In the Court of Appeal of Alberta

Citation: R. v Peers, 2015 ABCA 407

Date: 20151221
Docket: 1503-0076-A
1503-0077-A
1503-0197-A
Registry: Edmonton

#1503-0076-A/1503-0077-A

Between:

Her Majesty the Queen

Respondent
(Respondent)

- and -

Jeremy James Peers and Robert David Peers

Appellants
(Applicants)

- and -

The Attorney General of Alberta

Intervener

#1503-0197-A

And Between:

Her Majesty the Queen

Respondent
(Respondent)

- and -

Ronald James Aitkens

Appellant
(Applicant)

- and -

The Attorney General of Alberta

Intervener

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice Brian O'Ferrall

Memorandum of Judgment of the Honourable Mr. Justice Berger and the Honourable Mr. Justice Slatter

Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall Concurring in the Result

Appeal from the Decision by
The Honourable Madam Justice J.E. Topolniski
Dated the 24th day of February, 2015
Filed on the 24th day of February, 2015
(2015 ABQB 129, Docket: 120790480Q2; 120790480P1)

Appeal from the Decision by
The Honourable Mr. Justice E.C. Wilson
Dated the 8th day of May, 2015
(Docket: 131151698U1; 131151698P1)

Memorandum of Judgment

The Majority:

[1] The issue on this appeal is whether the appellants are entitled to a jury trial. They are charged with offences under the *Securities Act*, RSA 2000, c. S-4, which provides in s. 194 for a maximum penalty of imprisonment of five years less a day, a fine of up to $5 million, "or to both". Section 11(f) of the *Canadian Charter of Rights and Freedoms* grants a right to a trial by jury "where the maximum punishment for the offence is imprisonment for five years or a more severe punishment". The appellants argue that the potential punishment of five years less one day, plus a $5 million fine, amounts to a "more severe punishment" which generates a right to a trial by jury. If the appellants are correct, and they are entitled to a jury trial, it is argued that the Provincial Court cannot accommodate that right.

[2] In the Peers matter the Provincial Court Judge agreed with the appellants, and transferred the proceedings to the Court of Queen's Bench. A judge of that court overruled the Provincial Court decision, finding that those appellants did not have a right to a trial by jury: ***R. v Peers***, 2015 ABQB 129, 18 Alta LR (6th) 396. In the Aitkins matter the Provincial Court Judge rejected the appellants' argument: ***R. v Aitkens***, 2015 ABPC 21. The Court of Queen's Bench affirmed that decision in unreported reasons. These appeals resulted.

[3] The provisions of the *Charter* should be interpreted in their entire context and in their grammatical and ordinary sense in harmony with the purpose, scheme and object of the *Charter*, having due regard to the fundamental nature of the rights protected by the *Charter*. The Supreme Court of Canada has emphasized a "purposive" approach to interpretation of the *Charter*. As stated in ***R. v Big M Drug Mart Ltd.***, [1985] 1 SCR 295 at p. 344:

> In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit

> of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. (emphasis in original)

The Court contrasts "generous" with "legalistic". A formalistic or technical interpretation is inappropriate in a constitutional context. As Professor Hogg notes in Constitutional Law of Canada (5th ed., looseleaf), Carswell: Toronto, 2007 at para. 36.8(c): "Generosity is a helpful idea as long as it is subordinate to purpose."; ***Big M*** warns against "overshooting" the intended purpose. As Professor Hogg explains: "What [the purposive approach] involves is an attempt to ascertain the purpose of the Charter right, and then to interpret the right so as to include activity that comes within the purpose and exclude activity that does not."

[4] The appellants rely on a number of technical interpretative arguments, an approach contrary to the principles set out in ***Big M***. For example, they argue that for interpretive purposes the word "punishment" should be examined in isolation, and that it must have the same meaning wherever it appears in the *Charter*: ss. 11(f), 11(h), 11(i), and 12. This formalistic approach, however, takes the word "punishment" out of its context: "imprisonment for five years or a more severe punishment". Whereas s. 11(f) triggers the right to a jury trial, the other sections that use the word "punishment" impose constitutional limits on the penal liability of the accused. The context of s. 11(f) is different, and its interpretation must reflect that.

[5] The wording in the *Charter* is: "where the maximum punishment for the offence is imprisonment for five years or a more severe punishment". The expression "more severe" must be related back to the term "imprisonment" in some way, and the entire phrase must be interpreted as a whole. Whether a particular type of punishment is "more severe" than five years imprisonment must be a qualitative, not a quantitative, comparison. Even if in some contexts the word "punishment" includes "fines", it must still be determined when a penalty becomes "more severe" than a term of imprisonment. The issue is not whether "punishment" includes "fines", but whether penalties including fines are qualitatively "more severe" than imprisonment.

[6] The purpose of s.11(f) was obviously to entrench the traditional right to a trial by jury for the most serious offences: ***R. v Rowbotham***, [1994] 2 SCR 463 at p. 477. The five year cut-off would, for example, exclude all summary conviction offences. One could argue that the five year cut-off is "arbitrary", and that some other cut-off would be more appropriate. There is little point to that debate, because some limit had to be selected. The "purpose" of the five year cut-off in s.11(f) is to distinguish those cases that are deemed "serious enough" for a jury trial from those that are not. As a review of *Hansard* confirms, the maximum penalty of five years less a day found in the *Securities Act* was deliberately chosen to avoid jury trials of complex securities prosecutions. The Provincial Legislature cannot be criticized for attempting to enact *Charter*-compliant legislation

by deliberately setting a maximum penalty which reflects the *de facto* cut-off in the *Charter*, and the procedural limitations of the Provincial Court.

[7] The parties discussed in detail the relationship between s. 7 and s. 11 of the *Charter*. The two sections obviously arise from common principles, but it does not follow that the provisions of s. 11 have no independent operative effect. Whatever the conceptual relationship between s. 7 and s. 11, s. 7 is neither a floor nor a ceiling on the s. 11 rights. Section 11(f) is clearly related to "liberty" and engages a fundamental principle of criminal procedure, the jury trial. Section 11(f), however, must be interpreted in its own context, according to its specific purpose.

[8] The provision in s. 11(f) could be interpreted as the appellants propose. A maximum sentence of "five years" admittedly engages the right to a jury trial, and it could be argued that if anything is attached to a maximum sentence of "five years less a day", the result is "a more severe punishment" than five years. Thus, the addition of a small fine, a revocation of a licence or permit for any meaningful period of time, a period of probation, or a requirement to report one's place of residence, could arguably generate a right to a trial by jury. It is clear, however, that not every order made at the time of sentencing is a part of the "punishment": ***R. v Rodgers***, 2006 SCC 15 at para. 63, [2006] 1 SCR 554.

[9] The appellant Robert Peers argues in his factum: ". . . how much is a night in jail worth to a reasonable Canadian? If a night in jail is worth $5 million or less then the appeal must succeed". At a formalistic level, this argument must be acknowledged. The result, however, is entirely unworkable; while the *Charter* protects fundamental rights, its interpretation must be practical: ***R. v Silveira***, [1995] 2 SCR 297 at para. 120. Any interpretation must be capable of reasonable definition and application. What would be the result, for example, if the maximum penalty were "four years imprisonment plus a $5 million fine"? Is that a "more severe punishment" than five years imprisonment? The problem with the appellants' argument is that it is impossible to measure how much "a night in jail is worth" when compared in a qualitative sense to imprisonment.

[10] Our legal system does not recognize any equivalency between money and deprivation of liberty. For example, a wealthy convict cannot buy his way out of prison. He cannot say: "Tell me how much two years less a day's worth, and I will write the cheque". Apart from the fact that imprisonment serves many objectives (such as protection of the public), loss of liberty cannot be monetized.

[11] At the time the *Charter* was drafted, fines (with default for nonpayment) were a very well-known and frequently used form of punishment. If the drafters thought that some combination of imprisonment and fines should compel a jury trial, one would expect some reference to that. Given the obvious difficulty of equating, at a qualitative level, a loss of liberty with a fine, the absence of any such provision is telling.

[12] The prospect of jail time for nonpayment of a fine does not change the analysis. Jail time for nonpayment of a fine is not a punishment for the original offence, but rather a method of

compelling or motivating payment of the fine. Further, imprisonment for failure to pay a fine is moderated by the limits on the quantum of fines properly imposed, and by the various provisions of the *Criminal Code* respecting fine programs and the inability to pay.

[13] The appellants' argument is inconsistent with the two concepts just discussed: our system of criminal justice does not recognize an equivalency between imprisonment and money, and incarceration in lieu of paying a fine is a method of encouraging payment of the fine, not a penalty for the original offence. The appellants' rhetorical question about the value of a day in jail would invite the argument that a fine of $90, combined with the potential sentence of five years less one day, would require a trial by jury. The sum of $90 is chosen for illustration because under s. 734(5)(a)(ii) of the *Criminal Code* each day of imprisonment, in lieu of paying a fine, is calculated at eight times the provincial minimum hourly wage, which in Alberta is 8 X $11.20 = $89.60. This provision applies to provincial prosecutions by virtue of s. 3 of the *Provincial Offences Procedure Act*, RSA 2000, c. P-34, which also provides in s. 7(2) that the maximum penalty for failure to pay a fine is six months imprisonment. Thus, the appellants' argument would presumably mean that a maximum penalty of 4.5 years less one day plus a fine would survive *Charter* scrutiny.

[14] The appellants also rely on the magnitude of the potential fines under the *Securities Act*. The constitutional characterization of these fines must recognize that the *Securities Act* is there to prevent economic misconduct, and that removing the economic incentive is an important and legitimate deterrent consideration in imposing sanctions. In that context, the mere magnitude of the fine is not determinative: ***Guindon v Canada***, 2015 SCC 41 at paras. 76-81, 387 DLR (4th) 228.

[15] On a proper purposive interpretation of s. 11(f), in its context, the expression "imprisonment for five years or a more severe punishment" should be interpreted as primarily engaging the deprivation of liberty inherent in the maximum sentence of imprisonment imposed by the statute. This interpretation appropriately serves the purpose of the *Charter* in distinguishing between those crimes that are serious enough to warrant a jury trial, and those that are not. A maximum penalty of "five years less one day" does not become a "more severe punishment" just because some collateral negative consequences are added to it. From a purposive perspective, that is not enough to change the offence into one that is "serious" enough to warrant a jury trial. This is not to say that there might not be some forms of punishment that could be added to a term of imprisonment which would be so punitive that they might constitute a "more severe punishment". Examples might possibly include corporal punishment, banishment from the community, forced labour, or revocation of citizenship. However, the mere prospect of a fine or financial penalty does not qualify.

[16] This conclusion is consistent with the few decisions on the subject, although none of them is binding: ***R. v Bondy***, 2013 ONCJ 268 at paras. 41-3; ***R. v Gibbs***, 2001 BCPC 361 at para. 33.

[17] With respect to remedy, the appellants argue that no remedy other than a stay of the charges is possible. Firstly, they argue that "reading down" is not possible because there is no challenge to

the validity of the statute. That is an artificial proposition; the appellants have advanced a full frontal assault on the statutory regime. They argue that the potential penalty in the *Securities Act*, combined with the inability of the Provincial Court to hold a jury trial, results in a *Charter* breach.

[18] Secondly, the appellants argue that proper notice was not given of a constitutional challenge to the statute. In effect, the appellants argue that their default in giving the required notice entitles them to an inappropriate remedy. The result of inadequate notice, if any, is that the appellants are not entitled to any relief. The failure to give notice cannot be used as a sword.

[19] Even if there were a constitutional problem with s. 194, the appellants would not be entitled to the extreme remedies they seek. At most, the section might be "read down" to ensure that no person would receive a more severe punishment than five years imprisonment: ***R. v Cohn*** (1984), 48 OR (2d) 65 at p. 87, 13 DLR (4th) 680 (CA). This could easily be accomplished, as s. 718.3 of the *Criminal Code* illustrates:

> 718.3(3) Where an accused is convicted of an offence punishable with both fine and imprisonment and a term of imprisonment in default of payment of the fine is not specified in the enactment that prescribes the punishment to be imposed, the imprisonment that may be imposed in default of payment shall not exceed the term of imprisonment that is prescribed in respect of the offence.

The appropriate remedy under s. 24(1) of the *Charter*, if one is even needed after a s. 1 analysis, would be to apply this concept by analogy when sentencing under the *Securities Act*. The clear intent of the Legislature in excluding jury trials for securities prosecutions could be respected, while also reading the legislation in compliance with the spirit of the *Charter*. This makes reading down the statute "appropriate and just" in accordance with s. 24(1).

[20] The appeals are dismissed.

Appeal heard on November 6, 2015

Memorandum filed at Edmonton, Alberta
this 21st day of December, 2015

Berger J.A.

Slatter J.A.

O'Ferrall J.A. (concurring in the result):

[21] I have read my colleagues' reasons and I agree that the appeal must be dismissed. However, I come to this decision by a slightly different route. I am not entirely satisfied that the appellants' argument concerning their right to a jury trial, due to the application of section 11(f) of the *Charter*, is without merit. A plain, purposive, contextual and non-technical reading of section 11(f) of the *Charter* suggests to me that a jury might well be required in the prosecution of an offence for which the maximum punishment is five years less a day plus a $5 million fine. However, I find it unnecessary to decide this issue because it is apparent that the appellants are not interested in actually having a jury trial. The remedy they seek is a stay and from that I infer that the appellants' argument alleging infringement of section 11(f) is simply a means to avoid prosecution altogether.

[22] Remedies for *Charter* breaches under section 24(1) are discretionary and must be "appropriate and just in the circumstances." Furthermore, a stay of proceedings is a "draconian" remedy of last resort (*R v Taillefer*; *R v Duguay*, 2003 SCC 70, [2003] 3 SCR 307 at para 117). This means that before granting a stay, the court must ask whether there is a more appropriate remedy that "vindicates the rights and freedoms of the claimants" (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 SCR 3 at para 55).

[23] Applying these principles here, if one assumes the appellants have been denied the benefit of a jury trial, the obvious remedy is a trial by jury. However, the appellants are not interested in that remedy. They say there is no other option but to stay the prosecutions. Of course, there are other options, such as reading down the statute. There may be others. In my view, however, a stay is not an option here. Section 24(1) confers upon the court the discretion to give a remedy that the court considers appropriate and just in the circumstances. A stay is not appropriate or just because, as a remedy, it has no connection to the right alleged to have been infringed or denied. I agree, therefore, with my colleagues that this appeal must be dismissed.

Appeal heard on November 6, 2015

Memorandum filed at Edmonton, Alberta
this 21st day of December, 2015

Authorized to sign for: O'Ferrall J.A.

Appearances:

D.A. Young and R.J.C. Stack
for the Respondent

N.J. Whitling and S.J. Fix and A.S. Millman
for the Appellant Jeremy James Peers

G.L. Wolch
for the Appellant Robert David Peers

B.M. Miller and J.D. Sutherland
for the Appellant Ronald James Aitkens

R.J. Normey
for the Intervener The Attorney General of Alberta