IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R v. Primrose, 2008 NSPC 80

Date: 20081216
Docket: 1650792, 1650793
Registry: Bridgewater

Between:

R.

v.

Christopher Wayne Primrose

Judge:	The Honourable Judge James H. Burrill
Heard:	December 16, 2008, Liverpool, Nova Scotia
Written decision:	January 27, 2009
Charge:	253(a) CC, 253(b) CC
Counsel:	Murray Judge, for the Crown Alan Ferrier, Q.C., for the Defence

By the Court:

Introduction

[1] Christopher Wayne Primrose has been charged with offences of impaired driving and operation of a motor vehicle while his blood alcohol concentration exceeded the legal limit. The offences are alleged to have occurred on May 20, 2006.

[2] On July 2, 2008, Canada's drinking and driving legislation was amended by Bill C-2. The amendments specified the type of evidence capable of raising a reasonable doubt in order to rebut the presumption of identity contained in s. 258(1)(c) of the *Criminal Code*.

[3] Prior to July 2, 2008, s. 258(1)(c) stated that:

> "Evidence of the results of the analyses so made is, in the absence of evidence to the contrary, proof that the concentration of alcohol in the blood of the accused at the time when the offence is alleged to have been committed was, where the results of the analyses are the same, the concentration determined by the analyses and, where the results of

the analyses are different, the lowest of the concentrations determined by the analyses;

[4] After July 2, 2008, that section has been changed and now reads:

"The evidence of the results of the analyses so made is conclusive proof that the concentration of alcohol in the accused's blood both at the time when the analyses was made and at the time when the offence was alleged to have been committed was, if the results of the analyses is the same, the concentration determined by the analyses and, if the results of the analyses are different, the lowest of the concentrations determined by the analyses, in the absence of evidence tending to show all of the following three things; that the approved instrument was malfunctioning or was operated improperly, that the malfunction or improper operation resulted in the determination that the concentration of alcohol in the accused's blood exceeded 80 mg of alcohol in 100 ml of blood, and that the concentration of alcohol in the accused's blood would not in fact have exceeded 80 mg of alcohol in 100 ml of blood at the time when the offence was alleged to have been committed;"

"emphasis added"

[5] Prior to these amendments an accused who wanted to rebut the statutory presumption of identity, could rely on a "Carter defence". This defence was named after the case of **R v Carter** (1985), 19 C.C.C. (3d) 174 (Ont. C.A.). In that case the court ruled that if a trial court accepted an accused's evidence as to a certain level and pattern of alcohol consumption together with a toxicologist's evidence concluding that this would have resulted in a blood alcohol concentration below the legal limit at the time of driving, this would constitute, by itself, evidence capable of raising a reasonable doubt about the accused's blood alcohol level at the time of the offence.

[6] The amendments mean that Parliament has non-legislated that the "Carter defence" is no longer, by itself, sufficient to rebut the presumption of identity.

The Issue

[7] In this case the defence has applied for direction as to whether the amendments operate retrospectively. The defence argues that they do not while the Crown, essentially supporting the position of the defence, leaves it to the court to make it's determination.

Analysis

[8] Parliament was silent as to whether the provisions were to apply retrospectively and as such one can look to the common law for guidance. In the case of **R.v. Bickford** (1989), 51 C.C.C. 3(d) 181 (Ont. C.A.) at 185 the court said:

> As a matter of fundamental principle, a statute is not to be construed as having a retrospective operation unless such a construction is made evident by its terms or arises by necessary implication. However the presumption against retrospective construction has no application to enactments which relate only to procedural or evidentiary matters"

[9] Since July 2, 2008 there have been multiple decisions, mainly in Ontario and British Columbia, that have dealt with this very issue. Most have approached it as

an exercise in trying to decide wether the amendments in Bill C-2 are purely procedural or evidentiary in nature.

[10] In conducting that analysis courts, however, have had to also be mindful of the Supreme Court of Canada's decision in **Martin v. Perrie** [1986] 1 S.C.R. 41 stating that :

> "The proper approach to the construction of the Act..... is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied, retrospectively [immediately and generally] to a particular type of case, would impair existing rights and obligations"

[11] The decisions to date appear to be almost equally divided, but in Nova Scotia there is only one reported decision; **R. v. Delory,** [2009] N.S.J. No. 9 (Prov. Ct.). In that case Judge Sherar decided that the provisions applied retrospectively.

[12] After reviewing these decisions I find that the words that Justice Duncan wrote in the case of **R. v. McDonald,** [2008] O.J. No. 4297 (Ont. Ct. Jus.), ring true:

> "Since July 2 there has been an avalanche of thoroughly researched and well reasoned decisions on the retrospectivity point. Two of the leading cases in favour of retrospectivity are *R. v. Dudhnath,* O.J. 3073 and *R. v. Hall* [2008] B.C.J. 1610. The contrary view is well represented by *R. v. Lungal*, [2008] A.J. 1070 and *R v. Carapiet*, [2008] O.J. 3835. Little can be added to the discussion contained in these cases and the authorities cited therein. They demonstrate that characterization of the amendments as evidentiary/procedural versus substantive, as affecting vested rights or not, is an exercise that does not yield a simple or conclusive answer. Learned judges reading the same legislation and relying on the same case of higher authority can come to different conclusions. As Fontana J. Put it in *R. v. Hayes* [2008] O.J. No. 4095, 2008 ONCJ 494, "there is as good a reason for viewing it one way as there is for another"."

[13] It must indeed be frustrating to the public not to receive a definitive answer on this issue. While these cases have served to guide my analysis none of these decisions have been at an appellate level that is binding on me.

[14] With the greatest of respect to those who have held otherwise I find that the amendments affect substantive rights and are not retrospective in application. In reaching this conclusion I have relied heavily on and adopt the reasoning of Mulligan J. In **R. v. Bartholomew**, [2008] O.J. No. 4869 (Ont. Ct. Jus.)

[15] In the case of **R. v. Phillips,** (1988), 42 C.C.C. (3d) 150 (Ont. C.A.) the court found that the presumption of identity was unconstitutional. In fact, the Crown conceded that the presumption of identity represented a *prima facie* infringement of the presumption of innocence. The presumption was saved by s. 1 of the *Charter* because it was a rebuttable presumption which operated only in the absence of evidence to the contrary. At page 168 Justice Blair said;

> "By this standard the presumption in s. 241(1)(c) [now 258(1)(c)] is not onerous because, to rebut it an accused need only create a reasonable doubt as to the existence of the presumed BAC at the time of the alleged offence."

[16] While I am not deciding the constitutionality of the current s. 258(1)(c), a comparison of the amendments to the statement of Justice Blair makes it clear to me that it is impossible to characterize the amendments as being only procedural or

evidentiary. The amendments have essentially legislated away that which allowed the former legislation to pass constitutional muster. The former legislation was saved because of the “Carter defence”. Now that this defence has legislatively been deemed to be insufficient by itself, the amendments, in my view, have more than just exclusively evidentiary or procedural effect. The amendments result in a substantive change to a constitutional right.

[17] It is for these reasons that I have concluded that the legislation in questions is not retrospective.

J.H.

Burrill