CR 02296

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

YVAN BRIEN, JEAN-MARC DANIS, ROBBY IMBEAULT, LEO LACHOWSKI, JOHN LAFOND, TERRY LEGGE, CONRAD LISOWAY, JOHN MACPHEE, DAVID MADSEN, DENNIS MORAFF, CLARENCE PYKE, EDMUND SAVAGE, DEREK WISEMAN, LEWIS WHALEN and JAMES McAVOY

Applicants

REASONS FOR JUDGMENT

1 This application to quash an indictment, charging the 15 accused with taking part in a riot contrary to s.65 of the **Criminal Code**, puts the constitutionality of that section in issue as being inconsistent with s.7 and para. 11(d) of the **Canadian Charter of Rights and Freedoms** which state:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; ...

I. The Impugned Legislation

2 The term "riot" is to be understood as it is defined by s.64 of the **Criminal Code**:

> 64. A riot is an unlawful assembly that has begun to disturb the peace tumultuously.

3 That definition leads, in its turn, to the provisions of s.63, defining "an unlawful assembly":

> 63. (1) An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such manner or so conduct themselves when they are assembled as to cause persons in the neighbourhood of the assembly to fear, on reasonable grounds, that they
>
> (a) will disturb the peace tumultuously; or
>
> (b) will by that assembly needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously.
>
> (2) Persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose.
>
> (3) Persons are not unlawfully assembled by reason only that they are assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein.

4 It is in this immediate context that we are obliged to read and understand s.65 of the **Criminal Code**:

> 65. Every one who takes part in a riot is guilty of an indictable offence and liable to imprisonment for a term not exceeding two

years.

5 An indictment charging an offence contrary to s.65 arguably includes a lesser offence under s.66, which reads as follows:

> 66. Every one who is a member of an unlawful assembly is guilty of an offence punishable on summary conviction.

6 The term "riot" also appears in s.67 of the **Criminal Code**, which refers to what is commonly known as "reading the Riot Act", following which s.68 may be engaged, with even more serious penal consequences than those provided for in s.65. Sections 67 and 68 state:

> 67. A justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff, who receives notice that, at any place within his jurisdiction, twelve or more persons are unlawfully and riotously assembled together shall go to that place and, after approaching as near as safely he may do, if he is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:
>
> Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN.
>
> 68. Every one is guilty of an indictable offence and liable to imprisonment for life who

(a) opposes, hinders or assaults, wilfully and with force, a person who begins to make or is about to begin to make or is making the proclamation referred to in section 67 so that it is not made;
(b) does not peaceably disperse and depart from a place where the proclamation referred to in section 67 is made within thirty minutes after it is made; or
(c) does not depart from a place within thirty minutes when he has reasonable grounds to believe that the proclamation referred to in section 67 would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it.

II. Grounds of Challenge

7 The applicants base their challenge to the constitutional validity of s.65 of the **Criminal Code** on the proposition that the offence it purports to create does not require proof beyond a reasonable doubt of the mental elements of an offence, as contemplated by s.7 and para. 11(d) of the **Canadian Charter of Rights and Freedoms**.

8 That proposition rests on the view that since "an unlawful assembly" is an essential ingredient of the offence under s.65, given the definition in s.64, an accused may be found guilty of the offence without having any guilty intent, by reason of the definition of "an unlawful assembly" in s.63 of the Code.

9 The applicants argue that three or more persons assembled together for any common purpose might be found, pursuant to s.63 of the Code, to be an unlawful assembly for no better reason than that a person in the neighbourhood fears (on reasonable but mistaken grounds, which grounds are not discernible by members of the assembly) that some of its

members will either disturb the peace tumultuously or cause others to do so without reasonable cause. In such a case, a perfectly lawful gathering whose members have no unlawful purpose or guilty knowledge could be found by a court to be an unlawful assembly purely on the basis of a completely reasonable mistake made by someone in the neighbourhood. That being so, anyone participating in a lawful assembly is at risk of a conviction under s.65 of the Code, as I understand the applicants' position, if for any reason a tumultuous disturbance of the peace breaks out during the assembly, notwithstanding the absence of any guilty intent on the part of the participant in question.

10 It is therefore the applicants' position that s.65 of the Code creates an absolute liability offence punishable by a term of imprisonment, which violates s.7 of the **Canadian Charter of Rights and Freedoms**. And since a conviction under s.65 does not require proof of a guilty mind, s.65 also violates para. 11(d) of the Charter. Moreover, since s.65 of the Code is not a reasonable limit on the rights guaranteed by s.7 and para. 11(d), in the sense of s.1 of the Charter, s.65 is inconsistent with those provisions of the Charter and hence is of no force and effect pursuant to s.52 of the **Constitution Act, 1982**.

11 Even if an objective test of *mens rea* can be applied in determining if an offence contrary to s.65 of the Code has been committed, on the basis that once a tumultuous breach of the peace has begun to take place a reasonable person will take immediate steps to disassociate himself or herself from any assembly in relation to which the breach of the peace takes place, since the assembly may by then reasonably be presumed to have become unlawful in the sense intended by s.63 of the Code, it is the applicants' position that such an objective test

is insufficient to satisfy the requirements of s.7 and para. 11(d) of the Charter. On this alternative basis, the applicants invite the Court to again conclude that s.65 of the Code is not saved by s.1 of the Charter, and that s.65 is therefore inoperative by virtue of s.52 of the **Constitution Act, 1982**.

12 It is the applicants' submission that the offence contemplated by s.65 of the **Criminal Code** is one which can only satisfy the requirements of s.7 and para. 11(d) of the Charter if it includes subjective *mens rea* as an essential element.

III. Procedure & Evidence

13 Counsel both for the applicants and for the Crown have argued the matter without reference to the evidence adduced at the preliminary inquiry. I have therefore not examined the transcripts of that evidence.

14 Crown counsel has urged me to reserve my decision on the present application until all the trial evidence has been adduced; and, in any event, to allow the Crown the opportunity to adduce evidence with reference to s.1 of the **Canadian Charter of Rights and Freedoms** should I conclude that the applicants have made out a *prima facie* case for holding that s.65 is in violation of s.7 or para. 11(d) of the Charter.

15 Counsel for the applicants urge me to come to a decision on the present application without waiting for the trial evidence, since in their submission no evidence is necessary as to the alleged offence and the trial is likely to take up several weeks, requiring the

presence of witnesses who are no longer in the Northwest Territories. If there is a *prima facie* violation of the Charter, the applicants agree that the Crown should have an opportunity to adduce evidence with reference to s.1. No evidence or submission in reference to s.1 has yet been heard at this point.

16 In hearing the application argued before plea as provided by s.601 of the **Criminal Code**, it is open to me to proceed in the manner proposed either by the applicants or by the Crown. In considering which of the two alternatives to follow, I remind myself of the provisions of s.24(1) of the **Canadian Charter of Rights and Freedoms**:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

17 The relevant considerations are described by the unanimous panel of five in **R. v. DeSousa**, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66, as follows (at C.C.C. p.132):

> The decision whether to rule on the application or reserve until the end of the case is a discretionary one to be exercised having regard to two policy considerations. The first is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own. This policy is the basis of the rule against interlocutory appeals in criminal matters: see **R. v. Mills** (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, (1986) 1 S.C.R. 863. The second, which relates to constitutional challenges, discourages adjudication of constitutional issues without a factual foundation: see, for instance, **Moysa v. Alberta (Labour Relations Board)** (1989), 60 D.L.R. (4th) 1, (1989) 1 S.C.R. 1572, 89 C.L.L.C. ¶14,028, and **Danson v. Ontario (Attorney General)** (1990), 73 D.L.R. (4th) 686, (1990) 2 S.C.R. 1086, 43 C.P.C. (2d) 165. Both these policies favour disposition of applications at the end of the case. In exercising the discretion to which I have referred, the trial judge should not depart from these policies unless there is a strong reason for so doing. In some cases the interests of justice necessitate an immediate

> decision. ... An apparently meritorious Charter challenge of the law under which the accused is charged which is not dependent on facts to be elicited during the trial may come within this exception to the general rule: see **Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832** (1987, 38 D.L.R. (4th) 321 at p.337, (1987) 1 S.C.R. 110, 87 C.L.L.C. ¶14,015. This applies with added force when the trial is expected to be of considerable duration: see, for example, **R. v. Nova Scotia Pharmaceutical Society**, S.C.C., July 9, 1992, unreported (since reported 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1.

18 It is the applicants' position that this is one of the exceptional cases not depending on facts to be elicited at trial and in which a meritorious Charter challenge ought to be disposed of in their favour now so as to avoid placing them on trial, where the trial is expected to be a lengthy one. The Crown's position is to the contrary, although it concedes that the trial is expected to last for several weeks.

19 Not that the Crown concedes that s.65 of the **Criminal Code** has been shown to violate s.7 or para. 11(d) of the Charter; or that so much as a *prima facie* case to that effect has been made out, so as to put the Crown to the task of persuading the Court that s.65 is a reasonable limit on those Charter provisions pursuant to s.1 of the Charter. If the Crown is correct in this, there would seem, at first blush, little to be gained by a postponement of the Court's determination of the present application until the trial, although that is what the Crown asks for in the interests of ensuring an adequate factual foundation for that determination, should it later require consideration on appeal.

20 The parties before the Court are thus sharply at odds as to whether the application should be determined before or after trial on the indictment. The applicants contend for "before" whereas the Crown contends for "after". I shall indicate my decision on that point following a

discussion of the issues as they reflect on the point.

IV. Discussion

I. The legislation

21 As the applicants recognize, in linking the provisions of s.63 and 64 of the **Criminal Code** to their challenge to the constitutionality of s.65 of the **Code**, s.65 cannot be read in isolation from those provisions. Furthermore, s.65 is to be understood in the wider context of ss.66, 67 and 68 of the Code as well, even if the constitutionality of those provisions is not in issue here.

22 Sections 65 and 66 of the **Criminal Code** are to be understood also in the context of other provisions of the Code, such as section 175:

> 175. (1) Every one who
> (a) not being in a dwelling-house, causes a disturbance in or near a public place,
> (i) by fighting, screaming, shouting, swearing, singing or using insulting or obscene language,
> (ii) by being drunk, or
> (iii) by impeding or molesting other persons,
> (b) openly exposes or exhibits an indecent exhibition in a public place,
> (c) loiters in a public place and in any way obstructs persons who are in that place, or
> (d) disturbs the peace and quiet of the occupants of a dwelling-house by discharging firearms or by other disorderly conduct in a public place or who, not being an occupant of a dwelling-house comprised in a particular building or structure, disturbs the peace and quiet of the occupants of a dwelling-house comprised in the building or structure by discharging firearms or by other disorderly conduct in any part of a building or structure to which, at the time of such conduct, the occupants of two or more dwelling houses comprised in the building

> or structure have access as of right or by invitation, express or implied, is guilty of an offence punishable on summary conviction.
>
> (2) In the absence of other evidence, or by way of corroboration of other evidence, a summary conviction court may infer from the evidence of a peace officer relating to the conduct of a person or persons, whether ascertained or not, that a disturbance described in paragraph (1)(a) or (d) was caused or occurred.

23 There is always available, in appropriate cases, the preventive jurisdiction provided by s.810 of the **Criminal Code**, which states in part as follows:

> 810. (1) Any person who fears that another person will cause personal injury to him or his spouse or child or will damage his property may lay an information before a justice.
>
> (2) A justice who receives an information under subsection (1) shall cause the parties to appear before him or before a summary conviction court having jurisdiction in the same territorial division.
>
> (3) The justice or the summary conviction court before which the parties appear may, if satisfied by the evidence adduced that the informant has reasonable grounds for his fears,
>
> (a) order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed in the recognizance as the court considers desirable for securing the good conduct of the defendant; or
>
> (b) commit the defendant to prison for a term not exceeding twelve months if he fails or refuses to enter into the recognizance.

24 It will be noticed that s.65 of the **Criminal Code** and the other Code provisions dealing with riots and unlawful assemblies do not include a provision similar to s.175(2). If that is because s.175(2) is intended to specifically and additionally empower a court which has only a limited summary conviction jurisdiction, one might have expected a similar provision to be included in s.66 of the Code, which creates only a summary conviction offence.

25 It is apparent from the scope of s.810 of the **Criminal Code**, furthermore, that this provision is of limited value in terms of preventing the outbreak of a riot. Section 66 of the Code, on the other hand, appears to be intended to have such a preventive purpose. And section 175 might well be similarly employed. Sections 67 to 68, by contrast, are provisions intended primarily for the suppression of a riot already in progress. Section 67, it may be noticed, speaks of "twelve or more persons", whereas s.63 contemplates an assembly of only three or more; and s.67 refers to the "twelve or more persons" being "unlawfully **and riotously** assembled together" (emphasis added here), suggesting that s.67 applies only to situations which have progressed well beyond the s.63 stage to one in which riotous activity is already quite clearly in progress. Section 64 likewise reflects a situation which has progressed beyond the stage described in s.63, even if the definition of "riot" in s.64 is expressed in terms of an "unlawful assembly" as defined in s.63.

26 The offence created by s.65 of the Code is clearly to be distinguished from that created by s.66. To offend against s.65 one has to take part in a tumultuous disturbance of the peace and not merely in the unlawful assembly giving rise to that disturbance. At the same time, it is to be noticed that a mere disturbance of the peace by disorderly conduct or otherwise, in the sense of s.175 of the Code, is not enough in itself to engage s.65. As s.64 indicates, it is not even enough, for purposes of s.65, to take part in a tumultuous disturbance of the peace; the disturbance must, for those purposes, be one brought about in relation to an unlawful assembly.

27 It is equally apparent that while s.65 and s.66 both relate to an "unlawful assembly" as defined in s.63, they do so differently due to the intervention of s.64. Consideration must

therefore be given to what is meant by the words "disturb the peace tumultuously" in s.64.

28 The words "tumultuous" and "tumultuously" are derived from the noun "tumult", which connotes actual or threatened force and violence in addition to any public disorder, confusion and uproar: **R. v. Lockhart** (1976), 15 N.S.R. (2d) 512 (C.A.) at p.529. The combined effect of ss. 63, 64 and 65 is that a riot does not require the prior presence, in an unlawful assembly, of a large number of persons; since three or more are enough, by virtue of ss. 63 and 64, for the purposes of s.65. It is however essential to the existence of a riot that there be actual or threatened force and violence, in addition to any public disorder, confusion and uproar.

29 It is against this background of analysis that I turn to the grounds of the applicants' challenge to the constitutionality of s.65 of the **Criminal Code**.

2. The challenge

30 As I have already mentioned, the offence created by s.65 is not to be confused with that created by s.66. Let us assume, for purposes of the argument, that three or more persons assembled together for any common purpose might be found to constitute an unlawful assembly for no better reason than that a person in the neighbourhood fears on reasonable (but perhaps nevertheless mistaken) grounds, which grounds may not be discernible by members of the assembly, that some of its members will disturb the peace tumultuously or cause others to do so without reasonable cause, so that all those participating in the assembly might be successfully prosecuted under s.66, whether or not they were aware that the assembly

had become unlawful: see **R. v. Paulger and Les** (1982), 18 C.C.C. (3d) 78 (B.C. Co.Ct.); **R. v. Kalyn** (1980), 52 C.C.C. (2d) 378 (Sask. Prov. Ct.).

31 But more is required before the participants in the assembly could properly be convicted of an offence contrary to s.65. It does not follow that those who are held to be participating in an unlawful assembly stand to be convicted under s.65 just because a tumultuous disturbance of the peace breaks out during the assembly. They must be shown first to have taken some part in that disturbance in one way or another: see **R. v. Atkinson and Others** (1869), 11 Cox C.C. 330, per Kelly C.B.; **R. v. Thomas** (1971), 2 C.C.C. (2d) 514 (B.C. Co. Ct.). And, where the common purpose mentioned in s.63 has been accomplished, so that the unlawful assembly is effectively dissolved by the time that the tumultuous disturbance of the peace occurs, there being no other basis for finding that there then was any riot, a prosecution under s.65 against any of those involved in the disturbance must fail: **R. v. Lockhart (*supra*)**. In other words, as s.64 makes clear, there is no riot without there then being an unlawful assembly as defined by s.63.

32 As counsel for the applicants has reminded the Court, the intent of the participants in what is held to be an unlawful assembly need not be unlawful; they need only have an intent to carry out any common purpose, and the purpose may be perfectly lawful. The assembly only becomes unlawful when those assembled conduct themselves in the manner described in s.63. Absent such conduct, the assembly remains lawful in the sense contemplated by s.63, even if it may be unlawful in some other sense, as by trespassing on private property or by breaching a court injunction. It is only the threatening or unruly conduct of the assembly that may render it

unlawful under s.63.

33 The reference to "reasonable grounds" in s.63 is indicative of something distinct from and more than the privately held opinions or fears of someone in the neighbourhood of the assembly; and, given the context, requires that these be grounds which are manifest not only to such a person but are equally so to any reasonable person within the assembly. What is required, clearly enough, is at least objective foresight of the consequences detailed in paragraphs (a) and (b) of s.63, so that such foresight on the part of individuals in the neighbourhood is capable of being shared by any reasonable person within the assembly, and may be therefore be reasonably imputed to all members of the assembly.

34 If that is the basis for the decisions in **R. v. Paulger and Les** and **R. v. Kalyn (*supra*)**, I have no difficulty with them. Furthermore, the requirement of objective foresight on the part of members of the assembly does not, in my opinion, require the Crown as a matter of law to produce witnesses to say that they were in the neighbourhood of the assembly when it became unlawful pursuant to s.63, much though there may be said, from the Crown's point of view, for doing so. The Crown may be able instead to rely on evidence of circumstances from which the reasonable grounds mentioned in s.63 can be inferred on the basis of the usual requirements of proof beyond a reasonable doubt. The manner of proof is immaterial for purposes of the present discussion; it is only necessary to apply the test set out in s.63 to the conduct of those in the assembly, as revealed in evidence, to determine if the assembly is unlawful.

35 Counsel have referred me to a number of Canadian cases decided in the early

1930s, with reference to what are now ss. 63 and 66 of the **Criminal Code**. Taken in chronological order, these are **Rex v. Patterson**, [1931] 3 D.L.R. 26, 55 C.C.C. 218 (Ont. C.A.); **Rex v. Beattie** (1931), 55 C.C.C. 380 (Man. C.A.); and **Rex v. Jones and Sheinin; Rex v. Thernes** (1931), 57 C.C.C. 81 (Alta. S.C., App.Div.). I have also referred to **Rex v. Pavletich** (1932), 58 C.C.C. 285 (Que. Dist. Ct.). As the cases show, ss. 63 and 66 are rooted in the English common law, having been given statutory form (with some modifications and additions) in Canada in 1892. These cases, and the English authorities on which they rest, lend support for the view, as held in **R. v. Jones and Sheinin; R. v. Thernes *(supra)*** at p.89, that:

> ... the common purpose and the likelihood of a disturbance are questions to be determined ordinarily not by direct evidence but by inference from the conduct of the meeting and from all the circum-stances surrounding it.

36 By extension to s.65 of the **Criminal Code**, through the definition in s.64, the same requirement of objective *mens rea* as to the unlawful character of the assembly, in the sense of s.63, applies also with reference to s.65. That requirement applies additionally, in a s.65 case, to the element that the unlawful assembly "has begun to disturb the peace tumultuously"; although it probably should be no more difficult to prove subjective *mens rea* as to that.

37 By objective *mens rea* I mean simply that a reasonable person, in the circumstances, not being in any relevant sense incapacitated from comprehending those circumstances, will recognize the unlawful character of the assembly when it meets the criteria described in s.63 and, in a case under s.65, the additional criteria described in s.64. By subjective *mens rea*, I mean that the accused person charged under s.65 did in fact recognize

the actual nature of the assembly as described in ss. 63 and 64.

38 The further element of participation in the riot, once existence of the riot has been proved beyond a reasonable doubt, together with proof likewise of the required objective *mens rea* as to that fact, will require proof not only of the *actus reus* of participation (by word or deed or other manner) but the necessary *mens rea* as to that. I agree with counsel for the applicants, as I understand his submissions, that in this respect the requirement is one of subjective, as distinct from objective, *mens rea*. And by this, I mean that the accused person must be shown not only to have acted as a participant, but also to have intended to "take part" in the riot (or to have been so reckless as to have acted as if he or she did so intend).

39 I therefore reject the applicants' submission that an accused person may be found guilty of an offence contrary to s.65 of the **Criminal Code** without having any guilty intent, by reason of s.63 of the Code. A person participating in a lawful assembly does not risk a conviction under s.65 of the Code even if (or after) the assembly is (or has become) unlawful, in the event that the assembly has begun to disturb the peace tumultuously, unless that person continues (intentionally or recklessly) to take part, from that point on, in what has become a riot.

40 Likewise, I reject the applicants' submission that s.65 of the **Criminal Code** creates an absolute liability offence punishable by a term of imprisonment. And I reject the applicants' contention that objective *mens rea* is insufficient in relation to the criteria contained in ss. 63 and 64 of the Code, in reference to an offence under s.65. However, I agree with the applicants' submission that subjective *mens rea* is required to establish that the accused did, intentionally or recklessly, "take part" in a riot.

41 It remains only to consider the applicants' proposition that an offence under s.65 of the Code does not meet the requirements of s.7 and para. 11(d) of the **Canadian Charter of Rights and Freedoms** regarding proof beyond a reasonable doubt of the mental elements of an offence.

3. The Charter

Although the law relating to riots and unlawful assemblies has its roots in the law of England in earlier centuries, and conditions in Canada today no doubt differ in many significant respects from those earlier times, it is nevertheless apparent that there is a continuing need in our law for effective means of controlling public disorder creating risks of danger to life, health and safety. This has been expressly recognized by Canadian courts since the first enactment of the **Criminal Code** in 1892, and implicitly since the advent of the **Canadian Charter of Rights and Freedoms** ninety years later.

42 Even before the Charter was entrenched in our Constitution in 1982, the Supreme Court of Canada began paving the way for a principled approach to the formulation of *mens rea* and other fault requirements in our law in **R. v. Sault Ste Marie (City)**, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295; **R. v. Chapin**, [1979] 2 S.C.R. 121, 7 C.R. (3d) 225, 45 C.C.C. (2d) 333, 8 C.E.L.R. 151, 95 D.L.R. (3d) 13. And see **R. v. Wholesale Travel Group Inc.**, [1991] 3 S.C.R. 154, 8 C.R. (4th) 145, 67 C.C.C. (3d) 193; and **R. v. Ellis Don**, [1992] 1 S.C.R. 840, 71 C.C.C. (3d) 63n, 92 D.L.R. (4th) 288n

for a post-Charter confirmation of those earlier authorities.

43 That this approach, and an evolving view of the scope of s.7 and para. 11(d) of the Charter, has had major significance for our understanding of the requirements of *mens rea* and other fault in our law is apparent from such seminal decisions as **Reference re s.94(2) of the Motor Vehicle Act (British Columbia)**, [1985] 2 S.C.R. 486 (*sub nom.* **Reference re Constitutional Questions Act (British Columbia)**), [1986] 1 W.W.R. 481, 48 C.R. (3d) 289, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 36 M.V.R. 240, 69 B.C.L.R. 145, 63 N.R. 266 and **R. v. Vaillancourt**, [1987] 2 S.C.R. 636, 60 C.R. (3d) 289, 39 C.C.C. (3d) 118, 47 D.L.R. (4th) 399, 32 C.R.R. 18, 68 Nfld. & P.E.I.R. 281, 209 A.P.R. 281, 10 Q.A.C. 161, 81 N.R. 115.

44 Most recently, the foregoing and other authorities have received consideration in a number of cases delineating the minimum standards of fault required to satisfy the requirements of s.7 and para. 11(d) of the Charter. See **R. v. Hundal** (1993), 79 C.C.C. (3d) 346, 19 C.R. (4th) 169 (S.C.C.); **R. v. Creighton** (1993), 83 C.C.C. (3d) 346 (S.C.C.); **R. v. Gosset** (1993), 83 C.C.C. (3d) 494 (S.C.C.); **R. v. Finlay** (1993), 83 C.C.C. (3d) 513 (S.C.C.); **R. v. Naglik** (1993), 83 C.C.C. (3d) 526 (S.C.C.) and **R. v. De Sousa** (1992), 76 C.C.C. (3d) 124, 15 C.R. (4th) 66 (S.C.C.). Time constraints prevent me from entering on a discussion of these or the many other relevant cases, here. It must suffice that I remain unpersuaded, after considering these decisions of the highest judicial authority, that the applicants are charged with an offence, as described in ss. 63 to 65 of the **Criminal Code**, which may violate either s.7 or para. 11(d) of the Charter.

V. Conclusion

45 It is not necessary, therefore, to call upon the Crown to consider its position, or to offer any evidence or submissions, with reference to s.1 of the **Canadian Charter of Rights and Freedoms**. I agree with counsel for the applicants that the motion to quash should be determined before the arraignment, since it is unnecessary to await the evidence which may be adduced at trial.

46 The motion is therefore dismissed.

47 In closing, I express my appreciation to both counsel for their written briefs and the books of authorities which they submitted on this motion, in addition to their concise and very helpful oral submissions.

M.M. de Weerdt

J.S.C.

Yellowknife, Northwest Territories

December 15th, 1993

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