SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

SHARON TURPIN and
LATIF SIDDIQUI

APPELLANTS

-and-

HER MAJESTY THE QUEEN

RESPONDENT

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PART I - STATEMENT OF THE FACTS

HISTORY OF THE CASE

1. The Appellants were charged jointly and with one Whitley Clauzel with first degree murder in an indictment which read as follows:

> SHARON TURPIN, LATIF SIDDIQUI, and WHITLEY CLAUZEL stand charged that they, on or about the 8th day of February, 1983, at the City of Gloucester in the Judicial District of Ottawa-Carleton, did commit first degree murder on the person of Paul TURPIN, contrary to s. 218(1) of the Criminal Code of Canada.

Appeal Case, page 1.

2. The trial of the Appellants and Whitley Clauzel commenced in the Supreme Court of Ontario before the Honourable Mr. Justice Sirois on April 29th, 1985.

3. At the outset of the trial, counsel for the Appellant Turpin made two applications to the Learned Trial Judge, one for severance of the trial of Turpin from the trial of Siddiqui and Clauzel, the other for trial by Judge alone. The severance application was argued first.

Reasons for Judgment, Sirois J., Appeal Case, p. 26.

4. On May 3rd, 1985, Mr. Justice Sirois granted a separate trial to the Appellant Turpin, in the event that a jury trial would in fact be conducted.

Appeal Case, page 29.

5. On May 6th, 1985, argument commenced on the issue of trial by Judge alone and on May 9th, 1985, Mr. Justice Sirois ruled that section 429 of the Criminal Code was of no force or effect to prevent an accused charged in an indictment in Ontario in May of 1985 with first degree murder from exercising the right of election for trial by Judge alone granted by section 430 of the Criminal Code to individuals in the Province of Alberta charged with first degree murder in May of 1985.

6. Turpin, Siddiqui and Clauzel all elected to be tried by Judge alone on May 9th, 1985. As a direct consequence of that election, one joint trial was conducted (not two as would have been required had these been jury trials).

Appeal Case, page 48.

7. The joint first degree murder trial proceeded from May 9th, 1985 to July 25th, 1985, consuming a total of approximately eleven weeks. The Appellant, Sharon Turpin, was acquitted. The Appellant, Latif Siddiqui, was convicted of second degree murder. Whitley Clauzel was convicted of second degree murder as well.

Appeal Case, page 71.

8. By Notice of Appeal dated August 12, 1985, the Attorney General for Ontario (the Respondent herein) appealed the

decision of Sirois, J. dated May 9th, 1985, granting trial by Judge alone to the Appellants. The Attorney General for Ontario has never appealed the merits of the acquittal of Sharon Turpin on the law and evidence nor the second degree murder convictions of Latif Siddiqui and Whitley Clauzel on the merits.

Appeal Case, page 4.

9. By Order dated August 20th, 1987, the Ontario Court of Appeal set aside the Order of Sirois, J. granting trial by Judge alone (and the acquittal and convictions which resulted from that trial) and directed a new first degree murder trial for the Appellants and Whitley Clauzel. The Appeals of the Appellants Sharon Turpin and Latif Siddiqui are from that decision.

Order of Ontario Court of Appeal, Appeal Case, p. 78.

10. On February 8, 1988, the Respondent obtained an Order from this Court directing that these appeals be inscribed for hearing for the Spring term, 1988; the Appeals were set to be heard on Thursday, the 16th day of June, 1988.

Order of McIntyre, J., Appeal Case, page 12.

11. The Appellants subsequently applied to this Court for an Order stating constitutional questions and directions with respect to intervenors. On Tuesday, the 16th day of February, 1988, Chief Justice Dickson stated four constitutional

questions in relation to this Appeal.

Appeal Case, page 14.

12. The Attorney Generals for Canada, British Columbia and Manitoba have subsequently intervened in this Appeal.

Appeal Case, pages 18 to 25.

PART II - THE ISSUES

13. It is submitted that the legal issues that arise for determination in these appeals are as stated in the constitutional questions posed by the Chief Justice:

1. Do sections 429 and 430 of the Criminal Code (as they read in May, 1985) requiring in Ontario a jury trial in murder cases, contravene the rights and freedoms guaranteed by section 11(f) of the Canadian Charter of Rights and Freedoms by denying the right of an accused person to waive the benefit of the guarantee by trial by jury?

1. Les articles 429 et 430 du Code criminel qui exigeaient en Ontario (selon le texte existant en mai 1985) un procès par jury dans les affaires de meurtre, violent-ils les droits et libertés garantis par l'al. 11(f) de la Charte canadienne des droits et libertés en privant un accusé du droit de renoncer au bénéfice de la garantie d'un procès par jury?

2. If the answer to question 1 is affirmative, are sections 429 and 430 of the Criminal Code (as they read in May, 1985) justified by section 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

2. Si la réponse à la question 1 est affirmative, les art. 429 et 430 du Code criminel (selon le texte existant en mai 1985) sont-ils justifiés aux termes de l'article premier de la Charte et donc compatibles avec la Loi constitutionnelle de 1982?

3. Do sections 429 and 430 of the Criminal Code (as they read in May, 1985) requiring in Ontario in 1985 a jury trial in murder cases, but permitting in Alberta in 1985 a non-jury murder trial, infringe or deny the rights and freedoms guaranteed by section 15 of the Canadian Charter of Rights and Freedoms?

3. Les articles 429 et 430 du Code criminel, qui exigeaient en Ontario en 1985 (selon le texte existant en mai 1985) un procès par jury dans les affaires de meurtre, mais autorisaient en Alberta en 1985 un procès pour meurtre sans jury, portent-ils atteinte les droits et libertés garantis par l'art. 15 de la Charte canadienne des droits et libertés?

4. If the answer to question 3 is affirmative, are sections 429 and 430 of the Criminal Code (as they read in May, 1985) justified by section 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

4. Si la réponse à la question 3 est affirmative, les art. 429 et 430 du Code criminel (selon le texte existant en mai 1985) sont-ils justifiés aux termes de l'article premier de la Charte et donc compatibles avec la Loi constitutionnelle de 1982?

PART III - ARGUMENT

THE FIRST ISSUE: Do sections 429 and 430 of the Criminal Code (as they read in May, 1985) requiring in Ontario a jury trial in murder cases, contravene the rights and freedoms guaranteed by section 11(f) of the Canadian Charter of Rights and Freedoms by denying the right of an accused person to waive the benefit of the guarantee by trial by jury?

14. Section 11(f) of the Charter states:

Any person charged with an offence has the right...	Tout inculpe a le droit:
(f) except in the case of an offence under military law tried before a military tribunal to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;	(f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de beneficier du'un proces avec jury lorsque la peine maximale prevue pour l'infraction dont il est accuse est un emprisonement de cinq ans ou une peine plus grave;

15. Section 429 of the Criminal Code, as it read in May, 1985, makes mandatory trial by judge and jury for every accused charged with an indictable offence, except where otherwise expressly provided by law. A number of Criminal Code provisions, however, permit a non-jury mode of trial of an indictable offence:

a) s. 430, as it read in May, 1985, permits an accused charged with an indictable offence in the Province of Alberta the option to be tried by a superior court judge without a jury. Consent of the Attorney General is not required.

Regina v. Lightning and Rabbit (1981), 61 C.C.C. (2d) 494 (Alta. C.A.), leave to appeal to S.C.C., refused (Martland, Ritchie and Dickson J.J. (as he then was) October 1, 1981).

Regina v. Davis (No. 2) (1977), 35 C.C.C. (2d) 464 (Alta. S.C., App. D.)

b) s. 483 confers upon a provincial court judge an absolute although not exclusive jurisdiction over a number of minor indictable offences enumerated in the section - e.g. mischief, theft, driving while disqualified.

c) s. 484 permits an accused charged with an indictable offence not mentioned in s. 483 or s. 427 to elect to be tried by a provincial court judge.

d) s. 464 permits an accused charged with an indictable offence not mentioned in s. 483 or s. 427 to elect to be tried by a superior court judge alone.

e) s. 498 permits the Attorney General to direct trial by judge and jury notwithstanding an accused's election under s. 464 or re-election under s. 491. This provision was not in issue at trial or on appeal.

Re. Hanneson and The Queen (1987), 31 C.C.C. (3d) 560 (Ont. H.C.)

16. The Appellants stand charged with first degree murder contrary to s. 218 of the Criminal Code, an offence mentioned in s. 427(viii) and consequently within the exclusive jurisdiction of a superior court of criminal jurisdiction (in Ontario the Supreme Court of Ontario). Therefore, s. 429, directing trial by judge and jury applies to a murder trial in the Province of Ontario in 1985.

17. The Appellants respectfully submit that the foregoing Criminal Code provisions demonstrate that in a majority of indictable offences (except for those listed in s. 427) an accused may be tried without a jury. Approval of the Attorney General of mode of trial is not a precondition to an accused's election; the choice rests with the accused.

By virtue of the Criminal Law Amendment Act, 1985, c. 19, s. 64, (Bill C-18 proclaimed December 4, 1985), s. 430, as it read in May, 1985, was repealed and substituted by a provision permitting trial of s. 427 indictable offences in all provinces without a jury, conditional however on the consent of the accused (as before) and the Attorney General.

18. It is submitted that unlike the foregoing procedural provisions of the Criminal Code, the preamble to s. 11(f) makes only three distinctions among kinds of persons charged and kinds of offences. The right to the benefit of trial by jury is limited to:

a) persons charged with an offence;

b) persons not charged with an offence under military law tried before a military tribunal; and,

c) persons not charged with an offence where the maximum punishment for the offence is imprisonment for a period of less than five years.

19. It is respectfully submitted that s. 11(f) does not, unlike the Criminal Code, make trial by jury obligatory. Rather, it confers a benefit upon a class of accused persons to exercise a right to a jury trial. It is submitted that there is nothing in the language of s. 11(f) to prevent an accused from not exercising his right to a jury trial and that the section ought to be read as providing an accused

a choice. The notion of a right to a benefit implies some measure of freedom of choice as to the exercise of the benefit, otherwise, the Appellants submit that the benefit is rendered more apparent than real. The Appellants submit that a fundamental aspect of the right guaranteed by s. 11(f) is that it confers a benefit and that a benefit, when forced upon an unwilling accused, is not a benefit but a disadvantage.

> Young, James and Webster v. United Kingdom (1981), 4 E.H.R.R. 38 (European Court of Human Rights), at p. 52-3.

20. On the basis of the foregoing characterization, the Appellants submit that since s. 11(f) confers upon all non-exempt accused persons charged with an indictable offence a right to a benefit, then it follows that an accused can waive that right, without intervention by the Court or the Crown, by declining the benefit and proceed to a trial by Judge alone

> Regina v. Briltz, [1983] 2 C.R.D. 725. 300-07, 24 Sask. R. 120 (Sask.Q.B.)
>
> Regina v. Crate (1983), 7 C.C.C. (3d) 127, 6 C.R.R. 253 (Alta.C.A.)
>
> Regina v. Heaslip (1983), 7 C.R.R. 257 (Ont.C.A.)
>
> Regina v. Bryant (1984), 48 O.R. (2d) 732, 16 C.C.C. (3d) 408, 11 C.R.R. 219 (Ont.C.A.)
>
> Regina v. Johnston et al. 23 Sept., 1985, Ont.Dist.Ct., Salhany Dist.Ct.J., summarized at 15 W.C.B. 27
>
> Korponey v. The Queen, [1982] 1 S.C.R. 41; (1982), 65 C.C.C. (2d) 65 (S.C.C.)
>
> Hogg, The Canada Act Annotated, at page 42
>
> Patton v. United States, 281 U.S. 276 (1930)

Singer v. United States, 380 U.S. 24 (1965)

Adam v. United States, 317 U.S. 269 (1942)

R. v. Brown (1986), 19 A.Crim.R. 136 (Aust.H.C.)

Note, "Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure, 65 Yale L. J. 1032 (1956)

Note, "Constitutional Law: Criminal Procedure: Waiver of Jury Trial: Singer v. U.S. ...", 51 Cornell L.Q. 339 (1966)

Donnelly "The Defendant's Right to Waive Jury Trial in Criminal Cases", 9 U. Fla. L.R. 247 (1956)

Comment, "U.S. v. Sun Myung Moon: The Right of an Unpopular Defendant to Bench Trial", 8 Am. J. of Trial Advocacy 445 (1985).

21. In the alternative, the Appellants submit that the imposition of trial by jury, against the Appellants will, constitutes an infringement of the Appellants' right to a benefit as guaranteed by s. 11(f). Consequently, by virtue of Charter s. 24(1), a court of competent jurisdiction may fashion a remedy the court considers appropriate and just in the circumstances. Therefore, the Appellants submit that:

(a) the remedy fashioned by the learned trial Judge allowing the Appellants to re-elect in a manner analogous to Criminal Code s. 492 was "appropriate and just in the circumstances";

(b) where a breach of a Charter right has been established, the absence of an alternative statutory procedure for the conduct of trials of offences mentioned in s. 427

ought not to deprive or obstruct a court that otherwise has jurisdiction in fashioning a remedy; and

(c) s. 429 does not provide an exclusive mode of procedure: "Except where otherwise expressly provided by law..."

10 And, whereas the Constitution is the supreme law of Canada, s. 429 is of no force and effect to the extent to which it is inconsistent with s. 11(f).

> Re. Regina and Arviv (1985), 19 C.C.C. (3d) 395 (Ont. C.A.), Leave to appeal to S.C.C. refused (MacIntyre, Wilson, LaForest J.J.) June 27, 1985.
>
> Charter, s. 24(1)

20 Constitution Act, 1982, s. 52

Appeal Case, p. 46

22. This Court has held consistently that the proper technique for the interpretation of Charter provisions is to pursue a "purposive" analysis of the right guaranteed. Chief Justice

30 Dickson, speaking in Morgentaler et al v. The Queen and The Attorney General of Canada [1988], 1 S.C.R. 30, (1988), 37 C.C.C. (3d) 449, summarized the goals of Charter interpretation at S.C.R. p. 51 as follows:

> The goal of Charter interpretation is to secure for all people "full benefit of the Charter's protection": R. v. Big M. Drug Mart Ltd., [1985] 1 S.C.R.. 295, at page 334. To attain that goal, this Court has held
> 40 consistently that the proper technique for the interpretation of Charter provisions is to pursue a "purposive" analysis of the right guaranteed. A right recognized in the Charter is "to be understood, in other words, in the light of the interests it was meant to protect": R. v. Big M. Drug Mart Ltd., at p. 344. (See also Hunter v. Southam Inc., [1984] 2 S.C.R. 145; and R. v. Therens, [1985] 1 S.C.R. 613.)

23. The Appellants submit that the meaning of the right guaranteed by section 11(f) of the Charter ought to be ascertained by an analysis of the purpose of the guarantee and understood in light of the interests it was meant to protect. Further, in ascertaining the fundamental purpose of section 11(f), it is submitted the provisions of s. 7 of the Charter should act as a frame of reference vis-a-vis s. 11(f) in a manner analagous to the analysis of s. 11(b) by Mr. Justice Lamer in Mills v. The Queen [1986] 1 S.C.R. 863, 26 C.C.C. (3d) 481 at p. 537:

> The purpose of s. 11(b) can, in other words, be ascertained by reference to s. 7 of the Charter. Section 11(b) is designed to protect, in a specific manner and setting, the rights set forth in s. 7, though, of course, the scope of s. 7 extends beyond those manifestations of the rights to liberty and security of the person which are found in s. 11. Hence, the focus for the analysis and proper understanding of s. 11(b) must be the individual, his or her interests and the limitation or infringement of those interests. (Emphasis added).

24. The Appellants submit that like s. 11(b), s. 11(f) enunciates an individual right - the right to the benefit of trial by jury - and that that right has no collective rights dimension. Even if society may have an interest in the prosecution of criminal cases before juries, it is submitted that that interest finds no expression in s. 11(f).

25. Although the possibility of waiver of Charter rights in a general sense has not, to the Appellants' knowledge, been heretofore determined by this Court, it is submitted

that the ability of accused persons to waive specific common law and constitutional rights has been judicially approved:

a) Statutory and common law procedural guarantees (e.g. re-elections and voir dires) may be waived with full knowledge of the rights the procedure was designed to protect and of the consequence of the waiver.

Korponey v. The Attorney General of Canada, supra, C.C.C. at p. 74; D.L.R. at p. 363.

Park v. The Queen, [1981] 2 S.C.R. 64, (1981), 59 C.C.C. (2d) 385, 122 D.L.R. (2d) 1, 21 C.R. (3d) 182 (S.C.C.).

b) The right to counsel guaranteed by s. 10(b) of the Charter cannot be forced upon an unwilling accused and can be waived where the waiver is premised on a true appreciation of the consequences of giving up the right.

R. v. Clarkson [1986] 1 S.C.R. 383, 25 C.C.C. (3d) 207 at p. 219;

R. v. Manninen [1987] 1 S.C.R. 1233, 34 C.C.C. (3d) 385 at p. 393.

c) Waiver of the s. 11(b) Charter right to be tried within a reasonable time finds support in the judgment of Mr. Justice Lamer in Mills, supra. Where an accused is represented by counsel, waiver of delay may be deemed clear and unequivocal - and hence valid - with full knowledge of the rights and of the effect the waiver will have on the accused's rights. The test is more strict in the case of an unrepresented accused. Mr. Justice Lamer's judgment appears not to address the

concept of waiver generally and states at C.C.C. p. 547 that:

> waiver should, in my view, be seen not as going to the right itself but only to the time waived ...without deciding here the possibility of waiver of Charter rights, I consider that time should itself be assessed subject to waiver.

Mills, supra, at C.C.C. p. 544-547.

26. The related issue of the ability of an accused person effectively to waive his s. 11(f) right to trial by jury, in the context of s. 526.1 of the Criminal Code, (where an accused has previously absconded) has generated a conflict of opinion among appellate and superior courts of provincial jurisdiction.

Regina v. Allan (1982), 2 C.R.R. 45 (Alta.Q.B.)

Regina v. Gladhue (1982), 2 C.C.C. (3d) 175, 4 C.R.R. 193 (B.C.S.C.)

Regina v. Ramirez [1983] 2 C.R.D. 725. 300-01, 9 W.C.B. 107 (Alta.Q.B.)

Regina v. Crate, supra.

Regina v. Bryant, supra.

Regina v. James John Ryan (May 5, 1986) 16 W.C.B. 384 (Nfld. S.C.T.D.)

Regina v. McNabb (1987), 33 C.C.C. (3d) 266, 55 C.R. (3d) 369, [1987] 2 W.W.R. 308 (B.C.C.A)

27. In all of the foregoing decisions but for Bryant, supra, the deemed waiver provisions of s. 526.1 were upheld. The Appellants respectfully submit however that all of the decisions

affirm the principle that rights can be waived - expressly or impliedly. Further, the characterization of s. 11(f) by the Ontario Court of Appeal in Bryant, supra, enunciates two propositions relevant in this appeal:

i) s. 11(f) is "a right given to an accused which prevails unless he or she voluntarily chooses not to utilize it by electing another mode of trial": at C.C.C. p. 414; and,

ii) Any waiver of a jury trial by an accused must be voluntary and made with full knowledge and understanding.

28. In the United States, the right to a jury trial is enshrined in the Sixth Amendment of the Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

29. Rule 23(a) of the Federal Rules of Criminal Procedure governs waiver of a jury trial by a defendant and provides:

> "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

30. This procedure was upheld by the Supreme Court of the United States in 1965 in Singer v. U.S., supra. The Court

acknowledged that a defendant can, in some instances, waive his right to a jury trial. It determined, however, that the ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right, i.e. trial by Judge alone, and that in the U.S., a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury.

Singer, supra, at p. 790

Patton, supra.

31. Since 1965 however, American courts have interpreted Singer as being not authority for imposing a rigid rule of government consent as a pre-condition to waiver and have in fact allowed re-elections by defendant's without consent, notwithstanding rule 23(a):

U.S. v. Braunstein, 474 F. Supp. 1 (D.N.J. 1979)

U.S. v. Panteleakis, 422 F. Supp. 247 (D.R.I. 1976)

U.S. v. Shipani, 44 F.R.D. 461 (E.D.N.Y. 1968)

U.S. v. Mayr, 350 F. Supp. 1291 (S.D.Fla. 1972)

See also the following State court decisions:

Cole v. State, 569 P.2d 470 (Okla. 1977)

Colbert v. State, 654 P.2d 624 (Okla.Crim.App. 1982)

Godfrey v. State, 155 N.W.2d 438 (Neb. 1968)

32. The Appellants respectfully submit that in any event the right guaranteed by s. 11(f) is fundamentally different

from the right guaranteed by the Sixth Amendment, for the following reasons:

a) The Sixth Amendment applies in all criminal prosecutions and guarantees a right to an impartial jury trial; s. 11(f) is restricted in its application for reasons discussed above and guarantees the "right ... to a benefit of trial by jury";

b) s. 11(f) ought to be read and interpreted in the context of s. 11 and s. 7 of the Charter and as a result, ought to be characterized as being an individual right with no collective rights dimension; the Sixth Amendment addresses the right to an "impartial jury" in a different context and manner than the s. 11(f) right;

c) The Constitution Act, 1982 does not place emphasis on trial by jury or establish jury trials as a preferable way of disposing of issues of fact in criminal cases. These same features were identified by the Supreme Court of the United States in upholding the requirement of government consent in waiver of a jury trial by a defendant.

Singer, supra. at p. 790

d) As of May, 1985, rules of criminal procedure in Canada did not have an equivalent to Rule 23(a) of the American Federal Rules that expressly requires government consent as a precondition to waiver of a jury trial.

33. Finally, the Appellants submit that s. 11(f) ought to be interpreted liberally and that the essence of the operation of the guarantee is that it provides an accused a right to a benefit. The notion of a benefit implies some measure of freedom of choice as to its exercise. Nothing can properly constitute a benefit conferred on an accused when that accused is forced to accept the right in every circumstance. This would effectively convert the benefit to a burden or disadvantage upon an accused in selecting the appropriate trial forum.

THE SECOND ISSUE: If the answer to issue one is affirmative, are sections 429 and 430 of the Criminal Code (as they read in May, 1985) justified by section 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

THE APPELLANTS' INITIAL POSITION

34. It is submitted that the onus rests with the Respondent to establish that a limit is justified by s. 1 of the Charter. The test for so doing was formulated by this Court in R. v. Oakes, [1986] 1 S.C.R. 103, and subsequently restated by Dickson, C.J.C. in R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at pp. 768-69:

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding

a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

35. It is submitted that sections 429 and 430, as they read in May, 1985, do purport to limit the Appellants' s. 11(f) right. If this Court accepts the principle and consequence of waiver as proposed by the Appellants, then the Appellants submit that sections 429 and 430 "limit" the right by limiting or inhibiting the extent to which the Appellants can waive that right.

36. The Appellants further submit that sections 429 and 430 of the Criminal Code are not representative of a legislative objective of a "pressing and substantial concern" in May, 1985. Indeed, any national importance that could be attributed to s. 429 is undermined by the existence of s. 430 and the special status afforded to individuals charged in the province of Alberta.

THE APPELLANTS' ALTERNATIVE POSITION

37. In the alternative, the Appellants respectfully submit that s. 1 of the Charter has no application in these appeals because the Appellants are being forced to accept the right guaranteed by s. 11(f); the right itself is not the subject of any limit prescribed by law.

38. S. 1 of the Charter provides:

> 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. (Emphasis added)

The verb "limit" is defined in Black's Law Dictionary, 1979 ed. as:

> "To abridge, confine, restrain, and restrict. To mark out, to define; to fix the extent of ..."

The Concise Oxford Dictionary, 6th ed. provides the following definition:

> "Confine within limits, set bounds to, restrict to; serve as limit to; ..."

39. It is submitted that the foregoing definitions underline the significance of the term "reasonable limit" as it appears in s. 1 of the Charter. S. 1 addresses the taking away or restriction of rights; it ought not to be construed as a basis upon which to justify the forced acceptance of a right or freedom upon an unwilling accused. S. 1 provides that rights and freedom are "subject only" to reasonable limits prescribed by law" (Emphasis added). Accordingly,

it is submitted that a significant difference exists between a law designed to limit a right (e.g. reducing the size of juries, abolishing jury trials, further restrictions upon the availability of jury trials) and a law designed to buttress a right by enhancing the operation of that right, irrespective of the wishes of the beneficiary of the right in the first place.

THE THIRD ISSUE

Do sections 429 and 430 of the Criminal Code (as they read in May, 1985) requiring in Ontario in 1985 a jury trial in murder cases, but permitting in Alberta in 1985 a non-jury murder trial, infringe or deny the rights and freedoms guaranteed by section 15 of the Canadian Charter of Rights and Freedoms?

PRELIMINARY MATTERS:

40. The Appellants respectfully submit that the trial verdicts of acquittal of the Appellant, Sharon Turpin, and conviction for second degree murder of the Appellant, Latif Siddiqui and Whitley Clauzel after lengthy trial proceedings in the Supreme Court of Ontario are not impugned in respect of their merits by the Respondent: there is no suggestion by the Crown that the verdicts reached by the Learned Trial Judge sitting alone are not justified in law and by the evidence. In the Ontario Court of Appeal, Crown counsel took the position, in effect, that in May, 1985, a Judge alone only in Alberta could reach such a legally correct verdict in a Canadian murder trial; in Ontario, such a verdict had to come from a jury.

see Notice of Appeal to the Ontario Court of Appeal filed on behalf of the Attorney General of Ontario, Appeal Case, pp. 4-6

41. The Appellants respectfully submit that the right to choose the form of one's trial, as between a Judge sitting alone or a Judge and jury, is in our adversary system of criminal justice, a significant benefit or advantage. Experienced trial counsel have always recognized the importance of the form of trial chosen and its potential for impact upon the case. For a number of reasons and depending upon varying factors, the selection of mode of trial

may be the most important single decision the accused and his or her counsel make in a serious criminal trial.

See, for example 1969 Special Lectures of the Law Society of Upper Canada: Defending a Criminal Case at p. 75

See also R. v. R.L. (1986) 26 C.C.C.(3d) 417 (Ont. C.A.) at p. 433

42. The Appellants respectfully submit that a fundamental principle of criminal law in Canada is the uniformity of criminal law and its application throughout the country. This, it is submitted, is particularly so in dealing with the gravest of crimes, namely murder.

R. v. Hamilton (1986) 57 O.R.(2d) 412 (Ont. C.A.) at p. 436

R. v. Hardiman (1987) 35 C.C.C.(3d) 226 (N.S.C.A.) at p. 230

Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings [1987] 5 W.W.R. 577 (Sask.C.A.) at pp. 613-614

R. v. Sheldon S. (unreported; March 17th, 1988, Ont. C.A.) at pp. 47-49

R. v. Punch (1985) 22 C.C.C.(3d) 289 (N.W.T.S.C.) at p. 307

Section 7(1), Criminal Code of Canada

43. The Appellants respectfully submit that Section 15 is the statement of a "positive right":

> "It ought to be noted, too, that the subsection has a particular orientation, a matter we regard as significant to its construction. It is cast in positive rather than negative terms. That is to say, it does not so much prohibit governmental discrimination as it guarantees individual equality before and in the law. Its title emphasizes equality rather than freedom from discrimination. Its opening clause declares that everyone is equal before and under the law, not that everyone is free from official discrimination. And the clause which follows expressly confers individual rights of equality in the law. It is true, of course, that equality in relation to the law is closely associated with freedom from official discrimination; they are in a sense obverse sides of the same coin, the former the positive, the latter the negative side. The fact, however, that the section is cast in positive terms is in our view significant to its true purpose." (per Cameron, J.A. in Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings, supra, at pp. 601-602)

This right is stated positively in both official languages. The French Version of Section 15(1) is of particular assistance in the approach the Court should take in analyzing the substantive content of the right therein guaranteed.

English Version	French Version
Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.	La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même benefice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

The French version of Section 15 guarantees that the law will make exception of no-one and will apply equally to all; all individuals have the right to the same protection and benefit of the law, free of, or independent of, "all" discrimination (not "sans discrimination"). The Appellants submit that the French language version of Section 15 makes plain the Constitutional intent to stress positively the equal application of law and equal protection and benefit of law and to make clear that "discrimination" is not to be conceived or interpreted in its narrowest or most pejorative or invidious form: all discrimination is forbidden. The French language version imposes a significant onus upon those who seek to justify inequality of treatment of identifiable classes of individuals similarly situated which inequality results in unequal protection or benefit of law and disadvantages a class of individuals.

Collins v. The Queen (1987) 33 C.C.C.(3d) 1 (S.C.C.) at pp. 21-22

Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings, supra

R. v. Hardiman, supra

Reference Re Act to Amend Education Act (1986) 53 O.R.(2d) 513 (Ont. C.A.)

44. "Discrimination" is not defined in Section 15 or elsewhere in the Charter of Rights and Freedoms or Constitution Act, 1982 or the Criminal Code of Canada. "Discrimination" in English language dictionaries embraces a number of related, but not identical, concepts: differences or distinctions; unreasonable distinctions; arbitrary distinctions; injurious distinctions. Section 15 analysis must properly proceed with a view that all

discrimination ("toute discrimination") is the Constitutional standard. The Constitutional guarantee is of equal protection and benefit of law free of all discrimination. This is not necessarily to read "discrimination" in a purely neutral manner, as will be set out below, but is an important frame of reference for analysis of the right and any inherent limitation (that is to say within Section 15 itself and apart from other limitations prescribed by law) alleged to be part of the right. The approach to the section must also bear in mind the words of Dickson, C.J.C. at p. 344 in R. v. Big M Drug Mart Ltd., infra: "In Hunter and Southam Inc. (1984) 2 S.C.R. 145 this Court expressed the view that 'the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one.' The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection."

R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295; 18 C.C.C.(3d) 385

The Concise Oxford Dictionary, Seventh Edition (Oxford: Clarendon Press, 1982)

The Shorter Oxford English Dictionary, Third Edition (Oxford: Clarendon Press, 1982)

Webster's New Collegiate Dictionary, Second Edition, (Massachussets: G. & C. Merriam Co., 1951)

Black's Law Dictionary, Fifth Edition (Minneapolis: West Publishing, 1979)

JUDGMENT OF THE ONTARIO COURT OF APPEAL

45. It is respectfully submitted that the judgment of the Ontario Court of Appeal is wrong in law in at least two fundamental aspects:

(A) The definition of the content of the Section 15 right - The "Section 15 analysis" - is wrong in law;

(B) The finding that there was a valid, pressing federal objective or purpose which justified the denial of equal benefit of law in May, 1985, as between those charged with first degree murder in Ontario and those charged with first degree murder in Alberta (identifiable and similarly situated classes) and which disadvantages those in the class in Ontario, is wrong in law.

(A) SECTION 15 ANALYSIS:

46. The Judgment of the Ontario Court of Appeal purported to apply the "three-step" analysis of Section 15 derived from the earlier Ontario Court of Appeal judgment in R. v. Ertel:

> "To establish a s. 15 infringement, the one challenging the law must:
> (1) identify the class of individuals who are alleged to be treated differently;
> (2) demonstrate the class purported to be treated differently from another class is similarly situated to that other class in relation to the purposes of the law; and
> (3) show that the difference in treatment is discriminatory in the sense of a pejorative or invidious purpose or effect of the impugned law."
>
> Appeal Case, p. 88

47. The Appellants respectfully submit that the Ontario Court

of Appeal was correct in law in finding that "Step 1" was satisfied: there was established by the Appellant herein the existence of a relevant and identifiable class (of individuals) for comparison purposes: those individuals in Ontario and Alberta charged under the criminal law of Canada with murder:

(a) "In the case now before the court, therefore, the question is: does the law treat that class of persons who are charged with murder in Ontario differently from the class of persons charged with murder in Alberta? The effect of ss. 429 and 430 of the Criminal Code is to treat individuals charged with murder in Alberta differently from their counterparts in other provinces because the latter class of persons is limited to a trial by a judge and jury while the former class can, with the agreement of the judge, be tried by a judge alone."

Appeal Case, pp. 89-90

(b) The Ontario Court of Appeal properly rejected the submission of Crown counsel that a "class" for Section 15 purposes must have "some personal characteristic, similar to those specifically enumerated in Section 15(1) and not merely a classification with respect to a mode of trial."

R. v. Century 21 Ramos Realty Inc. and Ramos (1986) 29 C.R.R. 320

R. v. Ertel (1987) 58 C.R.(3d) 252 (Ont. C.A.)

R. v. Sheldon S, supra

Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings, supra

48. The Appellants respectfully submit that the Ontario Court of Appeal was correct in law in finding that the identifiable

classes were "similarly situated". ("Step 2").

R. v. Century 21 Ramos Realty Inc. and Ramos, supra

R. v. Ertel (supra)

(a) Similarly situated means similarly circumstanced at the time of the comparison (i.e. 1985). Individuals charged with murder in Ontario (or for that matter downtown Ottawa) are similarly circumstanced or situated in 1985 with individuals charged with murder in Alberta (or downtown Calgary or Edmonton).

R. v. Hamilton, supra

R. v. Sheldon S, supra

Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings, supra

R. v. Hardiman, supra

R. v. Punch, supra

(b) The purpose of the similarly situated requirement is "to require that those who are similarly situated be treated similarly!": per Morden, J.A. in Re McDonald and The Queen at p. 349.

Re McDonald and The Queen (1985) 21 C.C.C.(3d) 330 (Ont. C.A.)

(c) The Ontario Court of Appeal properly rejected the submission of Crown counsel that 19th Century problems of assembling juries in the North West Territories (and Alberta (in 1905) was a rational basis in May, 1985, for deciding that the classes

were not similarly situated.

Appeal Case, pp. 91 - 92

see also R. v. Punch, supra, at pp. 307-310

(d) While 19th and early 20th Century problems of assembling juries in sparsely settled territories explained the origin of Section 430 (as it read in May, 1985) and its precursor sections, such historical explanation "cannot be the basis for concluding that in 1985 the class of persons charged with murder in Ontario was not similarly situated to the class of persons charged with murder in Alberta. This conclusion is supported by the decision that was made by Parliament in 1985 [December 4th, 1985] to change Section 430 so as to provide the same right of election throughout Canada, although only with the consent of the Crown." (emphasis added).

Judgment, Ontario Court of Appeal, Appeal Case, p. 92

49. The Appellants respectfully submit (as set out earlier in paragraph (41)) that the Ontario Court of Appeal was correct in law in finding that having a choice or option of electing one's mode of trial (as between Judge Alone or Judge and Jury) is "a benefit" of law and that denial of that option or choice (as by compelling jury trial via Section 429) is denial of equal benefit of law and thereby disadvantages those in Ontario:

> "A choice as to having or not having a jury trial, (even though limited by the overriding determination by the trial judge), based upon the advantages of one mode of trial over the other because of a wide range of factors,

such as: the nature and circumstances of the killing, the amount of publicity, the reaction in the community, the size of the community from which the jury is being drawn and even the preference of defence counsel with respect to trying to convince a jury or a judge of the defence version of the facts (or leave them with a reasonable doubt), indicates that having that choice must be considered a benefit. The absence of that benefit in Ontario must be considered a disadvantage."

Judgment, Ontario Court of Appeal,
Appeal Case, pp. 95 - 96

50. The Judgment of the Ontario Court of Appeal herein therefore (and correctly, the Appellants respectfully submit) decided that there was a difference or distinction created by the Criminal Law of Canada (Sections 429 and 430 of the Criminal Code of Canada) in the treatment of those charged with murder in Ontario in 1985 from those charged with murder in Alberta in 1985, relevant and identifiable classes, similarly situated, which difference in legal treatment denied the guaranteed right to equal benefit of law and which created a demonstrable disadvantage to the class of individuals in Ontario.

Judgment, Ontario Court of Appeal,
Appeal Case, pp. 88-92; 95-96

51. "Step 3": "discrimination: The Ontario Court of Appeal nevertheless found that Section 15 was not infringed and no resort need even be had to Section 1 of the Charter. It is in this respect that the Appellants submit that the Ontario Court of Appeal fell into the first of the two substantial errors set out in paragraph 45 above, namely legally incorrect Section 15 analysis.

52. The Ontario Court of Appeal applied a test or standard of "discrimination" which asked whether the difference in legal treatment which denied equal benefit of law and thereby clearly

disadvantaged those in Ontario charged with murder was "so unfair" or "so invidious" or "so irrational" as to infringe the Section 15 right, having regard for the purpose and effect of the legislation (Sections 429 and 430). It is respectfully submitted that this test or standard is legally wrong.

Judgment, Ontario Court of Appeal,
Appeal Case, p. 96, ll. 21-28

53. The Appellants respectfully submit that a number of approaches (on the basis of present case law and texts) may arguably be taken about the meaning of the words "without discrimination" (or the words in French "independent de toute discrimination"). To deal with this issue is to define the content and scope of the Section 15 guaranteed right. The approach taken by the Ontario Court of Appeal is the most extremely restrictive seen anywhere in the case law, and, for a number of reasons, it is submitted, it is wrong in law, having the effect of virtually nullifying the Section 15 right and rendering Section 1 entirely meaningless. Four alternate approaches to Section 15 analysis are the following:

(i) A purely neutral reading may be effected of the words "without discrimination", "independement de toute discrimination", such that all differences in treatment at law are inequalities which will prima facie constitute a Section 15 infringement and move to Section 1 all considerations of (reasonable) justification. This is the view espoused by Professor Hogg in Constitutional Law of Canada, Second Edition, for the reasons he sets out at pp. 799-801. This approach has the advantage of

according with the principle in R. v. Oakes that Section 1 "states explicitly the exclusive justificatory criteria (outside of Section 33 of the Charter)" (emphasis added) against which limitations on rights must be measured. It has the further advantage of avoiding the unhappy dilemma developing in the case law of failing to draw a line between Section 15 and Section 1 considerations (e.g. McKinney v. Board of Governors of University of Guelph and Attorney General of Ontario, infra). This approach to Section 15 analysis has found little favour in the case law: (see paragraph (iii) below).

R. v. Oakes (1986) 24 C.C.C.(3d) 321 (S.C.C.) per Dickson, C.J.C. at p. 345

McKinney v. Board of Governors of University of Guelph and Attorney General of Ontario (unreported; December 10th, 1987; Ont. C.A.)

P. Hogg: Constitutional Law of Canada, Second Edition (Toronto: Carswell, 1985)

(ii) A second approach to Section 15 analysis may be seen as a variant of (i) and may for analysis be called the modified neutrality approach. This approach involves no reverse-onus on the party alleging the Charter breach so as to require this party to prove pejorative or invidious (unreasonable, unfair, arbitrary, capricious, unjustifiable) distinction: it will be a prima facie Section 15 infringement and remit justification to Section 1 if the applicant establishes:

(a) a difference in treatment created by law;

(b) a relevant and identifiable class of individuals;

(c) similarly situated to a comparison class of individuals;

(d) which first class is denied by the difference in treatment, equal protection or equal benefit of law;

(e) and which first class is thereby disadvantaged.

The applicant will not be required to prove in addition to (a) through (e) that the difference in treatment is also pejorative, although the denial of equal benefit or protection and consequent disadvantage must be more than trivial.

See: R. v. Hamilton, supra

R. v. Hardiman, supra

Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings, supra

Re Blainey and Ontario Hockey Association et al (1986) 54 O.R.(2d) 513 (Ont. C.A.)

R. v. Punch, supra

R. v. Sheldon S, supra

(iii) A third form of Section 15 analysis, and that apparently most favoured in the case law (although not without a good deal of confusion) is the "pejorative or invidious" approach to the concept of discriminatory differences. It is not sufficient for the applicant to establish factors (a) through

(e) set out in the modified neutrality test; the applicant must prove further on a balance of probabilities that the difference in treatment is unreasonable, is unjustifiable, is arbitrary or capricious, or is unfair having regard for the purpose and the effect of the legislation in question. This form of Section 15 analysis blurs the distinction between Section 15 and Section 1: Section 1 "justification" criteria (as required by Oakes and Edwards Books) also involve consideration of the reasonableness or justifiability of legislation having regard for its purposes and effects. This approach to Section 15 analysis has proved very difficult for the courts to work with in an intellectually coherent way. This approach saddles the applicant with an additional onus to prove a negative: the other party (in criminal cases usually the Crown) is in a better position to allege and prove (if possible) the justification or reasonableness of the legislative objective and effect.

R. v. Oakes, supra

R. v. Edwards Books and Art Ltd. (1986) 2 S.C.R. 713

Andrews v. Law Society of British Columbia (1986) 23 C.R.R. 273 (B.C.C.A.)

R. v. Century 21 Ramos Realty Inc. and Ramos, supra

R. v. Ertel, supra

R. v. Sheldon S, supra

Re McDonald and The Queen, supra

R. v. Le Gallant (1986) 29 C.C.C.(3d) 291 (B.C.C.A.)

Gold, "A Principled Approach to Equality Rights", 4 Supreme Court L.R. 131 (1982)

Re Aluminum Co. and The Queen (1986) 55 O.R.(2d) 522 (Ont. H.C.J.)

(iv) A fourth category of Section 15 analysis is that derived from the Ontario Court of Appeal judgment in Turpin et al. herein. This is what may be termed the "grossly invidious" approach. No other case known to the Appellants has ever actually applied such a test. The Ontario Court of Appeal purported to draw this test from the decision in Ertel, however an examination of Ertel reveals that the test actually used was that set out in paragraph (iii) above: "Where the analysis of the words "without discrimination" takes place in the context of Section 15, the onus is on the person alleging discrimination to demonstrate the unfairness or irrationality of the differential treatment which is alleged to constitute an infringement." (R. v. Ertel, supra, at p. 274) (emphasis added). As set out in paragraph 13 above, using the Turpin standard for discrimination not only must the applicant establish factors (a) through (e) of the modified neutrality test (as the Ontario Court of Appeal

found were established in this case), not only must the applicant establish that the difference or distinction in treatment is "unreasonable" or "invidious" or "unfair" but the applicant must go further and establish that the distinction is "so" unreasonable, "so" invidious or "so" unfair as to be discriminatory. Unreasonable or invidious or unfair distinctions having regard for the purposes and effects of legislation are not sufficient to infringe Section 15 and move to Section 1. This test wholly subsumes and exceeds the Section 1 justification test, hence Section 1 is, for Section 15 Charter purposes, meaningless. This test is also vague and incapable of coherent application: at what point does an unreasonable or unfair distinction become so unreasonable or unfair as to amount to discriminatory distinction? Section 15 is reduced from the positive statement of a guaranteed right to an uncertain or relatively empty guarantee given its inherent justification barrier. The Appellants respectfully submit that the Ontario Court of Appeal erred in law in applying this standard to the analysis of Section 15 in this case.

Judgment, Ontario Court of Appeal,
Appeal Case, p. 96, ll. 21-28

(B) Valid Federal Purpose of Objective in May, 1985

54. The Appellants respectfully submit that the Ontario Court

of Appeal purported to justify (still within the context of Section 15 and apart from Section 1) what it properly found was a distinction in treatment at law (Sections 429 and 430) of relevant and identifiable classes which distinction denied equal benefit of law and which disadvantaged those in Ontario in murder trials in 1985 on the basis of a valid federal purpose or objective, namely an expression of the federalist nature of our country:

> "One of the most fundamental and pervasive aspects of our Constitution since 1867 has been federalism. As Dubin J.A. pointed out in Hamilton, supra, not only does s. 15 not require the same laws within each province, but Parliament may need to give its laws special application in terms of locality. Because of the general jurisdiction of the provinces over the administration of justice, including the prosecution of the criminal laws enacted by Parliament, absolute uniformity of criminal procedure as it applies throughout Canada, may be impossible or undesirable, especially given historical differences."
>
> Appeal Case, p. 98

The Appellants submit that this statement is subject to other fundamental principles pertaining to the Criminal Law of Canada, and in any event the statement does not address the question of whether the denial of equal benefit of law herein is reasonable or fair or appropriate in the circumstances obtaining in May, 1985.

(a) The Criminal Law of Canada is, by virtue of Section 91(27) of the Constitution Act, 1867, not a matter of provincial or local jurisdiction, but is solely within the jurisdiction of Parliament.

Constitution Act, 1867

(b) Criminal procedure is an essential facet of criminal law. In criminal procedure is the heart of the protections and benefits of our criminal justice

system. The important matter of election of mode of trial is not a trivial or insignificant aspect of criminal law and procedure which admits of "special application in terms of locality."

Judgment, Ontario Court of Appeal,
Appeal Case, p. 98

(c) The matter of a right of election as to mode of trial in murder cases in Canada is not part "of the general jurisdiction of the provisions over the administration of justice..."

Judgment, Ontario Court of Appeal,
Appeal Case, p. 98

(d) In respect of criminal law in Canada, as set out in paragraph (4) above, and as endorsed by a number of Provincial Appellate Courts, the fundamental rule is uniformity of the criminal law and its application not, as the Ontario Court of Appeal in Turpin stated at p. 98: "...absolute uniformity of criminal procedure as it applies throughout Canada, may be impossible or undesirable, especially given historical differences."

R. v. Hamilton, supra (p. 436): "Although...there may be circumstances which would permit a lack of uniform application of the criminal law, such circumstances are exceptional. I think it is clear that as a general rule it is fundamental that the criminal law treat all individuals in like circumstances equally." (per Dubin, J.A.)

R. v. Hardiman, supra (p. 230): "It seems to me that it is a fundamental principle of our

system that the criminal law should apply equally throughout Canada." (per Jones, J.A.)

Reference Re French Language Rights of Accused in Saskatchewan, supra (pp. 613-614): "First, we are concerned with the criminal law which, next to the Constitution itself, is the most fundamental of all law and which, in this country, is a body of national law; as such the case for uniformity is especially forceful." (per Cameron, J.A.)

R. v. Sheldon S, supra (pp. 47-49) (per Tarnopolsky, J.A.)

(e) While history (or "historical differences") may explain the origin of the difference in treatment at law which denies equal benefit of law, it will not, simply because it is a piece of historical fact, justify the inequality. The law speaks in the present. The case for the reasonableness of the inequality must be made out in the present circumstances which obtain. What may have been reasonable or justifiable inequality the better part of a century ago given circumstances in Alberta and the North West Territories at that time will not necessarily be reasonable or justifiable in May, 1985 (see in particular pp. 307-310 in R. v. Punch, supra, where the situation in the North West Territories and Alberta is specifically addressed). This temporal quality to the justification test has always been recognized by the Appellate Courts and by a number of trial Courts.

see Cornell v. The Queen (unreported, S.C.C.; March 24th, 1988): where the original or historical purpose for failing to proclaim

Section 234.1 universally - provincial resources not yet in place - could not justify the inequality ..."after an elapse of more than seven years"... (p. 13)

R. v. Oakes: The justification standard of a valid federal purpose relates "to concerns which are pressing" (emphasis added). (supra, p. 348)

R. v. Edwards Books and Art Ltd., supra

R. v. Negridge (1980) 54 C.C.C.(2d) 304 (Ont. C.A.)

R. v. Hamilton, supra

R. v. Punch, supra

Re Tremblay and The Queen (1985) 20 C.C.C.(3d) 454 (Sask. Q.B.)

(f) The Appellants submit that there was and is no valid basis upon which to justify the important inequality in this case in May, 1985. Indeed, in recognition of this, Parliament removed the inequality when on December 4th, 1985, the present Section 430 of the Criminal Code was proclaimed and rights of election in murder cases were equalized throughout Canada. This is not a case like Cornell, Hufsky or Thomsen, all recent judgments of this Court, where a valid and pressing federal policy or objective - society's legitimate battle against drinking driving, a pressing problem in the late 20th century - may clearly be identified to justify limits upon the Bill of Rights guarantee of equality or Charter rights.

Criminal Law Amendment Act, 1985

Cornell v. The Queen, supra

Hufsky v. The Queen (unreported, S.C.C.; April 28th, 1988

Thomsen v. The Queen (unreported, S.C.C.; April 28th, 1988

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55. In support of its thesis of valid federal purpose or objective, the Ontario Court of Appeal purported to given examples of "substantial variations in the procedure applicable to various provinces with respect to the trial of criminal cases" (emphasis added). These were apparently to be seen as analogous to the right 20 of election as to mode of trial in murder cases. For the following reasons, the Appellants respectfully submit that these four examples in no way justify the inequality created by Sections 429 and 430.

Judgment, Ontario Court of Appeal, Appeal Case, p. 98

30 (a) The method of giving examples of "other" differences in the criminal law is not the proper way to address and answer the question of whether the unequal treatment at law herein may be justified in the circumstances obtaining in Canada (in Ontario and Alberta) in May, 1985. It is simply stating a non-sequitor: those "other" differences may or may 40 not be suitably analogous and may or may not have been themselves justifiable given Sections 15 and 1 of the Charter.

(b) None of the four examples is as "substantial" a denial of equal benefit of law as the right to elect mode of trial in a murder case.

(c) The first and second of the four examples are matters of sheer nomenclature: there is no denial of equal benefit of law. The accused in Ontario and "in some provinces in Western Canada" both had the benefit of trial by Judge alone or by jury. In the case of trial by jury, in Ontario the Judge was called a "District Court Judge"; in Western Canada the Judge was called a Judge of the Court of "Queen's Bench". In Quebec, Judges called "Sessions Court Judges" exercise the same jurisdiction as Judges called "District Court Judges" in other Provinces.

(d) The now-abolished (and abolished well before Section 15 was proclaimed) and largely historical institution of the grand jury is the third example given but is simply a moot point. The issue in this appeal is not whether the fact that some provinces did and some did not have a grand jury system might or would have offended Section 15 had the grand jury not been abolished; the issue is that set out in Constitutional Question number 3.

(e) The fourth example given is also of a now-abolished procedure: appeal by way of stated case. Like the third example, it is a moot point and of no intellectual assistance in determining the issue posed by Constitutional Question number 3.

(f) The Appellants respectfully submit that the Ontario Court of Appeal, without any real analysis, simply

presumes that these four examples settle the issue in this case and concludes that the denial of equal benefit in this case is not "so" unreasonable or "such" invidious or unfair distinction as to amount to "discrimination" so as to violate Section 15. It is submitted that this conclusion in no way follows and is wrong in law.

56. Remedy: The Appellants respectfully submit that the difference or distinction in legal treatment of the similarly situated classes in Ontario and Alberta herein which in murder trials denies equal benefit of law to and disadvantages individuals in Ontario in the class is wholly unjustifiable as of May, 1985. The historical reason or justification for the inequality had long since vanished. The amendments of December 4th, 1985, confirm this reality. The Learned Trial Judge, having found a Section 15 breach, was correct in law in granting the benefit (right of election) enjoyed by the class in Alberta to those in the class in Ontario. This was precisely the type of "appropriate and just" Section 24(1) remedy applied in the following cases by Appellate and Trial Courts:

(a) R. v. Hamilton (Ont. C.A.): extension to the class in Ontario of the benefit of law available elsewhere (curative discharges).

(b) R. v. Hardiman (N.S.C.A.): extension to the class in Nova Scotia of the situation obtaining elsewhere (234.1 not proclaimed in British Columbia and Quebec).

(c) Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceeedings (Sask. C.A.): extension to the class in Saskatchewan of the

benefit of law available in other provinces (right of the accused to elect trial in French or English).

(d) R. v. Punch (N.W.T.S.C.): extension to the class in the North West Territories of the benefit of law available elsewhere (12 person juries).

The Learned Trial Judge (an Ontario Judge) could not have purported to declare Section 430 of the Criminal Code (applying solely to Alberta) of no force and effect. The remedy of the Learned Trial Judge accorded with the views of the Supreme court of Canada in Hunter and Southam Inc. and Big M Drug Mart that the judicial approach to the Charter should be a "generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection".

Hunter and Southam Inc. (1984) 2 S.C.R. 145

R. v. Big M Drug Mart, supra (at p. 544)

R. v. Hamilton, supra

R. v. Hardiman, supra

Reference Re French Language Rights of Accused in Saskatchewan Criminal Proceedings, supra

THE FOURTH ISSUE

If the answer to question 3 is affirmative, are sections 429 and 430 of the Criminal Code (as they read in May, 1985) justified by section 1 of the Charter and therefore not inconsistent with the Constitution Act, 1982?

57. For the reasons set out in paragraphs 54 through 56 above, the Appellants respectfully submit that the Respondent herein cannot justify the Section 15 infringement as a reasonable limit prescribed by law, demonstrably justified in Canada in May, 1985.

58. The Appellants respectfully submit that Section 1 involves the following approach:

(a) the onus is upon the Respondent herein to justify the inequality as a reasonable one in 1985;

(b) the onus is on a balance of probabilities but must be a "rigorous" standard requiring evidence to establish the reasonableness of the limit;

(c) the Respondent must establish a valid federal purpose of overriding importance involving concerns which are "pressing and substantial" (in 1985). The Appellants submit there is and was in 1985 no such "pressing" objective.

(d) The Respondent must establish that alternative measures were not reasonably available: the amendment of December 4th, 1985, to create universal application of the right of election in murder trials clearly demonstrates that alternative measures were available.

R. v. Oakes, supra

R. v. Edwards Books and Art Ltd., supra

PART IV - NATURE OF ORDER REQUESTED

It is respectfully submitted that these appeals should be allowed and the decision of the learned trial Judge affirmed.

All of which is respectfully submitted.

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LIST OF AUTHORITIES