New Nouveau Brunswick CANADA

January 12th, 2022

Chantal Carbonneau,
Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Dear Ms. Carbonneau

RE: *R v Basque* – SCC File Number: 39997
Respondent's Reply to the Applicant's Leave Application

The New Brunswick Court of Appeal's decision in *R v Basque*[1] dealt with a distinctly narrow question of law. The issue was *not* whether a pre-trial driving prohibition may reduce the post-trial prohibition period, but rather whether it may reduce this period *below the statutorily prescribed one-year mandatory minimum*. The Applicant claims this distinction is immaterial.[2] The Crown disagrees, and so did the Court of Appeal.

In his meticulous reasons for Judgment, Chief Justice Richard, writing for the Majority, thoroughly canvassed all applicable legal considerations and conducted a thoughtful exercise of statutory interpretation. Having done so, he agreed with the Crown's position and concluded that a court does not have the jurisdiction to give credit for a pre-trial driving prohibition to the extent that it would result in a sentence where the go-forward driving prohibition was reduced *below the one-year mandatory minimum*.

The Crown unequivocally maintains that the Majority of the Court of Appeal arrived at the correct conclusion. If leave to appeal is granted, the Crown would emphatically argue as such and would additionally support its position with the reasons of the Alberta Court of Appeal in *R v Sohal*.[3] That said, the Crown does not intend on arguing the merits of the appeal in its response to this leave application. Instead, it will address the considerations relevant to whether leave to appeal

[1] *R v Basque* 2021 NBCA 50.

[2] Applicant's Memorandum of Argument at para 45.

[3] *R v Sohal* 2019 ABCA 293. Although the Applicant claims *Sohal* is irrelevant because it dealt with a Provincial administrative driving prohibition, and not a criminal bail prohibition, the Crown supports the conclusion of Chief Justice Richard wherein he found that this is a "distinction without a difference." (*Basque* at para 41).

should be granted, including whether there is an issue of law that ought to be resolved by this Court due to its public importance.[4]

There is no doubt that there are conflicting Canadian authorities on the issue that arose in the case at bar. This was highlighted by Chief Justice Richard.[5] Indeed, the Crown's decision to appeal this matter to the New Brunswick Court of Appeal was purely propelled by the fact that clarification of the law in New Brunswick was necessary in light of the divergent authorities on this issue, including two diametrically opposed conclusions on the issue from the New Brunswick Court of Queen's Bench.[6] And, although the Crown maintains the correctness of the Majority's reasons in *Basque*, the dissenting judgment of Justice French illustrates the ongoing conflict in the law and further supports the need for clarification. On that very point, it is apt to recall that impaired driving offences remain one of the most common crimes in Canada.[7] Accordingly, there is an importance associated with clarifying the interpretation of such a frequently applied sentencing provision.[8]

Bearing the foregoing in mind, the Crown is not a position to credibly register a particularly forceful objection to this application. Put simply, the Crown recognizes the importance of this appeal. Nonetheless, as Justice Cromwell (as he then was) explained, when considering a leave application, the Court may consider whether it is "an appropriate time" to hear the particular appeal.[9] From the Crown's perspective, it is not. There is strong utility in allowing this issue to unfold in the appellate courts below so that this Court may benefit from various appellate decisions on the issue should it one day determine to hear and adjudicate upon this question of law.

As it stands, there are only two appellate court decisions on point – *Basque* and *Sohal* – both of which have reached similar conclusions. The remaining decisions which contradict *Basque* and *Sohal* are lower court decisions with limited precedential value. As a result, allowing the binding and persuasive nature of both *Basque* and *Sohal* to unfold may result in unanimity on this issue amongst all Canadian appellate courts as the law develops. For that reason, despite its clear concession that this appeal carries with it an important question of law which requires resolution, the Crown requests that the leave application be dismissed.

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[4] Section 40 of the *Supreme Court Act* R.S.C. 1985, c. S-26.

[5] *R v Basque* 2021 NBCA 50 at paras 41-42.

[6] *R v Basque* 2021 NBCA 50 at para 6.

[7] *R v Alex* 2017 SCC 37 at para 1.

[8] While this specific appeal dealt with the now-repealed section 259(1)(a) of the *Criminal Code*, it was replaced with the almost identical section 320.24(2)(a) of the *Criminal Code* (*Basque* at paras 10 and 13). As a result, the issue to be determined in this appeal is relevant going forward.

[9] Justice Thomas Cromwell (as he then was), "Leaves to Appeal and Interventions at the Supreme Court of Canada – a View from the Bench of Final Appeal", CBA Law Series, Presented on February 4th, 2015 at page 21: Justice Cromwell Presentation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at City of Fredericton, Province of New Brunswick this 12th day of January, 2022.

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For:

Patrick McGuinty
Counsel for the Respondent,
Her Majesty the Queen