IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
(COURT OF APPEAL)

No. S APCR 2011 0099

BETWEEN:

THE QUEEN

v

[redacted]

VICTORIAN EQUAL OPPORTUNITY
AND HUMAN RIGHTS COMMISSION

(INTERVENING)

SUMMARY OF CONTENTIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION (INTERVENING)

The trial judge correctly applied the *Charter of Human Rights and Responsibilities* (Charter) in his construction of s 6(1) of the *Surveillance Devices Act* (SDA)

1. Section s 6(1) of the SDA is to be interpreted, so far as possible consistently with its purpose, so as to be compatible with human rights, by reason of s 32 of the Charter. Consistently with *R v Momcilovic* [2010] VSCA 50 at [35], this required consideration of all possible meanings of s 6(1) and the selection of that which least infringes Charter rights.

Right to privacy

2. The relevant right to which regard is to be had in this case is the right to privacy. The jurisprudence of the Canadian Supreme Court (*Duarte v R* [1990] 1 SCR 30) and the European Court of Human Rights (eg *PG v United Kingdom* [2001] ECHR 550), which, contrary to the views expressed in *WBM v Chief Commissioner of Police* [2010] VSC 219, is relevant to the meaning of "arbitrary" in the Charter, is to the effect that the recording of private conversations at the instigation of police involves an arbitrary interference with privacy unless the use of that technique is:

   a. subject to judicial oversight, such as a requirement to obtain a warrant on the satisfaction of objective criteria; and/or

   b. subject to legal regulation identifying the circumstances in which the technique may be used.

Construction of s 6(1)

3. Section 6(1) of the SDA is open to two constructions:

   a. First, the phrase "use ... a listening device ... to record ... a private conversation" could be construed so as to be limited to the person who physically activates the recording device.

   b. Alternatively, this phrase could be construed to include circumstances where a police officer procures another person to physically activate the device, but where the circumstances are such that the law enforcement officer is in substance a "person" who "uses ... a listening device ... to record" the conversation. This avoids the issue turning on who "pressed the button".

4. If s 6(1) is interpreted in the first way described above, so as to leave unregulated the participant recording of a private conversation at the instigation of police, then it permits the police to act in a way that involves arbitrary interference with privacy because the decision whether or not to utilise participant surveillance is left to the discretion of the police, without judicial or regulatory oversight.

5. If s 6(1) is interpreted in the second way described above, then there will be no arbitrary interference with privacy because the police officer will be subject to judicial supervision through the warrant requirement (except in the limited circumstances provided for by s 6(2)).

6. Further, the second interpretation is "possible", consistently with the purpose of the SDA, as that purpose is protection from, and regulation of, the use of surveillance devices, including though the requirement of judicial oversight. Thus s 32 of the Charter requires this construction to be adopted.

7. Having regard to the terms of s 6 of the SDA as a whole, there is no difficulty in interpreting s 6(1) as prohibiting law enforcement officers from enlisting a participant in a private conversation to record that conversation unless all of the parties to that conversation consent (or unless one of the circumstances in s 6(2) applies). Indeed, that would have been a possible interpretation of s 6 even without s 32 of the Charter, particularly given the closing words of s 6(1) (and save, perhaps, for existing authority). To the extent necessary, however, s 32 of the Charter justifies a departure from the previous understanding of the operation of s 6 of the SDA.

8. The second interpretation is supported by s 6(2) of the SDA, which expressly deals with the situations in which law enforcement officers may record private conversations. It would undermine the scheme of that subsection (and thus of s 6 as a whole) if the police could obtain a recording of a private conversation without satisfying any of the requirements in s 6(2), provided they could procure the co-operation of a participant in the conversation. Further, both the Explanatory Memorandum to the Surveillance Devices Bill and the Second Reading Speech support the Commission's construction of s 6(1).

9. Finally, the trial judge was correct to conclude that the use by the police of the listening device was a breach of s 38 of the Charter relevant to his discretion under s 138 of the *Evidence Act*.

Contentions in response to the Court's question (a)

10. The *Charter of Human Rights and Responsibilities* ('the Charter') does not alter the principle that a provision in a statute should have a single meaning in all circumstances. Thus the construction to be given to s 6(1) will be the same in criminal proceedings for its breach and in proceedings concerning admissibility of a recording obtained by use of a listening device.

11. The High Court has observed that the common law presumption in favour of a strict construction of penal statutes "has lost much of its importance in modern times" and is a rule of "last resort" (*Beckwith v R* (1976) 135 CLR 569). While common law presumptions will play a role in the interpretive process, if there is any inconsistency between a common law interpretation and an interpretation achieved through s 32, the legislative requirements in s 32 must prevail over common law interpretive presumptions. Further, to permit the common law presumption to oust or override s 32 of the Charter would mean that, whenever Parliament has used criminal sanctions, s 32 will have no work to do in resolving ambiguity — ambiguity will always be resolved in favour of a strict construction, regardless of other rights involved. Such an approach to the relationship between s 32 and common law cannons of construction cannot be correct.

12. Where Parliament has made a clear choice to protect a particular right, including through the imposition of criminal sanctions (as here), that choice is not to be undermined by recourse to common law presumptions. In face of a clear choice of this kind it will usually be fairly straightforward to interpret consistently with the right that the provision intended to protect; and more difficult to interpret consistently with some other right, taking into account the purpose of the provision.

Contentions in response to the Court's question (b)

13. While it cannot be said that the police "overheard" the conversation while it took place, the Commission contends that it can be said that the police "used" a listening device to "record" the conversation in question within the meaning of s 6(1) when that section is interpreted to give the greatest possible protection to the Charter's privacy right, as discussed above.

Contentions in response to the Court's question (c)

14. The Commission contends that it was not premature of the judge to introduce issues relating to the Charter in his interpretation of s 6(1). Rather, consideration of the Charter at this point was required in light of this court's injunction in *Momcilovic* that the Charter is "to be applied at the outset, in ascertaining the meaning of the provision in question". *Momcilovic* clearly rejected the proposition that the "ordinary meaning" of a statute is to be ascertained before consideration of Charter rights is introduced into the construction process.

15. It is difficult to give effect to the command in s 32 using rights with lawfulness caveats to interpret provisions that may themselves form the lawful basis for limiting a right. However the Commission's arguments, which were accepted by the trial judge, turned on the arbitrary interference with privacy, not on any asserted unlawful interference. As explained above, arbitrariness in this context is demonstrated by an absence of judicial or regulatory control over police use of listening devices. The proposition was that where police bring about recordings of private conversations without judicial or regulatory supervision, such action constitutes an arbitrary interference with privacy. Thus to interpret s 6(1) so as to permit the police to do just that would be to construe s 6(1) so as to authorise an arbitrary interference with privacy; yet the Charter mandates that such a construction not be adopted if another construction that does not limit rights is open. Here such an alternative was open, thus it was to be preferred.

16. The arbitrariness identified above is not removed by pointing to s 6(1), interpreted without reference to the Charter so as to permit police use of a listening device without a warrant, as legislative authorisation for such interference. Rather, the arbitrariness is caused by interpreting s 6(1) in this way, so as to permit the device of having the participant "press the button" and thus avoiding the judicial scrutiny necessary to ensure that the interference with privacy is not arbitrary. In contrast, the arbitrariness is removed by interpreting s 6(1) so as to require police to obtain a warrant to use listening device in relation to "pretext conversations" recorded at their instigation and with their assistance (save for the limited exceptions provided for by s 6(2)).

Dated: 18 May 2011 KRISTEN WALKER