

Her Majesty The Queen *Appellant*

v.

Claude R. Beare *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Canadian Association of Chiefs of Police *Intervenors*

and

Her Majesty The Queen *Appellant*

v.

Frederick G. Higgins *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of Manitoba, the Attorney General for Alberta and the Canadian Association of Chiefs of Police *Intervenors*

INDEXED AS: R. v. BEARE; R. v. HIGGINS

File No.: 20384.

Hearing and judgment rendered: 1987: December 16, 17.

Reasons delivered: 1988: December 1.

Present: Dickson C.J. and Beetz, Estey*, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Right to liberty — Fingerprinting after person charged but prior to conviction — Whether or not right to liberty infringed — Whether or not principles of fundamental justice infringed — If section 7 infringed, whether or not infringement justified under s. 1 — Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 9, 10, 11(c), (d) — Constitution Act, 1982, s. 52(1) — Criminal

*Estey and Le Dain JJ. joined in the judgment of December 17, 1987, but took no part in this judgment.

Sa Majesté La Reine *Appelante*

c.

Claude R. Beare *Intimé*

^a
et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de l'Alberta et l'Association canadienne des chefs de police *Intervenants*

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et

Sa Majesté La Reine *Appelante*

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Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Nouveau-Brunswick, le procureur général du Manitoba, le procureur général de l'Alberta et l'Association canadienne des chefs de police *Intervenants*

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RÉPERTORIÉ: R. C. BEARE; R. C. HIGGINS

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N° du greffe: 20384.

Audition et jugement: 1987: 16, 17 décembre.

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Motifs déposés: 1988: 1^{er} décembre.

Présents: Le juge en chef Dickson et les juges Beetz, Estey* McIntyre, Lamer, Wilson, Le Dain*, La Forest et L'Heureux-Dubé.

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EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Droit constitutionnel — Charte des droits — Droit à la liberté — Prise des empreintes digitales d'un accusé avant qu'il soit reconnu coupable — Y a-t-il atteinte au droit à la liberté? — Y a-t-il violation de principes de justice fondamentale? — S'il y a violation de l'article 7, est-elle justifiée en vertu de l'article premier? — Charte canadienne des droits et libertés, art. 1, 7, 8, 9, 10, 11c, d) — Loi constitutionnelle de 1982, art. 52(1)

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* Les juges Estey et Le Dain ont pris part au jugement du 17 décembre 1987, mais n'ont pas pris part au présent jugement.

Code, R.S.C. 1970, c. C-34, ss. 453.3(3), 455.5(5) — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2.

Criminal law — Fingerprinting after person charged but prior to conviction — Whether or not right to liberty infringed — Whether or not principles of fundamental justice infringed — If section 7 infringed, whether or not infringement justified under s. 1.

Respondents Beare and Higgins were charged with separate criminal offences and were served respectively with an appearance notice and a summons requiring attendance at R.C.M.P. offices to be fingerprinted under the *Identification of Criminals Act*. Section 2 of that Act provided for the fingerprinting of a person in lawful custody and ss. 453.3(3) and 455.5(5) of the *Criminal Code* required an appearance and deemed a person so appearing to be in lawful custody charged with an indictable offence. Neither respondent attended at the R.C.M.P. offices as required. The requirement that appearances be made for fingerprinting following charge but before conviction was unsuccessfully challenged on separate motions but the appeals, which were heard together, were allowed. The constitutional questions before this Court queried whether or not s. 2 of the *Identification of Criminals Act* and ss. 453.3(3) or s. 455.5(5) of the *Criminal Code*, to the extent that they provided for the fingerprinting of a person charged with but not convicted of an indictable offence, infringed s. 7 of the *Charter*, and if so, whether or not such infringement was justified by s. 1. Sections 8, 9, 10 and 11(c) and (d) of the *Charter* were also relied on.

Held: The appeal should be allowed. The first constitutional question should be answered in the negative in respect of each case; it was not necessary to consider the second.

Fingerprinting, while an invaluable tool of criminal investigation, serves a wide variety of purposes not all confined to the criminal justice system and the judicial process. Sections 453.3(3) and 455.5(5) are not simple expansions of the authority to take fingerprints and photographs but rather integral parts of a larger scheme aimed at reducing the number of persons who are arrested and taken into custody.

* The impugned provisions infringe the rights guaranteed by s. 7 because they require a person to appear at a

— *Code criminel, S.R.C. 1970, chap. C-34, art. 453.3(3), 455.5(5) — Loi sur l'identification des criminels, S.R.C. 1970, chap. I-1, art. 2.*

Droit criminel — Prise des empreintes digitales d'un accusé avant qu'il soit reconnu coupable — Y a-t-il atteinte au droit à la liberté? — Y a-t-il violation des principes de justice fondamentale? — S'il y a violation de l'art. 7, est-elle justifiée en vertu de l'article premier?

b Les intimés Beare et Higgins ont été inculpés d'infractions criminelles distinctes et ont reçu signification respectivement d'une citation à comparaître et d'une sommation leur ordonnant de se présenter aux bureaux de la G.R.C. pour que soient prises leurs empreintes digitales en vertu de la *Loi sur l'identification des criminels*. L'article 2 de cette loi prévoit la prise des empreintes digitales d'une personne légalement sous garde et les par. 453.3(3) et 455.5(5) du *Code criminel*, qui prévoient la comparution, prévoient aussi qu'une personne qui comparaît ainsi est censée être une personne légalement sous garde qui est accusée d'un acte criminel. Ni l'un ni l'autre des intimés ne s'est présenté aux bureaux de la G.R.C. comme requis. L'obligation de comparaître pour la prise d'empreintes digitales après l'arrestation mais avant la déclaration de culpabilité a été contestée sans succès dans des demandes distinctes mais les appels, qui ont été entendus ensemble, ont été accueillis. Cette Cour est saisie de questions constitutionnelles visant à déterminer si l'art. 2 de la *Loi sur l'identification des criminels* et les par. 453.3(3) ou 455.5(5) du *Code criminel*, dans la mesure où ils prescrivent la prise des empreintes digitales d'une personne qui a été accusée d'un acte criminel sans en être reconnue coupable, enfreignent l'art. 7 de la *Charte* et, dans l'affirmative, si ces violations sont justifiées par l'article premier. Les articles 8, 9, 10 et les al. 11(c) et d) de la *Charte* ont aussi été invoqués.

Arrêt: Le pourvoi est accueilli. La première question constitutionnelle doit recevoir une réponse négative dans chaque cas; il est inutile de traiter de la seconde question constitutionnelle.

i Les empreintes digitales sont un outil d'investigation criminelle d'une valeur inestimable qui ne se limite pas à la justice criminelle ni à la procédure judiciaire. Les paragraphes 453.3(3) et 455.5(5) ne sont pas une simple extension du pouvoir de prendre des empreintes digitales et des photographies; ils font partie intégrante d'un projet plus large visant à réduire le nombre d'arrestations et de détentions.

j Les dispositions attaquées enfreignent les droits garantis par l'art. 7 parce qu'elles obligent une personne

**Regina v. Beare
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[Indexed as: R. v. Beare]

Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.* December 1, 1988.

Constitutional law — Charter of Rights — Fundamental justice — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Assuming provisions infringe right to liberty and security of the person, deprivation in accordance with principles of fundamental justice — Provisions valid — Cr. Code, ss. 133, 453.3, 455.5, 455.6, 451 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 7.

Constitutional law — Charter of Rights — Search and seizure — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Assuming provisions authorizing search or seizure, provisions not unconstitutional — Cr. Code, ss. 133, 451, 453.3, 455.5, 455.6 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 8.

Constitutional law — Charter of Rights — Arbitrary detention or imprisonment — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Provisions not authorizing arbitrary detention or imprisonment — Provisions valid — Cr. Code, ss. 451, 453.3, 455.5, 455.6 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 9.

Constitutional law — Charter of Rights — Right to fair trial — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Provisions not infringing right to fair trial — Cr. Code, ss. 451, 453.3, 455.5, 455.6 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 11(d).

The respondents were each charged with an indictable offence and as a result of process issued to them required to attend at the police station for the purposes of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, and in particular, to attend for fingerprinting. In the case of one of the respondents, this requirement was set out in an appearance notice issued by a peace officer pursuant to s. 451 of the *Criminal Code*, as permitted by s. 453.3. In the case of the other respondent, the requirement was set out in a summons issued by a justice of the peace as authorized by s. 455.5(5). The respondents refused to comply with the requirement and instead launched proceedings in the Court of Queen's Bench questioning the constitutionality of the *Identification of Criminals Act* and the related provisions of the *Criminal Code*. These applications were dismissed. However, an appeal by

*Estey and Le Dain JJ. joined in the judgment of December 17, 1987, but took no part in this judgment.

to contact counsel had been provided: see *R. v. Manninen* (1987), 34 C.C.C. (3d) 385 at pp. 391-3, 41 D.L.R. (4th) 301, [1987] 1 S.C.R. 1233 at pp. 1241-4 (S.C.C.). The search, in my view, was therefore unconstitutional and unreasonable under s. 8. As in *Simmons*, the search under s. 8 was not only *per se* unreasonable because of its unconstitutionality, it was also conducted in an unreasonable manner in that, despite repeated requests by the appellant to call his lawyer, the police officers continued to deny him his right to contact counsel, telling him at one point that he would only be permitted to do so after a search warrant on his Vancouver residence had been executed. This is unacceptable under the Charter. It is totally incompatible with the plain words "without delay".

I would add that in situations involving searches and seizures during periods of arrest or detention the citizen's right to retain and instruct counsel without delay under s. 10(b) of the Charter and his or her right to be secure against unreasonable search and seizure are mutually reinforcing. The right to counsel is surely the main safeguard to the citizen that his or her other rights will be respected.

LA FOREST J. concurs with DICKSON C.J.C.

L'HEUREUX-DUBE J.:—Given my reasons and the court's judgment in *R. v. Simmons* (given concurrently) I would dismiss the appeal.

Appeal dismissed.

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[Indexed as: R. v. Beare]

Supreme Court of Canada, Dickson C.J.C., Beetz, Estey, McIntyre, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.* December 1, 1988.

Constitutional law — Charter of Rights — Fundamental justice — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Assuming provisions infringe right to liberty and security of the person, deprivation in accordance with principles of fundamental justice — Provisions valid — Cr. Code, ss. 133, 453.3, 455.5, 455.6, 451 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 7.

*Estey and Le Dain JJ. joined in the judgment of December 17, 1987, but took no part in this judgment.

Constitutional law — Charter of Rights — Search and seizure — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Assuming provisions authorizing search or seizure, provisions not unconstitutional — Cr. Code, ss. 133, 451, 453.3, 455.5, 455.6 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 8.

Constitutional law — Charter of Rights — Arbitrary detention or imprisonment — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Provisions not authorizing arbitrary detention or imprisonment — Provisions valid — Cr. Code, ss. 451, 453.3, 455.5, 455.6 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 9.

Constitutional law — Charter of Rights — Right to fair trial — Compulsory fingerprinting — Provisions of Criminal Code and Identification of Criminals Act (Can.), permitting fingerprinting of accused charged with indictable offences prior to conviction — Provisions not infringing right to fair trial — Cr. Code, ss. 451, 453.3, 455.5, 455.6 — Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2 — Canadian Charter of Rights and Freedoms, s. 11(d).

The respondents were each charged with an indictable offence and as a result of process issued to them required to attend at the police station for the purposes of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1, and in particular, to attend for fingerprinting. In the case of one of the respondents, this requirement was set out in an appearance notice issued by a peace officer pursuant to s. 451 of the *Criminal Code*, as permitted by s. 453.3. In the case of the other respondent, the requirement was set out in a summons issued by a justice of the peace as authorized by s. 455.5(5). The respondents refused to comply with the requirement and instead launched proceedings in the Court of Queen's Bench questioning the constitutionality of the *Identification of Criminals Act* and the related provisions of the *Criminal Code*. These applications were dismissed. However, an appeal by the respondents to the Saskatchewan Court of Appeal was allowed, the court holding that the requirement that a person charged with an indictable offence but not yet convicted as authorized by s. 2 of the *Identification of Criminals Act* offended the fundamental justice guarantee in s. 7 of the *Canadian Charter of Rights and Freedoms*.

On appeal by the Crown to the Supreme Court of Canada, held, the appeal should be allowed.

Fingerprinting as permitted by the *Identification of Criminals Act* is an invaluable tool of criminal investigation which serves a wide variety of purposes in the criminal justice system. Fingerprints are also of great assistance in the judicial process and can also provide advantages to an innocent accused. On the other hand, because the impugned provisions of the *Criminal Code* require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply, it could be said that the provisions infringe the rights to liberty and security of the person as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. However, infringement of the s. 7 rights does not violate the principles of fundamental justice and, accordingly, there is no violation of s. 7. While it may be that the process of fingerprinting is demeaning and distasteful for many persons, nevertheless the

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[Indexed as: R. v. Beare]

Supreme Court of Canada,
Dickson C.J.C., Beetz, Estey*, McIntyre, Lamer,
Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

Heard – December 16 and 17, 1987.

Oral judgment – December 17, 1987.

Written judgment – December 1, 1988.

Criminal law – Identification of criminals – Identification of Criminals Act, s. 2, and Criminal Code, ss. 453.3(3) and 455.5(5), requiring persons not under conviction to attend for purposes of Act not violating accuseds' Charter rights.

Civil liberties and human rights – Legal rights – Life, liberty and security – Identification of Criminals Act, s. 2, and Criminal Code, ss. 453.3(3) and 455.5(5), while infringing s. 7 Charter rights of accused persons required to attend for purposes of Act, not amounting to violation of principles of fundamental justice.

Civil liberties and human rights – Legal rights – Fair and public hearing – Identification of Criminals Act, s. 2, and Criminal Code, ss. 453.3(3) and 455.5(5), requiring persons charged with offence but not under conviction to attend for purposes of Act – Admission into evidence of fingerprints obtained under provisions in Acts not infringing right to fair trial.

The first applicant was issued an appearance notice, alleging he had committed the offence of break, enter and theft, which required him to attend at the police offices for the purposes of the Identification of Criminals Act. The second applicant, who was charged with fraud, was also served with a summons requiring him to attend for the purposes of the Act. Neither applicant attended and both commenced proceedings in the Court of Queen's Bench to challenge the constitutional validity of s. 2 of the Act. The applicants appealed decisions dismissing their applications. The Court of Appeal held that s. 2 infringed the rights of persons not under conviction and declared that the section was, to that extent, of no force or effect. The Crown appealed.

Held – Appeal allowed.

Section 2 of the Identification of Criminals Act and ss. 453.3(3) and 455.5(5) of the Criminal Code, which provide for the fingerprinting of a person who has been charged with, but not convicted of, an indictable offence, do not violate s. 7 of the Charter. Although the provisions infringe rights guaranteed under s. 7 in that they require a person to appear at a specific time and place and to go through an identification process on pain of imprisonment for failure to comply, the deprivation of rights does not violate the principles of fundamental justice.

Fingerprinting is an invaluable tool of criminal investigation, serving a wide variety of purposes both within the criminal justice system and outside the criminal process.

*Estey and Le Dain JJ. joined in the judgment of 17th December 1987 but took no part in this judgment.

Although being fingerprinted may offend the dignity of the accused person, it does not unduly invade the rights of an accused. Moreover, this issue must be considered with a sense of proportion. The ordinary aspects of law enforcement and the criminal justice system, including arrest and being charged with an offence, involve other distasteful procedures and a stigma which far outweighs that associated with being fingerprinted. It cannot be argued that subjecting a person to those procedures violates the principles of fundamental justice when there are reasonable and probable grounds to believe the person has committed an offence.

Both the common law and legislative practice suggest that compulsory fingerprinting of those in custody does not offend the principles of fundamental justice. While the applicants in this case were not in custody, their position should not be considered as being different from that of a person who has been arrested. Prior to the Bail Reform Act, the applicants could have been arrested on the basis of reasonable and probable grounds that they had committed the offences charged. Sections 453.3(3) and 455.5(5) of the Criminal Code are integral parts of a larger scheme aimed at reducing the number of persons who are arrested and taken into custody. These sections are not simple expansions of the authority to take fingerprints. Accordingly, the applicants could not complain about a procedure which, while it required them to conform to a procedure to which they could have been subjected if they were in fact arrested, permitted a much lesser intrusion than arrest.

Nor are the provisions providing for identification procedures under the Identification of Criminals Act arbitrary. They apply only where there are reasonable and probable grounds to believe the persons have committed an indictable offence. Moreover, the Act does not grant unlimited powers; it only authorizes identification processes which have been sanctioned by the Governor in Council. Those processes which have been approved are universally accepted as reliable and efficient and as being minimally intrusive on the individual. Although the statutory provisions confer a discretion, this does not infringe the requirements of fundamental justice. The requirements necessary to issue and confirm an appearance notice offer a sufficient safeguard to meet the requirements of fundamental justice necessary for the taking of fingerprints. Considering the numerous and varied functions of fingerprints, it would be inappropriate to require an officer to first show on reasonable and probable grounds the necessity of fingerprinting.

Nor do the provisions violate any right to privacy under s. 7 of the Charter. Assuming s. 7 includes such a right, it guarantees a reasonable expectation of privacy. A person who is arrested on reasonable and probable grounds of having committed a serious crime, or a person against whom a case has been made out for issuing a summons or warrant or for confirming an appearance notice, must expect a significant loss of personal privacy.

As the fingerprints of the applicants in this case were not taken, a consideration relating to the retention of the fingerprints of an accused, who was not convicted, did not arise. In any event, this issue has nothing to do with the taking of fingerprints under s. 2(1) and (2) of the Act.

Finally, the rights of the applicants were not infringed under ss. 8, 9, 10 or 11(c) or (d) of the Charter. As fingerprinting pursuant to the provisions in question is not unreasonable, it would not be an unreasonable search under s. 8, even assuming fingerprinting was a search. For the reasons given earlier, the applicants' rights not to be arbitrarily detained or imprisoned were not infringed and thus, in the circumstances, ss. 10 and 11(c) were not applicable. If the fingerprints were obtained in a manner consistent with the principles of fundamental justice, it was not apparent that their use as evidence could violate the right to a fair trial guaranteed under s. 11(d).

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R. v. HIGGINS et al.**

[Indexed as: Beare v. R.]

Supreme Court of Canada,
Dickson C.J.C., Beetz, Estey,*
McIntyre, Lamer, Wilson, Le Dain,* La Forest and L'Heureux-Dubé JJ.

Heard – December 16 and 17, 1987.

Oral judgment – December 17, 1987.

Written judgment – December 1, 1988.

Civil liberties – Life, liberty and security – Principles of fundamental Justice – Provisions of Identification of Criminals Act and Criminal Code, providing for fingerprinting of persons charged with but not convicted of indictable offence, not violating principles of fundamental justice under s. 7 of Charter of Rights and Freedoms – Requiring reasonable and probable grounds – Not being arbitrary and not violating privacy.

Civil liberties – Unreasonable search and seizure – Fingerprinting powers not violating s. 8 of Charter of Rights and Freedoms.

Civil liberties – Arbitrary detention or imprisonment – Fingerprinting powers not violating s. 9 of Charter of Rights and Freedoms.

Civil liberties – Right to counsel – Section 10(b) of Charter of Rights and Freedoms not being applicable to fingerprinting powers.

Civil liberties – Self-incrimination – Section 11(c) of Charter of Rights and Freedoms not being applicable to fingerprinting powers.

Civil liberties – Fair and public hearing – Fingerprint evidence not violating right to fair trial if evidence taken in manner consistent with fundamental justice.

The accused, B. and H., were charged with separate criminal offences and were served respectively with an appearance notice and summons requiring attendance at R.C.M.P. offices to be fingerprinted under the Identification of Criminals Act. Section 2 of that Act provides for the fingerprinting of a person in lawful custody; ss. 453.3(3) and 455.5(5) of the Criminal Code require an appearance and deem a person so appearing to be in lawful custody charged with an indictable offence. Neither accused attended at the R.C.M.P. offices as required. The requirement that appearances be made for fingerprinting following a charge but before conviction was unsuccessfully challenged on separate motions, but the appeals, heard together, were allowed by the Saskatchewan Court of Appeal, which held that the provisions violated s. 7 of the Canadian Charter of Rights and Freedoms and that the violation was not a reasonable limit under s. 1 of the Charter. The Crown appealed further.

Held – Appeal allowed; provisions of Identification of Criminals Act and Criminal Code providing for fingerprinting of person charged with but not convicted of indictable offence held constitutional.

*Estey and Le Dain JJ. joined in the judgment of 17th December 1987 but took no part in this judgment.

The impugned fingerprinting provisions infringe the rights guaranteed by s. 7 of the Charter because they require a person to appear at a specific time and place and oblige that person to go through an identification process on pain of imprisonment for failure to comply. However, the violation of the right to life, liberty and security of the person is not contrary to the principles of fundamental justice. Like other provisions of the Charter, s. 7 must be construed in light of the interest it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question. The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial system but also of the other components of our legal system. Here, in assessing law enforcement measures, specifically in the context of a person charged with an offence, it was relevant to consider the applicable principles and policies that have animated legislative and judicial practice in the field. The stigma attached to being charged with an offence or the stigma attached to being arrested, detained or required to answer the charge in a public trial far outweighs any feeling of indignity attached to having one's fingerprints taken. The taking of fingerprints is not a more serious invasion of the right of a person in custody than examining the person's body for birthmarks and the like. The common law experience reveals that the vast majority of judges do not consider custodial fingerprinting fundamentally unfair. Canada is by no means alone in legislation authorizing the police to fingerprint persons in custody for indictable offences. Custodial fingerprinting has not been declared unconstitutional under comparable provisions in the United States Constitution. Here, the accused were not in custody, but were nevertheless required to subject themselves to fingerprinting. However, their position should not differ from that of a person who has been arrested. Before the Bail Reform Act they could have been arrested on the basis that there were reasonable and probable grounds that they had committed the offences charged.

The impugned fingerprinting provisions do not violate the principles of fundamental justice through arbitrariness or any violation of the accused's privacy. The main purposes of the fingerprinting power in question are to establish the identity and criminal record of the accused, to discover whether there are warrants outstanding for his arrest or if he has escaped from lawful custody and, in some cases, to gather evidence which may be relevant to the question of whether he committed the crime with which he is charged. It is appropriate and necessary for peace officers to check, confirm or establish the identity of accused persons in a wide variety of situations. The legislation was not arbitrary in its scope and did not create an arbitrary or irrational statutory scheme. The powers operate only with respect to indictable offences, and there must be reasonable and probable grounds to believe that the person involved has committed an indictable offence. Requiring an officer to show reasonable and probable grounds for believing that fingerprinting was necessary could seriously impede criminal investigations. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. A person who is arrested on reasonable and probable grounds that he has committed a serious crime, or a person against whom a case for issuing a summons or warrant, or confirming an appearance notice, has been made out, must expect a significant loss of personal privacy. He must expect that incidental to his being taken into custody he will be subjected to observation, physical measurement and fingerprinting. While some may find fingerprinting distasteful, it is insubstantial and of very short duration, and leaves no lasting impression.

The lack of provision for the destruction of fingerprints of an accused who was not convicted raised important considerations, but did not arise on the facts of the present case.

Sections 8, 9, 10 and 11(c) and (d) of the Charter were not violated by these fingerprinting powers. Sections 8 and 9 were not breached, for the reasons given with

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Supreme Court of Canada,

December 1, 1988.

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La Forest and L'Heureux-Dubé JJ.

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Fundamental justice – Meaning of “life, liberty and security of the person” – Fingerprinting – Provisions requiring fingerprinting after arrest but prior to conviction infringing rights guaranteed by s. 7 since attendance required on pain of imprisonment for failure to comply – However, infringements in accordance with principles of fundamental justice – Canadian Charter of Rights and Freedoms, s. 7 – Criminal Code, R.S.C. 1970, c. C-34, ss. 453.3(3), 455.5(5) – Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2.

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Fundamental justice – Fingerprinting – Provisions requiring fingerprinting after arrest but prior to conviction infringing rights guaranteed by s. 7 since attendance required on pain of imprisonment for failure to comply – However, infringements in accordance with principles of fundamental justice – Canadian Charter of Rights and Freedoms, s. 7 – Criminal Code, R.S.C. 1970, c. C-34, ss. 453.3(3), 455.5(5) – Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2.

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Search or seizure – Fingerprinting – Assuming fingerprinting constitutes “search”, such search not unreasonable – Canadian Charter of Rights and Freedoms, s. 8 – Criminal Code, R.S.C. 1970, c. C-34, ss. 453.3(3), 455.5(5) – Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2.

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Arbitrary detention or imprisonment – Fingerprinting – Statutory scheme requiring attendance for fingerprinting of accused persons following their release neither arbitrary nor irrational – Canadian Charter of Rights and Freedoms, s. 9 – Criminal Code, R.S.C. 1970, c. C-34, ss. 453.3(3), 455.5(5) – Identification of Criminals Act, R.S.C. 1970, c. I-1, s. 2.

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(C.)

The accused, after being charged with criminal offences, were served with a summons requiring attendance at Royal Canadian Mounted Police

*Estey and Le Dain JJ. joined in the judgment of December 17, 1987 [33 C.R.R. 382], but took no part in this judgment.

HER MAJESTY THE QUEEN v. CLAUDE R. BEARE and THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL FOR ONTARIO, THE ATTORNEY GENERAL FOR NEW BRUNSWICK, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL FOR ALBERTA and THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE

HER MAJESTY THE QUEEN v. FREDERICK G. HIGGINS and THE ATTORNEY GENERAL OF CANADA, THE ATTORNEY GENERAL FOR ONTARIO, THE ATTORNEY GENERAL FOR NEW BRUNSWICK, THE ATTORNEY GENERAL OF MANITOBA, THE ATTORNEY GENERAL FOR ALBERTA and THE CANADIAN ASSOCIATION OF CHIEFS OF POLICE
(No. 20384)

INDEXED AS: R. v. BEARE; R. v. HIGGINS

Supreme Court of Canada
Dickson, C.J.C., Beetz, Estey,
McIntyre, Lamer, Wilson, Le Dain,
La Forest and L'Heureux-Dubé, JJ.
December 1, 1988.

Summary:

The accused Higgins was charged with defrauding a company of more than \$200.00 contrary to s. 338(1) of the Criminal Code. The accused Beare was charged with break, enter and theft contrary to s. 306(1) of the Code. Both accused were required to appear for fingerprinting pursuant to the Identification of Criminals Act. Both accused refused to report as required and challenged the constitutional validity of the Identification of Criminals Act.

The trial judges, in separate decisions, dismissed the actions. The accused both appealed. The appeals were heard together.

The Saskatchewan Court of Appeal, in a decision reported in [1987] 4 W.W.R. 309; 56 Sask. R. 173; 57 C.R.(3d) 193, allowed the appeals. The Court of Appeal held that s. 2 of the Identification of Criminals Act and ss. 453.3 (3) and 455.5(5) of the Criminal Code violated the right to life, liberty and security of the person in s. 7 of the

Charter and were of no force and effect. The court further held that the violation was not a reasonable limit within the meaning of s. 1 of the Charter. The accused both appealed to the Supreme Court of Canada.

The Supreme Court of Canada allowed the appeals and held that the taking of fingerprints pursuant to the impugned legislation did not violate the principles of fundamental justice within the meaning of s. 7 of the Charter.

Civil Rights - Topic 1217

Security of the person - Lawful or reasonable search - Unreasonable search and seizure defined - Section 8 of the Charter guaranteed the right to be secure against unreasonable search and seizure - The Supreme Court of Canada opined that assuming fingerprinting could be looked on as a "search", the fingerprinting of persons arrested but not yet convicted of an indictable offence pursuant to s. 2 of the Identification of Criminals Act and ss. 453.3(3) and 455.5(5) of the Criminal Code, would not be unreasonable - See paragraph 64.

Civil Rights - Topic 1406

Security of the person - Law enforcement - Fingerprinting - The Supreme Court of Canada held that the federal provisions respecting the fingerprinting of persons arrested but not yet convicted of an indictable offence, namely, s. 2 of the Identification of Criminals Act and ss. 453.3 (3) and 455.5(5) of the Criminal Code, did not violate s. 7 of the Charter - The court specifically held that the alleged infringement did not violate the principles of fundamental justice and that the legislation was not arbitrary in scope, applying only to three categories of accused who have not yet been convicted of an indictable offence - The existence of a statutory discretion in police to require fingerprinting did not offend the principles of fundamental justice - Neither did the provisions offend the accused's privacy.

Civil Rights - Topic 8472

Canadian Charter of Rights and Freedoms - Interpretation - Precedent - General - The Supreme Court of Canada stated that "while the common law is, of course, not determinative in assessing whether a particular practice violates a principle of fundamental justice, it is certainly one of the major repositories of the basic tenets of our legal system referred to in *Re B.C. Motor Vehicles Act ...*" - See paragraph 39.

Civil Rights - Topic 8546

Charter - Interpretation - Life, liberty and security of the person - [See Civil Rights - Topic 1406 above].

Civil Rights - Topic 8546

Charter - Interpretation - Life, liberty and security of the person - The Supreme Court of Canada stated that "the analysis of s. 7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to 'life, liberty and security of the person' and, secondly, that that deprivation is contrary to the principles of fundamental justice. Like other provisions of the Charter, s. 7 must be construed in light of the interests it was meant to protect. It should be given a generous interpretation, but it is important not to overshoot the actual purpose of the right in question" - See paragraph 28.

Criminal Law - Topic 3254

Compelling appearance, detention and release - Appearance and appearance notice - Power to compel attendance of accused for purposes of Identification of Criminals Act - [See Civil Rights - Topic 1406 above].

Criminal Law - Topic 3254

Compelling appearance, detention and release - Appearance and appearance notice - Power to compel attendance of accused for purposes of Identification of Criminals Act - The Supreme Court of Canada referred to the specific purposes of ss. 453.3(3) and 455.5(5) of the Criminal Code, respecting fingerprinting - See para-

graphs 26 to 27.

Cases Noticed:

Reference Re Section 94(2) of the Motor Vehicle Act (B.C.), [1985] 2 S.C.R. 486; 63 N.R. 266; [1986] 1 W.W.R. 481; 24 D.L.R.(4th) 536; 23 C.C.C.(3d) 289; 48 C.R.(3d) 289; 36 M.V.R. 240, refd to. [para. 12].

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