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Docket: CR 16-02-01635
Indexed as: Vaillancourt v. Her Majesty et al
Cited as: 2017 MBQB 95
(Brandon Centre)

COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	
	)	
Brandon Tyler Vaillancourt	)	**D. Manning**
Appellant	)	
and	)	
	)	
Her Majesty The Queen	)	**D. Badcock**
Respondent	)	For the Respondent
	)	
and	)	
	)	
Director of Public Prosecutions	)	**J. Hyman**
Intervener	)	For the Intervener
	)	
	)	
	)	
	)	
	)	**JUDGMENT DELIVERED:**
	)	**May 24, 2017**

MENZIES, J.

[1] On May 2nd, 2014, Vaillancourt, ("the accused") approached the Canadian Border Services Office at the international border between Canada and the United States. Upon being questioned, the Border Services Officer determined that a secondary search was required. During that search one of the

two officers involved in the secondary search decided to conduct a cursory search of the accused's iPhone. During that search the officer located a number of images he believed to be child pornography. The accused was arrested and charged with possession of child pornography.

[2] The charges proceeded to trial in the Provincial Court on January 29th, 2016. At the trial, the accused argued the cursory search of the iPhone was a warrantless search and therefore a violation of provisions to be free from an unreasonable search and seizure pursuant to s.8 of the *Canadian Charter of Rights and Freedoms* ("the Charter"). The Crown countered that the search of the iPhone was authorized by s. 99(1)(a) of the ***Customs Act*** which permits an inspection of any goods being brought across the international border.

[3] After receiving written argument, the learned trial judge asked the parties to address a further question, namely if the iPhone is a good pursuant to s. 99(1)(a) of the ***Customs Act***, should there be limits imposed of the search of the iPhone similar to those set out in the decision of ***R. v. Fearon***, 2014 SCC 77, [2014] S. C. R. 621. The learned trial judge found that a search of an electronic device at a border crossing is subject to s. 8 of the *Charter* and then proceeded to analyse the search of the iPhone in the context of these charges. The learned trial judge found that the search undertaken in this instance was *Charter* compliant and admitted the evidence.

[4] The accused was convicted of possession of child pornography. The accused appealed his conviction.

[5] The appeal having been set for hearing, the Director of Public Prosecutions ("the federal Crown") applied to this court for intervener status. The federal Crown argues that the question raised by the learned trial judge constituted a challenge to the constitutional validity of s. 99(1)(a) of the ***Customs Act***. As such, the federal Crown takes the position that the ***Constitutional Questions Act***, CCSM c. 180 required that notice of the question raised by the learned trial judge was required to be given to the federal Crown before the matter was litigated.

WAS NOTICE REQUIRED

[6] The relevant section of the ***Customs Act*** reads as follows:

> 99(1) An officer may
>
> (a) At any time up to the time of release, examine any goods that have been imported and open or cause to eb opened any package or container of imported goodsl and take smaples of imported goods in reasonable amounts.

[7] The ***Constitutional Questions Act*** provides:

> 7(2) Where in a cause, matter or other proceeding the constitutional validity or constitutional applicability of any law is challenged or an application is made for a remedy, the law shall not be held to be invalid, inapplicable or inoperable and the remedy shall not be granted until
>
> (a) The Attorney General of Canada and the Attorney General of Manitoba have been served with the notice of the challenge or the application in accordance with this section...

[8] The argument of the accused at trial was that an IPhone is not a good as defined in s.99 (1)(a). The learned trial judge rejected that argument but found that the provisions of s. 99 (1)(a) of the ***Customs Act*** were subject to the operation of s. 8 of the *Charter* if the "good" being searched was an electronic device such as an iPhone. Although the learned trial judge did not strike down the provisions of the ***Customs Act***, he imposed restrictions to the manner in which the section applies to electronic devices. In arriving at his decision, the learned trial judge found there was an inconsistency between s. 99(1)(a) of the ***Customs Act*** and s. 8 of the ***Charter***. In my opinion, this ruling constitutes a constitutional challenge to the applicability of the provisions of the ***Customs Act***. Accordingly, pursuant to the ***Constitutional Questions Act***, notice to Attorney General of Canada was required.

THE EFFECT OF THE FAILURE TO GIVE NOTICE

[9] s. 7(2) of the ***Constitutional Questions Act*** enjoins the court from declaring any law invalid or inoperable or from granting a remedy until notice is given in accordance with the ***Act***. In other words, the provision of notice is a precondition to the exercise of a court's jurisdiction to strike down or modify the applicability of a statute on constitutional grounds. (See: ***Saskatchewan v. Gorguis***, 2013 SKCA 32 at para. 29 and 30).

[10] The requirement of notice has a dual purpose. Both the federal and provincial governments have a vested interest in supporting the

constitutional validity of their legislation. In addition, notice operates to ensure that a proper evidentiary record is presented to the court deciding constitutional cases. (See; ***Eaton v. Brant County Board of Education***, [1997] 1 S. C. R. 241, 1q42 D. L. R. (4th) 385).

[11] While I accept it is within the purview of the learned trial judge to raise the applicability of s. 8 of the *Charter* and its effect on s. 99(1)(a) of the ***Customs Act***, there was an onus of the trial judge to ensure that notice was given to the Attorney General of Canada.

[12] The federal Crown argues that the failure to give notice of this issue has caused it prejudice. The federal Crown submits it would be the intention of the Attorney General of Canada to present evidence to support the reasonableness of the law and if necessary, to justify the provisions of the ***Act*** under s. 1 of the *Charter*.

[13] I accept that the federal Crown has been prejudiced by the lack of notice of the constitutional issues raised by the learned trial judge. It would not be appropriate to decide this appeal given the record is lacking the evidence the federal Crown submits is necessary for a balanced consideration of the issue raised by the learned trial judge.

[14] In light of this finding, I would appreciate the advice of counsel as to how they would wish this matter to proceed to resolution.

_____ J.