

IN THE SUPREME COURT OF CANADA  
ON APPEAL FROM THE COURT OF APPEAL  
FOR BRITISH COLUMBIA

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

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

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FACTUM OF THE INTERVENER, B.C. BRANCH OF THE  
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PART I

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STATEMENT OF INTERVENER'S POSITION  
TO APPELLANT'S STATEMENT OF FACTS

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1. The Intervener, the British Columbia Branch of the Canadian Bar Association, agrees with the Appellant's statement of facts as corrected by the Factum of those contending for a negative answer.

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2. In the text of this Factum, the terms "absolute liability" and "strict liability" will have the meanings defined in R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30. Prior to that decision, the terms "strict liability" and "absolute liability" had been used, to varying degrees, interchangeably, which should be noted when reference is made to pre-Sault Ste. Marie and U.S. sources.

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PART II  
ISSUE

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3. Is s.94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c.288, as amended by the Motor Vehicle Amendment Act, 1982, S.B.C. 1982, c.36, consistent with the Canadian Charter of Rights and Freedoms?

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4. The British Columbia Branch of the Canadian Bar Association submits that this question should be answered in the negative: that the absolute liability offence, together with mandatory imprisonment, described by s.94(2) of the Motor Vehicle Act is inconsistent with s.7 and not a "reasonable limit ... demonstrably justified" under s.1 of the Charter.

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PART III  
ARGUMENT

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5. Together with s.94(1), s.94(2) of the Motor Vehicle Act creates an absolute liability offence of driving while suspended and imposes a mandatory term of seven days' imprisonment on first conviction.

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6. That a defendant convicted under s.94 will be deprived of his right to liberty is a certainty. Section 7 of the Charter permits deprivation of the right to liberty only in accordance with "principles of fundamental justice". It is a principle of fundamental justice, recently reaffirmed by this Court in Sault Ste. Marie, supra, that, in general, punishment, especially imprisonment, should not be imposed upon those without fault. Section 94 is inconsistent with s.7 of the Charter.

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7. It has not been shown that the imposition of mandatory imprisonment by means of absolute liability for driving while suspended is a "reasonable limit ... demonstrably justified" under s.1 of the Charter.

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I. THE CHARTER OF RIGHTS

A. The Charter as Part of the Constitution of Canada

8. As a constitutional document, the Charter imposes limits on the supremacy of Parliament and the provincial legislatures (s.52). Recognition and enforcement of these constitutional limits are judicial functions (s.24). Parliamentary supremacy has not been abolished. Parliament and the provincial legislatures may infringe

1 rights by reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (s.1) and may, by statutory declaration, abrogate certain constitutionally entrenched rights (s.33).

10 9. The Constitution requires that the courts deny operative effect to otherwise duly enacted legislation where:

- 1) a guaranteed fundamental right or freedom has been infringed, and,
- 2) the infringement is not a reasonable limitation demonstrably justified in a free and democratic society.

20 Reference: Re Germany and Rauca (1983), 41 O.R. (2d) 225, 34 C.R. (3d) 97 (sub nom. R. v. Rauca), 4 C.C.C. (3d) 385, 145 D.L.R. (3d) 638 (Ont. C.A.)

30 10. The general principle that it is not for the courts to pass upon the wisdom of the legislation must yield to the requisites of the Constitution of Canada. By it the bounds of sovereignty are defined and supremacy circumscribed.

Reference: Amax Potash Ltd. v. Saskatchewan, [1977] 2 S.C.R. 576 at 590

#### 40 B. Interpretation of the Charter

11. The Charter was enacted for the purpose of protecting certain fundamental rights and freedoms. The Charter should be given a large and liberal interpretation so as to give full recognition and effect to the secured rights.

1 Reference: R. v. Antoine (1983), 5 C.C.C. (3d) 97  
at 101 (Ont. C.A.)

10 12. Principles of constitutional law ensure a large  
and liberal interpretation of constitutional documents:  
see Edwards v. Attorney General for Canada, [1930] A.C.  
124 at 136; British Coal Corporation v. The King, [1935]  
A.C. 500 at 518.

20 13. More recently, the Privy Council applied these  
principles to the interpretation of Chapter 1 of the  
Constitution of Bermuda, headed "Protection of Fundamental  
Rights and Freedom of the Individual": see Minister of  
Home Affairs v. Fisher, [1980] A.C. 319 at 329, quoted in  
R. v. Antoine, supra.

30 14. These principles were not applicable to the  
interpretation of the Canadian Bill of Rights and previous  
decisions dealing with that statute must be read in light  
of this change.

C. The Interpretation of Section 7

40 15. An exhaustive definition of the scope of s. 7, or  
of the phrase "principles of fundamental justice", which  
phrase does not have an established constitutional  
meaning, is neither necessary nor desirable.

Reference: John Deere Plow Company Limited v.  
Wharton, [1915] A.C. 330 at 338-9

16. It is not necessary to decide whether the phrase  
"principles of fundamental justice" refers, as the



1 Appellant submits, at p.19, to "procedural matters only". Section 94(2) does not fit into a procedural or substantive category; it mixes means and ends. Absolute liability is primarily a procedural aid to administrative efficiency in obtaining convictions for the substantive offence of driving while suspended.

10 17. It is not necessary to decide, as the Appellant submits at pp.11, 17, 18, 26, whether s.7 provides a "vehicle for monitoring the content of offence creating legislation." The reason s.94(2) infringes s.7 of the Charter does not have to do with the content or substance of the offence of driving while suspended. It has to do with the manner by which mandatory imprisonment is imposed, that is, without an enquiry into fault. A negative answer to the question referred does not mean it is unconstitutional for the provincial legislature to create an offence with penal consequences of driving while suspended. The British Columbia Court of Appeal did not decide this.

20 18. Alternatively, the essence of the security of the rights protected by s.7 would be defeated by confining it to procedural matters.

Reference: The Hon. Ivan C. Rand, "Except by Due Process of Law" (1961), 2 Osgoode Hall L.J. 171 at 179

40 19. The interpretation given to s. 1(a) of the Canadian Bill of Rights by this Court in Curr v. The Queen, [1972] S.C.R. 889 should not restrict the "principles of fundamental justice" to "procedural due

1 process". Laskin J., as he then was, in Curr at p. 899, and later as Chief Justice, dissenting, in Morgentaler v. The Queen, [1976] 1 S.C.R. 616 at 632 - 33, was not prepared rigidly to confine s. 1(a) to procedural matters.

10 20. Fauteaux C.J.'s comments in Duke v. The Queen, [1972] S.C.R. 917 at 923, regarding s. 2(e) of The Canadian Bill of Rights, were made with respect to the entire phrase "fair hearing in accordance with principles of fundamental justice" to assist in determining the requirements of a fair hearing, not to restrict the scope of the principles of fundamental justice to procedural matters.

20 II. ABSOLUTE LIABILITY AND PUBLIC WELFARE OFFENCES

21. In Sault Ste. Marie, this Court exhaustively examined the use of absolute liability in public welfare offences. The same issues that were discussed must now be considered in a constitutional context.

30 22. In Sault Ste. Marie, this Court examined the conflict, inherent in the use of absolute liability, between interference with the individual's right to liberty in the absence of fault and the protection of the public and social goals of administrative efficiency in obtaining convictions for public welfare offences. The same examination is required by the Charter. Section 7 is directed at the protection of the right to liberty of the individual. Section 1 ensures the protection of the legislative powers of the state to act to further public and social interests.

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1 23. Since a defendant convicted under s.94 will certainly be deprived of liberty, enquiry under s.7 can begin with the identification of an infringement of a principle of fundamental justice.

10 24. In Sault Ste. Marie, supra, this Court recognized that absolute liability offences violate the principle, based on fairness, that in general punishment should not be imposed upon those without fault. Arguments advanced in "justification" of the use of absolute liability in public welfare offences, and relevant to s.1 of the Charter, were prima facie rejected unless the legislation was part of an unusual regulatory scheme which would be impossible to enforce without absolute liability and where penalties were minimal.

20 A. Section 7, Punishment and Fault

30 25. Section 94 creates an absolute liability offence. It requires conviction on proof that the defendant committed the prohibited act constituting the actus reus of the offence (driving while suspended).

40 26. In Sault Ste. Marie, supra, this Court emphasized the "generally held revulsion against punishment of the morally innocent" (p.1310) and recognized that absolute liability "violates fundamental principles of penal liability" (p. 1311).

27. This Court quoted with approval Professor F.B. Sayre who stated in "Public Welfare Offences" (1933), 33 Columbia Law Review 55 at p. 82 (quoted at p. 1314);

1 "It is fundamentally unsound to convict a  
defendant for a crime involving a substantial  
term of imprisonment without giving him the  
opportunity to prove that his action was due to a  
honest and reasonable mistake of fact or that he  
acted without guilty intent. If the public  
danger is widespread and serious, the practical  
situation can be met by shifting to the shoulders  
of the defendant the burden of proving a lack of  
guilty intent."

10 Professor Sayre also stated at p.70:

20 "The group of offences punishable without proof  
of any criminal intent must be sharply limited.  
The sense of justice of the community will not  
tolerate the infliction of punishment which is  
substantial upon those innocent of intentional or  
negligent wrongdoing; and law in the last  
analysis must reflect the general community sense  
of justice."

30 28. This Court also referred, at p. 1320, to the  
recommendations made by the Law Reform Commission to the  
Minister of Justice in its March 1976 report entitled Our  
Criminal Law. The Commission referred to a research paper  
prepared for it P.J. Fitzgerald, "Strict Liability in  
Practice", in Studies in Strict Liability, L.R.C., June  
1974, which said at p. 69:

40 "[Strict liability] goes against fundamental  
legal principles too well established to be  
lightly breached. It offends against fairness,  
justice and common sense which all alike forbid  
the punishment of those without moral fault."

29. Reference was also made, at p. 1320, to The  
Meaning of Guilt - Strict Liability, L.R.C. Working Paper  
No. 2, February, 1974, which pointed out, at p.15, that

1 punishment of those without fault is never just. It offends two cardinal principles:

- (1) every man should be given his due and punishment is never due to a man without fault; and
- (2) like cases should be treated alike and different ones differently. The difference between a blameless person and a blameworthy person warrants discrimination but absolute liability offences treat both alike.

10 This paper recommended, at p.38, that all offences which are not truly criminal should at a minimum allow due diligence as a defence and, in general, imprisonment should be excluded for these offences.

20 B. Section 1, Justification for Punishment Without Fault

30. Sault Ste. Marie, supra, also examined, at pp.1310-1311, the "justification" for absolute liability in public welfare offences. This enquiry touched upon some of the same issues raised by s. 1 of the Charter.

31. This Court indicated:

- (1) there was no evidence that absolute liability promoted a higher standard of care;
- (2) administrative efficiency in obtaining convictions did not require a foreclosure of enquiry as to fault; and
- (3) the argument that no stigma attaches did not withstand analysis (pp. 1310-1311).

40 32. This Court's discussion proceeded on the assumption that those convicted of an absolute liability

1 offence might still receive beneficial consideration on sentencing by establishing due diligence. Moreover, this Court emphasized the importance of the connection between "slight penalties" and the justification for the existence of absolute liability offences (p. 1312).

10 33. There is a clear distinction between conviction and sentencing. At the stage of determining whether to convict, it may be possible to justify ignoring blameworthiness since an act is not necessarily harmless merely because whoever performed it meant no harm.

20 34. After a conviction, the presence or absence of fault must be considered in determining the appropriate sentence. The imposition of punishment which is disproportionate to the degree of culpability of the offender offends one's sense of justice and fairness however great the need to regulate motor vehicle traffic.

30 35. Professor Sayre, supra, said at p. 72:  
"If [the penalty] be serious, particularly if the offence be punishable by imprisonment, the individual interest of the defendant weighs too heavily to allow conviction without proof of a guilty mind. To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice; and no law which violates this fundamental instinct can long endure."

40 36. Mandatory imprisonment is unusual. As Paradis, P.C.J., stated:  
"In the Canadian legal fabric, offences which carry a minimum penalty of a term of imprisonment are rare. I have searched in vain for any such

1 offence which imposes a burden of absolute liability."

Case on Appeal, p. 23.  
See also Beaver v. R., [1957] S.C.R. 531 at 541

10 37. Section 94(2) is not a "reasonable limit" which can be "demonstrably justified" in this society. The Appellant has not demonstrated that absolute liability and mandatory imprisonment is the only way to deal adequately with this type of offence.

Reference: Re Southam Inc. and The Queen (No. 1)  
(1983), 41 O.R. (2d) 113 at 125 (Ont. C.A.)

20 III. CONCLUSION

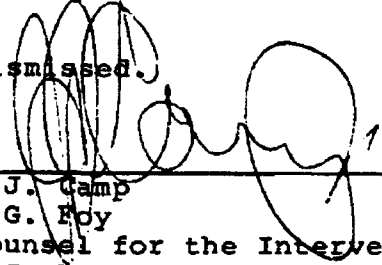
30 38. When Sault Ste. Marie, supra, was decided, parliamentary supremacy restricted this Court's role to the creation of rebuttable presumptions regarding the use of absolute liability. Since the amendment to the Constitution, this Court's direction to the legislature with respect to the use of absolute liability in public welfare offences must go beyond the requirement that the legislature "make it clear that guilt would follow proof merely of the proscribed act" (p.1326). The Court is asked to declare that this legislation is inconsistent with s. 7 of the Charter.

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PART IV  
NATURE OF ORDER SOUGHT

39. That this appeal be dismissed.

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