Q.B. No. 1150 of 2010

In the Court of Queen's Bench for Saskatchewan

Judicial Center of Saskatoon

Between:

Edward Burke Hudson

Applicant

-and-

The Attorney General of Canada

Respondent

Brief

of

Reasons

Addendum

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Brief of Law

Addendum

Court of Queen's Bench, Saskatoon

The Rule of Law and the Protection of Individual Rights

Index

Paragraph

12. “link the protection of human rights with the rule of law”

13. “embracing the protection of human rights within its scope. “

14. “Law cannot be simply what is dictated by political authority”

16. “The right to a fair trial is cardinal requirement of the rule of law.”

17. “ judges must be independent of ministers and the government.”

18. ‘the birthright of every British citizen’.

19. “to be presumed innocent until he is proven to be guilty.”

21. “a tree is bearing bad fruit,”

Quotations from:
Tom Bingham, *The Rule of Law*, Penguin Books, 2010

The Rule of Law
and the
Protection of Individual Rights

1. The *Canadian Charter of Rights and Freedoms* clearly articulates that the Rule of Law is a foundational principle of Canada:

> Canada is founded upon principles that recognize the supremacy of God and the rule of law:

2. In *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the Supreme Court of Canada has forcefully attested to the importance of the Rule of Law in Canada:

> 63 The constitutional status of the rule of law is beyond question. The preamble to the *Constitution Act*, 1982 states:
>
> > Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.
>
> This is explicit recognition that "the rule of law [is] a fundamental postulate of our constitutional structure" (per Rand J., Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142). The rule of law has always been understood as the very basis of the English Constitution characterising the political institutions of England from the time of the Norman Conquest (A.V. Dicey, *The Law of the Constitution* (10th ed. 1959), at p. 183). It becomes a postulate of our own constitutional order by way of the preamble to the *Constitution Act*, 1982, and its implicit inclusion in the preamble to the *Constitution Act*, 1867 by virtue of the words "with a Constitution similar in principle to that of the United Kingdom".

3. In discussing the importance of the rule of law, Thomas Henry Bingham, Baron Bingham of Cornhill, KG, PC, QC, FBA, formerly Senior Law Lord of the United Kingdom from 2000 to 2008, in his recently published book, *The Rule of Law*[1], indicates:

> Credit of coining the expression ‘the rule of law’ is usually given to Professor A.V. Dicey, the Vinerian Professor of English Law at Oxford, who used it in his book, *An Introduction to the Study of the Law of the Constitution*, published in 1885.

4. In discussing Dicey's contribution to our understanding of the Rule of Law, Baron Bingham at pages 3 to 4 writes:

> Dicey gave three meanings to the rule of law:
>
> > We mean in the first place that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.
> >
> > A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (1885; 9thedn., Macmillan, 1945), p. 188
>
> Dicey's thinking was clear. If anyone – you or I – is to be penalized … It must be for a proven breach of the established law of the land. And if must be a breach established before the ordinary courts of the land, not a tribunal of members picked to do the government's bidding, lacking the independence and impartiality which are expected of judges.
>
> Dicey expressed his second meaning this way:
>
> > We mean in the second place, when we speak of the 'the rule of law' as a characteristic of our country, not only that with us no man is above the law, but (which is a different thing) that here, every man, whatever his rank of condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
> >
> > Thus no one is above the law, and all are subject to the same law administered in the same courts.
>
> Dicey put his third point as follows:
>
> > There remains yet a third and a different sense in which 'the rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the grounds that the general principles of the constitution (as for example the right to personal liberty, to the right or public meeting) are with us as the result of judicial decisions determining

> the rights of private citizens in particular cases brought before the courts; … .

5. This thus raises the pertinent question here before this Honourable Court:

> Does the Rule of Law protect our individual Canadian liberties?

6. Baron Bingham wisely observes that there are two conflicting versions of the meaning of the Rule of Law, i.e., the "thin" view and the "thick" view of the Rule of law.

7. Bingham, in his text at chapter 7, entitled Human Rights, 'The law must afford adequate protection of fundamental human rights' points out at page 66 that:

> This is not a principle which would be universally accepted as embraced within the rule of law. … Professor Raz has written:
>
> > A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequities, and religious persecution may, in principle, conform to the requirements of the rile of law better than any of the legal systems of the more enlightened Western democracies … It will be an immeasurable worse legal system, but it will excel in one respect: in its conformity to the rule of law … The law may … institute slavery without violating the rule of law.
> >
> > J. Raz. 'The Rule of Law and its Virtue', in Raz, *The Authority of Law" Essays on Law and Morality*, Oxford University Press, 1979, p. 96

8. However, of Raz's description, Bingham declares:

> This is close to what some economists have called the 'thin' definition of the rule of law,

and then Bingham adds:

> On the other hand Geoffrey Marshall has pointed out, chapters V to XII of Dicey's great work, in which he discusses what would now be called civil liberties, appear within Part II of the book, entitled 'The Rule of Law'. As Marshall observes:
>
> > the reader could be forgiven for thinking that Dicey intended them to form part of what the rule of law meant for Englishmen.

Geoffrey Marshall, *The Constitution: Its Theory and Interpretation*, Oxford University Press, 2003, p. 58

9. Commenting of the importance of the Rule of Law at page 6 Bingham recounts:

Lord Steyn, in *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539, 581:

> Unless there is the clearest provision to the contrary, parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.

and then here further notes:

Universal Declaration of Human Rights 1948, Preamble:

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

10. beginning at page 10 Baron Bingham then presents the:

important historical milestones on the way to the rule of law as we know it today.

(A)

the Magna Carta, 1215:

p. 10

It is very hard to decipher. It is in Latin. And even in translation much of it is very obscure and difficult to understand. But even in translation the terms of chapters 30 and 40 have the power to make the blood race:

> 39. No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.
> 40. To no one will we sell, to no one deny of delay right of justice.

p.12

Sir James Holt, the greatest modern authority on the charter, has written:

> Magna Carta was not a sudden intrusion into English society and politics. On the contrary, it grew out of them … Laymen had been assuming, discussing, and applying the principles of Magna Carta long before 1215. They could grasp it well enough.

It had a quality of inherent strength because it expressed the will of the people.

p. 13

The significance of Magna Carta lay not only in what it actually said but, perhaps to an even greater extent, in what later generations claimed and believed it had said. Sometimes the myth is more important that the actuality … The myth proved a rallying point for centuries to come – and still does, for example when a government proposes some restriction of jury trial.

(B)

The English Declaration of Rights 1689

p. 24

Personal liberty and security were protected by prohibiting the requirement of excessive fines, the imposition of excessive bail, and the infliction of 'cruel and unusual punishments'. Jury trial was protected.

(C)

The French Declaration of the Rights of Man and the Citizen 1789

p. 28

The aim of all political association was to preserve the natural and imprescriptible rights of man; (These rights are liberty, property, security, and resistance to oppression)… that liberty consisted in freedom to do anything which was not injurious to others; that law could only prohibit such actions as were harmful; … that since property was an inviolable and scared right, no one was to be deprived of it save where public necessity demanded it, and then he should be compensated.

(D)

The American Bill of Rights 1791

p. 29

Article V:

> No person shall be held to answer for a capital, or otherwise infamous crime, … nor be deprived of life, liberty, or property, without due process of law; … .

The expression, 'due process', … derives from later translations of chapter 39 of Magna Carta.

Article VI:

> In all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury … .

Article VII:

> preserves the right to trial by jury in any civil case where the sum in dispute exceeds twenty dollars.

(E)

The Universal Declaration of Human Rights 1948

p.32

But drawing upon Magna Carta, the Bill of Rights 1689, the French Declaration of Rights of Man and the Citizen 1789, the American Bill of Rights, it has provided the common standard for human rights upon which formal treaty commitments have subsequently been founded … .

11. Baron Bingham then, at page 33, summarizes:

> If, as I think, the rule of law now demands protection of fundamental human rights … the almost worldwide acceptance of that principle … to make that principle enforceable and effective.

12. Baron Bingham reiterates this point at pages 66 to 67:

> Both the Universal Declaration of Human Right and later international instruments link the protection of human rights with the rule of law, and the

European Court of Human Rights has referred to 'the notion of the rule of law from which the whole convention draws its inspiration'.

The European Commission has consistently treated democratization, the rule of law, respect for human rights and good governance as inseparably interlinked.

13. Reiterating this point at page 67, Bingham declares:

> While, therefore, one can recognize the logical force of Professor Raz's contention, I would roundly reject it in favour of a 'thick' definition, embracing the protection of human rights within its scope.

14. Significantly Baron Bingham at pages p. 67 – 68, calls our attention to:

> V. D. Zorkin, President of the Constitutional Court of the Russian Federation said at a symposium held by the International Bar Association in Moscow on 06 July 2007:
>
> > Law cannot be simply what is dictated by political authority or issued by the state. In the 20th Century there have been two examples of legal tragedies, which were developing in parallel. One was totalitarian Soviet Communism, and the other was German Nazism.
> >
> > In the USSR, owing to efforts of Stalinist regime theoretician Vyshinsky, the law was identified with statutory law, and law was identified with the will (or rather dictatorship) of the proletariat. Through such logic, whatever was prescribed by the state in the form of statutory law was lawful.
> >
> > Hitler flowed yet a different ideological pathway, absolutely antagonistic to communist ideology, but the result was the same. In Nazi Germany, the law was the expression of the will of the German nation, and the will of the German nation was incorporated in the Fuhrer. Hence the law existed only as a body of statutory laws.
> >
> > Both systems were killing millions of people, because for both the law was given and contained in the statutes.

15. In a concluding statement at page 68 Bingham states:

> It is, I think, possible to identify the rights and freedoms which, in the UK and developed Western and Westernized countries elsewhere, are seen as fundamental, and the rule of law requires that those rights should be protected. … I shall … (suggest) a number of conclusions:
> that the common law and statute have for many years given a measure of protection to such rights; that there were gaps in such protection; that the rights and freedoms embodied in the European Convention on Human Rights, given direct effect in this country (UK) by the Human Rights Act 1998, are in truth 'fundamental', in the sense that they are guarantees which no one living in a free democratic society such as the UK should be required to forgo; and that protection of these rights does not, as is sometimes suggested, elevate the rights of the individual over the rights of the community to which he belongs.

16. Addressing the specific issue at hand here - the Right to a fair trial - Bingham asserts at pages 90 to 97:

> The right to a fair trial is cardinal requirement of the rule of law. It is a right to be enjoyed, obviously and pre-eminently, in a criminal trial, but the rather ponderous language of this principle is choose to make clear that the right extends beyond criminal trial. It applies to civil trials, whoever is involved, … .
>
> First it must be recognized that fairness means fairness to both sides, not just one. The procedure followed must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it.
>
> A trial is not a fair trial if the procedural dice are loaded in favour of one side or the other, if (in the phrase used in the European cases) there is no equality of arms.
>
> p. 91
> The constitution of a modern democracy governed by the rule of law must … guarantee the independence of judicial decision makers, an expression I use to embrace all those making decisions of a judicial character.

17. Concerning the role of judges, Bingham at page 92 emphasizes:

> These statutory references make clear that judges must be independent of ministers and the government. … It calls for decision-makers to be independent of local government, vested interests of any kind, public and parliamentary opinion, the media, political parties and pressure groups. In short, they must be independent of anybody or anything which might lead them to decide issues coming before them on anything other than the legal and factual merits of the case … . p. 92

18. And again, at page 96, Bingham speaks directly to the issue here of criminal trials:

> The right to a fair criminal trail has been described as 'the birthright of every British citizen'.
>
> It has also be said to be 'axiomatic that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried at all'.
>
> Yet again, the right to a fair trial has been described as 'fundamental and absolute'.

19. And at page 97 Bingham underscores a fundamental principle:

> A defendant is to be presumed innocent until he is proven to be guilty.

20. In conclusion Baron Bingham affirms at page 84:

> The rule of law requires that the law afford adequate protection of fundamental human rights. It is a good start for public authorities to observe the letter of the law, but not enough if the law in particular country does not protect what are there regarded as the basic entitlements of a human being.

21. In closing I would like to mirror Baron Bingham;

> the Lord Chief Justice of England (Lord Hewart) who, in a powerful and very readable polemic published in 1929 entitled *The New Despotism*, launched a coruscating attack on the legislative and administrative practices of the day:

> It does not take a horticulturalist to perceive that, if a tree is bearing bad fruit, the more vigorously it yields the greater will be the harvest of mischief.

22. We respectfully submit that the misapplication of *Criminal Code* s. 117.03 is 'bearing bad fruit'.

23. The public will not be put at risk by pruning this bad branch of the law.

Respectfully submitted to the Court of Queen's Bench, Saskatoon, Saskatchewan, Wednesday, 13 September 2010.

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1. Tom Bingham, *The Rule of Law*, Penguin Books, 2010

Criminal Code of Canada
Section 117.03

SEIZURE ON FAILURE TO PRODUCE AUTHORIZATION /
Return of seized thing on production of authorization
Forfeiture of seized thing

117.03

(1) Notwithstanding section 117.02. a peace officer who finds

(a) a person in possession of a firearm who fails, on demand, to produce, for inspection by the peace officer, an authorization or a licence under which the person may lawfully possess the firearm and a registration certificate for the firearm, or

...

may seize the firearm, prohibited weapon, restricted weapon, prohibited device or prohibited ammunition unless its possession by the person in the circumstances in which it is found is authorized by any provision of this Part, or the person is under the direct and immediate supervision of another person who may lawfully possess it.

(2) Where a person from whom any thing is seized pursuant to subsection (1) claims the thing within fourteen days after the seizure and produces for inspection by the peace officer by whom it was seized, or any other peace officer having custody of it,

(a) an authorization or a licence under which the person may lawfully possess it, and

(b) in the case of a firearm, a registration certificate for the firearm,

the thing shall be forthwith returned to that person.

(3) Where any thing seized pursuant to subsection (1) is not claimed and returned as when provided by subsection (2), a peace officer shall forthwith take the thing before a provincial court judge, who may, after affording the person from whom it was seized or its owner, if known, an opportunity t establish that the person is lawfully entitled to possess it, declare it to be forfeited to Her Majesty, to be disposed or or otherwise dealt with as the Attorney General directs. 1995, c.39, s. 139.