RE L.H.F. AND THE QUEEN

Prince Edward Island Supreme Court, MacDonald J. December 5, 1985.

Young offenders — Disposition — Judge given power to sentence young offender to open custody or secure custody — "Open custody" defined as community residential centre, group home, child care institution, or forest or wilderness camp or any other like place or facility designated by Lieutenant-Governor or delegate — Minister designating upstairs area of jail as place of open custody — Jail previously designated as place of secure custody — Later designation invalid — Young Offenders Act, 1980-81-82-83 (Can.), c. 110, ss. 20, 24.

The applicant, a young offender, had been found guilty of a charge and committed to a term of three months' open custody pursuant to the *Young Offenders Act*, 1980-81-82-83 (Can.), c. 110. Following the disposition the Minister of Justice designated "King's County Jail (upstairs area — when adults not present)" as a place of open custody for the applicant. By Order in Council King's County Jail had previously been designated as a place of secure custody. King's County Jail is also the common jail for the county and used as a holding place for adult offenders. The evidence indicated that the applicant was kept in a room on the upstairs area and that other young offenders who had been committed to secure custody were kept on the same floor. The evidence also indicated that for a period of time the applicant had been kept in solitary confinement but was now permitted to leave the institution during the day to attend a course. On application to have the designation declared invalid, **held**, the application should be granted.

Section 24(1) of the *Young Offenders Act* defines "open custody" to mean custody in "(*a*) a community residential centre, group home, child care institution, or forest or wilderness camp, or (*b*) any other like place or facility designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated". The open custody provided for the applicant in this case fell below the standard contemplated by the *Young Offenders Act* and the designation made by the Minister was not one contemplated by the Act. King's County Jail is a jail and its facilities cannot be equated with a centre, home, institution or camp mentioned in s. 24(1)(*a*). The designation of the "upstairs area" of the jail is not a proper designation as a place for open custody as its location is in the county jail. The *Young Offenders Act* never contemplated the housing of young offenders committed to open custody in a jail. The manner in which the applicant is housed and treated falls far below a minimum standard to which he was entitled. Moreover, the designation of the King's County Jail as a place for open custody was invalid because the designation was made at a time when the place had already been designated as a place for secure custody. The inescapable conclusion was that the applicant was being confined to a jail. It is impossible that one room or area can be both a place for housing convicted adult offenders, young offenders committed to secure custody and young offenders committed to open custody.

Re F and The Queen et al. (1984), 16 C.C.C. (3d) 258, [1985] 3 W.W.R. 379; revg 14 C.C.C. (3d) 161, [1984] 6 W.W.R. 37, 30 Man. R. (2d) 120 *sub nom. C.F. v. Canada and Manitoba et al.*, **discd**

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Statutes referred to

Canadian Charter of Rights and Freedoms, s. 24
Criminal Code, s. 2
Jails Act, R.S.P.E.I. 1974, c. J-1
Young Offenders Act, 1980-81-82-83 (Can.), c. 110, ss. 7(1), 24

APPLICATION by the young offender to have the designation of King's County Jail as a place for open custody declared invalid.

W. K. Brown, for accused, applicant.
J. M. Haldemann, for the Crown, respondent.

MACDONALD J.:—By originating notice (action) the applicant has requested that this Court declare that the designation of the King's County Jail as a place for open custody for the applicant be declared invalid, being in violation of the *Young Offenders Act*, 1980-81-82-83 (Can.), c. 110.

The facts are not in dispute. The applicant is 17 years of age. He appeared in youth court on October 22, 1985, before Provincial Court Judge B.R. Plamondon on a charge of failing to comply with the terms of a probation order in respect to certain curfew provisions. The applicant pleaded guilty to the charge and was committed to a term of three months' *open* custody. The place of committal was rightfully not mentioned by the youth court judge, that being an administrative decision.

On the same date, October 22, 1985, the Minister of Justice signed a document entitled, "Designation as a Place of Open Custody", which stated:

> This is to designate the Kings County Jail (up-stairs area — when adults not present) . . . as a place of open custody for *L.H.F.*, d.o.b. March 23, 1968 . . . until such time as further arrangements are required and/or until further dealt with under the Young Offenders Act.

This designation had to be made *after* the applicant was committed to open custody.

By O.C. 957/84 effective December 1, 1984, the King's County Jail is also designated as a place of secure custody. This latter designation does not specify any one area of the jail as being set aside for secure custody. The designation makes the whole jail as a place for secure custody. Further, by O.C. 312/84 the King's County Jail was designated as a place of temporary detention pursuant to s. 7(1) of the *Young Offenders Act*. In addition to these uses of the King's County Jail, it is also the common jail for the county and is used as a holding place for adult offenders.

The King's County Jail is not one of Prince Edward Island's more desirable places of habitation. It is a 75-year-old building. Its facilities are antiquated as is evident from the fact that a new

provincial jail (Sleepy Hollow Correctional Centre) was built some seven to eight years ago to replace the three old county jails, including the King's County Jail. However, it continues to be used both as a holding "tank" and for the overflow of prisoners from the Sleepy Hollow Correctional Centre.

The jail is not a large building. Downstairs it has facilities for 16 prisoners in very cramped quarters. Upstairs, is a much smaller area than downstairs, and it is divided into three rooms in addition to a storage area and wash-rooms.

For the first two days of his committal, the applicant was placed in the downstairs portion of the jail, which was an immediate breach of the committal. The applicant was then placed in one of the rooms upstairs. He was confined to the upstairs room until November 11th, only being permitted on one occasion to go outside to walk around the jail-yard. His confinement during this period of time had all the appearances of solitary confinement.

On November 12th he was permitted to attend an up-grading course in a nearby town and continues to attend five days a week. He leaves his place of confinement at 8:30 a.m. and returns at 3:30 p.m.

During the early part of his committal he was in the same room with young offenders who had been placed in secure custody, however, at the present time he has been separated from those in secure custody. The applicant and the offenders in secure custody are now in two of the upstairs rooms where they are kept separate and apart, although the rooms adjoin each other.

During the total time of his confinement he has been visited on four occasions by a probation officer. The visits have been of one-half hour duration. Three days before this hearing a person was hired by the Minister of Justice to act as a special counsellor for the applicant.

The room in which the applicant is confined is without a television and he is not allowed out to watch television. Three days ago he received a radio. His meals are brought in to him. There are bars on his window. There is only one exit from the upstairs area, other than from a fire escape located off the room occupied by those in secure custody. There was no evidence whether the windows are barred in the room where the offenders under secure custody are located. If a fire were to occur in the stairway leading to the second floor, the applicant would be unable to escape from his room.

On one occasion after October 22nd, the applicant was transferred to the Prince County Jail, a facility of the same antiquity as

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the King's County Jail. The reason for the transfer was due to overcrowding and the need to use his "room". He was in the Prince County Jail for four days and while there he was locked in a cell at night. In view of the action of the Minister of Justice in specifically designating the King's County Jail as a place of open custody for L.H.F., his removal to the Prince County Jail was also illegal.

It is alleged by the applicant that his detention is not unlawful because the King's County Jail is not a place of open custody as defined in s. 24(1) of the *Young Offenders Act*. Section 24(1) reads:

> 24(1) In this section, "open custody" means custody in
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> (*a*) a community residential centre, group home, child care institution, or forest or wilderness camp, or
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> (*b*) any other like place or facility
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> designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated;
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> "secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

It cannot be disputed that the King's County Jail has been and still is considered to be the *jail* for King's County. It is defined as such under the *Jails Act*, R.S.P.E.I. 1974, J-1. The jail is also the facility contemplated by s. 2 of the *Criminal Code* to be a prison. It is a well-known fact that the King's County Jail was never known as a facility in the nature of a "community residential centre, group home, child care institution" or "forest or wilderness camp" as set forth in s. 24(1)(*a*) of the *Young Offenders Act*. Furthermore, by no stretching of one's imagination can the jail be called a "like place or facility" under s. 24(1)(*b*). However, merely because in the past it was not known by any one of those terms does not mean that it cannot be capable of being designated as a place for open custody if the place is one of those kinds set forth in s. 24(1)(*a*) and (*b*).

In *Re F and The Queen et al.* (1984), 16 C.C.C. (3d) 258, [1985] 3 W.W.R. 379 (Man. C.A.), Matas J.A., in giving judgment for the court, quoted with approval from the lower court decision of Kroft J., 14 C.C.C. (3d) 161 at p. 167, [1984] 6 W.W.R. 37, 30 Man. R. (2d) 120 *sub nom. C.F. v. Canada and Manitoba et al.*, when he stated:

> To resolve the question I must determine, from the agreed facts, whether the custody to which F was assigned should be described as "open" or "secure". If it does not meet the description of "open custody" as set forth in

> the Act then, in my opinion, no regulation or designation can give it a characteristic which it does not possess. *The responsibility given to the Lieutenant-Governor in Council must be exercised within the parameters of the law.*

(Emphasis added.)

What must be determined is whether the custody to which the applicant was committed has the characteristics of open custody contemplated by s. 24(1)(*a*) or (*b*). The place to which the applicant was committed was the "upstairs *area*" of the King's County Jail. That area consists of three rooms, however, the applicant has now been restricted to only one of those rooms, so that he is not in custody in accordance with the designation of the Minister of Justice.

Can one room be assimilated with the meaning of open custody? Undoubtedly, the physical characteristics are not the only things to be looked at. Other factors which make up a place suitable for open custody would include the security that is in place, the number of staff, the qualifications of the staff, bearing in mind that one of their primary functions is to teach young offenders how to better achieve in society. Additionally, a place of open custody will have programmes set up for the benefit of the offenders.

Weighing these considerations against what has been provided for the applicant, results in a finding that here the alleged open custody falls far below the standard contemplated by the Act, to a degree that the designation is not one contemplated by the Act. I have already mentioned the physical characteristics of the applicant's *room*. It cannot be equated with the facilities mentioned in s. 24(1)(*a*) or (*b*). Section 24(1)(*a*) refers to a "centre", a "home", an "institution" and a "camp". All of these designations refer to facility or place. Neither can the room be included within the words "and includes a place or facility within a class of such places or facilities so designated".

The designation of the "upstairs area" of the jail is not a proper designation as a place for open custody because of its location in the county jail. The Act never contemplated the housing of young offenders committed to open custody in a jail. The manner in which he is housed and treated falls far below a minimum standard to which he is entitled. Plamondon Prov. Ct. J., in *R. v. D.R.* (unreported, November 5, 1985), has come to the same conclusion that this particular portion of the King's County Jail cannot be construed as a place for open custody.

Reference may also be made to s. 24(8) and (9) of the *Young Offenders Act*, which reads:

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24(8) Subject to subsection (9), no young person who is committed to open custody may be transferred to a place or facility of secure custody except in accordance with section 33.

(9) The provincial director or his delegate may transfer a young offender from a place or facility of open custody to a place or facility of secure custody for a period not exceeding fifteen days if the young person escapes or attempts to escape lawful custody or is, in the opinion of the director or his delegate, guilty of serious misconduct.

Prior to the designation by the Minister of Justice of the King's County Jail (upstairs area) as a place of open custody, it had previously been designated as a place of secure custody. In my opinion, the designation of the King's County Jail as a place for open custody was also invalid because the designation was made at a time when the place had already been designated as a place of secure custody.

In *Re F and The Queen, supra*, Kroft J., the trial judge, also reached the conclusion that a specific cottage contained inside a secure facility could not be declared "open". The decision of Kroft J. was overturned, however, when the matter came before the Court of Appeal the Lieutenant-Governor in Council had deleted the facility in question as one for secure custody.

The one inescapable conclusion that must be reached is that the applicant is being confined to jail. The staff who look after him wear the uniform and the insignia of "P.E.I. Correctional Officer". In my opinion, it is impossible that one room or area can be both a place for housing convicted adult offenders, young offenders committed to secure custody and young offenders committed to open custody.

The submission made by the respondent does nothing to quiet my concern as to what has occurred here. She argues that the designation was made to fit this particular offender because of the inability of those in authority to provide adequately for young offenders in this province. She argues that the court should take into consideration matters placed before the federal government by the government of this province prior to the implementation of the Act, which matters were undoubtedly not accepted by the federal government. To do so would be to act contrary to the provisions of the Act.

She states that we are living in a small province and the facilities that are contemplated under the *Young Offenders Act* would be too expensive for this province. She stresses throughout her submission that committal was intended "to teach" the applicant his responsibility for his actions. Certainly, the conditions of solitary confinement that he was initially placed in must have met

her expectations of teaching him a lesson. The rehabilitation aspect of the Act does not appear to have been as important a consideration as that of teaching the offender a lesson.

While this decision may create some hardships for the respondent, to do otherwise would be to disregard the law. I declare that the designation of the King's County Jail — upstairs area as a place of open custody is not a designation contemplated by the *Young Offenders Act*.

The appellant has requested that if I make a declaration in his favour that he be permitted to address me further as to relief that he seeks under s. 24 of the *Canadian Charter of Rights and Freedoms*. Counsel may set a date for a hearing.

Judgment accordingly.

ATTORNEY-GENERAL OF CANADA v. QUEBEC READY MIX INC. et al.; ROCOIS CONSTRUCTION INC. et al. mise-en-cause*

Federal Court of Appeal, Pratte, Ryan and MacGuigan JJ. November 21, 1985.

Constitutional law — Distribution of legislative authority — Trade and commerce — Provision in federal statute giving civil cause of action for damages to person suffering loss as result of conduct contrary to statute — Provision intra vires Parliament under trade and commerce power — Combines Investigation Act, R.S.C. 1970, c. C-23, s. 31.1(1)(a) — Constitution Act, 1867, s. 91(2).

Section 31.1(1)(*a*) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, as enacted by 1974-75-76, c. 76, s. 12, which gives a person who suffers loss or damage as a result of conduct contrary to Part V of the Act a civil cause of action for damages against the person engaging in that conduct, is *intra vires* Parliament.

Per Pratte J.: The prohibitions contained in s. 32(1) of the *Combines Investigation Act* (one of the sections in Part V of the Act) were validly enacted by Parliament in the exercise of its powers to regulate trade and commerce under s. 91(2) of the *Constitution Act, 1867*. When the Constitution gives Parliament the power to enact a prohibition it impliedly also gives it, as a rule, the power to determine the consequences of the violation of that prohibition, whether those consequences be of a civil or penal nature. That principle has no application when a legislative power is conferred in terms that exclude its application. Thus, the power conferred on Parliament by s. 91(27) to legislate with respect to criminal law does not include the power to regulate the civil consequences of criminal acts, except inasmuch as those consequences are considered as part of the sentences to be imposed, because, by definition, criminal law does not include that kind of regulation. However, the power to regulate trade and commerce granted to Parliament by s. 91(2) is not subject to the same limitation.

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*Leave to appeal to the Supreme Court of Canada granted (Beetz, Lamer and La Forest JJ.) February 3, 1986.