



# THE CHARTER CHALLENGE LE DÉFI DE LA CHARTE

Ontario Justice Education Network  
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## CASE SCENARIO FALL 2010

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

-v.-

NOEL CLEARWATER

## SUPERIOR COURT OF JUSTICE

**B E T W E E N:**

**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)**

**- AND -**

**NOEL CLEARWATER**

**(Applicant)**

## REASONS FOR JUDGEMENT

**LOCKUP, J.**

**E. M. Hall, Q.C.  
Thomas Torquemada, Q.C.**

**Counsel for the Applicant  
Counsel for the Respondents**

1. At the conclusion of the hearing in this matter, I dismissed Mr. Clearwater's application for *habeas corpus* and indicated that I would issue reasons. These are those reasons.
2. In this application, once again, a Court is being called upon to determine the delicate balance between the rights of individuals and the need for public safety. This is not an

enviable task. It is necessary to set out the facts of the application and the very shocking circumstances which led to a state of public order emergency being declared. This, in turn, led to the arrest of Mr. Clearwater.

### **The Facts**

3. In 2004 in northern Ontario, near the border of Polar Bear Provincial Park, which is on the western shore of Hudson Bay and above James Bay, a major titanium deposit was discovered. An application was made to the Ministry of Lands and Forests to develop the mine. As required, 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. It was only earlier this year that both governments gave approval for the development of the mine. The development was, since the discovery, a matter of great controversy.
  
4. Mr. Clearwater is the president of a group known as Friends of the North. This is an association of environmental activists who have opposed the mine and demanded that it be halted. They have held 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. According to them, the north must remain in its pristine state and there is no room for mining of any sort in this area. That is not what led to Mr. Clearwater's arrest.

5. Another group of people, who have called themselves the Environmental Liberation Movement, have also opposed the mine; however, they have been violent in their actions. Since 2004, they have attempted to plant explosives at the Ministry of the Environment offices located just outside the provincial park; they have sabotaged some construction equipment which was part of the environmental assessment; and earlier this year, Tom Hardy, the Mayor of Casterbridge, Ontario and a mine proponent, was the target of a drive-by shooting. Fortunately, he was not injured.
6. Last week, the Provincial Lands and Forests Minister was kidnapped by this group. An ultimatum was delivered to the Premier's office that the Minister would be killed if the mine was not stopped. As of this moment, 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. There is no claim by the Applicant that the pre-conditions set out by the *Act* were not followed.
7. I will set out the relevant provisions of the *Emergency Measures and Public Order Act*:
- s. 23** The Legislative Council of a Province may, upon certifying to the Attorney General of Canada that a state of real or apprehended insurrection exists within the Province, ask the Governor in Council to declare a Public Order Emergency.
- s. 24** When the Governor in Council declares that a Public Order Emergency exists, it may, through the office of the Prime Minister or the Attorney General of Canada:

- a) declare any group to be a criminal organization and make membership in it unlawful;
- b) declare any supporter organization of a criminal organization to be unlawful; [...]
- f) by warrant signed personally by the Attorney General, order the arrest of any person if, in the opinion of the Attorney General, that person is a threat to public order [...]
- m) no detention of a person arrested or held under this section may last more than 30 days unless the person is charged with an offence. If a person is charged with an offence, the provisions of the *Criminal Code* apply to the person arrested or detained and any arrest or detention under this *Act* ceases to have effect upon a charge being laid.

**s. 32** The Governor in Council may declare a Public Order Emergency to exist in a limited area as deemed proper.

**s. 49** A declaration by the Governor in Council of a Public Order Emergency is deemed to be conclusive proof that a Public Order Emergency exists and is not reviewable in any court.

**s. 59** During the period of any Public Order Emergency, any Member of the Parliament of Canada may demand that a vote be held to affirm or to cancel the declaration of Emergency. Where Parliament is not in session and a state of emergency is declared, the Governor General may recall Parliament upon address by thirty members thereof.

8. The Attorney General declared the Environmental Liberation Movement to be a criminal organization and signed warrants for the arrest of all its known members. This did not include Mr. Clearwater. 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.

9. In response to the declaration, Mr. Clearwater 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.”

10. Later that day, 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. Upon his arrest, an application for *habeas corpus* was brought before me.

### The Issues

11. Mr. Clearwater seeks his release, stating the actions of the Attorney General violate his rights under the *Canadian Charter of Rights and Freedoms*, particularly:
- a) The right to free speech, peaceful assembly and association (these arguments are intertwined), contrary to sections 2 (b, c and d) of the *Charter*;
  - b) That the actions of the Attorney General are not consistent with the principles of fundamental justice and he has been deprived of liberty by those actions, contrary to s. 7 of the *Charter*;
  - c) That he has been subject to an arbitrary arrest and detention, contrary to s. 9 of the *Charter*; and

- d) That none of these actions are reasonable limits upon his rights and freedoms, pursuant to s. 1 of the *Charter*.
12. The Crown counters each issue and argues in any event that in the current situation the acts of the state do constitute reasonable limits upon the rights and freedoms of the individual. I will deal with each of these arguments in turn.

**Issue One: Freedoms of Speech, Association and Peaceful Assembly (ss. 2(b), 2(c) & 2(d))**

13. There is much overlap between the issues of freedom of speech, freedom of peaceful assembly and freedom of association. While the Applicant is guaranteed the freedom to denounce the political leanings of the government, and to even (subject to the laws of defamation) believe its members to be corrupt and state this, there is no basis upon which one can advocate crimes be committed. It must be remembered that, in Canada, a country dedicated to the rule of law, a Minister of the Crown has been kidnapped and threatened with death. Mr. Clearwater seems to believe that the group which has done this has been driven to act in this way and even mused that perhaps the victims of the ELM deserve to be victims. This is intolerable in a free society.
14. One does not have the right to counsel the commission of crimes, or give aid and support to criminals. Counselling the commission of an offence and being an accessory after the fact to an offence are well recognized crimes; they are vital to the rule of law in any society. The Applicant has crossed the line from protected speech to counselling

criminal acts. Supporting a group of criminals, no matter what their political motivations may be, is not covered by freedom of association any more than supporting a biker gang or the mob would be. Finally, the *Charter* protects freedom of peaceful assembly. This must influence the interpretation of other parts of s. 2. There is nothing peaceful in what the Applicant has done. These arguments fail.

### **Issue Two: Right to Liberty (s.7)**

15. The next point is that the actions of the federal cabinet and the law itself allow the Prime Minister, the Minister of Justice, or the collective cabinet to, in effect, rule by decree which is contrary to the principles of fundamental justice. This argument has some merit, but must also fail. In an emergency, it is necessary for the state to protect not only itself but also its people. Collective rights may supersede individual rights. In extraordinary times, extraordinary measures may be called for. This has been recognized throughout our history. For example, during both World Wars, the *War Measures Act*, now repealed, was proclaimed to deal with the war effort, the distribution of resources and the security of the state. The law under review in this matter is a much lesser version of that legislation, made in response to very specific acts, and has been passed by a democratically elected Parliament. It is limited in scope, dealing with only certain groups and people and applies to limited areas of one province. The emergency was proclaimed after the provincial cabinet sought the assistance of the federal government. These steps show that the principles of fundamental justice were respected when the emergency was declared.



16. Further, the emergency powers are not exercised without any form of control. Random police officers are not permitted to go out and simply arrest anyone they suspect of involvement in these acts. The Attorney General must personally authorize an arrest. The Attorney General is the chief law officer of the Crown for this country. It cannot be presumed that he will act in a manner inconsistent with his duties and oath of office.
17. Finally, I do not accept that the non-reviewable nature of the emergency contravenes the *Charter*. A court is not equipped to second guess the actions of Parliament in allocating resources or setting budgets, conducting international affairs or setting priorities in policy. Neither can the court second-guess the intelligence that the cabinet may have received, nor decide what measures should be taken to deal with an emergency. That falls within the scope of ministerial duty. I decline to interfere.

### **Issue Three: Arbitrary Detention or Imprisonment (s. 9)**

18. The third issue raised by the Applicant is that his arrest and detention were arbitrary, contrary to s. 9 of the *Charter*. I must disagree. This was an act of state made in extraordinary circumstances. If one equates arbitrary with illegal, this argument cannot succeed. It was a lawful arrest and detention, made pursuant to an Act of Parliament. It was personally ordered by a responsible Minister of the Crown. It could hardly, thus, be an illegal arrest or detention.
19. If one were to equate arbitrary with despotic, perverse or capricious, again the argument

must fail. This is not a case of an individual police officer stopping someone on the street and taking them into custody because he or she does not like the person's appearance or that person cannot give a good accounting of themselves. Instead, the Attorney General has used lawfully granted powers in an extraordinary situation. While it is true that precise rules have not been laid down for the exercise of the Attorney General's discretion, one must assume that these powers will be exercised in good faith and in accordance with the traditions of office. I cannot give effect to this argument.

#### **Issue Four: Reasonable Limits on the Rights of the Applicant (s. 1)**

20. The final issue revolves around whether the powers used to arrest and detain the Applicant are reasonable limits to freedoms, demonstrably justified in a free and democratic society. I have found no breaches of the *Charter*, so it is strictly unnecessary to address this point; however, if I am wrong in what I have found so far, I will assume that the *Charter* has been breached and address the issue of limits.
21. As noted, every state has a duty to its citizens to protect them and to preserve itself. Those who take up arms against the state are subject to prosecution. They will have a full, fair and public trial. They will have the right to counsel, to contest any charges and present evidence. In this case, the Applicant has not been charged with an offence at this point, but will have full rights to defend himself if charged.
22. While it may be preferable to ensure that a person is not detained unless and until

formally charged, that cannot always be the case. A police officer may arrest a person on having reasonable grounds to believe that the person has committed an offence. The person is then under the control of the officer and his or her liberty suspended. It may be that, upon reflection or further investigation, the officer will decide not to charge the individual. This does not mean that the initial arrest was unlawful. Detention and arrest, prior to a formal charge being laid, is common police work.

23. In this case, the period of detention can only last thirty days unless the person is charged with an offence. If charged, the *Criminal Code* takes over, and the accused has a right to a bail hearing, where it will be determined whether he will be at liberty while he awaits trial. While detention for up to thirty days would not be acceptable in ordinary criminal matters, this is not such a case. I must stress that this situation is extraordinary; that will, in and of itself, justify unusual measures.
24. In addition, the detention will only come about upon the personal order of the country's most senior law officer. Members of Parliament can require a vote be held to decide if the declaration of emergency should be cancelled; as few as thirty members can demand that Parliament be recalled to hold such a vote. This is not, as counsel submitted, an invitation to dictatorship. It is recognition of the need for public and state security, which balances the rights of the individual with the need for public protection.
25. Thus, even if any of the Applicant's *Charter* rights had been infringed, I would hold that the actions of the Attorney General and that the law itself are reasonable limits upon

those rights, demonstrably justified in a free and democratic society.

### **Conclusion**

26. The Application is dismissed.

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LOCKUP, J.