Date: May 22 1997
Docket: CR 03112

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF IRVIN GEORGE McPHERSON, convicted at Fort Simpson, in the Northwest Territories, on the 6th day of February, 1997 by Justice J. Vertes, upon an Indictment alleging that he did, on or about the twelfth day of November, 1995 at or near the Village of Fort Simpson in the Northwest Territories did break and enter a certain place to wit: the residence of L.L.M. situated in the Village of Fort Simpson in the Northwest Territories, and did commit therein the indictable offence of sexual assault, contrary to Section 348(1)(b) of the Criminal Code;

AND IN THE MATTER OF an Application on behalf of the Attorney General of Canada, pursuant to section 753 of the Criminal Code of Canada to have IRVIN GEORGE McPHERSON declared a dangerous offender;

AND IN THE MATTER OF the Consent of the Attorney General of Canada, as required by section 754(1)(a) of the Criminal Code of Canada.

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

IRVIN GEORGE McPHERSON

Respondent

On the application of Crown to have Respondent declared a dangerous offender pursuant to Part XXIV of the Criminal Code of Canada, the Respondent challenges the constitutional validity of s.756 C.C.C. Constitutional validity of s.756 C.C.C. upheld.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on May 20, 1997

Reasons filed: May 22, 1997

Counsel for the Applicant (Crown): Margo Nightingale
Counsel for the Respondent: Thomas H. Boyd

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

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BETWEEN:

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REASONS FOR JUDGMENT

[1] Irvin George McPherson (the “offender”) is the subject of proceedings brought by the Crown, pursuant to Part XXIV of the **Criminal Code**, to have him declared a dangerous offender and to impose upon him a sentence of indeterminate imprisonment. On this application, the offender challenges the constitutional validity

of s.756 of the Code. For the reasons that follow, I conclude that the section is valid and therefore this application is dismissed.

[2] Section 756 provides for the compulsory psychiatric observation of an offender in preparation for the hearing of the dangerous offender application:

> 756 (1) A court to which an application is made under this part may, by order in writing,
>
> (a) direct the offender in relation to whom the application is made to attend, at a place or before a person specified in the order and within a time specified therein, for observation, or
>
> (b) remand the offender in such custody as the court directs, for a period not exceeding thirty days, for observation,
>
> where in its opinion, supported by the evidence of, or where the prosecutor and the offender consent, supported by the report in writing of, at least one duly qualified medical practitioner, there is reason to believe that evidence might be obtained as a result of the observation that would be relevant to the application.
>
> (2) Notwithstanding subsection (1), a court to which an application is made under this Part may remand the offender to which that application relates in accordance with that subsection
>
> (a) for a period not exceeding thirty days without having heard the evidence or considered the report of a duly qualified medical practitioner where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the offender and give evidence or submit a report; and
>
> (b) for a period of more than thirty but not more than sixty days where it is satisfied that observation for that period is required in all the circumstances of the case and its opinion is supported by the evidence of, or where the prosecutor and the offender consent, by the report in writing of, at least one duly qualified medical practitioner.

[3] This provision must be put in the context of other sections relating to dangerous offender applications.

[4] Part XXIV provides the legislated mechanism for incarcerating habitual offenders. Section 753 provides that where a person has been convicted of a "serious personal injury offence", as defined in s.752, and that person constitutes a threat to the life, safety or physical or mental well-being of other persons, or, there is a likelihood of the person causing injury, pain or other evil to other persons as a result of his failure in the future to control his sexual impulses, the court <u>may</u> find the

offender to be a dangerous offender and may thereupon impose a sentence of indeterminate imprisonment. I emphasize "may" because there is a residual discretion to not make those rulings. All of the necessary elements must be proven by the Crown beyond a reasonable doubt: *R. v Sullivan* (1987), 87 C.C.C. (3d) 143 (Ont. C.A.).

[5] Section 755 mandates that, at the hearing of an application, the court shall hear the evidence of two psychiatrists and all other relevant evidence called by the Crown or the offender. That section also provides that one psychiatrist shall be nominated by the Crown and one by the offender. If the offender fails or refuses to nominate a psychiatrist then the court shall nominate one on his behalf. Section 756(1) provides for the remand of the offender for purposes of observation when the court is of the opinion that evidence "might" be obtained. Subsection (2) provides for remand in exigent circumstances or for a longer period. In this case the Crown is seeking a remand under subsection (1) to a designated facility for observation before a specific psychiatrist.

[6] I will address in turn each of the offender's grounds for challenging this provision.

[7] First, the offender submitted that s.756 violates his right against self-incrimination, as protected by s.11(c) of the Charter of Rights and Freedoms. In my opinion this submission has been definitively answered by the Supreme Court of Canada in their decisions in *Lyons v The Queen* (1987), 37 C.C.C. (3d) 1, and *R. v Jones* (1994), 89 C.C.C. (3d) 353.

[8] In those cases, a majority of the Court held that proceedings under Part XXIV are part of a sentencing process. It is not the adjudication of a new offence. Hence, since the rights protected by s.11 of the Charter apply to persons "charged with an offence", and since the guilt of the offender on the offence with which he was charged has already been determined, s.11 does not apply to these proceedings.

[9] Second, the offender submitted that compulsory observation violates his right to be secure against unreasonable search and seizure, as protected by s.8 of the Charter.

[10] In my opinion, the requirement to attend for observation cannot be equated with the "seizure" of things. The body of the offender is compelled to be in attendance but he is in custody in any event. Nothing, however, compels him to say

anything or to cooperate in any way with the examining psychiatrist. While arguably intimate personal information in the mind of an individual can be the subject of protection under s.8, nothing compels the offender to provide such information. Furthermore, the fact that the offender is in custody implies a lack of a reasonable expectation of privacy as to the person of the offender. As noted in *Conway v Attorney-General of Canada* (1993), 83 C.C.C. (3d) 1 (S.C.C.), imprisonment necessarily entails surveillance, searching and scrutiny. I find that s.8 is not triggered in these proceedings.

[11] Third, the offender submitted that compulsory observation violates his right to life, liberty and security of the person and his right not to be deprived thereof except in accordance with the principles of fundamental justice, as protected by s.7 of the Charter.

[12] There is no doubt in my mind that the offender's liberty interest is at risk in these proceedings. Furthermore, there is no doubt that, even if the specific rights delineated in s.11 are not available in these proceedings, similar rights are still applicable as part of the general underlying principles of fundamental justice. In this matter the fundamental principle against self-incrimination, and the concomitant right to silence, are brought into play.

[13] It is the case, however, that the requirements of s.7 are not necessarily the same at every point of the criminal law process. The Supreme Court of Canada has recognized that those requirements are not immutable but vary according to the context. A significant difference may exist between the trial phase, before a finding of guilt, and the post-trial or disposition phase. This was highlighted by Gonthier J. for the majority in *Jones* (at page 394):

> Full s.7 protection in the pre-trial phase is essential to ensuring that an accused is not found culpable as a result of non-voluntary statements made against himself. That logic cannot easily be transferred to the post-trial phase. Given that guilt has conclusively been determined by that time, I do not believe that the logic of *Hebert* applies. As this court held in *Lyons* ss.7 to 14 protection has a more limited scope when applied to the sentencing process. Once guilt has been established, our fundamental principles of justice dictate a focus on the most appropriate sentence for the guilty party. To assume that s.7 post-trial protection should be identical to pre-trial and trial protection ignores a rather critical intervening fact: the accused has been found guilty of a crime. Having so found, the court places greater emphasis on the interests of society in developing a sentence that is appropriate to the guilty party.

[14] The reference to the "interests of society" in this extract is noteworthy because, as the Supreme Court held in another context, the requirements of s.7 are not to be considered solely from the perspective of the individual accused or offender. In *R. v Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), McLachlin J. wrote (at page 385):

> The principles of fundamental justice reflect a spectrum of interests, from the rights of the accused to broader societal concerns. Section 7 must be construed having regard to those interests and "against the applicable principles and policies that have animated legislative and judicial practice in the field" (*Beare supra*, at p.70, *per* La Forest J.). The ultimate question is whether the legislation, viewed in a purposive way, conforms to the fundamental precepts which underlie our system of justice.
>
> One way of putting this question is to ask whether the challenged legislation infringes the Charter guarantee in purpose or effect: *R. v Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295. "Purpose", on this test, must be defined generously in terms of the ultimate aim of the legislation. "Effect" refers to the actual consequences of the legislation. Where the Charter guarantee relates to individual rights, as does s.7, the inquiry as to effect will necessarily concern not only the over-all effect of the measure as it operates in the justice system but will extend to consideration of its impact on the individuals whose rights the Charter protects, typically the person charged with an offence.

[15] In analyzing this ground I am prepared to accept the definition of self-incrimination propounded by Lamer C.J.C. in his dissenting opinion in the *Jones* case (at page 367): "Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries violates the principle against self-incrimination."

[16] The purpose of s.756 specifically is to facilitate the obtaining of psychiatric evidence for the hearing. To declare the offender dangerous requires proof that he represents a threat to society. However uncertain it may be this requires a consideration of the likelihood of violent behaviour in the future. In this context psychiatric evidence is clearly relevant to the issue of whether the offender is likely to behave in a certain way. As noted previously, s.755 makes psychiatric evidence obligatory in all dangerous offender hearings.

[17] The purpose of proceedings under Part XXIV generally is to protect society from habitual offenders who pose a risk of repeat violent behaviour. In this sense there is a strong societal interest in making sure that as much relevant information as

possible is placed before the court. This was noted by Gonthier J. in *Jones* (at page 396):

> As with all sentencing, both the public interest in safety and the general sentencing interest of developing the most appropriate penalty for the particular offender dictate the greatest possible range of information on which to make an accurate evaluation of the danger posed by the offender.
>
> In the case of dangerous offender proceedings, it is all the more important that the court be given access to the widest possible range of information in order to determine whether there is a serious risk to public safety. If there is, the dangerous offender sentencing allows the justice system to more precisely tailor the actual time served by the offender to the threat that he poses to society. The overriding aim is not the punishment of the offender but the prevention of future violence through the imposition of an indeterminate sentence.

[18] In terms of the effect of s.756 on the offender, his counsel asks me to assume a "no win" situation: If the offender cooperates then he will reveal potentially incriminating information. If the offender does not cooperate then that will be taken as an indicator of psychological disturbance. But there is a third possibility: The offender cooperates and the result is a favourable evaluation by the examiner. All of this, however, is speculative. The relevant point is that this is but one step in the gathering of information. And, as noted previously, the compulsory attendance may be allowed but there is nothing in the legislation compelling the offender to speak or cooperate with the examiner. In any event, in my opinion when one gets to the stage of determining whether to label an offender as "dangerous", the interests of society outweigh the potential incriminatory use of psychiatric observation.

[19] Previous cases, including *Lyons* and *Jones*, have held that the procedural provisions of Part XXIV do not offend s.7 of the Charter. And, while no case has specifically addressed the requirements of s.756, I note that even the dissenting judgment of Lamer C.J.C. in *Jones* recognizes that the compulsory observation provisions of Part XXIV have protections for the offender (see at pages 378 - 379). The *Jones* case dealt solely with the use of information gathered at a pre-trial psychiatric evaluation. The constitutional considerations are not the same after a trial and conviction. The majority in both *Lyons* and *Jones* emphasize the various protections afforded in Part XXIV, especially the offender's right to nominate a psychiatrist. These requirements preserve the principles of fundamental justice. Therefore, I conclude that s.756 does not violate s.7 of the Charter.

[20] Finally, the offender submitted that s.756 is constitutionally vague. He argued that the use of the term "might" in subsection (1) is imprecise.

[21] The concept of vagueness is a component of the s.7 Charter right. It was explained by Gonthier J. in *R. v Canadian Pacific Ltd.* (1995), 99 C.C.C. (3d) 97 (S.C.C.), at page 125:

> In *Nova Scotia Pharmaceutical Society*, *supra*, I enunciated the appropriate interpretive approach to a s.7 vagueness claim. As I observed there, the principles of fundamental justice in s.7 require that laws provide the basis for coherent judicial interpretation, and sufficiently delineate an "area of risk". Thus, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (at p.313 C.C.C., p. 59 D.L.R.). This requirement of legal precision is founded on two rationales: the need to provide fair notice to citizens of prohibited conduct, and the need to proscribe enforcement discretion.
>
> . . . Vagueness must not be considered *in abstracto*, but instead must be assessed within a larger interpretive context developed through an analysis of considerations such as the purpose, subject-matter and nature of the impugned provision, societal values, related legislative provisions, and prior judicial interpretations of the provision.

[22] A decision by McKinnon J. of the British Columbia Supreme Court, *R. v Rollins* (1993), 80 C.C.C. (3d) 385, previously rejected this argument. The offender's counsel asks me to decide differently.

[23] I have already discussed the purpose of s.756 within the broader context of Part XXIV proceedings. Its meaning, I think, is clear. To obtain potentially relevant evidence, the offender is required to attend for observation. The offender no longer enjoys the presumption of innocence, he is in custody, and psychiatric evidence is a necessary component of the eventual hearing. A certain degree of compulsion is necessary in the interests of society so as to determine the most appropriate disposition. I cannot think how s.756 could not be the subject of coherent judicial interpretation.

[24] The use of the term "might" simply recognizes that such an observation may provide relevant evidence or it may not. This proviso sets the basis for the exercise of the judicial discretion to order a remand: "reason to believe that evidence might be obtained as a result of the observation that would be relevant to the application". The discretion must be exercised on reasonable grounds with a view to obtaining helpful

evidence. I agree with the *Rollins* decision in its conclusion that the wording of s.756 is not vague and, furthermore, accords with the objectives of Part XXIV.

[25] For these reasons, I find that s.756 is constitutionally valid.

J. Z. Vertes
J.S.C.

Dated this 22nd day of May, 1997.

Counsel for the Applicant (Crown): Margo Nightingale

Counsel for the Respondent: Thomas H. Boyd

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