In the Supreme Court of Canada

[On Appeal from the Court of Appeal for the Province of Ontario]

B E T W E E N:

SHARON TURPIN and
LATIF SIDDIQUI

Appellants

- and -

HER MAJESTY THE QUEEN

Respondent

RESPONDENT'S FACTUM

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PART I

THE FACTS

A. THE PROCEEDINGS AT TRIAL

1. On April 29, 1985 the two Appellants, Sharon Turpin and Latif Siddiqui, along with their co-accused Whitley Clauzel, appeared in the Supreme Court of Ontario before the Honourable Mr. Justice Sirois, pursuant to an Indictment which jointly 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 section 218(1) of the Criminal Code of Canada.

Reference:

Indictment, Appeal Case, pages 1 to 3

2. At the very outset of the proceedings counsel on behalf of the Appellant Sharon Turpin brought an application to be

tried separately from her two co-accused. On May 3, 1985 Mr. Justice Sirois delivered his Ruling on this application, in which he concluded that he would be prepared to order that Sharon Turpin be tried separately, on the condition that she abandon her application to be tried without a jury. However, Sharon Turpin never abandoned that application.

Reference:

Severance Ruling, Appeal Case, pages 26 to 29

3. On May 6, 1985 defence counsel on behalf of all three of the accused brought an application to be tried by a Judge alone. On May 9, 1985 Mr. Justice Sirois ruled that, notwithstanding the mandatory provisions of sections 427 and 429 of the Criminal Code, the accused could "elect" to be tried by a Judge alone. His Lordship held that the provisions of sections 427 and 429 of the Code, in requiring a trial by jury upon all charges of murder, violated section 11(f) of the Charter of Rights. Mr. Justice Sirois also held that, as section 430 of the Criminal Code made it possible for a person charged with murder in the province of Alberta to in effect "elect" to be tried by a Judge alone, the provisions of sections 427 and 429 also violated section 15 of the Charter of Rights as they made jury trials mandatory for persons charged with murder in all of the other provinces. Finally, Mr. Justice Sirois held that sections 427 and 429 did not constitute a "reasonable limit", within the meaning of section 1 of the Charter of Rights, upon the equality rights guaranteed in section 15 of the Charter. At the conclusion of his Ruling Mr. Justice Sirois gave each of the accused an "election" in language analogous to that used in section 492 of the Criminal Code. All three of the accused then "elected" to be tried by a Judge without a jury.

Reference:

Judge Alone Ruling, Appeal Case, pages 31 to 46

Election, Appeal Case, pages 46 to 47

4. Mr. Justice Sirois began hearing evidence on May 14, 1985. After hearing approximately 27 days of evidence His Lordship reserved judgement. On July 25, 1985 Mr. Justice Sirois delivered his Reasons for Judgement acquitting all of the accused of first degree murder, but convicting both Latif Siddiqui and Whitley Clauzel of the included offence of second degree murder. On September 27, 1985 His Lordship sentenced both Siddiqui and Clauzel to life imprisonment, ordered Siddiqui to serve 12 years without eligibility for parole, and ordered Clauzel to serve 10 years before becoming eligible for parole.

Reference:

Reasons for Judgement, Appeal Case, pages 48 to 72

Reasons for Sentence, Appeal Case, pages 75 to 77

B. THE COURT OF APPEAL

5. The Attorney General of Ontario appealed against the acquittals of all three of the accused on the charge of first degree murder. The Crown has no appeal on a question of fact alone. Nor did it appeal on the basis of any error of law in the reasons of Mr. Justice Sirois. The question raised was more fundamental, namely did Mr. Justice Sirois have any jurisdiction to acquit a person charged with first degree murder or indeed to convict a person of murder on his own verdict and order them imprisoned for life. The accused Clauzel appealed to the Court of Appeal against his conviction for second degree murder. All of the appeals were argued in the Ontario Court of Appeal before Martin, Grange and Tarnopolsky JJ.A. on May 11, 1987, together with another appeal (Regina v. Gordon Martin) involving the same constitutional issues raised in the present matter. At the conclusion of argument the judgement of the Court was reserved. On August 20, 1987 the Court released its Reasons for Judgement allowing the Crown appeal, setting aside all of the verdicts, and ordering a new trial for all three of the accused on the original charge of first degree murder. At the same time, the

Court of Appeal released its Reasons for Judgement in the related appeal (Regina v. Gordon Martin), dismissing the defence appeal against his convictions for both first and second degree murder. The learned trial Judge in Martin had reached the opposite conclusion to that reached by Mr. Justice Sirois in the present matter concerning the constitutional validity of sections 427 and 429 of the Criminal Code, and had held that the accused could not be tried without a jury.

Reference:

Notice of Appeal, Appeal Case, pages 4 to 6

Court of Appeal Judgement, Appeal Case, pages 79 to 104

Court of Appeal Order, Appeal Case, page 78

Reasons for Judgement of The Honourable Madam Justice Van Camp (unreported, Ont.S.C., May 29, 1985)

6. The Court of Appeal drew the following conclusions with respect to the proper interpretation to be placed upon the relevant provisions of the Criminal Code:

> We do not find much difficulty in the interpretation of the sections of the Criminal Code. Every superior court has jurisdiction to try any indictable offence (s.426); every court has jurisdiction to try any criminal offence except certain ones including murder (s.427); and except where otherwise provided by law, an indictable offence shall be tried by a court composed of a judge and jury (s.429). Examples of "otherwise provided" are found in s.484 (which gives an election to the accused in certain indictable offences to be tried by either a Magistrate or a Judge without a jury) but that section specifically excludes the offences mentioned in s.427. The only exception in the case of murder is found in s.430 which in 1985 applied only to Alberta. Under the Code, an accused charged with murder anywhere in Canada except Alberta had no choice but to be tried by a superior court of criminal jurisdiction consisting of a judge of that court together with a jury.

Reference:

Court of Appeal Judgement, Appeal Case, pages 80 to 83

7. The Court of Appeal held that section 11(f) of the Charter of Rights, in guaranteeing to persons charged with certain offences "the right ... to the benefit of trial by jury", did not also guarantee the converse, namely the right to be tried by a judge alone. The Court of Appeal relied in part upon the United States Supreme Court decision in Singer v. United States, 380 U.S. 24, 85 S.Ct. 783 (1965), which reached this same conclusion in construing the equivalent provision in the 6th Amendment to the United States Constitution. The Court of Appeal drew the following conclusions with respect to section 11(f) of the Charter:

> We agree that in this country also the government (i.e., the Crown) has a legitimate interest in the method of trial of the most heinous of crimes. The Criminal Code has decreed that it will be by jury. Until the amendment of December 1985, there was no other method provided for outside Alberta. Section 11(f) of the Charter simply assured that trial by jury for murder (and other serious crimes) would continue as a right of the accused. It in no way affected the similar right in the Crown nor granted any unilateral right of waiver in the accused. Indeed, there was no right of waiver even with the consent of the Crown, until the enactment in December 1985 of the new s. 430 of the Code.
>
> Reference:
>
> Court of Appeal Judgement, Appeal Case, pages 83 to 86

8. In considering the application of section 15 of the Charter of Rights to the circumstances of the present case, the Court of Appeal applied its previously established "three-step analysis", which it described as follows:

> 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 that 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.

Reference:

Court of Appeal Judgement, Appeal Case, pages 86 to 88

9. The Court of Appeal concluded that the defence had met the first step in the section 15 analysis by showing that the operation of sections 429 and 430 of the Criminal Code created a classification system, wherein individuals charged with murder in Alberta were treated differently from individuals charged with murder in the other provinces. In reaching this conclusion the Court of Appeal rejected the argument advanced by the Crown that, in order to attract the scrutiny of section 15, the impugned legislative classification system must be based on some personal characteristic akin to the ones specifically enumerated in section 15(1) of the Charter of Rights.

Reference:

Court of Appeal Judgement, Appeal Case, pages 88 to 90

10. The Court of Appeal also concluded that the defence had met the second step in the section 15 analysis, by demonstrating that the individuals in each identified class were "similarly situated" with respect to the purposes of the law.

Reference:

Court of Appeal Judgement, Appeal Case, pages 90 to 92

11. With respect to the third step of the section 15 analysis, the Court of Appeal noted that the defence was required to show that the different treatment of the similarly situate classes subjected one of the classes to an "inherent disadvantage", which was so "unfair" or "invidious" or "irrational" so as to be properly labelled "discriminatory". The Court of Appeal concluded that the defence had not met this third step. The Court concluded that the fact that an accused charged with murder in Alberta had a measure of "choice" as

to whether or not he would be tried by a jury could be considered a "benefit", and that the absence of this "choice" in all of the other provinces must be considered, to some extent, a "disadvantage". Nevertheless, the Court concluded that, in light of the federal nature of our country, the provinces' constitutional jurisdiction over the administration of justice, and the historical diversity in criminal procedures throughout the country, the provisions of sections 427, 429 and 430 of the Criminal Code did not amount to "discrimination" within the meaning of section 15(1) of the Charter of Rights.

Reference:

Court of Appeal Judgement, Appeal Case, pages 93 to 100

12. Notwithstanding that the Court of Appeal found that there was no violation of section 15(1) of the Charter of Rights, the Court went on to hold that, in any event, they were satisfied that, had they found a violation of section 15, they would have held that it was a "reasonable limitation" which had been "demonstrably justified in a free, democratic and federally organized society".

Reference:

Court of Appeal Judgement, Appeal Case, page 100

C. THE SUPREME COURT OF CANADA

13. All three of the accused launched appeals as of right to this Honourable Court against the decision of the Ontario Court of Appeal. However, the accused Clauzel has subsequently formally abandoned his appeal, and now remains in custody awaiting a new trial for first degree murder pursuant to the order of the Court of Appeal issued in the case at bar. On February 8, 1988 Mr. Justice McIntyre directed that the appeals launched by Turpin and Siddiqui be heard on June 16, 1988.

The accused in the related appeal (Regina v. Gordon Martin) has sought leave to appeal to this Honourable Court against the decision of the Ontario Court of Appeal dismissing his appeals against conviction. That application for leave to appeal has been heard by this Honourable Court and is presently reserved. (S.C.C. No. 20727)

Reference:

Notices of Appeal, Appeal Case, pages 7 to 11

Orders of Mr. Justice McIntyre, Appeal Case, pages 12 to 13

PART II

RESPONDENT'S POSITION ON THE POINTS IN ISSUE

14. The Respondent's position with respect to the potential issues which may arise for determination in the present case is as follows:

ISSUE 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 of trial by jury?

It is the Respondent's position that this question should be answered in the negative.

ISSUE 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?

It is the Respondent's position that, if it becomes necessary to consider the application of section 1 of the Charter of Rights, this question should be answered in the affirmative.

ISSUE 3: Did Section 430 of the Criminal Code (as it read in May 1985) operate to, in effect, confer an election on the persons charged with any indictable offence to be tried by a Judge of the Superior Court of criminal jurisdiction, or did it create in the accused an ability to agree with the Crown and the Court to such a trial?

It is the Respondent's position that, properly interpreted, section 430 of the Criminal Code required an agreement between the parties before any accused could be tried by a Supreme Court Judge without a jury. There was no such agreement in the present case. Accordingly, it is the Respondent's position that even if the provisions of section 430

were extended all across Canada, a trial by Judge alone could not have occurred in the present case.

ISSUE 4: **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?**

It is the Respondent's position that, in the event that it becomes necessary to consider section 15 of the Charter of Rights, this question should be answered in the negative.

ISSUE 5: **If the answer to question 4 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?**

It is the Respondent's position that, if it becomes necessary to consider the application of section 1 of the Charter of Rights, this question should be answered in the affirmative.

ISSUE 6: **Assuming that the operation of sections 429 and 430 of the Criminal Code (as they read in May, 1985) amounted to a violation of section 15 of the Charter of Rights not justified by section 1, was the appropriate constitutional remedy to judicially extend the operation of section 430 across Canada?**

It is the Respondent's position that, assuming that there is a violation of section 15 of the Charter of Rights in the present case, which is not justified under section 1, the only appropriate remedy would have been for Mr. Justice Sirois to strike down the provisions of section 430 of the Criminal Code (applicable only in the province of Alberta), rather than judicially extend its operation across Canada.

PART III

BRIEF OF ARGUMENT

ISSUE 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 of trial by jury?**

The General Position of the Respondent

15. It is respectfully submitted that the true purpose of section 11(f) of the Charter of Rights, which guarantees that "any person charged with an offence has the right ... to the benefit of trial by jury" where the maximum punishment for the offence is imprisonment for five years or more, was to constitutionally enshrine the ancient common law right of accused persons to be tried by a jury of their peers. It is submitted that, properly understood, section 11(f) of the Charter constitutionally prohibits Parliament from legislatively denying a jury trial to any accused person charged with having committed a serious criminal offence. The argument advanced by the Appellants would require that section 11(f) of the Charter not only be interpreted as guaranteeing a trial by jury but also the exact opposite, namely the right to be tried by a judge alone. According to the Appellants, this novel constitutional right would render inoperative otherwise valid legislation conferring exclusive jurisdiction upon a court composed of a judge and jury and would permit a judge to try any offence without a jury even absent express statutory authority permitting him to do so. It is respectfully submitted that there is nothing in the express language or discernible underlying purpose of section 11(f) of the Charter which supports this suggestion that section 11(f) confers such rights for the first time in our country's history.

Reference may be made to:

The Honourable D. McDonald, Legal Rights in the Canadian Charter of Rights and Freedoms, (1982), p. 109

Robin Elliot, "Interpreting the Charter: Use of Earlier Versions as an Aid", U.B.C. L.R. (Charter Edition) (1983), p. 34

Andre Morel, "Certain Guarantees of Criminal Procedure" in The Canadian Charter of Rights and Freedoms - A Commentary, (1982), W.S. Tarnopolsky and G.A. Beaudoin (ed.) at pp. 372-373

Court of Appeal Reasons, Appeal Case, pages 83 to 86

The Historical Development of Trial By Jury

16. It is respectfully submitted that the history of the right to trial by jury in Canada is important to determining the purpose of section 11(f). It must be remembered that the Charter was not enacted in a vacuum. The English common law never recognized a right in the accused to "waive" a trial by jury and to insist instead upon being tried by a judge alone. This precise point was made by Chief Justice Warren in Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, when, in delivering the unanimous opinion of the Court, he stated (at pp. 785-786 S.Ct.):

> We have examined petitioner's arguments and find them to be without merit. We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial. Although instances of waiver of jury trial can be found in certain of the colonies prior to the adoption of the Constitution, they were isolated instances occurring pursuant to colonial "constitutions" or statutes and were clear departures from the common law .... "by its intrinsic fairness as contrasted with older modes [of trial] and by the favour of the Crown and the judges [trial by jury] grew fast to be regarded as the one regular common law mode of trial always to be had when no other was fixed." [emphasis added]

Likewise in Regina v. Brown (1986), 19 A.Crim.R. 136 (Aust.H.C.) Brennan J., on behalf of the majority of the Court, reached the same conclusion (at p. 152):

> At common law no waiver was permitted, even after attainder was abolished. Once trial by ordeal was no longer available to determine guilt in criminal cases, trial by jury was the only mode of trial available though the accused was required formally to consent to trial by jury by putting himself on his country: Holdsworth, A History of English Law, (7th ed., 1956) Vol. 1, pp. 326-327. So far from permitting waiver of trial by jury, the law of England for centuries compelled an accused to plead and thereby to put himself upon the country. That was an essential preliminary to trial and conviction by jury. If an accused stood mute of malice, he was ordered to suffer peine forte et dure until he pleaded or was crushed to death in the press ... At common law, the jury is an essential constituent of any court exercising the jurisdiction to try persons charged on indictment .... [emphasis added]

Reference may also be made to:

Regina v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at pp. 344

Sir William Holdsworth, A History of English Law (7th ed., 1956) Vol. 1, pp. 326-327

17. It is respectfully submitted that all true crimes, be they treason, felony or misdemeanor were punishable by indictment. In order to permit a summary trial by a judge without a jury statutory authorization was required as the common law was a stranger to such a proceeding. These rules of English criminal law were incorporated into the various provinces which made up Canada at the time of Confederation at various points in time during the 18th century.

Reference may be made to:

Regina v. Bryant (1984), 16 C.C.C. (3d) 408 (Ont.C.A.) per Blair J.A. at pp. 421-422

The Honourable Roger Salhany, The Origin of Rights (1986), pp. 110-112

Wm. Blackstone, Commentaries on the Laws of England, 1st ed., 1769, Book IV, Ch. 20, pp. 277-278

18. It is submitted that it was not until the 1850's that any significant inroad was made into the jury's exclusive jurisdiction over offences punishable on indictment in Upper or Lower Canada. While further rights of election have since been created in relation to offences punishable on indictment, there was an unbroken tradition in Canada at the time of Confederation that the most serious order of criminal offences could only be tried by a court composed of a judge and jury. This remained true into the modern day in Eastern Canada and, after the amendments to the Criminal Code of December 1985 persons charged with offences set out in section 427 of the Code, could not be tried anywhere in Canada without a jury except on the consent of the Attorney General.

Reference may be made to:

An Act respecting the prompt and summary administration of Criminal Justice in certain cases 22 Vict. ch. 105 (1859)

An Act for diminishing expense and delay in the Administration of Criminal Justice in certain cases 20 Vict. ch. 27 (1857)

An Act to Amend and Extend the Act of 1857 for diminishing the expense and delay in the administration of Criminal Justice in certain cases 22 Vict. ch. 27 (1858)

Criminal Code of Canada 55-6 Vict. ch. 29, sections 538-540, 762-781, 782-808, (1892)

Regina v. Bryant, supra, at pp. 422-423

The Criminal Law Amendment Act, 1985 S.C. 1985, Chap. 19, section 64

19. Section 429 of the Criminal Code provides as follows:

> Trial by Jury Compulsory
> 429. Except where otherwise expressly provided by law, every accused who is charged with an indictable offence shall be tried by a court composed of a judge and jury. 1953-54, c. 51, s. 415.

It is respectfully submitted that the enactment of this provision did not create any new rule in our criminal law, but rather simply gave statutory expression to the deeply rooted principle of English criminal law that, unless otherwise expressly provided, the only court which had jurisdiction to try a crime punishable on indictment was a court composed of a judge and jury.

Reference may be made to:

Criminal Code, section 7

Martin's Criminal Code (1955) at pp. 32-39, 683-691

A.J. MacLeod and J.C. Martin, "Procedure under the New Criminal Code" (1955), 33 Can. Bar Rev. 41 at pp. 42-48

Union Colliery Co. v. The Queen (1900) 31 S.C.R. 81, at pp. 86-87

Regina v. Solomon (1966), 48 C.R. 202 (Sask.Q.B.) at pp. 202-203

The Jurisdictional Nature of the Criminal Code Provisions Requiring A Jury Trial in Murder Cases

20. It is respectfully submitted that an accused person cannot confer jurisdiction on a tribunal by "waiver". As jurisdiction cannot be conferred by consent, the jurisdiction of a court to try an accused must exist independently from the position advanced from any of the parties. It is respectfully submitted that, upon a combined reading of sections 426, 427, and 429 of the Criminal Code, it is clear that the only court in Ontario which possesses the jurisdiction to try a person accused of murder is a court composed of a Supreme Court Judge and jury. It is respectfully submitted that an accused person cannot convey this trial jurisdiction to some other court simply by unilaterally expressing his consent.

Reference may be made to:

Phillips and Phillips v. The Queen, [1983] 2 S.C.R. 161, per McIntyre J. at p. 164

Re McLachlin and The Queen (1984), 18 C.C.C. (3d) 478 (O.H.C.J.) affd: (1986), 21 C.C.C. (3d) 255 (Ont.C.A.)

Korponey v. Attorney General of Canada, [1982] 1 S.C.R. 41, per Lamer J. at pp. 43-53

The Public Interest in Jury Trials

21. It is respectfully submitted that, even if the provisions of the Criminal Code requiring a jury trial in all murder cases could somehow be viewed as merely "procedural" in nature as opposed to "jurisdictional", they are not enacted solely for the benefit of the accused so as to permit the accused to unilaterally waive compliance with their terms.

Reference may be made to:

Korponey v. Attorney General of Canada, supra

Regina v. Brown, supra, at pp. 152-153

22. It is submitted that section 11(f) of the Charter expressly recognizes that the provision of a jury trial to an accused person is in fact a "benefit" to him. This accords with the traditionally held value that a jury trial provides the purest form of justice to the accused. This is not to say however, that the public does not also have an interest in jury trials. In fact, Parliament has recognized that there is a public interest in the requirement for a jury trial, which the Attorney General defends, in enacting various provisions of the Code itself. In Regina v. Brown, supra, Brennan J. made the following comments which are apposite (at p. 152):

> Trial by jury is not only the historical mode of trial for criminal cases prosecuted on indictment; it is the chief guardian of liberty under the law and the community's guarantee of sound administration of criminal justice. [emphasis added]

Reference may also be made to:

Criminal Code, section 498

Criminal Code, section 430 (as amended)

Singer v. United States, supra, at p. 790

Gannett Co. Inc. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898 (1979), per Stewart J. at p. 2907

Patton et al. v. United States, 281 U.S. 276, 50 S.Ct. 253 (1930) per Sutherlanld J. at p. 312

23. It is respectfully submitted that, as has been expressly recognized by the Law Reform Commission of Canada, there are a number of considerations which point to there being a very significant public interest in jury trials. More specifically:

(a) The jury is the ultimate fact finder. The jury is a collection of individuals who represent the broad spectrum of society and who possess a diversity of learning and experience. The jury, collectively, is better able to assess the case from all relevant perspectives. Further, the jury tackles each case freshly without any pre-disposition or bias towards the process or the accused.

(b) The jury serves as an educative institution in that it involves the public in a very direct way in the administration of criminal justice. This permits the public to become better acquainted with the system and understand how it functions.

(c) The involvement of the community through the jury legitimizes the system of criminal justice. It brings the law to the people, and makes the community responsible for the verdicts ultimately rendered. In this way, jury verdicts can generally be more readily accepted by the public.

As Sir James Stephen wrote:

"trial by jury interests large numbers of people in the administration of justice and makes them responsible for it. It is difficult to over-estimate the importance of this. It gives a degree of power and of popularity to the administration of justice which could hardly be derived from any other source."

(d) The jury is an institution which preserves judicial independence. It relieves the judge of the onerous duty

of deciding difficult questions of fact and the ultimate question of guilt or innocence. It thus allows the trial Judge to concentrate on the legal aspects of the trial. Contentious evidence can be the subject of a voir dire without contaminating the trier of fact's mind. Further, the jury deflects criticism from judges in cases of serious public concern.

Reference may be made to:

Canada Law Reform Commission, The Jury in Criminal Trials (Working Paper #27) at pp. 1-17

Canada Law Reform Commission, Report on the Jury, at pp. 1-8

Singer v. United States, supra, at p. 790

Conclusion Regarding Section 11(f) and Waiver

24. It is respectfully submitted that neither the specific language used in section 11(f) nor its apparent purpose supports the position advanced by the Appellants. Additionally, it is submitted that there is no Canadian, American, English or Austrailian authority which clearly supports the position advanced by the Appellants regarding section 11(f) of the Charter. Of the decisions which expressly reject the argument now advanced by the Appellants, perhaps the most significant one is Singer v. United States, supra, wherein Chief Justice Warren, in a very similar context stated (at p. 790):

> The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right .... In light of the constitution's emphasis on jury trial we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. [emphasis added]

Reference may be made to:

Regina v. Musitano (1982), 39 O.R. (2d) 732 (O.H.C.J.)

Regina v. Hanneson (unreported, O.H.C.J., January 7, 1987)

Re Regina v. Switzer (1985), 22 C.C.C. (3d) 60 at pp. 62-64 (B.C.S.C.)

ISSUE 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?**

25. It is respectfully submitted that even if section 11(f) creates a constitutional right to elect to be tried by a judge alone, the sections of the Criminal Code which operate so as to make a jury trial mandatory in relation to the most serious order of criminal offences are a reasonable limit within section 1 of the Charter. It is submitted that these provisions bear on the due administration of justice which is a matter of sufficient importance to justify the limiting of the rights conferred by section 11(f). For the reasons set out in paragraph 23 above, it is important that a jury adjudicate in relation to the most serious order of crimes. The means used to achieve this end were rational and proportionate.

Reference may be made to:

Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713 at pp. 768-769

ISSUE 3: **Did Section 430 of the Criminal Code (as it read in May 1985) operate to, in effect confer an election on the persons charged with any indictable offence to be tried by a judge of the Superior Court of Criminal Jurisdiction or did it create, in the accused an ability to agree with the Crown subject to the discretion of the Court to such a trial?**

26. It is respectfully submitted that section 430 properly interpreted permits a trial by a judge alone pursuant to an agreement between the parties subject to the discretion of the court. While the Alberta Court of Appeal has recognized the force of this argument in Regina v. Lightning and Rabbit (1981)

23 C.R. (3d) 90 at pp. 91-93, they felt foreclosed from giving effect to it at that point in time in light of the practice followed in Alberta.

Reference may also be made to:

Regina v. Lyding (1965), 54 W.W.R. 286

Case Comment re Lyding (1968), Alta. L.R. 281

Perka v. The Queen, [1984] 2 S.C.R. 232

27. It is submitted that the former section 430 of the Code operated only with the consent of the accused. This suggests that this mode of trial was being agreed to by the party opposite i.e. the Crown. Because the section utilizes the permissive "may" it is clear that the section also contemplated a discretion in the court to refuse to conduct the trial in the manner agreed on by the parties. It is submitted, that given the government's interest in the mode of trial of the most serious order of crime, the courts ought to be slow to interpret former section 430 so as to provide no input from the Crown on such a question.

28. It is therefore submitted that in the case at bar, the Crown not being in agreement to a trial by a judge alone, the Appellants were not entitled to such a trial even under the provisions of the former section 430. No section 15 issues thus arise to be decided in the case at bar.

ISSUE 4: **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?**

The General Position of the Respondent

29. It is respectfully submitted that the detailed "equality" analysis engaged in by the Ontario Court of Appeal in

the present case was unnecessary having regard to the proper interpretation of section 15 of the Charter of Rights. In the alternative, assuming that the impugned legislative classification in the present case somehow required such an examination, it is respectfully submitted that the Ontario Court of Appeal did not err in concluding that section 429 and 430 of the Criminal Code did not violate section 15 of the Charter of Rights.

In addition, it is observed that at the outset of the Appellants' submissions on the section 15 issue they state, "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." This is irrelevant to the section 15 issues. It should be noted, however, that the Court of Appeal did conclude that there was evidence upon which a reasonable jury properly instructed could convict of first degree murder.

Reference may be made to:

Court of Appeal Judgement, Appeal Case, pages 86 to 100

Appellants' Factum, paragraph 40

Reasons for Judgement, Appeal Case, page 51

Court of Appeal Judgement, Appeal Case, page 121

The Proper Approach to Section 15 of the Charter of Rights

30. It is respectfully submitted that this Honourable Court has recognized that, in interpreting the provisions of the Charter, a purposive approach must be taken. While the Charter should be given a generous interpretation aimed at fulfilling the purposes of its provisions, it is important that the courts not "overshoot" the actual purpose or objective of the section under examination. As pointed out earlier it must always be borne in mind that the Charter was not enacted in a vacuum.

Reference may be made to:

Regina v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 per Dickson J. at p. 344

31. It is respectfully submitted that in order to ascertain the purpose of section 15 of the Charter of Rights, recourse may be had to: (1) the historic origins of the Charter's guarantee of equality rights; (2) the text of sections 15(1) and 15(2) themselves; and (3) the place of section 15 within the Charter, and the place of the Charter within the greater context of the constitution as a whole.

Reference may be made to:

Regina v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 per Dickson J. at p. 344

A.G. of Quebec and Quebec Association of Protestant School Boards et al., [1984] 2 S.C.R. 66, at p. 79

Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J. at pp. 505-507

32. It is respectfully submitted that the purpose of section 15 is to guarantee equality for individuals so as to enable them to participate fully in the rights, benefits, privileges and burdens extended to the public by legislatures and governments to the extent of their individual abilities, regardless of any personal attribute which identifies them with a particular group. The focus of section 15 is the protection of those who are disadvantaged because of stereotyping, prejudice or paternalism. The interpretation which will best achieve this purpose is to construe section 15 such that it applies to legislative classification schemes which discriminate against individuals on the basis of one of the nine enumerated grounds or an unenumerated ground which is "akin" to the enumerated grounds.

(i) The History of Equality Rights in Canada

33. It is respectfully submitted that a survey of pre-

Charter Canadian "equality" legislation shows that section 15 of the Charter of Rights grew out of an increasing awareness of the problems associated with discrimination. To combat these problems a series of legislative initiatives, which ultimately culminated in the entrenchment of section 15, were undertaken. The pre-Charter initiatives were all clearly aimed at providing increased equality protections to those persons who had been traditionally disadvantaged in Canadian society by virtue of their being victimized through sterotyping, prejudice and paternalism.

34. Prior to the Second World War there was virtually no common law or legislative protection in Canada against discrimination. However, as Canadian society came to increasingly recognize the problem of inequality the Provincial governments began to act legislatively. Ontario enacted the first major equality rights legislation in Canada: The Racial Discrimination Act S.O. 1944 c. 51. This legislation, protected against discrimination in the provision of services to the public on the basis of race or creed through the prohibition of signs and other items expressing racial or religious discrimination or an intent to discriminate on such a basis.

Reference may be made to:

W.S. Tarnopolsky, "Equality and Discrimination" in Justice Beyond Orwell (1985) R.S. Abella and M.L. Rothman (ed.) at pp. 267-275

35. During the 1950's Ontario broadened the scope of its equality legislation by enacting The Fair Employment Practices Act, S.O. 1951, chap. 24 and The Fair Accommodation Practices Act, S.O. 1954, chap. 220. These pieces of legislation promoted equal access to employment and public lodging and services by prohibiting discrimination in relation to those matters on the basis of such personal characteristics as race, creed, colour, nationality, ancestry or place of origin. During this same time

period a number of other provinces enacted similar legislation.

Reference may be made to:

The Fair Employment Practices Act,
S.O. 1951, chap. 24
S.N.B. 1956, chap. 9
S.N.S. 1955, chap. 5
S.B.C. 1956, chap. 16
S.S. 1956, chap. 69

The Fair Accommodation Practices Act,
S.O. 1954, chap. 28
S.N.B. 1959, chap. 6
S.N.S. 1959, chap. 4
S.S. 1956, chap. 68

36. In 1962 the Ontario Human Rights Code, S.O. 1961-2, chap. 93 was enacted. This legislation consolidated and extended the equality legislation previously enacted in Ontario and increasingly provided for adjudication by administrative tribunal as opposed to simply placing reliance on quasi-criminal prosecution as an enforcement mechanism. At present, every jurisdiction in Canada has enacted comparable Human Rights legislation.

Reference may be made to:

Canadian Human Rights Act, S.C. 1976-7, chap. 33 (as amended)

Individual Rights Protection Act, R.S.A., 1980, chap. 1-2

Human Rights Code, R.S.B.C. 1979, chap. 186 (as amended)

The Human Rights Act, S.M. 1974, chap. 65 (as amended)

The Newfoundland Human Rights Code, R.S.N. 1970, chap. 262 (as amended)

Northwest Territorities Fair Practices Ordinance, R.S.N.W.T, chap. F-2 (as amended)

Human Rights Act, S.N.S. 1969, chap. 11 (as amended)

Human Rights Code, 1981 S.O. 1981, chap. 53

P.E.I Human Rights Act, S.P.E.I. 1975, chap. 72 (as amended)

Charter of Human Rights and Freedoms R.S.Q. 1977, chap. 12 (as amended)

The Saskatchewan Human Rights Code, S.S. 1979, chap. S-24.1 (as amended)

37. Since 1962, the Ontario Human Rights Code has been progressively amended to extend protection against discrimination on the basis of sex, marital status, age, ethnic origin, family status, handicap, citizenship, receipt of public assistance and record for offences. A similar expansion of such protection can be seen in the legislation now in force in other Canadian jurisdictions. Protection was extended as Canadians, through their legislators, identified other personal characteristics intimately associated with the individual which had been the subject of prejudice, stereotyping and paternalism giving rise to discriminatory practices. This legislation has now been extended in every jurisdiction to apply to the Crown as well as the private sector, and in some jurisdictions it has been given supremacy over other legislation.

Reference may be made to:

Ontario Human Rights Code, R.S.O. 1970, chap. 318, amended S.O. 1971, Vol. 2, c. 50, s. 63; proclaimed in force April 17, 1972, amended S.O. 1972, c. 119; in force June 30, 1972, amended S.O. 1974. c. 73; in force December 2, 1974;

Ontario Human Rights Code, R.S.O. 1980, chap. 340, repealed S.O. 1981, c. 53, s. 48; proclaimed in force June 15, 1982, and superseded by the Human Rights Code, 1981; in particular section 46(2);

Equality Rights Statute Law Amendment Act, 1986, S.O. 1986, chap. 64

Individual's Rights Protection Act, R.S.A. 1980, chap. I-2, s. 1;

The Saskatchewan Human Rights Code, S.S. 1979, chap. S-24.1, s. 44;

38. It is respectfully submitted that the purpose of the

equality guarantees of the Human Rights legislation in Canada has been accurately summarized by Dubin J.A. in Re Blainey and O.H.A. (1986) 54 O.R. (2d) 513 (C.A.) at p. 525 as follows:

> Section 1 of the human Rights Code extends to every person the right to equal treatment with respect to services and facilities without discrimination. Consistent with the preamble, its purpose is to recognize "the dignity and worth of every person to provide for equal rights and opportunities without discrimination that is contrary to law", and for "the creaction of a climate of understanding and mutual respect for the dignity and worth of each person so that each person feels a part of the community and able to contribute fully to the development and well-being of the community and Province".
>
> One of the grounds of discrimination specifically prohibited is, quite understandably, discrimination by reason of sex. In this respect, what was stated in a decision by a board of inquiry established under the Human Rights Code in Cameron v. Nel-gor Castle Nursing Home (1984), 5 C.H.R.R. D/2170 at D/2172, is apt:
>
> Essentially, the public policy underlying the Code seeks to rectify the denial of equality with respect to the inalienable basic rights of minorities and women and to enable them to realize their full potential as individuals and participate fully in society for the benefit of all people in Ontario. [emphasis added]

It is respectfully submitted that section 15 of the Charter of Rights has a similar underlying purpose and was intended to constitutionally entrench these ideals.

Canadian Bill of Rights

39. In 1960 Parliament sought further protection for those disadvantaged by discrimination through section 1(b) of the Canadian Bill of Rights, S.C. 1960, chap. 44, which provides as follows:

> 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.....

b) the right of the individual to equality before the law and the protection of the law;

10

The litigation in relation to this section revealed that, while the Bill of Rights was afforded quasi-constitutional status in relation to federal legislation, it did not engage all the interactions between the law and the individual.

Reference may be made to:

The Queen v. Beauregard, [1986] 2 S.C.R. 56

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Tarnopolsky, "Equality and Discrimination", supra, pp. 275-6

W.S. Tarnopolsky "The Equality Rights" in The Canadian Charter of Rights and Freedoms: Commentary (1982) W.S. Tarnopolsky and G.A. Beaudoin (ed.) at pp. 396, 407-423

McKinney v. University of Guelph (1987), 24 O.A.C. 241 at pp. 264-5 (Ont. C.A.)

30

(ii) The Text of Section 15 of the Charter of Rights

40. In the version of the Charter tabled in Parliament in October of 1980 the right of equality guaranteed by section 15 was extended to "everyone". However, this was subsequently changed to "every individual" so as to make it clear that the equality guarantee was to apply only to human beings and not to

40 corporations. This revision indicates that the focus of the section should be upon individual Canadians, and that the grounds of discrimination should also be limited to qualities which amount to personal characteristics intimately bound up with their individuality.

Reference may be made to:

Robin Elliott, "Interperting the Charter - Use of the Earlier Versions as an Aid", supra, at p. 38.

Milk Board v. Clearview Dairy Farm Inc., [1987] 4 W.W.R. 279 (B.C.C.A.) at p. 288

Re Aluminum Co. of Canada Ltd. (1986), 55 O.R. (2d) 522 (Ont. Div. Ct.) at p. 531

Re Baker and The Queen (1986), 26 C.C.C. (3d) 123 (B.C.S.C.) at p. 127

41. Virtually all of the drafts of the precursors to section 15 of the Charter prohibited discriminatory practices on the basis of enumerated grounds of discrimination. These grounds were all personal characteristics or qualities which could be seen to be the subject matter of prejudice, stereotyping and paternalism. The words "in particular" were added before the enumeration of the prohibited grounds of discrimination so as to ensure that the list of prohibited grounds would not be viewed as exhaustive. It was clearly intended that the Courts would expand the prohibited grounds of discrimination beyond those listed in section 15 as society's appreciation and understanding of the need for constitutional protection matured, a process which mirrors the development of human rights legislation. As the Minister of Justice said before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, when proposing this change:

> The position of the government is that certain grounds of discrimination have long been recognized as prohibited. Race, national or ethnic origin, colour, religion and sex are all found in the Canadian Bill of Rights and are capable of more ready definition than others.
>
> I want to make clear that the listing of specific grounds where discrimination is most prohibited does not mean that there are not other grounds where discrimination is prohibited. Indeed as society evolves, values change and new grounds of discrimination become apparent. These should be left to be protected by ordinary human rights legislation where they

> can be defined, the qualifications spelled out and the measures for protective action specified by legislatures....
>
> But if legislatures do not act, there should be room for the courts to move in. Therefore, the amendment which I mentioned does not list certain grounds of discrimination to the exclusion of all others. Rather, it is open-ended and meets the recommendations made by many witnesses before your Committee. Because of the difficulty of identifying legitimate new grounds of discrimination in a rapidly evolving area of the law I prefer to be open-ended rather adding some new categories with the risk of excluding others.

Reference may be made to:

Minutes of Proceedings, January 12, 1981, Vol. 36:14

Robin Elliot, "Interpreting the Chapter - Use of the Earlier Versions as an Aid", supra

42. The enumerated grounds of prohibited discrimination in section 15 of the Charter were extended with the addition of the words "mental or physical disability". It is respectfully submitted that this addition is of assistance in understanding the intended scope of the protection to be provided by section 15, as the added ground is a personal attribute which exhibits the same characteristics as those previously enumerated. This addition was made because of evidence tendered during the Committee hearings that disabled individuals have traditionally been subjected to disadvantageous treatment because of prejudice, stereotyping or paternalism.

Reference may be made to:

Robin Elliot, "Interpreting the Charter - Use of the Earlier Versions as an Aid", supra

M.D. Lepofsky and J.E. Bickenbach, "Equality Rights and the Physically Handicapped" in Equality Rights and the Canadian Charter of Rights and Freedoms (1985) A.F. Bayefsky and M. Eberts (ed.) at pp. 332-341

43. It is further submitted that the recognition of affirmative action programs for "disadvantaged individuals or groups" in s. 15(2) is an indiction that the protection afforded by s. 15(1) is to be given to individuals who have been traditionally disadvantaged (based on either an enumerated or unenumerated ground). Affirmative action programs are designed to help persons achieve equality who have been traditionally disadvantaged as victims of past discrimination.

Reference may be made to:

Minutes of Proceedings, January 12, 1981, Vol. 36:15 per The Honourable Jean Chretien

Action Travial des Femmes v. Canadian National Railway Co. (1987), 76 N.R. 161 (S.C.C.)

44. The original draft of section 15 of the Charter of Rights would have created a constitutional guarantee of equality of an exceptionally broad scope, as it would have required the courts to examine any "distinction or restriction" made in any legislation, in order to determine whether or not it was "fair and reasonable having regard to the object of the law". However, this proposal was abandoned very early in the history of the section, in favour of a constitutional guarantee of equality "without discrimination". It is respectfully submitted that this shift in focus away from judicial review of all legislative "distinctions" and towards the idea of judicial review of only those legislative classifications amounting to "discrimination", is of fundamental importance to the correct approach to the equality guarantee. It demonstrates that the drafters of section 15 did not intend to burden the courts with the onerous and undemocratic task of assessing all or virtually all legislative distinctions, but rather only intended to leave with the courts the responsibility of reviewing legislation in order to determine if individuals had been discriminated against on the basis of a personal characteristic bound up with the individual

and involving, prejudice, stereotyping and paternalism.

Reference may be made to:

R.M. McLeod., J.D. Takach, H.F. Morton, and M.D. Segal, Canadian Charter of Rights, Prosecution and Defence of Criminal and other Statutory Offences (1983) Vol. 2, at pp. A-152 - A-155

W.S. Tarnopolsky, "The Equality Rights", supra, at pp. 395-442

McKinney v. University of Guelph, supra

(iii) The Place of Section 15 Within the Charter of Rights and the Place of the Charter Within the Context of the Constitution as a Whole.

45. It is submitted that the purpose and scope of s. 15 is in part identified by the proper roles of the courts and the Legislature under the Constitution Acts 1867-1982. Although judicial review of legislation to determine its conformity with the values expressed in the Constitution is an important part of our framework of government, it is submitted that constitutional values against which legislation are measured must be truly fundamental. The rights and freedoms guaranteed by the Charter must be defined so that the courts are not transformed into courts of appeal from all government policy decisions. While "the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution", neither "before [nor] after the Charter have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments." At the core of any system of democratic government is the principle that legislation and policy should be made by those who are democratically accountable to the public.

Reference may be made to:

Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J. at p. 496

46. It is submitted that there are two features central to the process of legislating in a democracy. First, legislation, unlike adjudication, is a process whereby general rules are laid down to address social concerns. Second, legislation tends to be a progressive and imperfect process, whereby legislators identify social problems and periodically fashion and refashion measures in an attempt to redress these problems. It is submitted that section 15 was not intended to alter these essential features of the legislative process, nor to declare them constitutionally suspect. Parliament can not be expected to draw perfect lines.

Reference may be made to:

M.D. Lepofsky and H. Schwartz "Comment on Regina v. Ertel" (1988), 67 Can. Bar Rev. 115 at pp. 119-120

47. It is therefore submitted that, viewed in the context of the Constitution Acts 1867-1982, the proper role of the guarantee of equality rights in section 15(1) of the Charter of Rights is not to require the courts to re-evaluate every legislative and policy choice made by legislatures and governments. Instead, section 15 should be interpreted as protecting those who have been found to be weak or disadvantaged in Canadian society, who have been incapable of adequately participating in the majoritarian process to obtain redress of their grievances.

Section 15 of the Charter of Rights and the Present Case

(i) No Need for Detailed Section 15 Analysis

48. It is respectfully submitted that, when one considers the true purpose of section 15 of the Charter of Rights, it becomes apparent that the impugned classification system in the present case does not require section 15 analysis. Sections 427, 429 and 430 of the Criminal Code (as they read in May of 1985) interacted in the present case so as to create two modes

of coming to trial with respect to charges of murder. Both modes applied equally to all Canadians regardless of any personal characteristic belonging to the individual accused. Both systems had their roots in history. The procedural differences depended solely upon where the crime was committed. Who the accused was and what personal qualities he possessed were irrelevant. It is respectfully submitted that this type of legislative classification system is simply not one which involves any type of discrimination within the meaning of section 15. The legislative classification is not based upon any of the enumerated heads of prohibited discrimination, nor is it based upon any distinction which is even remotely connected to the types of discrimination expressly prohibited in section 15. Accordingly, it is submitted that no further "equality" analysis need be undertaken under section 15.

Reference may be made to:

Morgentaler v. The Queen, [1976] 1 S.C.R. 616, at pp. 636-637

Re Datta and Saskatchewan Medical Care Insurance Commission (1986 33 D.L.R. (4th) 507 (Sask. C.A.) at p. 531

Smith Klein & French Laboratories v. Attorney General of Canada (1987) 12 C.P.R. (3d) 385 (Fed. C.A.) at pp. 391-394

Aluminum Co. of Canada Ltd. v. The Queen, supra

Mirhadizadeh v. The Queen (1986) 57 O.R. (2d) 441 (Ont. S.C.) at p. 444

Re Andrews and the Law Society of British Columbia, [1986] 4 W.W.R. 242 (B.C.C.A.) at pp. 253-254

Re Election Act B.C. Scott v. Attorney General of British Columbia (1986), 3 B.C.L.R. 376 (C.A.) at p. 383

Regina v. CLP Can Market Lifestyle Products Corp. and Thorston, [1988] 2 W.W.R. 170 (Man. C.A.) at pp. 173-177

49. It should be noted that sections 427, 429 and 430 of the Criminal Code were an attempt by Parliament to preserve two different traditions and sets of values as to the necessary involvement of the community in the adjudication of allegations concerning the most serious order of crime. In the Province of Alberta even an accused charged with the commission of the most serious crime could be tried without requiring community participation if the accused consented. This tradition had grown out of Alberta's history. It was this tradition that Alberta brought into Confederation, and it was this tradition that Alberta wished to maintain as it had become attuned to this system of justice. On the other hand, this approach was quite out of step with the mainstream Anglo-Canadian tradition of mandatory community involvement in the resolution of the most serious criminal matters.

50. It is submitted that some historical background is of assistance. The territory known as Rupert's Land was taken over from the Hudson's Bay Company by Canada for the first time on July 15, 1870. During the early 1870's there was virtually no European settlement in the North West Territories outside the 100 square miles which made up the Province of Manitoba. The Metis of Manitoba were the first to move into the Northwest Territories to settle following the Buffalo herds as they retreated across the Prairies in the late 1860's. What were originally Buffalo camps developed into a few embryonic settlements in the 1870's. In addition, a few outposts such as Fort Edmonton had been established for the purposes of the fur trade. Initially, settlement generally occurred towards the north of the future Province, as the river networks naturally led it that way. Population was highly scattered and, needless to say, not very large. For example, Fort Edmondton became the first electoral district in the Province of Alberta when, in 1881, it became the first area of 1,000 square miles to accumulate a population of 1,000 souls.

Reference may be made to:

G.F.G. Stanley, "The Birth of Western Canada, A History of the Riel Rebellion", Longmans, Green and Co., pp. 177-193

An Act to Amend and Consolidate the several Acts relating to the Northwest Territories (1880). 43 Vict. chap. 25, s. 15

51. Growth and settlement in the Canadian West was slow compared to the United States and settlement was highly disperse for a number of reasons including:

a) the shift in settlement patterns that grew out of the decision in 1881 to have the C.P.R. follow a southern route as opposed to a northern one where settlement to that point had occurred;

b) government policy of reserving vast tracks of land for the railway and other purposes;

c) the size of farms.

Even as late as 1871 there were only 50,000 people in the entire Northwest Territories. Settlement in the West continued to be highly disperse even after the European settlers began to come to the West in larger volume during the 1890's .

Reference may be made to:

G.F.G. Stanley, "The Birth of Western Canada", A History of the Riel Rebellion, supra, pp. 187-193.

L.G. Thomas, "The Northwest Territories 1870-1905", Canadian Historical Association Booklet, pp. 13-14

52. The West was confronted by significant problems as to the need for law and order in its early history which, in turn, led to a number of unique experiments in the delivery of justice to the Northwest Territories.

Reference may be made to:

Roderick C. McLeod, "The Problem of Law and Order in the Canadian West" 1870-1905 in The Prairie West to 1905, L.G. Thomas (1975), pp. 134-137

Professor E.H. Oliver, "The Canadian North-West, Its Early Development and Legislative Records". Vol. 1 (1914) pp. 999-1003, 1018-1019

53. The nature of those experiments took various forms including the use of courts composed of stipendary magistrates, justices of the peace and juries of six. More importantly, however, the tradition of mandatory community involvement in the trial of the most serious order of offences was broken in the West as early as 1885. At that point, a stipendiary Magistrate was empowered to try an accused for any crime without a jury if the accused consented to such a trial.

Reference may be made to:

An Act Repsecting the Administration of Justice and for the Establishment of a Police Force in the Northwest Territories, (1873),36 Vict. chap. 35, sections 3, 4, 5

Professor E.H. Oliver, "The Canadian North-West, Its Early Development and Legislative Records", supra, p. 1003

An Act to Amend and Consolidate the Laws Respecting the North-West Territories, (1875), 38 Vict. 261, sections 63, 64

An Act to Amend the North-West Territories Act, 1875, (1877), 40 Vict. chap.7, s. 7

An Act to Amend and Consolidate the several Acts relating to the North-West Territories (1880), 43 Vict. chap. 25, s. 76

An Act Respect the Administration of Justice and other matters in the North-West Territories (1885), 48-9 Vict. chap. 51, s. 5

54. A series of amendments were made prior to the Province of Alberta's creation and its entry into Confederation. It remained true to say, however, during this period that Alberta

utilized six-man juries and even the most serious order of crime could be tried by a judge alone if the accused consented to such a trial.

Reference may be made to:

An Act further to Amend the Law respecting the Northwest Territories (1886), 49 Vict. chap. 25, sections 4, 30

An Act Respecting the Northwest Territories R.S.C. (1886), chap. 50, sections 41-81

An Act to amend the Acts Respecting the Northwest Territories (1891), 54-5 Vict. chap. 22, sections 7-14

An Act to Establish and Provide for the Government of the Province of Alberta (1905), 4-5 Edw. VII chap. 3, section 16

Criminal Code (1906), 55-56 chap. 29, section 9
Order in Council, Canada Gazette Aug. 31, 1907, pp. 485-6

55. Following Confederation the legislative record shows that Parliament addressed the question of the administration of criminal justice in Alberta. Ultimately, in 1946 the Code was for the first time made generally applicable to Alberta. Parliament however, chose to preserve in Alberta the special provisions for six-man juries and the election to be tried by a judge alone even for the most serious order of crime previously created under the Northwest Territories Act, supra. At that time it was clear that Parliament, in chosing to preserve these provisions in Alberta, was engaged in an exercise of co-operative federalism and was responding to Provincial requests.

Reference may be made to:

Criminal Code R.S.C. 1927, chap. 36, section 9

An Act respecting Criminal Procedure in Alberta (1930), 20-1 Geo. V chap. 12, sections 1, 2

An Act to Amend the Criminal Code (1935), 25-6 Geo. V, chap. 56, section 11

An Act to amend the Criminal Code (1946), 10 Geo. VI chap. 20, sections 1-5

Criminal Code (1954), 2-3 Eliz. II chap. 51, sections 413-417

Criminal Law Amendment Act (1968-9), 17-18 Eliz. I, Chap. 38

Hansard (1930), 2021 Geo. V, Vol. II, Fourth Session - Sixteenth Parliament 1498, 1776

Hansard (1946), 10 Geo. VI, Vol. IV, Second Session - Twentieth Parliament, 3719-3721

Hansard (1953-4) 2-3 Eliz. II, Vol. III, First Session - Twenty-second Parliament, pp. 2514-2515, pp. 3008-3009

Martin's Criminal Code 1955, pp. 683-691.

56. The administration of justice was clearly affected in the Province of Alberta as a result of the decisions made at various points in time to preserve Alberta's system. Writing in 1958, J.G. Matkin indicated that the provisions of section 417, the precursor to the current section 430, were frequently resorted to in Alberta. In fact it was utilized almost without exception in cases of manslaughter, rape and criminal negligence. While the Alberta judges, at one point, appear to have been hesitant to try murders without a jury, by 1965 even this offence came to be treated by the judiciary as all others had. Thus a decision to make mandatory jury trials in the most serious order of crime would have had and would continue to have consequences for the administration of justice in the Province of Alberta. Such a decision would also mean greater inconvenience for the citizens of Alberta, who would have been required to serve on more jury trials even though mandatory involvement on their part was out of step with their traditions.

Reference may be made to:

Regina v. Lyding, [1965] 54 W.W.R. 286 (Alta. S.C.)

J.G. Matkin, "Case Comment on Lyding", [1986] Alta. L.R. 281 at p. 284

Wm. Blackstone, Commentaries on the Criminal Law of England, supra, pp. 277-8

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57. It is respectfully submitted that it was in no sense a violation of section 15 for Parliament, in the spirit of co-operative federalism, to accede to Albert'a request and preserve their traditional system of administering criminal justice in that province, while at the same time maintaining for the rest of Canada the mainstream tradition of mandatory com-
20 munity involvement in the adjudication process with respect to serious criminal matters. As stated by the United States Supreme Court in Missouri v. Lewis, 101 U.S. 22, at pp. 31-32:

> We might go still further, and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws of judicature it sees fit for all or any part of its territory. If the State of New York, for example, should
30 see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent it doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the State should be
40 accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances...
>
> If a Mexican State should be acquired by

> treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by an fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction.
>
> [emphasis added]

It is respectfully submitted that these comments, while made in the context of a discussion concerning the proper interpretation of the "Equal Protection" Clause of the 14th Amendment of the United States Constitution, are equally appropriate in the Canadian constitutional context, where it is the Provinces that are constitutionally required to assume the responsibilities associated with the "administration of justice". Canada's criminal law and procedure has never been completely uniform.

The Queen v. Burnshine, [1975] 1 S.C.R. 693

Cornell v. The Queen (unreported, S.C.C., March 24, 1988)

Regina v. CLP Can Market Lifestyle Products Corp. and Thorston, supra

The Queen v. Smythe, [1971] S.C.R. 680

W.S. Tarnopolsy "The Equality Rights", supra, at 414

(ii) The Court of Appeal's Section 15 Analysis

58. It is the primary position of the Respondent that section 15 of the Charter of Rights should be interpreted so as to only prohibit legislative classification systems which disadvantage certain individuals by reason of one of the enumerated prohibited heads of discrimination, or by reason of some other

personal quality or characteristic which has come to be recognized as being the subject of prejudice, stereotyping, or paternalism. Once such a disadvantage has been shown to have been imposed on such a basis, however, it is respectfully submitted that this would constitute a violation of section 15 of the Charter, and that the judicial analysis of the constitutional validity of the legislation would be moved to section 1 of the Charter, in order to determine whether or not the legislative classification system is a reasonable and demonstrably justifiable limit upon the right to equality.

However, in the event that this proposed interpretation of section 15 of the Charter is rejected, and this Honourable Court construes section 15 as did the Court of Appeal such that all legislative distinctions, which have the effect of giving something to some individuals and denying that something to others, fall within its scope of judicial review, then it is the Respondent's position that the courts must consider the rationale for the classification system and the significance of the resulting disadvantage to some degree within the confines of section 15 of the Charter of Rights. Otherwise the judiciary will become the ultimate arbitrator with respect to all or virtually all lines drawn in government legislation, and will be conducting their review of the legislation under the strict test established under section one of the Charter.

It is respecfully submitted that the weight of the authorities to date clearly suggests that a "neutral" approach to section 15 over-shoots its purpose, and that in order to establish a violation of section 15 the applicant must at least demonstrate that he is similarly situate in relation to the purpose of the law and that he has been the subject of invidious discrimination.

Reference may be made to:

Regina v. Century 21 Ramos Realty and Ramos, supra, at pp. 760-763

Regina v. Ertel (1987), 58 C.R. (3d) 252 (Ont. C.A.) at pp. 274-275

Re Rebic and The Queen (1986), 28 C.C.C. (3d) 154 at 164-5, 173-6 (B.C.C.A.)

Re Andrews and the Law Society of British Columbia (1986) 27 D.L.R. 4th 600, at pp. 609-610 (B.C.C.A.)

Mahe et. al. v. The Queen (1987), 42 D.L.R. (4th) 514 (Alta. C.A.) at pp. 545-550

Regina v. Legallant (1986), 29 C.C.C. (3d) 291 (B.C.C.A.)

M. Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Sup. Ct. L. Rev. 131 at 145-7

W.S. Tarnopolsy, "The Equality Rights in the Canadian Charter of Rights and Freedoms (1983), 61 Can. Bar Rev. 242

(a) Similarly Situate in Relation to the Purpose of the Law

59. It is respectfully submitted that the concept of equality is "relational or comparative" in nature, as its purpose can be no more than to ensure that those who are "similarly situate" are treated similary. It is not always clear, however, that the true interests of equality are obtained by treating likes alike. It may be that the true interest of equality requires differentiation in treatment. The question of whether or not two groups of persons are truly similarly situate can only be determined in relation to the purpose of the law. The question at this stage of the inquiry ought to be, "has the person alleging a breach of section 15 demonstrated that differences amongst those being treated differently are not relevant to the purposes of the the law?" This the Appellants have failed to do. Given that the purpose of the legislative scheme in question was to preserve two different systems of administering justice, it cannot be said that persons charged in Alberta are similarly situate in relation to the purpose of the law to persons charged in Ontario.

Reference may be made to:

Regina v. Century 21 Ramos Realty and Ramos, supra, at pp. 754-757

Bregman v. A.G. for Canada (1986), 57 O.R. (2d) 409 (C.A.) at pp. 410-411

Regina v. Big M Drug Mart, [1985] 1 S.C.R. 295, at p. 341

(b) Is the Distinction Discriminatory?

60. Assuming the Appellants have satisfied the court that they are similarly situate, it is submitted that the Court of Appeal was correct in holding that the distinctions drawn were not of an invidious nature so as to amount to discrimination.

It is further submitted that, although the Court of Appeal took a different view, the denial of the possibility of a trial by a judge alone cannot reasonably be said to be a true "disadvantage".

61. It is respectfully submitted that denying an accused the possibility of a trial by a judge alone simply cannot reasonably be viewed as a true "disadvantage" when the accused is provided instead with a trial by an impartial jury of his peers. The quality of justice administered in trials by jury cannot be shown to be in any way inferior. Juries are just as capable as judges in setting aside their personal prejudices and backgrounds and trying cases on the evidence in accordance with the law and their oaths. The Charter of Rights itself recognizes that trial by jury is a "benefit" to the accused.

In Regina v. Patrick et al. (1986) 28 C.C.C. (3d) 417 (B.C.S.C.) Mr. Justice Cumming dealt with the argument that denying an accused a right to elect the mode of his trial violated section 15 of the Charter of Rights by citing the following passage from an earlier judgment (at pp. 435-436):

> A person charged by way of a direct indictment is denied an election as to his mode of trial. While

> such denial may not be a breach of fundamental justice, there can be no doubt that there are some cases in which it is at least perceived that a defence may be more advantageously presented, and therefore be more likely to succeed, before a judge alone rather than before a judge and jury. Viewed in the abstract, this perception results not from the fact that the truth of the defence varies according to the forum in which it is presented, but from the belief that certain preconceived notions of either the law, social conditions, or definable groups of offenders, will affect, adversely or otherwise, the judgment of one forum or the other. As long as the law continues to be administered by human beings, whether in groups of twelve or individually, that belief will prevail. The fact is that in those cases where there might be some foundation to the belief, the appellate process serves to ensure that no miscarriage of justice results. Viewed in the shadow of that safeguard, the adverse effect of the denial of an election is reduced to the complaint that an accused may thereby have less chance of succeeding with a defence of questionable merit. Such complaint must surely have little, if any, weight in a s.15(1) inquiry.

Mr. Justice Cumming then concluded that, in the case before him, he gave that complaint no weight at all.

Reference may be made to:

Washington v. Baker, 474 P. 2d 254 (1970, Wash S.C. En Banc) per Finley J. at p. 259

Mezzo v. The Queen, [1986] 1 S.C.R. 802

Regina v. Bryant (1984), 16 C.C.C. (3d) 408 (Ont. C.A.) per Blair J.A. at p. 419

Regina v. Hubbert (1975), 29 C.C.C. (2d) 279 (Ont. C.A.); affirmed: [1972] 2 S.C.R. 267

62. It is further submitted that even if the denial of an opportunity to have a trial by a judge alone is considered to be a true disadvantage, it cannot be said that the distinctions drawn by Parliament amount to invidious discrimination. The Court of Appeal correctly concluded that the decision made by

Parliament, to preserve, at Alberta's request, its historical tradition in relation to jury trials, and at the same time to preserve the main stream Anglo-Canadian tradition in the rest of the country, did not create such invidious distinctions as to amount to discrimination. Individuals tried in Ontario are still accorded a trial in accordance with the principles of fundamental justice by an impartial tribunal which is constitutionally recognized as being of "benefit" to the accused. On the other hand no one charged in Alberta is forced to be tried without a jury. As stated by W.S. Tarnopolsky:

> .....it may be desireable for some federal legislation, such as the criminal law, to accord in some of its procedures and particularities with those of the province in which the criminal law is to be administered. Thus, for example, special provision is made in Criminal Code s. 430 for an accused who is charged with an indictable offence in the province of Alberta to be tried by a judge in the superior court of criminal jurisdiction without a jury. Sections 555 and 556 of the Criminal Code make special provisions for mixed francophone and anglophone juries in certain provinces. Section 507 provides that in the provinces of New Brunswick, Quebec, Manitoba, Saskatchewan, Alberta and British Columbia, and in the Yukon Territory and the Northwest Territories, it is not necessary to prefer a bill of indictment before a grand jury. There are many others. In any of these cases, surely it would be absurd if these provisions, automatically and without more, could provide an argument that a person is unequal to someone in another province where a different provision applies.
>
> [emphasis added]

W.S. Tarnopolsky, "The Equality Rights", supra, at p. 414

J.D. Whyte,. "Equality or the Federal Principle: Constitutional Values in Conflict" (1986), 54 C.R. (3d) 224

ISSUE 5: If the answer to Question 4 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?

63. It is respectfully submitted that sections 427 through 430 of the Criminal Code bear upon the due administration of criminal justice and the principle of co-operative federalism. These are matters of sufficient importance to justify the limited intrusion into individual rights which those provisions may have represented. Those provisions preserved the mainstream Canadian tradition of community participation in the adjudication of the most serious order of crime, and also permitted the preservation of a system of coming to trial which the Province of Alberta had become attuned to and which grew out of the historical origins and peculiarities of that Province. The means chosen to do this were rational and proportionate and the intrusion on individual rights was minimal. The only effect on persons charged outside the Province of Alberta was to require them to undergo a trial by jury, which the Charter itself recognizes as a "benefit" and which has traditionally been seen as providing the purest form of criminal justice. On the other hand, persons in Alberta were never compelled to give up a jury trial against their wishes.

Reference may be made to:

Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713, at pp. 769, 772, 781-782

ISSUE 6: Assuming that the operation of Sections 429 and 430 of the Criminal Code (as they read in May, 1985) amounted to a violation of Section 15 of the Charter of Rights not justified by Section 1, was the appropriate constitutional remedy to judicially extend the operation of Section 430 across Canada?

64. It is respectfully submitted that there are always two ways of remedying an existing inequality. One way is to extend the benefit which had previously only been available to the under-inclusive class of individuals. The other way is to simply remove the improperly conferred privilege from the under-inclusive class. In the Canadian context the courts have indicated a distinct reluctance and unwillingness to "re-write" legislation found to be wanting in an effort to fashion a remedy. The drafting of constitutionally valid legislation has been said to be the task of Parliament and the Legislatures.

It is respectfully submitted that in the present case the only appropriate remedy would have been to declare section 430 of the Criminal Code inoperative.

Reference may be made to:

Welsh v. United States, 398 U.S. 333, 90 S. Ct. 1792 (1970), per Harlan J. at pp. 1807-1810

Heckler v. Mathews et al., 465 U.S. 728, 104 S. Ct. 1387 (1984), per Brennan J. at p. 1395

Regina v. Varga (1985), 18 C.C.C. (3d) 281 (Ont. C.A.) per MacKinnon A.C.J.O. at p. 285

Hunter et al. v. Southam Inc., [1984] 2 S.C.R. 145 per Dickson J. at pp. 168-169

48. RESPONDENT'S FACTUM PART IV NATURE OF THE ORDER REQUESTED

PART IV

NATURE OF THE ORDER REQUESTED

65. It is respectfully submitted that the constitutional questions posed should be answered as suggested in Part II and the appeal ought to be dismissed. In the alternative, even if the constitutional questions are answered as suggested by the Appellants, the appeal should be dismissed in any event as the only appropriate relief would have been to strike down section 430 which would not have assisted the Appellants in the case at bar.

ALL OF WHICH is respectfully submitted by

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