

CONSTITUTIONAL DECISIONS:

R. v. DeSousa (1990), 1 O.R. (3d) 152 (C.A.)

The issue in this case was whether a *Criminal Code* section (namely section 269) required a specific *mens rea* requirement with respect to each and every essential element of the *actus reus*. The trial judge found that section 269 of the *Criminal Code* violated section 7 of the *Charter* because the unlawful act causing bodily harm could be an absolute liability offence. The Court of Appeal, writing as a whole, found the trial judge to be in error and concluded that the section did not need a specific *mens rea* requirement. The Court found instead that it is only when a section cannot bear an interpretation compatible with the *mens rea* requirements essential to find criminal guilt that the constitutional validity must be examined under sections 7 and 1 of the *Charter*.

This case was appealed to the Supreme Court ([1992] 2 S.C.R. 944) and Justice Sopinka (Gonthier, Cory, McLachlin, and Iacobucci JJ concurring) delivered a unanimous decision. The reasoning regarding the issue of section 7 violation closely resembled that of the Ontario Court of Appeal. Subsequently the appeal was dismissed as Justice Sopinka held that section 269 does not violate section 7 or section 11(d) of the *Charter*.

Johnson v. Ontario (Minister of Revenue) (1990), 75 O.R. (2d) 558 (C.A.)

This case focused on the issue of reasonable search and seizure. Under section 15(3) and (4) of the *Tobacco Tax Act* a person authorized by the Minister of Revenue can detain and search any commercial vehicle for any purpose related to the administration or enforcement of the Act. The section contains no requirement of reasonable and probable grounds or even reasonable suspicion, nor is it limited to searches of commercial vehicles connected with the trade of tobacco products.

Justice Arbour stated that there is a lower degree of privacy interest in vehicles and cargo than in residences or personal offices; however, she still found that the intrusion was serious. She supported this claim by relying on numerous precedents that illustrated how such an unlimited search and seizure power (i.e. one

allowing random stops of a large target group) is unreasonable in the context of section 8. Justice Arbour found that the Act could be sufficiently limited by including the requirement of having reasonable grounds to justify the search and seizure and that this limitation would not greatly diminish the effect of the law. She held that the sections 15(3)(4) of the *Act* unjustifiably violated section 8 of the *Charter*.

Leroux v. Co-operators General Insurance Co. (1990), 17 O.R. (2d) 641(H.C.J.)

The constitutional issue that arose in this case was whether discrimination, on the basis of marital status, had occurred in the context of section 15 of the *Charter*. The plaintiff in the case was injured by an uninsured vehicle. At the time of the accident the plaintiff was a minor and residing with his mother and her common law spouse, who was insured by the defendant under an Ontario Standard Automobile Policy. The insurance company claimed that the defendant was not covered as the spouse in question was a common law spouse and, therefore, her dependants were not covered by the policy.

Justice Arbour decided that this unequal treatment based on marital status was discrimination in the context of section 15 of the *Charter*. The provisions of the Ontario Standard Automobile Policy are subject to the *Charter* as they are both prescribed and required by section 231 of the *Insurance Act*. Justice Arbour found that marital status was analogous to the enumerated grounds in section 15. The argument that marital status is a question of choice and, therefore, not an analogous ground was found to have no merit due to the existence of choice-related grounds enumerated within section 15 (i.e. religion) and due to the fact that the argument could not be applied to the son. Justice Arbour held that the proper interpretation of "spouse" included common law spouses, and subsequently the plaintiff, as a dependant relative of the insured's spouse, was entitled to coverage under the policy.

R. v. Bennett (1991), 3 O.R. (3d) 193 (C.A.)

The issue in this case was the right to trial in a reasonable time. The defendant appealed on the basis that he was denied trial within a reasonable time as set

out in *R. v. Askov* [1990] 2 S.C.R. 1199. Justice Arbour authored the majority opinion and claimed that *Askov* did not require a mechanical computation of the period of systematic pre-trial delay, but rather the precedent required a balancing of four factors (length of delay, explanation of the delay, waiver of the right, and prejudice to the accused) in determining whether an infringement has occurred. Arbour J.A. found that an overall period of thirteen and a half months did not, in itself, amount to a violation. However, such a delay did invite scrutiny regarding the other factors. Given the reason behind the delay, the minimal prejudice to the accused, the acceptable overall time frame, and that a preliminary inquiry was held, Justice Arbour found that no infringement occurred and allowed the matter to go to trial.

Justice Arbour applied this same reasoning to the cases of *R. v. White* (1991), 3 O.R. (3d) 247 (C.A.), and *R. v. Rabba* (1991), 3 O.R. (3d) 238 (C.A.), and concurred with Osbourne J.A. when he applied these principles to young offenders in *R. v. M.* (1991), 3 O.R. (3d) 223 (C.A.), and to complex cases in *R. v. Atkinson* (1991), 5 O.R. (3d) 301 (C.A.). Justice Arbour later concurred with the Court in deciding *R. v. Frazer* (1992), 8 O.R. (3d) 57 (C.A.), and *R. v. G.(M.)* (1992), 8 O.R. (3d) 337 (C.A.), both of which served to further loosen the strict restriction created by the *Askov* fiasco by placing more emphasis on the balancing of factors rather than the application of a set time limit.

***R. v. Finta* (1992), 92 D.L.R. (4th) 1 (Ont. C.A.)**

The accused was charged with unlawful confinement, robbery, kidnapping and manslaughter pursuant to the War Crimes provisions found in section 7(3.71) of the *Criminal Code* as a result of his actions in Hungary during the Second World War. Justice Arbour wrote the majority opinion for the five-member panel (Dubin C.J.O and Tarnopolsky J.A. dissenting). At trial the accused was acquitted of all charges, and the Crown appealed on twelve grounds; three of which were extensively considered.

The first significant issue dealt with was the respective functions of the judge and jury with regards to war crimes cases. Basically, the trial judge held that war crimes constituted unique jurisdictional circumstances and, therefore, it would be for the jury to decide whether Finta's acts amounted to a war crime. On this issue Justice Arbour reasoned that there was significant overlap between factual questions and questions of jurisdiction to make it reasonable to have the entire question dealt with by the jury. It was also held that section 7(3.71) was an exception to the general rule of territoriality (*Criminal Code* section 6(2)) and as such

the question of territoriality became an essential factual element of the crime. It was, therefore, reasoned that the issue was factual and should be decided by the jury.

The second major issue was whether the defence counsel's address to the jury constituted a violation of the right to a fair trial. Basically, the Crown contended that the defence counsel's jury address was improper and that the judge's attempt to correct these improprieties was inadequate. Justice Arbour found that the statements made by counsel were highly inappropriate. However, she determined that the trial judge was in the best position to correct the problem and the charge was deemed sufficient correction.

The third issue of significance was the admissibility of evidence introduced by the trial judge himself. The trial judge called testimony from persons in Hungary and previous testimony given as part of Finta's 1947-48 trial in Hungary. The Crown argued that the evidence was inadmissible and even if admissible it was not proper for the judge himself to call it. Justice Arbour reasoned that the evidence was admissible because of the uniqueness of the hearing and that fairness required the evidence be admitted in favour of the accused. However, she held that the trial judge erred in calling the evidence himself rather than leaving it for the defence to call. In addition to calling the evidence himself the trial judge held that the calling of the evidence, which was favourable to the accused, did not amount to "defence evidence" and did not affect the order in which the jury was to be addressed. Justice Arbour found that this, too, was in error. Even given these errors, Justice Arbour found that no substantial wrong or miscarriage of justice was established by the Crown. A new trial was not warranted because the improperly called evidence was not significantly compelling.

Justice Arbour concluded that none of the twelve grounds warranted allowing the appeal. This case was further appealed to the Supreme Court ([1994] 1 S.C.R. 701). In a rather complex decision a majority of the Supreme Court (Lamer C.J. and Gonthier, Cory, and Major JJ), following reasoning similar in many regards to that of Justice Arbour, held that the appeal should be dismissed (La Forest, L'Heureux-Dubé, McLachlin JJ dissenting). A subsequent cross appeal dealing with the issue of whether sections 7(3.74) and 7(3.76) of the *Criminal Code* violated sections 7, 11(a), (b), (d), (g), 12 or 15 of the *Charter* was brought forth. The unanimous Court found no violations. In essence, the judgment of Justice Arbour in this complex case was followed by a majority of the Supreme Court.

R. v. Durham (1992), 10 O.R. (3d) 596 (C.A.)

The main issue in this case was whether section 86(2) of the *Criminal Code*, which creates the offence of careless use or storage of firearms, has the required *mens rea* to make it valid under section 7 of the *Charter*. Justice Arbour authored the decision of the Court and found that the section could be upheld if it was either deemed to create a regulatory offence rather than a true crime or if the crime did not carry a special stigma sufficient to compel a subjective *mens rea*. Arbour J.A. held that section 86(2) is a regulatory offence and, therefore, nothing more than a defence of due diligence is constitutionally required. Arbour J.A. also concluded that the stigma surrounding a conviction for careless use or storage of a firearm is not such as to warrant a higher standard of mental culpability than the civil standard for negligence. In essence, it was found that section 7 of the *Charter* does not require a specific *mens rea* for all offences, namely those which are regulatory in nature, or do not carry a special stigma upon conviction.

Sauve v. Canada (Attorney General) (1992), 8 O.R. (3d) 481 (C.A.)

This case dealt with prisoners' right to vote. The appellant sought a declaration that section 51(e) of the *Canada Elections Act*, which disqualified prison inmates from voting, violated section 3 of the *Charter*. The trial judge found that the section did violate the *Charter*, but was justified under section 1. Justice Arbour delivered the decision of the Court which focused solely on the section 1 justification, as it was conceded that section 51(e) was in violation of section 3. Given the fact that this case dealt with the pitting of state power against the individual, with the state being the single antagonist, Arbour J.A. claimed that very pressing and substantial state objectives would need to be identified in order for a justification to be found.

The respondent presented three main objectives to support the violation. The first was to affirm and maintain the sanctity of the franchise. Justice Arbour held that this objective was too abstract and also claimed that she doubted anyone could be deprived of the right to vote on the basis that he or she were not decent or responsible. The second was to preserve the integrity of the voting process, which requires informed, participative voters. Justice Arbour reasoned that prisoners have access to the necessary information and in many cases may be more informed than other citizens. The third was to sanction offenders. This objective was also found unacceptable as Justice Arbour reasoned that if section 51(e) was meant to impose punishment, it was only imposing punishment

for being imprisoned and not for the commission of a crime, as it only restricted inmates and not all people convicted of serious crimes. In essence this third objective made the section both under- and over-inclusive. In conclusion, Justice Arbour found that none of the objectives presented were sufficiently pressing to justify the violation of section 3 of the *Charter* and she struck down the offending provision.

This case was appealed to the Supreme Court ([1993] 2 S.C.R. 438.) where Justice Iacobucci handed down the decision of the Court orally. The Supreme Court dismissed the appeal on the same grounds as the Appeal Court, namely that section 51(e) was drawn too broadly and failed to meet the proportionality test required by section 1.

R. v. Mercer (1992), 7 O.R. (3d) 9 (C.A.)

The accused were guests at a hotel where a maid, ignoring the do not disturb sign, found a pillowcase full of money in their closet. The hotel called the police, who then entered the room without a warrant and found the money and a brick of narcotics. Justice Arbour wrote the unanimous decision of the Court.

Two constitutional issues were raised. The first issue was whether there was a violation of right to a trial within a reasonable time. Arbour J.A. held that it was up to the trial judge to find that the agreement by the defence counsel to a date for the preliminary inquiry eleven months in the future constituted a waiver of any claim that that portion of the delay was unreasonable. The second issue dealt with unreasonable search and seizure. Justice Arbour reasoned that a hotel guest's awareness that cleaning staff may enter does not remove any expectation of privacy, especially when objects are not in plain view and/or stored in areas not requiring regular cleaning (i.e. the closet). She further found that consent by the manager is not an acceptable substitute for prior judicial authorization. Finally, Justice Arbour declared that there was no urgency compelling the warrantless search and that the police should have investigated using less intrusive methods. Even though the search was a violation of section 8, Justice Arbour held that the admission of this evidence would not bring the administration of justice into disrepute. It was reasoned that the police were acting in an uncertain area of law and made a reasonable and good faith mistake in entering the hotel room. Basically, she concluded that the violation was not flagrant and, therefore, the exclusion of the evidence was not warranted in the context of section 24(2) of the *Charter*.

R. v. Huot (1993), 16 O.R. (3d) 214 (C.A.)

The main issue dealt with in this case was the application of the evidentiary doctrine of similar fact. Justice Arbour delivered the majority opinion. She reasoned that the similar fact evidence at trial was inadmissible. However, it was found that the error did not bring about a serious miscarriage of justice, as the trial judge had only used the evidence to strengthen the convictions she already held. Justice Arbour further reasoned that the holding would be different if a jury had been involved.

R. v. Cribbin (1994), 17 O.R. (3d) 548 (C.A.)

The accused was convicted of manslaughter. He appealed on the grounds that the jury charge was defective and that the *de minimus* standard for causation violated section 7 of the *Charter*. Justice Arbour wrote the unanimous decision. Justice Arbour found that the jury charge was improper and that the errors were substantial enough to warrant a new trial. In regard to the section 7 violation, the accused claimed the causation standard was too remote and that it was void for vagueness. Justice Arbour reasoned that causation cannot be determined with mathematical precision and that none of the suggestions given by the accused would provide any greater precision. She held that the *de minimus* range standard was not void. Justice Arbour dealt with the argument that the test was too remote by noting that it was similar to the tests in other countries. She further reasoned that the fault element and the causation element are linked and that manslaughter combines the requirement that harm must be objectively foreseeable with the *de minimus* standard. Therefore, there is no danger that the morally innocent will be convicted. Thus, it was held that the principles of fundamental justice were not infringed by the *de minimus* standard. Justice Arbour allowed the appeal based on the defective charge, while she rejected the arguments based on causation issues.

R. v. Fisher (1994), 17 O.R. (3d) 295 (C.A.)

This case dealt with the constitutionality of section 121(1)(c) of the *Criminal Code*, which makes it an offence for a government official to receive a benefit from a person who has dealings with the government. Justice Arbour wrote the decision for the Court. The first constitutional issue raised was whether the section was so vague as to violate section 7 of the *Charter*. Justice Arbour reasoned that judicial interpretation must be considered in determining vagueness, and that while section 121(1)(c) was overbroad, this was insufficient as overbreadth has no independent standing under the *Charter*. From this she concluded that, given previous

interpretations, section 121(1)(c) provided sufficient guidance for government employees and, therefore, the section was not void for vagueness. The second issue addressed the validity of the reverse onus clause that required the employee to prove he or she obtained written consent from their superior. Justice Arbour held that this shift of burden left the possibility open that a conviction may result regardless of reasonable doubt and, as a result the clause violates section 11(d) of the *Charter*. With regard to section 1 analysis, Justice Arbour reasoned that the objective must relate to the reverse onus clause rather than to the section generally. Justice Arbour held that placing the burden on the accused was not necessary to meet the objective of preserving the integrity of the public service and, as a result, the violation was not proportional to the objective. In conclusion, Justice Arbour held that section 121(1)(c) unjustifiably violated section 11(d) and, in order to remedy this, she struck the reverse onus clause from the section.

Eaton v. Brant (County) Board of Education (1995), 22 O.R. (3d) 1 (C.A.)

The basic constitutional issue in this case was whether section 8 of the *Education Act*, which regulates the placing of disabled children in special classrooms, violated section 15 of the *Charter*. Justice Arbour authored the opinion of the Court and held that the section did constitute an unjustifiable violation of section 15 equality rights. It was reasoned that, when analyzed in a social, historical, and political context, the decision to place the child in a special classroom constituted a disadvantage based on an enumerated ground and was, therefore, discriminatory. She further concluded that while this discrimination may be easier to justify than, for example, one based on race, there is no hierarchy of discrimination within section 15 and, therefore, any analysis along this line must be done in the context of section 1. Based on the claimants' argument that did not propose to outlaw segregation, but rather advocated a presumption of inclusion rather than segregation, Justice Arbour found that the section did not infringe the child's right as little as possible, and was, therefore, not justifiable. Justice Arbour chose to remedy the section by reading it to include a direction that, unless the parents consent to placement in a special classroom, the school board must provide a placement that is the least exclusionary while still being reasonably capable of meeting the special needs of the student.

Eaton v. Brant, [1997] 1 S.C.R. 241 was appealed to the Supreme Court where two concurring decisions were handed down. The main decision was delivered by Justice Sopinka (LaForest, L'Heureux-Dube, Cory, McLachlin, Iacobucci, and Major JJ. concurring). Regarding the issue of a section 15 violation, it was held that purpose of section 15(1) of the *Charter*, in relation to disability, is to recognize the actual characteristics of the disabled person and the reasonable accommodation of these characteristics. Justice Sopinka further reasoned that segregation can serve to promote equality as well as violate it, depending on the person in question. Also, he decided that a test of the child's ability would be best done without the encumbrances of any presumptions. Finally, Justice Sopinka concluded that the view that a presumption as to the best interests of the child is a constitutional imperative is rendered questionable due to the fact that the parents can displace this presumption. Chief Justice Lamer (Gonthier J. concurring) fully agreed with Justice Sopinka reasoning but wished to add that Justice Arbour improperly applied a precedent. Basically, the Supreme Court, on the whole, was unable to find sufficient merit in any of the reasoning presented by Justice Arbour in the Ontario Court of Appeal decision.

OTHER CASES OF INTEREST:

Ontario Highway Transport Board v. Ontario Trucking Assn (1988), 66 O.R. (2d) 193 (C.A.).
R. v. Chase (1990), 56 C.C.C. 3(d) 521 (Ont. C.A.)
R. v. M. (G.C.) (1991), 3 O.R. (3d) 223 (C.A.)
R. v. White (1991), 3 O.R. (3d) 247 (C.A.)
R. v. Rabba (1991), 3 O.R. (3d) 238 (C.A.)
R. v. Deavitt (1991), 2 O.R. (3d) 150 (C.A.)
R. v. G. (M.) (1992), 8 O.R. (3d) 337 (C.A.)
R. v. Pugliese (1992), 8 O.R. (3d) 259 (C.A.)
Weber v. Ontario Hydro (1992), 11 O.R. (3d) 609 (C.A.)
R. v. Frazer (1992), 8 O.R. (3d) 57 (C.A.)
R. v. G. (M.) (1993), 8 O.R. (3d) 337 (C.A.)
R. v. Pierman (1994), 19 O.R. (3d) 704 (C.A.)
R. v. Simard (1995), 27 O.R. (3d) 116 (C.A.)

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- L. Arbour, *Que. (A.G.) v. Dubois* (1987), 61 C.R. (3d) 159 (Que. C.A.): Annotation, 61 C.R. (3d) 159.
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