof reflects the proper test as enunciated in A.G. Alberta v. A.G. Canada [1947] A.C. 503 (P.C.) at 518:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed the legislature would have enacted what survives without enacting the part that is ultra vires at all.

While the test quoted was created with respect to the question of whether or not a court should "sever" parts of legislation found to be ultra vires from the balance of it, it is submitted that s. 52 of the Constitution Act, 1982 enshrines this test in our written constitution and requires the courts to develop an analogous test with respect to legislation which to some degree conflicts with a provision of the Charter of Rights.

26. It is submitted that the foregoing is not inconsistent with the decision of the Ontario Court of Appeal in The Queen v. Southam (1983) 146 D.L.R. (3d) 408. In that case, that court ruled that it would not construe s. 12(1) of the Juvenile Delinquents Act, which provided for mandatory in camera trials for juveniles, as permitting a judge to exercise a discretion on a case-by-case basis since to do so would be to rewrite the legislation. It is submitted that same is in no way analogous to

what it is proposed this court do in this case in paragraphs 23-25 hereof.

27. Accordingly, it is submitted that, at the very least, this court ought not to declare that s. 94(2) is "of no force or effect" to the extent it applies to s. 94(1)(a).

28. Finally with respect to s. 7, it is submitted that there is no principle of fundamental justice which states that a statute may not prescribe a minimum sentence of incarceration upon conviction of an offence.

(b) Section 11(d)

29. It is submitted that s. 11(d) is only contravened where the accused bears the onus of proof (or disproof) with respect to an element of the offence with which he is charged; s. 11(d) does not permit a court to second-guess the legislature as to what the elements of the offence (which must be proven by the Crown) ought to include. On this point, the Attorney General for Alberta adopts the argument of the Appellant at paragraphs 58-64 pages 28-31 of its Factum, that of the Attorney General for Saskatchewan in paragraphs 20-23 pages 10-11 of its Factum, and that of the Attorney General for Canada in paragraphs 19-23 pages 18-20 of its Factum.

30. Hence, it is respectfully submitted that the s. 11(d) challenge to s. 94(2) must be rejected as well, as nothing in the impugned legislation requires the accused to disprove any element of the offence or raises any presumption of any kind against the accused with respect to an element of the offence.

PART IV

NATURE OF THE ORDER SOUGHT

31. That this appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

William Henkel, Q.C.

TABLE OF AUTHORITIES