Indexed as:
R. v. Fisher

Regina v. Fisher

[**1994**] O.J. No. 358

17 O.R. (3d) 295

111 D.L.R. (4th) 415

69 O.A.C. 286

88 C.C.C. (3d) 103

28 C.R. (4th) 63

20 C.R.R. (2d) 275

22 W.C.B. (2d) 552

Action No. C12389

Court of Appeal for Ontario,

Arbour, Doherty and Weiler JJ.A.

February 24, 1994

Counsel:

Anthony K. Graburn, for the Crown, appellant.

Sean J. May, for respondent.

The judgment of the court was delivered by

1 **ARBOUR J.A.**: -- The Attorney General of Ontario appeals from the judgment of Her Honour Judge Nicholas of the Ontario Court (Provincial Division) declaring s. 121(1)(c) of the Criminal Code, R.S.C. 1985, c. C-46, unconstitutional.

2 The respondent was charged in an information which alleged that he was a government official, and that he accepted the benefit of a computer system from a person who had dealings with the Government of Canada, without having the consent in writing of the head of the branch of government that employed him, thereby committing an offence under s. 121(1)(c) of the Criminal Code. The respondent challenged the constitutionality of s. 121(1)(c) of the Code at the outset of the proceedings and, after hearing submissions on a number of separate dates, Her Honour Judge Nicholas concluded that s. 121(1)(c) infringed s. 7 of the Canadian Charter of Rights and Freedoms by virtue of the doctrine of vagueness, and that the onus placed on the accused to prove written consent infringed s. 11(d) of the Charter. The Crown appeals on both grounds. The relevant Charter provisions are as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably
> justified in a free and democratic society. . . . . .
>
> 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.
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> . . . . .
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> 11. Any person charged with an offence has the right
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> . . . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

Section 121(1)(c) of the Criminal Code and the Doctrine of Vagueness

3 Section 121(1)(c) reads:

> 121(1) Everyone commits an offence who . . . . .
>
> (c) being an official or employee of the government, demands, accepts or offers or agrees to accept from a person who has dealings with the government a commission, reward, advantage or benefit of any kind directly or indirectly, by himself or through a member of his family or through any one for his benefit, unless he has the consent in writing of the head of the branch of government that employs him or of which he is an official, the proof of which lies on him;

4 In R. v. Greenwood (1991), 5 O.R. (3d) 71, 67 C.C.C. (3d) 435 (C.A.), Doherty J.A. enunciated the conduct requirements (actus reus) as well as the fault elements (mens rea) contained in s. 121(1)(c). He identified the conduct elements as follows [at p. 80]:

> (a) the giving of a "commission, reward, advantage or benefit of any kind" by a person "having dealings with the government";
> (b) the receipt of the "commission reward, advantage or benefit of any kind" by a government employee; and
> (c) the absence of the consent of the government employee's superior to the receipt of the "commission, reward, advantage or benefit of any kind".

5 Doherty J.A. elaborated upon the meaning of the expression "commission, reward, advantage or benefit of any kind", and he concluded that it includes gifts consisting of something of value which constitutes a profit for the government employee derived at least in part from the employee's relation to the government. As for the fault elements, without deciding whether recklessness as to one or more elements of the conduct would be sufficient, the court in Greenwood held that knowledge (including wilful blindness) of the existence of the relevant circumstances constituted the blameworthy state of mind which made the voluntary conduct criminal. Doherty J.A. pointed out that no additional criminal mind-set, no ulterior corrupt motive, was required. He said, at p. 93:

> However, in the face of the clear statutory language used, it can only be concluded that Parliament chose to place the giver and the receiver of the benefit on a different footing for the purposes of determining culpability. The court must give effect to that distinction. Clearly a lesser form of mental culpability is required for s. 121(1)(c) than for s. 121(1)(b). See Mewett and Manning, Criminal Law, supra, p. 459.

6 In reaching the conclusion that s. 121(1)(c) was void for vagueness, the trial judge took into consideration the interpretation given to that provision by this court in R. v. Greenwood, supra. Indeed, I take her reasons to mean that, as so interpreted, the section remains unconstitutionally vague. As I understand her reasons, the trial judge identified two potential sources of vagueness in s. 121(1)(c). The first one is said to be the failure of the section to spell out the mens rea requirement, and the second is the breadth of the prohibited conduct, which, it is argued, reaches the point of failing to give an ordinary person fair notice of whether a contemplated course of conduct is forbidden by the statutory provision.

7 I say at the outset that the absence of any reference to a mental element in a Criminal Code provision enacting an offence is not a sufficient basis for a declaration of vagueness within the meaning of s. 7 of the Charter. As presently drafted, many Criminal Code provisions do not refer explicitly to any or all of the requisite fault elements. The courts, applying established common law principles to the language used by Parliament, must determine appropriate fault requirements: R. v. Sault Ste-Marie (City), [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353. The interpretative contribution of the courts must be taken into account when deciding whether a statutory provision is unconstitutionally vague: R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 at p. 623, 74 C.C.C. (3d) 289 at p. 300; Reference re Criminal Code, ss. 193, 195.1(1)(c), [1990] 1 S.C.R. 1123 at pp. 1156-57, 56 C.C.C. (3d) 65 at pp. 89-90; R. v. Morgentaler (1985), 52 O.R. (2d) 353 (C.A.) at p. 387, 22 C.C.C. (3d) 353 at p. 387; R. v. Lebeau (1988), 41 C.C.C. (3d) 163 at p. 173, 62 C.R. (3d)

157 (Ont. C.A.); R. v. Farinacci, November 8, 1993 (Ont. C.A.) [now reported 18 C.R.R. (2d) 298, 86 C.C.C. (3d) 32]. Indeed, vagueness is tested by the court's ability to interpret statutory language within the framework of acceptable legal analysis and debate: Nova Scotia Pharmaceutical, supra, p. 640 S.C.R., p. 311 C.C.C.

8 The trial judge did not base her decision solely on the absence of a specified fault requirement in the wording of s. 121(1)(c). Rather, it appears that she relied mostly on the overbreadth of the proscribed conduct, which she viewed as unconstitutionally vague even with the inclusion of the mental element identified by this court in Greenwood, supra. The trial judge correctly pointed out the difference between the criminal liability of a government official or employee under s. 121(1)(c) of the Code, and the liability of officials and others under the other subsections of s. 121 as had been elaborated upon by this court in Greenwood. Essentially, the criminal liability of the government employee under s. 121(1)(c) is engaged whether or not the employee drew any connection between the accepted gift and the giver's dealings with the government, so long as the employee knowingly accepted something of value from a person having dealings with the government, which, in all the circumstances, constituted a profit to the employee, derived at least in part from his or her relation to the government. In contrast, the other subsections criminalize the offering or receiving of an advantage in consideration for or in relation to the giver's dealings with the government. The net of criminal liability is wider in s. 121(1)(c) than in the other subsections. Having pointed out that difference, the trial judge said:

> Parliament has thus deemed it appropriate to place the giver and the receiver of the advantage or benefit on a different footing. This would appear to visit an injustice upon such an employee who can be convicted upon a lesser standard of fault, i.e., in the absence of the corrupt mind required for the other subsections of s. 121 despite the very great stigma attached to a conviction for what is, in essence, a breach of trust situation for which loss of employment or severe disciplinary sanctions will no doubt ensue.

9 Commenting again later on the scope of s. 121(1)(c), the trial judge added:

> Contrary to other offences where the required actus reus is readily apparent, a significant discretion will vest in the law enforcement authorities who must decide whether, in all of the circumstances, prosecution is warranted. Similarly, one can envisage how difficult it might be for any public official or employee to know in what circumstances the acceptance of a gift might constitute a criminal offence, if the consent of that person's superior department head is not obtained.

10 In my respectful opinion, the trial judge erred in concluding that s. 121(1)(c) was unconstitutionally vague on that basis. In its substantive conception, fair notice requires not only that the law be brought home to persons governed by it, but that the law convey in an intelligible way what the proscribed conduct is. The fact that citizens would be surprised to find how broadly the net has been cast by Parliament in criminalizing corruption in the public service does not mean that the law is broad to the point of vagueness. Overbreadth has no autonomous status under the Charter. In Canadian law, it is merely a component of the doctrine of vagueness, which ranks as a principle of fundamental justice in s. 7 of the Charter. In Nova Scotia Pharmaceutical, supra, Gonthier J. elaborated

upon the distinction between vagueness and overbreadth and concluded as follows, at p. 632 S.C.R., p. 306 C.C.C.:

> 1. What is referred to as "overbreadth", whether it stems from the vagueness of a law or from another source, remains no more than an analytical tool to establish a violation of a Charter right. Overbreadth has no independent existence. References to a "doctrine of overbreadth" are superfluous.
> 2. The "doctrine of vagueness" the content of which will be developed shortly, is a principle of fundamental justice under s. 7 and it is also part of s. 1 in limine ("prescribed by law").

11 As for the standard of precision that a Criminal Code provision must meet in order to satisfy the constitutional standard contained in s. 7, I point again to the words of Gonthier J. in Nova Scotia Pharmaceutical Society, supra, at pp. 638-39 S.C.R., pp. 310-11 C.C.C.:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed, no higher requirement as to certainty can be imposed on law in our modern state. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

12 The decision of this court in Greenwood, supra, elaborates upon the meaning of the statutory components of s. 121(1)(c). As so interpreted, the enactment provides adequate guidance to government employees who are required to comply with s. 121(1) (c) of the Criminal Code, and it also curtails appropriately discretionary enforcement. The text of that provision, as judicially interpreted, cannot, in my view, be said to be unconstitutionally vague.

The Burden on the Accused to Prove Written Consent

13 The Crown also appeals the declaration made by the trial judge that the burden imposed on an accused to prove that he had the written consent of the head of the applicable branch of government, in order to escape conviction, infringes the presumption of innocence embodied in s. 11(d) of the Charter.

14 In R. v. Oakes, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, the Supreme Court held that a provision that requires an accused to disprove an element of the offence on a balance of probabilities violates s. 11(d) of the Charter since there is a possibility that the accused would be convicted despite the existence of a reasonable doubt as to his guilt. In R. v. Whyte, [1988] 2 S.C.R. 3, 42 C.C.C. (3d) 97, 64 C.R. (3d) 123, the court emphasized the risk of conviction despite a reasonable doubt as to guilt, and held that the protection offered by s. 11(d) applied to any factor affecting the ultimate verdict of guilt or innocence, whether that factor was characterized as an element of the offence, or a defence. This was reiterated in R. v. Keegstra, [1990] 3 S.C.R. 697, 61 C.C.C. (3d) 1.

15 The absence of consent in writing of the head of the branch of government was identified by this court in Greenwood, supra, as an essential element of the actus reus of the offence. Even if the consent of the employee's superior was characterized as a defence rather than the lack of consent being an ingredient of the offence, it remains essential to a verdict. Setting aside for a moment the requirement that the consent be in writing, the obtainment by an employee of the consent of his or her superior to the receipt of a gift would not only remove the legal guilt of the employee, but it would largely meet any concern by the public that the employee acted corruptedly. For instance, once the employee has the consent of his or her superior, it becomes unnecessary to attempt to determine objectively whether the gift, be it a modest or a more substantial one, constituted a benefit to the employee within the meaning of the subsection; the existence of the consent in writing disposes of any ambiguity which might otherwise arise as to the moral blameworthiness of accepting the benefit.

16 In using the expression "the proof of which lies on him" in s. 121(1)(c), Parliament imposed on the accused the burden of proving, on a balance of probabilities, that he had the requisite consent in writing, failing which the accused will be convicted if the Crown otherwise proves the other ingredients of the offence beyond a reasonable doubt: R. v. Proudlock, [1979] 1 S.C.R. 525, 43 C.C.C. (2d) 321; R. v. Chaulk, [1990] 3 S.C.R. 1303, 62 C.C.C. (3d) 193. This persuasive burden imposed on the accused clearly leaves open the possibility of a conviction despite the existence of a reasonable doubt as to guilt. For example, even if the accused testified that he had obtained the written consent of the head of his department prior to accepting a benefit, thereby raising a reasonable doubt on that issue, the jury might not be satisfied on a balance of probabilities that this was so if the accused could not produce the writing.

17 The Crown's contention, however, is that the expression "without the written consent . . . the proof of which lies on the accused" in s. 121(1)(c) does not create a reverse onus provision. Relying on R. v. Schwartz, [1988] 2 S.C.R. 443, 45 C.C.C. (3d) 97, the Crown submits that the accused is merely required to show, by production of the written consent, that the section does not apply to him. In Schwartz, McIntyre J. held that s. 115 of the Code, which required the accused to prove that he was the holder of a certificate, in order to resist a conviction for possession of certain weapons, did not create a reverse onus clause and thus did not violate s. 11(d) of the Charter. In relying on Schwartz, counsel for the Crown submits that although s. 121(1)(c) creates a "true crime" requiring full mens rea, it includes a form of licensing in that the written consent of the head of the depart-

ment operates as a form of licence for the employee to accept a gift or other benefit from a person having dealings with the government. I agree with the approach suggested by the Crown, but not with the proposed conclusion. In my view, the Crown correctly suggests that the authority of Schwartz is limited to cases where a licensing scheme is in place, such that the existence of a licence, permit or certificate can be said to be neither an element of the offence, nor a defence in the true sense. In that case McIntyre J. said, at p. 485 S.C.R., p. 129 C.C.C.:

> There is no reverse onus imposed upon the accused by s. 106.7(1), despite the words which are employed in the section. The holder of a registration certificate cannot be made subject to a conviction under s. 89(1) [now s. 91(1)]. He is not required to prove or disprove any element of the offence or for that matter anything related to the offence. At most, he may be required to show by the production of the certificate that s. 89(1) does not apply to him and he is exempt from its provisions.

18 He explained further, at p. 486 S.C.R., p. 130 C.C.C.:

> The theory behind any licensing system is that when an issue arises as to the possession of the licence, it is the accused who is in the best position to resolve the issue. Otherwise, the issuance of the certificate or licence would serve no useful purpose. Not only is it rationally open to the accused to prove he holds a licence . . . , it is the expectation inherent in the system.

19 Schwartz approved the decision of this court in R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539, 43 C.R. (3d) 289, where the court upheld the constitutionality of s. 48(3) of the Provincial Offences Act, R.S.O. 1980, c. 400, which imposed a burden on the accused of proving that he had a licence permitting him to operate a poultry slaughtering plant. Schwartz was applied by the British Columbia Court of Appeal in R. v. Daniels (1990), 60 C.C.C. (3d) 392. In that case the court upheld the validity of the burden placed on an accused by s. 730 (now s. 794) of the Criminal Code, R.S.C. 1970, c. C-34, to prove that he was the holder of a special permit allowing him to take shellfish from a contaminated area, so as to avoid conviction for an offence under the Sanitary Control of Shellfish Fisheries Regulations, C.R.C. 1978, c. 832, s. 5(1).

20 A narrow view of the ratio on Schwartz, supra, is consistent with the remarks of Lamer C.J.C., speaking for the majority in R. v. Chaulk, supra, where the Chief Justice pointed out that, according to the majority view in Schwartz, there was no risk of an accused being convicted despite the existence of a reasonable doubt as to his guilt in that case, since the production or non-production of the registration certificate would be conclusive of whether the accused had a registration certificate (p. 1332 S.C.R., p. 214 C.C.C.).

21 In my opinion, the written consent contemplated by s. 121(1) (c) is not analogous to a registration certificate, or to a licence or permit. In fact, the only thing that might suggest otherwise is the requirement that the consent be in writing. Typically, a licensing scheme is one that regulates and monitors a field of activity for a fee. There is no suggestion, in s. 121, of governments administering a licensing scheme to permit their employees to obtain benefits and rewards from government contractors. What is contemplated by the requirement that government employees obtain the consent of their superiors before accepting benefits is the removal of any secrecy and the judgment of a person in authority to the effect that the proposed gift will not compromise the integrity of the government.

What the employee obtains from his or her superior is not a permit or a licence, but a consent. There are other activities governed by the Criminal Code which may be criminal absent a person's consent, but not so if consent is obtained. Assault and theft readily come to mind. I would not be prepared to hold that the consent contemplated by s. 121(1)(c) becomes a form of licensing merely because it has to be in writing. Absent that feature, the consent here would be indistinguishable, in my view, from the ones just mentioned. I also note that in R. v. Laba (1992), 74 C.C.C. (3d) 538, 10 C.R.R. (2d) 321 (Ont. C.A.), the Crown conceded that the reverse onus provision in s. 394(1)(b) of the Code contravenes s. 11(d) of the Charter. Section 394(1)(b) makes it an offence for a person to sell or purchase certain minerals "unless [the accused] establishes that he is the owner or agent of the owner or is acting under lawful authority". No analogy was made, in Laba, between the lawful authority and the licence or permit in Schwartz. I therefore conclude that the reverse onus provision contained in s. 121(1)(c) of the Code infringes s. 11(d) of the Charter.

Whether s. 121(1)(c) is a Reasonable Limit Pursuant to s. 1 of the Charter

22 Counsel for the Crown submits that s. 121(1)(c) is a reasonable limit to the presumption of innocence which is justifiable under s. 1 of the Charter. The Oakes test has been conveniently summarized by the Supreme Court in Chaulk, supra, at pp. 1335-36 S.C.R., pp. 216-17 C.C.C.:

> 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
> (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
> (b) impair the right or freedom in question as "little as possible", and
> (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

Objective

23 The Crown contends that the objective of the impugned provision is to preserve the integrity and the appearance of integrity of the public service and that such an objective is of sufficient importance to engage the justificatory process in s. 1. I think that this statement of the objective is too broad. The preservation of the integrity of the public service is the purpose behind the existence of the offence in s. 121(1) (c), in the same way that the preservation of human life is the objective of the homicide provisions of the Code. It is the objective of the reverse onus clause, rather than the objective of the whole of s. 121, which should be the direct focus of the analysis.

24 The first part of the s. 1 inquiry must therefore be directed to the objective of the reverse onus clause. That section must itself have an underlying objective which is sufficiently important to warrant overriding s. 11(d) of the Charter. It is not enough that the reverse onus clause merely further the objective underlying the substantive offence by facilitating the conviction of those charged with the offence.

25 I doubt that the reverse onus clause in s. 121(1)(c) of the Code serves any objective other than to relieve the burden of proof generally borne by the Crown in criminal cases. I need not come to any firm conclusion on that issue as I am satisfied that even if the section survives the first part of the s. 1 test, it cannot survive the proportionality component of that test.

Proportionality

26 For this part of the analysis, I must assume that I wrongly stated the objective, and the Crown is correct in suggesting that the objective is to preserve the integrity of the public service. Similarly, desirable objectives could be articulated with respect to every offence contained in the Criminal Code. Despite the importance of preserving human life, protecting physical and sexual integrity, and securing private property, the Charter contemplates that the state must bear the burden of proving guilt beyond a reasonable doubt, even for the most serious offences, and with respect to elements of fault which are secreted in the accused's mind.

27 Having said that, I can see the rationality of placing the burden of proof on the accused. However, the reverse onus does not impair the presumption of innocence "as little as possible". Placing an evidential, rather than a persuasive burden, indeed, leaving the burden of proof entirely on the Crown, would have, in my view, served just as adequately to protect the public service from corruption. Neither is there, in my opinion, an acceptable proportionality between the effects and the objectives of the impugned provision.

28 The fact that the exculpating consent must be in writing suggests that its existence must be traceable in some physical (or electronic) form. I am not satisfied that there is such an inherent evidentiary difficulty in proving that element of the offence, in comparison to the evidentiary burden that the Crown must meet daily in criminal courts, and for offences as or more serious than this one, to justify facilitating the Crown's task with the inherent risk that an infringement of the presumption of innocence always entails that the morally innocent be convicted.

29 For these reasons, I agree with the conclusion reached by the trial judge that s. 121(1)(c) contains an impermissible infringement of s. 11(d) of the Charter. However, in light of the conclusion that I have reached with respect to the constitutionality on the rest of the subsection, the proper remedy is to delete the offensive words "the proof of which lies on him" from s. 121(1)(c): see R. v. Laba (1992), 74 C.C.C. (3d) 538 at p. 552, 10 C.R.R. (2d) 321 (Ont. C.A.); R. v. Ireco Canada II Inc. (1988), 43 C.C.C. (3d) 482, 65 C.R. (3d) 160 (Ont. C.A.); R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154 at p. 205, 67 C.C.C. (3d) 193 at p. 227, per Lamer C.J.C.; R. v. Holmes, [1988] 1 S.C.R. 914, 41 C.C.C. (3d) 497, per Dickson C.J.C. (dissenting). The deletion of the offensive words maintains both the legislative and the constitutional integrity of the section by ensuring that the Crown bear the burden of proving that the conduct contained all the elements of corruption which justify recourse to the criminal sanction, including the lack of consent in writing by a superior.

30 Consequently, I would allow the appeal, set aside the judgment below and remit the matter back to the Provincial Court.

Appeal allowed.

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Time Of Request: Monday, June 21, 2010 15:39:20