

Case Name:
R. v. Purtil

Between
Her Majesty the Queen, Respondent, and
Bonita Purtil, Applicant

[2012] O.J. No. 2769

Court File No. 7/10

Ontario Superior Court of Justice

K.A. Gorman J.

June 19, 2012.

(10 paras.)

Counsel:

S. Guiler, for the Respondent.

P. Kratzmann, for the Applicant.

1 K.A. GORMAN J.:-- The underlying allegations, which form the basis of this indictment occurred on October 13, 2008. On November 7, 2011 the matter was set down for trial, with jury selection to commence June 18, 2012.

2 On May 29, 2012 Counsel for the Applicant served and filed a Charter Application pursuant to sections 7, 10(b) and 24 of the *Charter of Rights and Freedoms*. The Crown responded to this application.

3 On June 15, 2012, the Applicant served and filed an "Amended Notice of Application and Constitutional Issue", challenging the constitutionality of section 255(2.2) and (3.2) of the *Criminal Code of Canada*. Additionally, it sought to sever counts five and six from the indictment, and added an alleged Charter breach pursuant to s. 9 of the *Charter*.

4 Section 109(1) of the *Courts of Justice Act R.S.O. 1990, Chap. C.43* governs the procedure to be followed when the issue of a constitutional question is sought to be raised.

(2) Failure to give notice --- If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

(2.2) Time of Notice --- the notice shall be served as soon as the circumstances requiring it become known, and, in any event, at least fifteen days before the day on which the question is to be argued, unless the court orders otherwise.

5 In *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 48, the court described the purpose of s. 109:

- (1) Within Canada's constitutional democracy, to provide government "the fullest opportunity to support the relevant legislation; and
- (2) To ensure that decision-making on the issue before the court is made with the benefit of a record "that is the result of thorough examination of the constitutional issues.

6 The Attorney General of Ontario and the Attorney General of Canada received short notice of the constitutional question as is evidenced by the court filing, and the fact neither branch of the government was represented in court.

7 As Hill, J. stated in *R. v. Mohla; R. v. Singh* [2012] O.J. No. 388 at para. 119:

Presumptively, government has not only a continuing interest and concern in particular legislation it has enacted, its constitutional validity and application, but also is the repository of information and has the resources often best suited to assisting the courts.

8 Further, I agree with Hill:

Without the necessity of showing prejudice, failure to provide the required s. 109 notice bars the court from considering the issues as to the constitutionality of the legislation: *Eaton (supra)* at para. 53; *R. v. Briggs* (2001), 55 O.R. (3d) 417 (C.A.), at par. 43 (leave to appeal refused, [2002] S.C.C.A. NO. 31); *Paluska Jr. v. Cava* (2002), 59 O.R. (3d) 469 (C.A.), at para. 24. While there may be instances where failure to properly serve written notice may not be fatal "because the Attorney General consents to the issues being dealt with or there has be a *de facto* notice which is the equivalent of a written notice" (*Eaton (supra)* at para. 54) that was not the case here [...]¹

9 The fact that the short notice to the Attorney General of Ontario and the Attorney General of Canada effectively amounted to no notice at all, is presumptively unfair. To permit the constitutional argument to proceed in the absence of any consideration by those branches of the government would be tantamount to having a one-sided hearing. I am not prepared to proceed in such a fashion. Accordingly the court is not prepared to entertain argument on the constitutionality of the legislation.

10 Further, given the timing of the request for severance, and its apparent "tie-in" to the constitutionality question, this motion is dismissed. The allegation of a s. 9 *Charter* breach will be heard in conjunction with the earlier motion filed according to the *Rules*.

K.A. GORMAN J.

cp/e/qljel/qljxr

---- End of Request ----

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