

COURT OF APPEAL FOR ONTARIO

BETWEEN:

NOEL CLEARWATER

(Appellants)

- and -

**HER MAJESTY THE QUEEN (In Right of Canada)
HER MAJESTY THE QUEEN (In Right of Ontario)
The ATTORNEY GENERAL OF CANADA and
The ATTORNEY GENERAL OF ONTARIO**

(Respondents)

APPELLANT'S FACTUM

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**PART I:
INTRODUCTION**

1. This case is about the balance between an individual's right and public safety. In this case we see that in order for public safety the court denies the Appellant his rights in regarding freedom of expression, peaceful assembly and association, the principles of fundamental justice and to be subject to arbitrary arrest and detention which violates the rights guaranteed in the Charter. The Appellant was forced into arrest when an *Emergency Measure Public Order Act* was ordered by the Governor General, for a crime in which Mr. Clearwater was unrelated to. Therefore it becomes an issue of ones individual rights being overridden due to public safety.

**PART II:
SUMMARY OF THE FACTS**

2. In 2004, a major titanium deposit was discovered near the border of Polar Bear Provincial Park in Northern Ontario. An application was made to the Ministry of Lands and Forests to develop the mine, and both the Federal and Provincial Ministries of the Environment conducted assessments to determine if the mine would meet the legal standards set out for mining. In 2010, both the Federal and Provincial governments gave their approval for the development of the mine.

3. The development of the mine has been opposed by various environmental activists. The Appellant, Mr. Clearwater, is the president of a group of environmental activists known as Friends of the North. This group opposes the development of the mine and has expressed their concerns by avenues of rallies, occupied politicians' constituency offices for limited periods, conducted mailing campaigns and stated that they would block road access to any mine that is to be developed.

4. Another group of environmental activists, the Environmental Liberation Movement has expressed its concerns by ways of violence. Since 2004, members of the group have attempted to plant explosives at the Ministry of the Environment offices located just outside the provincial park. They have sabotaged construction equipment which was part of the environmental assessment. In 2010, they claimed responsibility for targeting (although not injuring) Tom Hardy, the Mayor of Casterbridge, Ontario, and a mine proponent, in a drive-by shooting.

5. Last week, the Provincial Lands and Forests Minister was kidnapped by the Environmental Liberation Movement. An ultimatum was delivered to the Premier's office that the Minister would be killed if the mine was not stopped. The Minister's whereabouts are still unknown. In response, the Premier asked the Prime Minister to declare that a public order emergency existed. The

Federal cabinet agreed and, using the powers granted by the Emergency Measures and Public Order Act, invoked a state of public order emergency.

6. In accordance with the Emergency Measures and Public Order Act, the Attorney General declared the Environmental Liberation Movement to be a criminal organization and signed warrants for the arrest of all its known members. The Public Order Emergency was limited to the counties of Kenora and Cochrane, which are the areas where all activities of the subject groups have occurred

7. In response to the declaration, Mr. Clearwater, President of Friends of the North, stated on television:

“This is insane. A bunch of fascists are in power! We have to stop them! I agree with the goals of the ELM, but maybe not their methods. I hope they release the Minister, but I can see what has driven them to it. These guys in Toronto don’t care about us up here; they just want their payoffs from big mining companies. Maybe they deserve what they get.”

8. Following this statement, the Attorney General of Canada declared that Friends of the North was a supporter of a criminal organization and ordered the arrest of Mr. Clearwater.

9. Upon his arrest, Mr. Clearwater brought an application for habeas corpus. Justice Lockup dismissed the application. Justice lockup decided that Mr. Clearwater violated his freedom of expression by promoting a hateful act. It

was also decided that Mr. Clearwater was not part of a peaceful assembly. The Appellants would like to submit that Mr. Clearwater was in no way shape or form involved with the group committing the hateful acts and was simply stating his view using the media, which is protected under s. 2 of the Charter. Justice Lockup decided that emergency had been declared and that fundamental justice had been respected. The police officers weren't permitted to arrest anyone that they suspected unless the Attorney General authorized an arrest. Justice Lockup decided that in regard to s.9 of the Charter that there were no violations made due to the fact that an emergency had been called, it was a lawful arrest made because an Act of Parliament. Justice Lockup had found no breaches of the Charter but states if found wrong that they will address the Charter issues that have been breached and address the issue of limits.

PART III

GROUND OF APPEAL

ISSUE ONE: FREEDOMS OF SPEECH, ASSOCIATION AND PEACEFUL ASSEMBLY (S. 2(B), 2(C) & 2(D))

10. Mr. Clearwater's rights guaranteed under s.2 of the Charter have been infringed upon. Mr. Clearwater made a statement to the press about the kidnapping of the Provincial Lands and Forests Minister. He was then arrested for the context of his speech.

11. Since the cases of *Irwin Toy* and *R. v. Keegstra* the court must use a two Step enquiry. The first step involved determining whether Mr. Clearwater's speech falls within freedom of expression protected by the Charter. The second step is to determine whether the purpose or effect of the government action is to restrict Mr. Clearwater's freedom.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 1326
R. v. Keegstra, [1990] 3 S.C.R. 697

A) Step One of the *Irwin Toy* test

12. Mr. Clearwater's speech falls within freedom of expression protected by the charter. There is no doubt that Mr. Clearwater was trying to express and convey a meaning. The truth and falsehood of his speech is not to be considered in determining whether his speech falls within the freedom of expression along with the unpopularity of his views. As Holme J. stated "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought— not free thought for those who agree with us but freedom for the thought that we hate".

United States v. Schwimmer, 279 U.S. 644 (1929), at pp 654-55.
Ross v. New Brunswick School District NO. 15 [1996] 1 S.C.R. 825
Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 1326

B) Step Two of the *Irwin Toy* test

13. The purpose of the government's action was to restrict Mr. Clearwater's freedom of speech as guaranteed in the Charter. The government arrested and detained Mr. Clearwater because of the context of his speech. Mr. Clearwater's

intent of his speech was not to advocate violence; therefore his freedom of expression has been limited. He clearly states, "I agree with the goals of the ELM, but maybe not their methods. I hope they release the minister..." The objective of Mr. Clearwater's speech was not to pose a threat or an act of violence, but to convey a message. Mr. Clearwater's intent of his expression was not violence, therefore his statement is protected under section 2(b).

Trial decision paragraph 9.
Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 1326

14. Based on the facts of Mr. Clearwater's case and the two step enquiry his right and freedoms under s. 2(b) have been violated.

C) Peaceful Assembly and Association

15. Mr. Clearwater's freedom to peaceful assembly was also infringed upon. Not once did he act in violence or make his assembly unpeaceful. Mr. Clearwater just specifically stated his views about the matter in a verbal context. Therefore based on the facts of this case, Mr. Clearwater's right to peaceful assembly has been violated.

ISSUE TWO: RIGHT TO LIBERTY (s.7)

16. The Appellant feels that he was deprived of his liberty and that this was not in accordance with the principals of fundamental justice, arguing that the law was overly broad and too vague.

A) Mr. Clearwater was deprived of his Liberty

17. According to the case R. V. Malmgren, "liberty" grants the individual a degree of autonomy in making decisions of fundamental importance, without interference from the state."

18. Obviously Mr. Clearwater's statement was a statement of personal opinion, he was expressing his support for some of the causes of the Environmental Liberation Movement (ELM). Of course Mr. Clearwater would support some of the causes, as both groups are working towards some of the same goals as was stated as was stated. My client was simply stating his support for some of the goals of the ELM, but not their methods. Mr Clearwater was expressing his personal opinion, he was not speaking for his entire organization. To be detained for this reason is depriving Mr. Clearwater of his liberty.

B) This deprivation was not in accordance with the principles of fundamental justice.

19. According to the case Canadian Foundation for Children, Youth and the Law v. Canada (attorney general), (2004) 1 S.C.R. 76. (Para 16.) A law is vague if it prevents citizens from realizing when they are participating in a criminal act, it must give both citizens and government officials an intelligible standard. In the case of R. V. Heywood, (1994) 3 S.C.R. 761. Convicted sexual offenders are

not to loiter around in public parks and playgrounds. However, in this case this was rendered unconstitutional due to the loose wording of the case and the law being too vague.

*R. V. Heywood, (1994) 3 S.C.R. 761.
Canadian Foundation for Children, Youth and the Law v. Canada
(attorney general), (2004) 1 S.C.R. 76. (Para 16.*

20. According to Sopinka J. overly broad is described as being “vague generalizations about what our society considers to be ethical or moral” (Rodriguez, supra, at p. 591).

21. S. 24 b. of the Emergency Measures and Public Order Act is too vague and too broad. As stated a vague law prevents the citizens of clearly knowing when they are participating in a criminal act. Mr Clearwater had no idea that when he was speaking to the media the Attorney General would declare his whole organization a supporter of this criminal organization. Mr Clearwater was not showing full support of the ELM, he was only supporting the cause of the group.

22. To declare any group to be a criminal organization is overly broad and too general. For example, what makes an organization a criminal one? What has to be done in order to be considered a criminal organization? What is taken into consideration when declaring these organizations to be criminal? How can Mr. Clearwater’s organization be declared a criminal one when there is no evidence of criminal activity within the group? To say an organization is a

criminal one there has to be illegal activity, and s. 24 a. of the Emergency Measure and Public Order Act is an over broad law which make this law a deprivation of the principles of fundamental justice.

ISSUE THREE: ARBITRARY DETENTION OR IMPRISONMENT (S. 9)

23. Mr. Clearwater's rights and freedoms were taken away from him because of the Emergency Measures and Public Order Act. Mr. Clearwater was arbitrarily arrested and detained. Mr. Clearwater did no wrong, he only expressed an opinion to the media neither siding with or against the criminal organization the Environmental Liberation Movement. Aspects of the Emergency Measures and Public Order Act violates Charter rights and should be questioned when used. If the Emergency Measures and Public Order Act violates Charter Rights, the Charter should be held above the Act in importance, and the person, group should not be arrested, detained, prosecuted.

A) Mr. Clearwater's Arrest

24. An arrest is a imposition on another person's liberty and if no other options are available then the arrest should be made for the protection of the people.

Tucker v. Cadillac Fairview Corporation Ltd., 2005
CanLII 24579 (ON C.A.) at para. 71

25. It is clear that Mr. Clearwater was arrested and detained. Mr. Clearwater's arrest happened after he stated his opinion through the media. The Attorney General declared Mr. Clearwater and the Friends of the North were supporters of a criminal organization. Upon Mr. Clearwater's arrest he filed an application for habeas corpus to Justice Lockup, who dismissed it.

B) Mr. Clearwater's Arrest was Arbitrary

26. Arbitrary arrest or detention refers to the absence of reasonable and probable cause when arrested and detained. It refers to an unlawful arrest which people have rights to not be arbitrary arrest or detained in this country. Any person has the right to freedom from arbitrary arrest or detention. Every person who is arrested or detained has the right to an immediate judicial determination of the legality of their detention and to notice of the charges on which they are detained.

R. v. Storrey, [1990] 1 S.C.R. 241
Scowby v. Glendinning, [1986] 2 S.C.R. 226 at para. 55

27. Mr. Clearwater's arrest and detainment was arbitrary because it infringed on his rights and freedoms when there was no crime committed. Since he only expressed his controversial opinion to the media about the ELM. He did state that he didn't agree with their methods and hoped that they would release the captive Minister. So the Attorney General infringed on his rights of freedom of speech, opinion, expression, press and later the right not to be arbitrarily

detained. Mr. Clearwater and the Friends of the North have never been associated with ELM, and have not stepped out of their right to peaceful assembly.

ISSUE FOUR: REASONABLE LIMITS ON THE RIGHTS OF THE APPLICANT (S. 1)

28. The case of *R v. Oakes* provides the court with the opportunity to interpret the wording of S.1 of the Charter and how it is relevant to a case. It is the court's responsibility to prove that the limitations put on the person were "prescribed by law" and were "justified in a free and democratic society." In the case of *R v. Oakes*, it is stated that:

First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

1) Pressing and Substantial Objective:

29. The court must prove that there was a pressing and substantial objective, meaning the purpose of the infringement on the Charter Rights must be important to society.

30. In the present case, we accept that there was a pressing and substantial need for Mr. Clearwater's arrest in regards to an issue with public safety. However, we would also like to mention that Mr. Clearwater is in no way shape or form affiliated with the group that was involved with the kidnapping.

2) Proportionality Test

31. The Appellants submit that the infringement of Mr. Clearwater's right to free speech, peaceful assembly, and association were not proportional to the objective. We also feel that his denial to his rights of liberty, and arbitrary arrest and detention were also found to be not proportional to the objective.

I) Rational Connection

32. The decision made to imprison Mr. Clearwater did meet the rational connection test. In the case of R v. Oakes, a rational connection is made when "The proven fact must raise a probability that the presumed fact exists." We believe that Mr. Clearwater's statement through the media could have the potential to be seen

as a threat to society during times of an emergency, and could be rationally connected to the act of the kidnapping, therefore leading to his arrest.

II) Minimal Impairment

33. The arrest of Mr. Clearwater does not minimally impair the rights of the Appellants. This decision does not limit the Charter rights as little as it is reasonably possible. There were no attempts made to keep Mr. Clearwater's rights protected under s. 9 of the Charter, which everyone has the right not to be arbitrarily detained or imprisoned.

34. In *R v. Chaulk* 1990 CanLII 34 (S.C.C.), [1990] 3 S.C.R. 1303, at p. 1341, it is stated that what is necessary for minimal impairment "when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively"

35. In the case of *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLII 39 (S.C.C.), [1994] 3 S.C.R. 835, at p. 923, it is stated that:

The heart of the s. 1 analysis of publication and broadcast bans is to be found in the second and third branches of the proportionality part of the *Oakes* test. The second or minimal impairment branch is perhaps the aspect of the s. 1 analysis that is most altered when the task is to reconcile two *Charter* rights. The fact that the court must balance fair trial and freedom of expression rights forces a measure of flexibility into the analysis. If applied blindly or dogmatically, minimal impairment of one of the rights could theoretically mean maximal impairment of the other.

36. We accept that the violation of the Appellants rights could result in the protection of public safety, but the limitations of the Appellants rights in regards to the arrest were not limited to the least extent as possible. Not only does it go against a person's right to free speech, peaceful assembly, and association, but it goes against one's right to not be arbitrarily arrested, and goes against fundamental justice. The Appellants would like to suggest that there could have been other methods of detaining Mr. Clearwater rather than imprisonment. We would like to suggest possible alternatives including non associations with members from the Environmental Liberation Movement, house arrest, limitations to certain boundaries. These possible alternatives could have been used for minimal impairment.

III) Proportionality Test between Salutory and Deleterious Effects

37. The Appellants understand the great benefits that can be attained towards public safety as a result of the imprisonment of Mr. Clearwater, but they do not outweigh the Charter infringements that are a result.

38. In the case of *R v. O'Connor* 1995 CanLII 51 (S.C.C), [1995] 4 S.C.R. 411, it states that when balancing the rights that are in question, the following factors should be considered:

"(1) the extent to which the record is necessary for the accused to make full answer and defence; (2) the probative value of the record in question; (3) the nature and extent of the reasonable expectation of privacy vested in that record; (4) whether production of the record would be premised upon any

discriminatory belief or bias" and "(5) the potential prejudice to the complainant's dignity, privacy or security of the person that would be occasioned by production of the record in question" (para. 156).

39. We ask that the court deliberate the impact of limiting the Charter rights, especially the right to not be arbitrarily detained, considering the fact that by being imprisoned it takes away many rights that are guaranteed in the Charter. The Appellants also would also like to address the right to freedom of speech, peaceful assembly, and association, seeing as Mr. Clearwater has the right under the Charter to all of these rights mentioned. His use of free speech through the media is not spreading hate, and it is unnecessary to have him detained because of it.

40. The Appellants would like to submit that there is no evidence that proves Mr. Clearwater's association among the Friends of the North being related to the group to be in any way related to those of the group that is committing the crimes that have caused such chaos. There are no facts that can connect these two groups, or Mr. Clearwater to the crimes that have occurred. We understand that his statement that was made in the media to be possibly seen as spreading hate, but there is no factual evidence that his statement could endanger the nation and lead to a possible public threat to safety. Therefore, we believe that the denial of Mr. Clearwater's *Charter* rights have outweighed the objective that was set out by the government.

APPLICATION TO THIS CASE

41. In conclusion the Appellants understand that public safety is a concern for the community and keeping them safe is a main priority. However in this case we see a very unbalanced line between an individual's rights and the authority of the government. While public safety is a pressing and substantial issue today and individual's rights must be guaranteed as well. To imprison Mr. Clearwater for simply stating his opinion using media violates many freedoms guaranteed under the Charter and goes against fundamental justice. Finally these measures have failed aspects of s.1 of the Charter in relations to the Oaks Test and therefore can not be found reasonable and justified under the Charter. The Appellants would like to submit that when public safety is measured against an individual's rights there is no reason for imprisonment. As a final request we would like Mr. Clearwater released from custody.

PART IV ORDER REQUESTED

42. It is respectfully requested that appeal be granted and that the judge be persuaded granting release of the Appellant.

ALL OF WHICH is respectfully submitted by

Michelle Andrews, Janelle Ruetz, Danielle
Hetzler, & Kyle McCarthy

Of Counsel for the Appellant

DATED AT Walkerton this 18th Day of **November, 2010**

APPENDIX A

AUTHORITIES TO BE CITED

Tucker v. Cadillac Fairview Corporation Ltd., 2005 CanLII 24579 (ON C.A.) at para. 71

R. v. Storrey, [1990] 1 S.C.R. 241

Scowby v. Glendinning, [1986] 2 S.C.R. 226

Trial decision paragraph 9.

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 1326

United States v. Schwimmer, 279 U.S. 644 (1929), at pp 654-55

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