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In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL
FOR BRITISH COLUMBIA

IN THE MATTER OF THE CONSTITUTIONAL QUESTION ACT, R.S.B.C. 1979, c. 63

AND IN THE MATTER OF THE REFERENCE RE SECTION 94(2) OF THE MOTOR VEHICLE ACT, R.S.B.C. 1979, c. 288, as amended by the MOTOR VEHICLE AMENDMENT ACT, 1982, S.B.C. 1982, c. 36

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PART I

STATEMENT OF FACTS

1. On February 18th, 1982, George Campagna was charged with committing an offence contrary to Section 94.1(2) of the Motor Vehicle Act, R.S.B.C. 1979. Section 94.1 read:

94.1 (1) "For the purpose of this section, 'industrial road' means an industrial road as defined in the Highway (Industrial) Act.

(2) A person who drives a motor vehicle on a highway or industrial road while his driver's licence or right to apply for or obtain a driver's licence is suspended under section 82 or 92, commits an offence and is liable

(a) on a first conviction, to a fine of not less than $300 and not more than $2000 and to imprisonment for not less than 7 days and not more than 6 months, and

(b) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2000, and to imprisonment for not less than 14 days and not more than one year.

(3) Subsection (2) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the suspension."

A trial date was set for September 1982. On June 25th, 1982, Judge Paradis of the Provincial Court of British Columbia handed down reasons for judgment with respect to an issue that had been raised by defence counsel prior to trial. The issue was whether Section 94.1(3) of the Motor Vehicle Act as it then was, was of no force or effect because it was inconsistent with the provisions of the Constitution of Canada. Judge Paradis ruled that Section

94.1(3) was inconsistent with Section 7 of the Canadian Charter of Rights and Freedoms.

2. On August 12th, 1981, pursuant to Section 42 of the Motor Vehicle Amendment Act, 1982, various sections of the Motor Vehicle Act 1982 were proclaimed in force as of September 1, 1982. One of the sections of the Motor Vehicle Act proclaimed in force (in part) was Section 19. That section in turn enacted that Section 94 of the Motor Vehicle Act is (as of September 1st, 1981) as follows:

94. (1)"A person who drives a motor vehicle on a highway or industrial road while

(a) he is prohibited from driving a motor vehicle under section 90, 91, 92, or 92.1, or

(b) his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the Motor Vehicle Amendment Act, 1982,

commits an offence and is liable,

(c) on a first conviction, to a fine of not less than $300 and not more than $2000 and to imprisonment for not less than 7 days and not more than 6 months, and

(d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2000 and to imprisonment for not less than 14 days and not more than one year.

(2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension."

3. On August 16th, 1982, the Lieutenant Governor in Council referred the following question to the Court of Appeal.

> Is Section 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, as amended by the Motor Vehicle Amendment Act, 1982 (the relevant provisions of which are appended hereto as Schedule "A"), consistent with the Canadian Charter of Rights and Freedoms?

4. On November 29, 1982 the B.C. Court of Appeal heard argument with respect to the reference in the case at bar.

5. On February 3, 1983 the Court of Appeal handed down reasons for judgment in which it stated that S. 94(2) of the Motor Vehicle Act is inconsistent with the Canadian Charter of Rights and Freedoms.

6. The Attorney General of British Columbia launched an appeal to this Court. On May 12, 1983 Chief Justice Laskin (pursuant to Rule 32) stated that the constitutional question being raised in this appeal is as follows:

> 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?

PART II
POINTS IN ISSUE IN THE APPEAL

1. The relationship between S. 7 of the Charter and S. 94(2) of the Motor Vehicle Act.
2. The relationship between S. 11(d) of the Charter and S. 94(2) of the Motor Vehicle Act.
3. The applicability of S. 1 of the Charter.

PART III
ARGUMENT

A) The Legal Context in Which the Appeal Arises

7. It is submitted that this Court should be alive to the legal context in which the issues on appeal arise. In this case the legislation in question provides for a combination of a minimum sentence of imprisonment with a provision calling for absolute liability. This raises a false impression of a potential for wholesale injustice. The Appellant's purpose at this time is, therefore, to place the issues in perspective.

8. In R. v. Prue; R. v. Baril, 1979 2 SCR 547, the accused were charged with driving their motor vehicles while their licences were suspended, contrary to S. 238(3) of the Criminal Code. The accuseds' licences to drive had been suspended automatically by operation of provincial law upon their being convicted (some time earlier) of offences contrary to S. 236 of the Criminal Code.

9. The issue placed before this Court in R. v. Prue; R. v. Baril was whether ignorance by the accused of the fact that his licence was suspended was ignorance of law (and hence no defence at all) or ignorance of fact. A majority of this Court ruled that ignorance of a suspension automatically imposed upon the accused by operation of provincial law was ignorance of fact when the issue arose in the context of a prosecution for a Criminal Code offence.

10. By an amendment to the Motor Vehicle Act (1979 S.B.C., C. 22, s. 31), effective September 10, 1979, the

Legislature created an offence (S. 86D7) of driving while one's licence was suspended and stated that the offence was one of absolute liability (S. 86D8). S. 86D7 and 86D8 were renumbered as S. 92(9) and S. 92(10) in the Revised Statutes of British Columbia (1979). Effective August 15, 1981 S. 92(9) and 92(10) were replaced by S. 94.1, which is referred to R. v. Campagna (Case p. 10).

11. Effective September 1, 1982 S. 94.1 was replaced by S. 94 of the Motor Vehicle Act. S. 94 is set out in Part I of this Factum. It is S. 94(2) that is the subject matter of this appeal.

12. On November 23, 1982 the judgment of this Court in R. v. MacDougall, 44 NR 560 was handed down. The impact of the decision of this Court in that case is central to a proper understanding of the legal context in which the suggested conflict between S. 7 of the Charter and S. 94(2) of the Motor Vehicle Act arises.

13. It is submitted that in R. v. MacDougall this Court ruled that where an accused is charged with driving a motor vehicle while his licence was cancelled (contrary to a provincial statute) and the revocation in question arose automatically as a matter of law pursuant to a provincial statute, ignorance by the accused of the fact that his licence was revoked is ignorance of law and cannot provide the basis for an acquittal.

14. It is submitted that in the case at bar the Court of Appeal of British Columbia failed to grasp the impact of

the decision of this Court in R. v. MacDougall. The relevant passages in the Reasons for Judgment in the case at bar are at Case pages 37 (line 1-33), p. 35 (line 9-20).

15. It is submitted that when the ruling in R. v. MacDougall is applied to the legislation in question in the case at bar the result is as follows. One charged with an offence contrary to S. 94(1) of the Motor Vehicle Act would - ignoring the absolute liability provisions of S. 94(2) - have no defence to the charge if the accused was ignorant of the fact that he was prohibited from driving or that his licence was suspended automatically by operation of provincial law upon his being convicted at some previous time of an offence.

16. If the Appellant is correct with respect to the law as stated in R. v. MacDougall, then S. 94(2) (the absolute liability provision) is of limited effect. S. 94(1) (the offence-creating section) deals with those who drive after being prohibited from driving in any of four different ways (S. 90, 91, 92, 92.1) or who drive after their licence was suspended in one of two ways under the "old" Act (S. 82 and 92).

(a) The prohibition under S. 90 is imposed by the Court and can be imposed only if the accused or his counsel or agent is present.

(b) S. 91 has not been proclaimed in force.

(c) S. 92 provides for an automatic prohibition from driving by operation of law upon the accused being convicted of any of a number of offences. R. v. MacDougall says that ignorance of such a prohibition is ignorance of law and

could not lead to an acquittal even without regard to S. 94(2) (the absolute liability provision).

(d) S. 92.1 provides for a mandatory prohibition from driving to be imposed upon an accused who is convicted of an offence contrary to S. 92.1(1) and who is present in court personally or by his counsel or agent.

(e) S. 82 of the "old" Act provided for a Court-ordered suspension or cancellation of a driver's licence upon an accused being convicted of any of a number of offences. The Superintendent of Motor Vehicles could extend the suspension upon giving statutory notice.

(f) S. 92 of the "old" Act provided that where an accused was convicted of any of a number of offences, his driver's licence was automatically - as a matter of provincial law - suspended for a stated period (three months to one year). This Court's decision in R. v. MacDougall means that ignorance of such suspension could not result in an acquittal - even without regard to the absolute liability provisions of S. 94(2) of the Act. The Superintendent of Motor Vehicles could extend the period of the suspension.

17. It is submitted that this analysis makes it clear that when the effect of this Court's decision in R. v. MacDougall is taken into account in analyzing the legislation in question in the case at bar, it is unrealistic to speak of S. 94(2) as raising the spectre of injustice with respect to any accused charged with an offence contrary to S. 94(1) other than some of those individuals whose suspensions were imposed under the "old" Act (S. 82 and 92), i.e. those who were convicted of the underlying offence in their absence or who failed to receive statutory notice of the extension of their Court-ordered suspension (under S. 82(3) and 83 of the "old" Act).

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

1) The Significance of R. v. City of Sault Ste. Marie, 1978 2 SCR 1299

18. It is submitted that without determining the scope of S. 7 of the Charter this Court can conclude that the Court of Appeal erred in concluding that the absolute liability provision in question in the case at bar is inconsistent with S. 7 of the Charter.

19. The sheet anchor of any argument to the effect that S. 94(2) cannot stand with S. 7 of the Charter is an assumption that there was, prior to April 17, 1982, a rule in Canadian law, properly classified as a principle of fundamental justice, to the effect that absent specific legislation to the contrary no serious penal statute would be interpreted as providing for a complete offence upon proof of only the actus reus of the offence. Buried within the aforementioned assumption is a second assumption, i.e., if a provision of a statute is not in accord with the fundamental principles of penal liability, it is not in accord with the "principles of fundamental justice" (case p. 33-36).

20. It is submitted that in R. v. City of Sault Ste. Marie, 1978 2 SCR 1299, Strasser v. Roberge, 1979 2 SCR 953 and R. v. Chapin, 1979 2 SCR 121, this Court made it clear that the job of the courts is to discover what mental element if any forms part of the definition of an offence created by a statute (Sault Ste. Marie at 1302, 1326). To that end the Court created a series of rebuttable presumptions

aimed at providing some consistency with respect to the way in which penal statutes are interpreted. Parliament or a provincial legislature can create any of three different kinds of offence: a mens rea offence, a strict liability offence and an absolute liability offence. R. v. Sault Ste. Marie at 1326, Regina v. Kester, 58 CCC (2d) 219 at 222, 66 CCC (2d) 384, Strasser v. Roberge, 1979 2 SCR 985-986, 978-979. In the case of a public welfare offence created by a province, the rebuttable presumption is that the offence is one of strict liability (Strasser v. Roberge at 987-989, Dickson, J. dissenting on other grounds); R. v. Kester, 58 CCC (2d) 219 at 222, 66 CCC (2d) 384). Parliament or the Legislature can by express words or by implication place an offence in a category which it would not ordinarily occupy (Sault Ste. Marie at 1326, R. v. Chapin at 126-134). If one of the principles of fundamental justice is that a period of imprisonment should not be imposed where fault is absent, one would have expected this Court to have stated that nothing less than an express statement by the legislature would be sufficient to permit a Court to classify an offence involving serious repercussions for the offender as an absolute liability offence. But the Court did not do that. This Court made it clear that the nature of the penalty is but one factor to be taken into account in deciding whether the legislature has - if only by implication - created an absolute liability offence (Sault Ste. Marie at 1326, Chapin at 126-135).

21. It is submitted therefore that in R. v. City of Sault Ste. Marie this Court dealt with a rule of statutory

interpretation and simply created a series of rebuttable presumptions with respect to the way in which statutes ought to be interpreted. It is submitted that the only fundamental principle that was established by this Court was that the job of the courts is to ascertain the intent of the Legislature. To that end certain rebuttable presumptions should be employed by the courts.

2) The Scope of Section 7 of the Charter

22. It is submitted that S. 7 of the Charter, properly understood, does not provide a vehicle for the Courts to monitor the content of offence-creating legislation. It is submitted that the limits of S. 7 can be determined by examining the words used in S. 7, the position S. 7 occupies in the Charter, and the legal and historical context in which S. 7 was enacted. Because it is always tempting to look to the American experience for assistance, that will also be referred to; however, it is the Appellant's submission that ultimately the American experience is not helpful.

(a) The Words Used in Section 7

23. It is submitted that the important point to note is that the use of the words "fundamental" and "principle" drives home the point that S. 7 deals with those concepts which are utterly basic to our system of law (Balderstone v. The Queen, 2 CCC (3d) 37 at 51 (Man. Q.B. 1982)). It is submitted that in the great scheme of things the rule of law is utterly basic and is reflected in S. 7 of the Charter. A presumption (which is at the very least rebuttable) with respect to the way in which a penal statute ought to be

interpreted cannot realistically be described as "utterly basic".

(b) Section 7's Position in the Charter

24. S. 7 appears in that part of the Charter which deals with legal rights. It is submitted that even a superficial reading of S. 7-13 makes it clear that when Parliament intends to entrench a particular policy, it does so in clear and precise terms. For example, S. 8 prohibits substantive legislation permitting unreasonable search or seizure. S. 11(h) entrenches the long-standing policy of prohibiting multiple prosecutions for a single offence. S. 12 entrenches the substantive rule that a punishment cannot be cruel and unusual. The short point is that when Parliament is dealing with substantive issues and is set upon curtailing the right of the Canadian Parliament or a provincial legislature to choose the policy it will foster by way of legislation, Parliament does so in explicit terms. If Parliament had wanted to entrench a particular policy with respect to the relationship between criminal liability and fault, it would have done so in explicit terms. It did not do so. It is clear that Parliament has left policy decisions with respect to the relationship between mens rea, actus reus, penalties and social problems to the legislature.

25. It is submitted that S. 7 is limited to procedural considerations; that although S. 7 may be applicable to the criminal process (in the widest sense of that term) it is not engaged at the trial of a person charged with an offence

because of the existence of S. 11(d) of the Charter; that S. 7 should be applied to the criminal process in order to ensure a fair hearing with respect to, inter alia, an appeal from conviction or sentence (in Lowry and Lepper v. The Queen, 1974 SCR 195 at 200-201, this Court arrived at a somewhat similar reconciliation of the relationship between S. 2(e) and 2(f) of the Bill of Rights). Whether S. 7 (and S. 52) provides a vehicle for the striking down of the content of procedural legislation which is inconsistent with S. 7 (and not saved by S. 1 of the Charter) does not fall to be decided in the case at bar.

26. It is submitted that if the Respondent is correct and S. 7 does encompass substantive rules of law, then to the extent that S. 7 is applicable to offences it has swallowed up S. 11 and 12 of the Charter. The policies reduced to statutory form in S. 11 and 12 are the fundamental policies with respect to offences which developed in Canadian law prior to April 17, 1982. If the Respondent is correct, it means that the British Parliament has done one of three things. It has dealt with a number of specific questions of policy in S. 11 and 12 and then left an "open-ended" S. 7 which deals with additional matters of policy. It has dealt with any given policy in two places, i.e. S. 11 or 12 and S. 7. It has included S. 11 and 12 in the Charter for no reason at all, as S. 7 encompasses all of the principles of fundamental justice in any event. It is submitted that some guidance with respect to all of this can be gleaned from the decision of this Court in Curr v. The Queen, 1972 SCR 889. In that case it was suggested that S. 1(a) of the Bill of

Rights includes within it a statement of policy which is also made in another section of the Bill of Rights. That suggestion was rejected by this Court. This Court left open for decision later a case in which it was suggested that a "matter" might be said to fall under S. 1(a) of the Bill of Rights failing specific mention of the "matter" elsewhere in the Canadian Bill of Rights.

(c) The Legal and Historical Context in which Section 7 was Enacted

1. Introduction

27. Certain principles of justice are so basic and so widely accepted in our society that to state them is to state the obvious. But it must be remembered that just because Canadians are the beneficiaries of a legal and political battle which raged for 500 years (1215-1701), but came to a conclusion 280 years ago, does not mean that the principles laid down as a result of that battle are not the "principles of fundamental justice" referred to in S. 7. The Charter is a constitutional document. It deals with concepts that are fundamental to our society. It would be amazing if S. 7 did not deal with such things as the rule of law and the requirement for procedural fairness.

2. Magna Carta

28. On June 15, 1215, military might and political necessity led to the granting of Magna Carta by King John.

25. Until relatively recently, lawyers and scholars often confused the original Charter granted by John (1215)

with one of the three "re-issues" of Henry III (1216, 1217, 1225). It is now recognized that these "re-issues" were not in the original language of the Great Charter. As a matter of fact, some of the re-issues omitted important "articles" entirely.

30. A scholar would probably say that because of historical accident the re-issue of 1225 was in truth what became law (Sir Ivor Jennings, Magna Carta, p. 11).

31. In any event, modern scholars translate the famous 39th article of Magna Carta (1215) in a number of ways. William McKechnie (Magna Carta, 1905) translates it as:

> No free man shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land.

Sir Ivor Jennings includes the following translation in his monograph:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

32. The 39th article of Magna Carta (1215) became the slightly altered (and famous) 29th article of the 1225 re-issue.

33. Another wrinkle is alluded to by Laskin J. (as he then was) in Curr v. The Queen, 1972 SCR 889 at 898 where he

points out that subsequent to 1225 (and especially in 1355) statutes were enacted which reinforced the rule that the King was subject to the law and that all official conduct must be grounded in law.

34. S. 7 is, to some extent, based on these antecedents. It is also a fact that nothing in the 39th article of Magna Carta or of any of its re-issues or companion statutes was ever taken further by a Court (Curr v. The Queen, supra, at 898), than a statement to the effect that a man can be deprived of, inter alia, his liberty only by a process based on law. The 39th article of Magna Carta (1215) was a stunning beginning to the fight for the rule of law - but it said nothing about the content of the law.

35. The Petition of Right (1628), the Bill of Rights (1689) and the Act of Settlement (1701) carried forward the fight to subjugate the King to the will of Parliament. By 1701, the battle for the supremacy of the law as stated by Parliament over arbitrary conduct by the executive (the King) was won when the Act of Settlement established that the succession to the throne was under Parliament's control and that no judge could be dismissed except by order of Parliament.

36. It is submitted that S. 7 and S. 9 of the Charter are to some extent the result of the 500-year battle outlined above. For our purposes, the important point is that to the extent that S. 7 is the product of the history set out above, it is concerned with establishing that the subject cannot be deprived of his liberty except by law. As

noted above, whether the entrenching of the principles stated in S. 7 in a constitutional document means that S. 7 (and S. 52) should be interpreted as providing a vehicle for the striking down of the content of procedural legislation which is inconsistence with S. 7 (and not saved by S. 1) does not fall to be decided in the case at bar. There certainly is nothing to indicate that S. 7 should be interpreted as providing a vehicle for striking down the content of legislation which is concerned with the defining of an offence.

3. The Canadian Bill of Rights

A. Introduction

37. Structurally and grammatically, S. 7 is a blend of S. 1(a) and 2(e) of the Canadian Bill of Rights. S. 1(a) states:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.

S. 2(e) states:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and

> declared, and in particular, no law of Canada shall be construed or applied so as to
>
> (e) 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;

38. The interpretation given to these sections of the Bill of Rights by the Courts will be set out below. The important point to note is this - if S. 7 is to be interpreted as entrenching any given policy with respect to the defining of an offence, it can be so interpreted only if this Court goes so far as to say that S. 7 represents a radical departure by Parliament from all that has gone before. The submission set out below makes it clear that Canadian Courts have never accepted the proposition that S. 1(a) or 2(e) of the Bill of Rights permits a Court to strike down legislation. If the proper way to approach the Charter is to accept the fact as stated by Mr. Justice Zuber of the Ontario Court of Appeal in R. v. Altseimer, (1982) 29 CR (3d) 276 that:

> ...the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter which is part of the supreme law of this country.

then S. 7 of the Charter does not provide a vehicle for the monitoring by the Courts (i.e., every trial court judge in Canada) of the content of offence-creating legislation. The Manitoba Court of Appeal made the same point in The Queen v. Belton, 31 CR (3d) 223 at 227, leave to appeal to the Supreme Court of Canada refused February 7, 1983. (See also The Queen v. Currie, NSCA February 15, 1983.) It is

submitted that it is clear from the way in which the Charter is structured that when Parliament set about to introduce a new concept into Canadian law, it did so specifically, e.g. S. 13 of the Charter, which provides for "automatic use immunity".

39. In the case at bar, the Court of Appeal's Reasons contain a non sequitur. At Case p. 30, l. 16-32, p. 35, l. 40-45, the Court of Appeal says, in effect, that S. 7 deals with substantive matters because the Charter - unlike the Bill of Rights - is a constitutional document and can render a statute inoperative (S. 52 of the Charter is referred to). The fact of the matter is that because of the decision of this Court in R. v. Drybones, 1970 SCR 282, the Bill of Rights also has the effect of rendering legislation inoperative to the extent that it comes into conflict with the Bill of Rights. Therefore both the Bill of Rights and the Charter can render legislation inoperative. In cases dealing with the Bill of Rights, this Court (Duke v. The Queen, infra) made it clear that the phrase "principles of fundamental justice" refers to procedural matters only. There is therefore no logic to the suggestion that because the Charter can render statutes inoperative, S. 7 must relate to substantive matters.

B. Judicial Treatment of Section 1(a) of the Bill of Rights

40. In Curr v. The Queen, 1972 SCR 889, Laskin J. (as he then was) gave judgment on behalf of himself and four other Justices of this Court. (The case dealt with certain

aspects of the breathalyzer legislation contained in the Criminal Code.) Mr. Justice Laskin stated at 897-903 that the Court was being invited to monitor the substantive content of legislation by reference to S. 1(a); that the invitation was at bottom a suggestion that the phrase "except by due process of law" should be taken beyond its antecedents in English legal history; that the American experience with the fifth and fourteenth "due process" Amendments was not helpful; that the Americans have abandoned attempts to use "due process" clauses to provide "economic" due process; that to use the "large words" of S. 1(a) to monitor the substantative content of legislation would be to enter the "bog of legislative policy making". Admittedly, at 899 Mr. Justice Laskin pointed out that he was dealing with a statutory instrument and not a constitutional document.

41. Mr. Justice Ritchie, with whom Chief Justice Fauteux concurred, stated in Curr v. The Queen (at 915):

> It was also argued that since ss. 223 and 224A(3) had the effect of enabling a peace officer to compel a citizen to submit to a breath test which might yield incriminating evidence against him at his trial, these sections offend against the right of the individual not to be deprived of the security of his person 'without due process of law' which is recognized by s. 1(a) of the Bill of Rights.
>
> In concluding that the impugned sections of the Criminal Code did not offend against the 'due process' provisions of s. 1(a) of the Bill of Rights, my brother Laskin has made an extensive and instructive review of the meaning of 'due process of law', in the course of which he makes reference to the origins of the phrase and its applications

> in decisions of the Supreme Court of the United States of America. While I agree that ss. 223 and 224A do not offend against S. 1(a) of the Bill of Rights, I prefer to base this conclusion on my understanding that the meaning to be given to the language employed in the Bill of Rights is the meaning which it bore in Canada at the time when the Bill was enacted, and it follows that, in my opinion, the phrase 'due process of law' as used in s. 1(a) is to be construed as meaning 'according to the legal processes recognized by Parliament and the courts in Canada.'

42. In R. v. Isaacs' Gallery Ltd., 19 CCC (2d) 570, the Ontario Court of Appeal treated the above-noted remarks by Mr. Justice Ritchie as providing a proper basis for a ruling that nothing in S. 1(a) encourages the use of the Bill of Rights as a vehicle to monitor the content of valid federal legislation. In R. v. Miller, 31 CCC (2d) 177 at 195, Mr. Justice Ritchie made certain brief comments with respect to the scope of S. 1(a). In R. v. Appleby, 35 CCC (2d) 94 at 101-102, Chief Justice Hughes states that in speaking for a majority of the Court in R. v. Miller (as noted above), Mr. Justice Ritchie made it clear that if a person was deprived of one of the things protected by S. 1(a) of the Bill of Rights, but was deprived of that thing because of validly enacted federal legislation, then "due process" had not been violated.

43. The Court of Appeal (Case p. 31) found support for its views in that part of the Reasons for Judgment of Mr. Justice Laskin (as he then was) in Morgentaler v. The Queen, 1976 1 SCR 616, in which S. 1(a) of the Canadian Bill of Rights is referred to. This Court should note, however,

that only Mr. Justice Laskin spoke to the meaning of S. 1(a). Furthermore, Mr. Justice Laskin was giving reasons for dissenting from the decision of the Court.

44. It is submitted that the Supreme Court of Canada has never ruled that S. 1(a) of the Bill of Rights permits a Court to monitor the content of otherwise valid federal legislation.

C. Judicial Treatment of S. 2(e) of the Bill of Rights

45. In Duke v. The Queen, 1972 SCR 917 this Court dealt specifically with the meaning of the words "a fair hearing in accordance with the principles of fundamental justice". Chief Justice Fauteux said:

> Under S. 2(e) of the Bill of Rights no law in Canada shall be construed or applied so as to deprive him of 'a fair hearing in accordance with the principles of fundamental justice'. Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.

46. The words "the principles of fundamental justice" are reproduced in S. 7 of the Charter. Parliament should be taken to have included those words with knowledge that they have been interpreted in a unanimous judgment of the highest Court in Canada (Minister of Home Affairs v. Fisher, 1980 AC 319 at 329E (Privy Council)). It is submitted that insofar as S. 7 is derived from S. 2(e) of the Bill of Rights, it is proper to say that it is concerned with the procedure by

which an accused is deprived of his liberty and that it provides no basis for a Court to monitor the content of offence-creating legislation. The decision of this Court in Duke v. The Queen was drawn to the attention of the Court of Appeal; however, no mention of that case is made in the Court of Appeal's Reasons for Judgment.

47. It should be noted at this point that in Re Baptiste, 65 CCC (2d) 510 at 512, the British Columbia Court of Appeal adopted the Reasons for Judgment of Mr. Justice McKenzie of the British Columbia Supreme Court, who dismissed an application for prohibition with respect to a charge under S. 146(1) of the Criminal Code. In those Reasons for Judgment (64 CCC (2d) 35), Mr. Justice McKenzie rejected (at 38) an argument to the effect that S. 2(e) of the Bill of Rights restricted the ability of Parliament to create an absolute liability offence. In R. v. Stevens (February 4, 1983), the Ontario Court of Appeal dealt with a similar attack on S. 146(1) grounded, however, on S. 7 of the Charter. The Court declined to find that anything in S. 7 rendered S. 146(1) inoperative. The Court appears to have proceeded on the basis that it could deal with the appeal without deciding whether or not S. 7 permits a Court to monitor the substantive content of legislation. Leave to appeal to this Court was granted in June 1983.

48. The relationship between the Charter and the decision of this Court in Duke v. The Queen was explored by the Ontario Court in R. v. Potma, 2 CCC (3d) 383 (leave to appeal to this Court refused May 17, 1983). In that case it

was argued that the wording of S. 7 and 11(d) of the Charter is such that the destruction by the police of breathalyzer test ampoules prevents an accused charged with an offence contrary to S. 236 of the Criminal Code from obtaining a fair trial. The Court held that - apart from the Charter - Duke v. The Queen was determinative of the issue. The Court then considered the effect of, inter alia, S. 7 of the Charter. The Court rejected the suggestion that the Charter, in effect, reversed the decision in Duke v. The Queen. The Court then stated:

> 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 society to a fair procedure. The principles or standards of fairness essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is arbitrary, unfair or unjust.

49. In a series of lower court decisions the phrase "principles of fundamental justice" in S. 7 of the Charter has been given the meaning ascribed to it by this Court in Duke v. The Queen: R. v. MacIntyre, (1982) 69 CCC (2d) 162 (Alta. Q.B.), Jamieson v. The Attorney-General of Quebec, 70 CCC (2d) 430 (Que. S.C.).

50. Those who contend for a negative answer to the question posed in the reference will undoubtedly submit to this Court that S. 2(e) and S.7 are fundamentally different

because S. 2(e) is limited, on the face of it, to a hearing whereas S. 7 is not so limited. The following submission is to the effect that the above-noted difference between S. 7 and S. 2(e) is explained by the legal context in which the two statutes were enacted.

51. The Bill of Rights was enacted in 1960. The Charter was enacted in 1982. At the time the Bill of Rights was enacted, government decision makers were subject only to a rule to the effect that if the decision maker was under a duty to act judicially (which included "quasi-judicially"), then the decision maker had to provide the subject with notice and an opportunity to be heard (Nakkuda Ali v. Jayaratne, 1951 App. Cases 66, Natural Justice in Canada (1981), W. Pue, p. 6 and 11).

52. By 1982 this Court had revolutionized the law applicable to the procedures that must be followed by public officials or public bodies in making decisions that affect the rights of the subject. In cases such as Re Nicholson, 1979 1 SCR 311, and Martineau v. Matsqui Institution, 1980 1 SCR 602, this Court rejected the idea that if a power is to be exercised judicially "notice and hearing" is required, but if it is not to be so exercised, then nothing is required.

53. The Court substituted a different set of rules. Absent a clear legislative intent to the contrary (Homex Realty v. Wyoming, 33 NR 475 at 488), the Court will impose a duty of "fairness" upon any public tribunal empowered to

make decisions that impair the liberty of the subject (Martineau v. Matsqui Institution, supra, at 634-635). Whether the specific decision-making power is classified as a judicial power or an administrative power does not determine whether a duty of fairness is imposed. The procedural content of the duty of fairness is still being clarified by this Court. However, it is clear at this time that the obligation imposed upon the decision maker will vary according to the nature of the decision-making body, the practicalities and the extent to which the decision in question is ultimately based on facts as opposed to opinion: Re Nicholson, supra, at 324-327, Martineau v. Matsqui Institution, supra, at 628-629 (Mr. Justice Dickson concurring but not the majority opinion), The Attorney General of Canada v. Inuit Tapirisat of Canada, 1980 2 SCR 735 at 745-748.

54. The important point is that only S. 7 of the Charter constitutionally entrenches the right of Canadians to fairness in, inter alia, administrative proceedings. By 1982, S. 7 had to be drawn in terms not limited to a hearing for by 1982, as set above, this Court had made it clear that a broad duty of fairness would be imposed upon decision makers and that only in some cases would the general duty of fairness imposed upon the decision maker involve substantial procedural safeguards, including the right to a hearing. It was against this background and in this context that S. 7 was enacted. There is therefore no reason to state that the fact that S. 7 is not limited on the face of it to a hearing means that S. 7 necessarily goes far beyond S. 2(e) of the Canadian Bill of Rights and provides a vehicle for monitoring the content of offence-creating legislation.

(d) The American Experience

55. It is tempting to look at the American experience for assistance in interpreting S. 7 of the Charter. The fifth and fourteenth Amendments to the American Constitution are as follows:

Amendment V — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV — Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws...
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

56. If one looks to the American experience for the answer to the narrow issue as to the extent to which any particular doctrine with respect to the relationship between criminal liability and fault is constitutionally entrenched,

the short answer provided by the United States Supreme Court is that no doctrine is constitutionally entrenched. (Lambert v. California, 2 Lawyer's Edition (2d) 228 at 231, Powell v. Texas, 20 Lawyer's Edition (2d) 1254 at 1269, 1271-1274.)

57. However, the problem with reaching for a specific answer provided by the Americans to what appears to be a similar problem in Canadian jurisprudence is that (as pointed out in R. v. MacIntyre, supra) if Parliament had meant "due process" in S. 7 of the Charter, it would have used those words. Also, it should be noted that in R. v. Saxell, 59 CCC (2d) 176 at 188, the Ontario Court of Appeal made the point that even in interpreting the Canadian Bill of Rights, which did use the words "due process of law", American jurisprudence is of little assistance. In R. v. Carter, November 16, 1982, the Ontario Court of Appeal stated that the courts should be cautious about applying American law to the task of interpreting the Charter.

C) Section 11(d) of the Charter & Section 94(2) of the Motor Vehicle Act

58. The language of S. 11(d) of the Charter echoes the language of S. 2(f) of the Bill of Rights.

59. S. 2(f) of the Bill of Rights was authoritatively interpreted by this Court in R. v. Shelley, 37 NR 320 (1981).

60. It is submitted that this Court recognized that S. 2(f) of the Bill of Rights creates (only) a statutory standard for measuring the validity of federal legislation which places the burden of proof with respect to an essential element of the offence on the accused. If that analysis is applied to S. 94 of the Motor Vehicle Act and Charter S. 11(d), the result is that S. 11(d) has no application at all because S. 94(2) states that knowledge of the suspension, etc. is not an essential element of the offence. Therefore S. 11(d) of the Charter cannot render S. 94(2) inoperative.

61. In R. v. Shelley, supra, this Court clearly recognized that S. 2(f) of the Bill of Rights bears upon the burden of proof with respect to the facts in issue as determined by the legislature's definition of the offence.

62. Any attempt to extend S. 11(d) to the defining of an offence is grounded on a fundamental misunderstanding of just what the presumption of innocence is. The presumption of innocence is described by Rupert Cross in Evidence (5th edition) at p. 122 as follows:

> (i) The presumption of innocence. - When it is said that an accused person is presumed to be innocent, all that is meant is that the prosecution is obliged to prove the case against him beyond reasonable doubt. This is the fundamental rule of our criminal procedure, and it is expressed in terms of a presumption of innocence so frequently as to render criticism somewhat pointless; but this practice can lead to serious confusion of thought, as is shown by the much discussed decision of the American Supreme Court in Coffin v. The United States. The accused had been convicted of misappropriating the funds of a bank

> after the jury had been told that they should acquit him unless satisfied of his guilt beyond a reasonable doubt, and a new trial was ordered because the judge did not enumerate the presumption of innocence among the items of evidence favourable to the accused. In other words, the Supreme Court considered that the presumption was something different from the rule concerning the onus of proof on a criminal charge, for they regarded it as an instrument of proof - an item of evidence which had been withheld from the jury. This decision has been universally condemned, it could hardly have been pronounced if the court had not been misled by the verbal dissimilarity between the rule that the prosecution bears the legal burden of proof, and the presumption of innocence.

This is not to minimize the importance of the presumption of innocence. However, it is important to note that the presumption of innocence is a rule concerned with the proceedings at trial - it has nothing to do with the determination of the essential elements of the offence. As is pointed out by Mr. Justice Ritchie in R. v. Appleby, 1972 SCR 303, those who point to S. 2(f) as giving express statutory approval to the presumption of innocence as described by Lord Sankey in Woolmington v. D.P.P. are correct. However, they must accept the fact that the presumption of innocence - albeit important - has a precise role to play in our jurisprudence.

63. In Re Baptiste, 65 CCC (2d) 510 at 512, the British Columbia Court of Appal adopted the Reasons for Judgment in the Court below (64 CCC (2d) 35). The Court of Appeal has therefore (64 CCC (2d) at 38-40) rejected the argument now being advanced by counsel for those contending for a negative answer. (Of necessity the argument was

advanced in the context of S. 2(f) of the Bill of Rights rather than in the context of S. 11(d) of the Charter.)

64. That S. 11(d) of the Charter is a constitutionally entrenched rule which is engaged only in a case where the burden of proof with respect to an element of the offence has been placed on the accused is borne out by the analysis of S. 11(d) contained in the Reasons for Judgment of the Ontario Court of Appeal in R. v. Oakes, 2 CCC (3d) 339 and R. v. Holmes, March 3, 1983.

D) Section 1 of the Charter

65. If this Court rules that S. 94(2) of the Motor Vehicle Act is inconsistent with S. 7 (or S. 11(d)) of the Charter, then it is submitted that S. 1 of the Charter is applicable. It is submitted that Laskin J. (as he then was) made it clear in Curr v. The Queen, supra, that it is within the scope of judicial notice for this Court to recognize that a statutory provision was enacted as part of a legislative scheme aimed at reducing the human and economic cost of bad driving. S. 94 is but part of the overall scheme laid out in the Motor Vehicle Act by which the Legislature is attempting to get bad drivers off the road. S. 94 imposes severe penalties on those who drive while prohibited from driving and those who drive while their driver's licence is suspended.

66. It is submitted that if S. 94(2) is inconsistent with one of the above-note provisions of the Charter, then S. 94(2) contains a "reasonable limit, etc." within the meaning of S. 1 of the Charter.

PART IV

NATURE OF THE ORDER DESIRED

67. That the appeal from the decision of the Court of Appeal of British Columbia be allowed and that this Court state that it is its opinion that S. 94(2) of the Motor Vehicle Act, R.S.B.C. 1979, as amended by the Motor Vehicle Amendment Act, 1982, is consistent with the Canadian Charter of Rights and Freedoms. The costs with respect to Mr. Stein are to be paid by the Appellant regardless of the outcome of the appeal.

A.M. Stewart

A.M. Stewart
Counsel for the Attorney General
of British Columbia

PART V

LIST OF AUTHORITIES

APPENDIX

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

S.1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

S.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.11 Any person charged with an offence has the right
(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

S.12 Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

S.13 A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

S.52 The Constitution of Canada is the supreme law of Canada and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.