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## THE ADVERSARY PROCESS ON TRIAL: *FULL ANSWER AND DEFENCE AND THE RIGHT TO COUNSEL*

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### A. INTRODUCTION

The right to counsel has been called the "most pervasive" of the rights of the accused in a criminal case.<sup>1</sup> We take it that all other things held equal, it cannot be seriously contended that either the individual or the system is well served unless the accused is adequately represented by counsel at trial.<sup>2</sup> The integrity of the fact-finding process in adversarial proceedings depends on the presence of the trained advocate. The process by its very nature relies on them to illuminate the positions of the adversaries. Equally, the advocates are central to the integrity of the process in another aspect, for in their role as officers of the court they guard against perjured testimony, the suborning of jurors, lack of expedition and myriad other potentially destructive influences.

As well, respect for the dignity of the accused requires that we value a relationship which cushions the sometimes brutal impact of the criminal justice system. Even where there is no fear that guilt-determination as such has gone astray, we may wish to reaffirm the right of the accused to a friend in court for no reason other than our empathy for the terror he or she feels when cast adrift in the criminal process.

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I would like to thank my colleague Neil Brooks, who generously read earlier drafts and made many helpful suggestions.

<sup>1</sup> Yale Kamisar, *Right to Counsel and the Fourteenth Amendment: A Dialogue on the Most Pervasive Right of An Accused* (1962), 30 U. Chi. L. Rev. 1.

<sup>2</sup> *Contra*, Gilberg, [1975] 53 D.L.R. 441.

By extension, it becomes plain that these same values demand the provision of the right to counsel before trial. Most obviously, the *Criminal Code's* guarantee to full answer and defence<sup>3</sup> is empty if the accused and his lawyer do not have access to sufficient privacy in advance of trial to prepare the defence. Equally, it is suggested, the existence of any pre-trial right for the protection of accused person ineluctably entails the right to be informed of that right, and that is the job of counsel.

The tension between the sublime schizophrenia of the need to convict the guilty accused while acquitting the innocent<sup>4</sup> is perhaps no more keenly felt than in the area of the pre-trial right to counsel. The police will likely complain with reason that, for example, interrogation diminishes in effectiveness if counsel is allowed to be present to firm the accused's resolve to remain silent. Yet we do not talk out of both sides of our mouths; if, to take that example, we continue to hold that the accused has a right to remain silent, he has a right to be informed of that right. There could be little pride in a guilt affixing process which preyed on those too poor or too bemused to imitate the reaction of the rich or more experienced or more resolute suspect.

Against the background of a series of decisions on the rights to counsel,<sup>5</sup> in particular the 1972 case of *Brownridge*,<sup>6</sup> the Supreme Court decided the case of *Hogan*<sup>7</sup> in 1974. A majority of the Court held that evidence of a breathalyser test taken in overt and knowing violation of the accused's right to counsel was, notwithstanding that fact, admissible in evidence against him. The central purpose of this article is to analyse the judgment of the Supreme Court of Canada in *Hogan*. That case invites an examination of the nature of the pre-trial right to counsel. Because most of our jurisprudence prior to the *Bill of Rights* deals with right to counsel at trial, we begin there, in the hope of extrapolating some sense of the general posture of our courts towards criminal counsel. We argue that those values which dictate the system's repeated vindication of the right to counsel at trial also support a pre-trial right.

## B. THE BACKGROUND: FULL ANSWER AND DEFENCE

### 1. *Historical Background*

In their Draft Code of 1878, the English Criminal Law Commissioners provided that:

Every person accused of any offence whatever may make his full defence thereto by counsel; or by solicitor in courts where solicitors practise as advocates.<sup>8</sup>

<sup>3</sup> *Code*, s. 577(3).

<sup>4</sup> See Jerome Hall, *Objectives of the Federal Criminal Procedural Revision* (1942), 51 *Yale L.J.* 723, 728.

<sup>5</sup> *Gray* (1962), 132 C.C.C. 337 (B.C. Co. Ct.); *Steeves*, [1964] 1 C.C.C. 266; 42 C.R. 234; 42 D.L.R. (2d) 335 (N.S.S.C.); *O'Connor*, [1966] S.C.R. 619; 4 C.C.C. 342; 57 D.L.R. (2d) 123; *Ballegeer* (1969), 1 D.L.R. (3d) 74.

<sup>6</sup> (1972), 7 C.C.C. (2d) 417; 28 D.L.R. (3d) 1; 18 C.R.N.S. 308.

<sup>7</sup> (1975), 18 C.C.C. (2d) 65 (S.C.C.).

<sup>8</sup> *Draft Code and Report*, U.K. c. 2345, s. 512.

A marginal note refers readers to the statute of 6 & 7 Will. 4, c. 114<sup>9</sup> as authority for the proposition. It was not deemed necessary to make further reference to the provision in the accompanying commentary by the commissioners.

Speaking for the majority of the Supreme Court of the United States in *Betts v. Brady*,<sup>10</sup> Mr. Justice Roberts remarks that until the statute of 6 & 7 Will. 4, the prisoner in England was not entitled to be heard by counsel in any felony trial save only treason.<sup>11</sup> More recent scholarship<sup>12</sup> argues that there is evidence suggestive of the right to the assistance of counsel *before* trial even at the time of the infamous state trials of the sixteenth century.<sup>13</sup> While this period marks the low point of the right to counsel, it also marks the beginning of its increasing recognition and ultimate legitimation in 1836:

The right to counsel, then, is not a recent grant of largess by society but an old right which never completely faded in the face of severe opposition.<sup>14</sup>

Learning on the history of our own administration of criminal justice is sadly lacking. Mr. Justice Chisholm's examination of the official record of the sitting of 'our first common law court' at the Garrison of Annapolis Royall on April 19, 1721 makes no mention of the presence of counsel.<sup>15</sup> Speaking of the end of the Quebec Act period, Professor Neatby writes:

. . . the most noticeable thing is that general characteristic of almost all English criminal trials before the reforms of the nineteenth century — the way in which the dice were loaded against the prisoner. The witnesses were called in turn, and their depositions, prepared beforehand, were read aloud in court. The prisoner, who had not seen the depositions beforehand, was allowed to cross-examine each individual, but it is not surprising if he made little use of the privilege. He was not allowed the assistance of a lawyer. One man who asked for it was told that such aid was unnecessary, since it was the duty and desire of the whole court to do him justice.<sup>16</sup>

<sup>9</sup> An Act for Enabling Persons indicted of Felony to make their Defense by Counsel or Attorney:

s. I . . . Be it therefore enacted . . . That . . . all Persons tried for Felonies shall be admitted, after the Close of the Case for the Prosecution, to make full Answer and Defense thereto, or by Attorney in the Court, where Attornies [sic] practise as Counsel.

s. II And be it further declared and enacted, that in all Cases of Summary Conviction Persons accused shall be admitted to make their full Answer and Defense, and to have all witnesses [sic] examined and cross-examined, by Counsel or Attorney.

<sup>10</sup> 316 U.S. 455 (1941): overruled *Gideon v. Wainwright*, 83 Sup. Ct. 792.

<sup>11</sup> By virtue of 7 Will. 3., c. 3. s. 1.

<sup>12</sup> *An Historical Argument for the Right to Counsel During Police Interrogation* (1964), 73 Yale L.J. 1000.

<sup>13</sup> *Id.* at 1028.

<sup>14</sup> *Id.* at 1032.

<sup>15</sup> *Our First Common Law Court* (1921), 1 Dal. Rev. 17.

<sup>16</sup> H. Neatby, *The Administration of Justice Under the Quebec Act* (Minneapolis: Univ. of Minnesota Press, 1937) at 308-09; the reference is to the proceedings of the Court of Oyer and Terminer at Kingston, September and October, 1789, Internal Correspondence of the Province of Quebec, S, vol. 32, item 68.

The records of the Court of Oyer and Terminer at L'Assomption in the District of Hesse show that William Dummer Powell, later a Chief Justice of Upper Canada, tried two capital cases there in September, 1792.<sup>17</sup> Louis Roy was acquitted of murder by a jury. Josiah Cutan, a labourer from Detroit, was convicted by a jury of burglary at night and sentenced to death. Neither record indicates the assistance of counsel. Moreover, William Roe, one of two lawyers resident in the province at the time,<sup>18</sup> was present throughout but appears, after having acted for many of the litigants in Common Pleas in the same month, to have acted only as the clerk of the criminal court.

The matter was put beyond doubt by an act of the Provincial Parliament<sup>19</sup> of 1836 providing that:

. . . it shall be lawful for any person tried for Felony in this Province, to be heard in full defence before the Court and Jury, either personally or by Counsel, at his or her election.

The right was confirmed and extended to summary conviction matters by the first Parliament after the Act of Union of 1840.<sup>20</sup> It eventually passed into the 1892 Code in substantially the same form.<sup>21</sup>

Prior to the passage of the *Bill of Rights* in 1960, judicial elaboration of the provisions of the "full answer and defence" requirement provided the basis for the right to counsel. Thereafter, full answer and defence remained the mainspring of the judicial elaboration of the right to counsel at trial. Without putting too fine a point on it, it is suggested that these cases are authority for the following general propositions.

## 2. Full Answer and Defence

### *Proposition One: In Proceedings on Indictment, The Accused Must be Present Throughout His Trial*

#### (i) Generally<sup>22</sup>

At common law, the presence of the accused was mandatory in trials for felony and, except in special circumstances, for misdemeanors.<sup>23</sup> Presently,

<sup>17</sup> Alexander Fraser, *Records of the Early Courts of Justice of Upper Canada*, being the *Fourteenth Report of the Bureau of Archives for the Province of Ontario* (Toronto: King's Printer, 1918).

<sup>18</sup> W. R. Riddell, *The Bar and the Courts of the Province of Upper Canada or Ontario* (Toronto: Macmillan, 1928).

<sup>19</sup> 6 Will. 4., c. 48, s. I (1836); s. II of the same Act provides that accused persons will be provided with copies of the indictment on application and payment at ". . . the rate of ninepence for every hundred words contained in said Indictment".

<sup>20</sup> *An Act for improving the administration of Criminal Justice in this Province*, 4 and 5 Vict., c. 24, ss. 9 and 10 (1840).

<sup>21</sup> 55-56 Vict., c. 29, ss. 659 (indictable) and 850 (summary conviction); presently *Code*, ss. 577(3) and 737(1).

<sup>22</sup> See generally, A. E. Popple, *Annotation* (1956), 22 C.R. 265.

<sup>23</sup> *Lee Kun* (1915), 11 Cr. App. R. 293 at 300.

in summary matters, the accused may generally appear by counsel or agent;<sup>24</sup> in certain circumstances,<sup>25</sup> the Court may proceed *ex parte*.

The Code formerly provided that in indictable proceedings the accused "shall be entitled to be present in court during the whole of his trial."<sup>26</sup> The present section expresses a requirement and not, as it is sometimes put, a right:

577(1) Subject to subsection (2), an accused other than a corporation shall be present in court during the whole of his trial.

The courts have rigorously applied the principle that proceedings in poenam are *strictissimus juris*<sup>27</sup> in interpreting this provision. The Supreme Court has twice, albeit without reasons, upheld judgments of the Quebec Court of Appeal which underlined the "absolute character" of the right, noted its "imperative" nature and held that its denial goes to the jurisdiction of the trial court and is not curable under s. 613(1) (b) (iii),<sup>28</sup> the "substantial wrong or miscarriage of justice" provision.

The substance of the matter is that there may be nothing done "of a nature to advance the case in the absence of the [accused]."<sup>29</sup> In *Meunier*, the accused was ordered from the courtroom while counsel argued whether he might be asked a certain question on cross-examination. Other cases have involved the exclusion of the accused from a consultation with a juror<sup>30</sup> or a witness.<sup>31</sup> In still others the accused was not present for all or part of the charge to the jury.<sup>32</sup> There are instances in which a view was held in the accused's absence.<sup>33</sup> Each time the error was held to be fatal.

There are two cases in which the rule has not in fact been applied with the customary strictness. In *Collin*,<sup>34</sup> the accused's appeal was grounded on his inability to hear a discussion between the lawyers and the judge, following which his counsel withdrew a question put to a witness. *Meunier* was distinguished on the basis that here there was nothing "of a nature to advance

<sup>24</sup> Code, s. 735(2).

<sup>25</sup> Code, s. 738(3); it ought to be noted here that for some inexplicable reason the Minister of Justice has sought to amend the Code to permit *ex parte* trial where the accused 'absconds' during the trial; equally whimsical is the notion of making the amendment by inserting a section after s. 431 rather than after s. 577: Bill C-71 (1975), s. 39.

<sup>26</sup> R.S.C. 1927, c. 36, s. 943(1).

<sup>27</sup> *Martin v. Mackonochie* (1878), 3 Q.B.D. 730 at 775 per Cockburn, C.J.

<sup>28</sup> *Meunier*, [1966] S.C.R. 399; 50 C.R. 75; aff'g [1966] Que. Q.B. 94; 48 C.R. 14 (C.A.); *Ginoux (Giroux)* (1971), 16 C.R.N.S. 256 (S.C.C.); aff'g 15 C.R.N.S. 117 (C.A.).

<sup>29</sup> Per Casey, J.A., *Meunier*, 48 C.R. 14 at 17.

<sup>30</sup> *Rufange* (1964), 43 C.R. 12 (Q.C.A.); *Frisco* [1971] Que. C.A. 176; 14 C.R.N.S. 194.

<sup>31</sup> *Lalonde*, [1969] Que. Q.B. 634 (C.A.); *Daloz*, [1970] 5 C.C.C. 136 (Man. C.A.).

<sup>32</sup> *Paris* (1922), 38 C.C.C. 126; *Howell* (1956), 22 C.R. 263.

<sup>33</sup> *Grant* (1950), 98 C.C.C. 401; *Huard* (1949), 8 C.R. 337; 95 C.C.C. 393; *Tanguay et Pilon* (1971), 15 C.R.N.S. 21 (Que. C.A.).

<sup>34</sup> [1968] Que. Q.B. 340 (C.A.).

the case in the absence of the appellant" inasmuch as the question was withdrawn. The Court also took the point that the accused voiced no objection at the time and that in any event the jury could not hear the discussion either.

Given the strict formulation of the pertinent principle, *Collin* is anomalous. An argument might have been made for venturing down the slippery slope of a *de minimis* holding. If this is implicit in the judgments, none of the reasons offered is compelling on its face. It must be patently wrong to decide that a case is not advanced because a question is withdrawn. In a later case in the same court,<sup>35</sup> nothing was made of the accused's failure to object; in the same case, the jury was also uninvited to the consultation.

The accused in *Tomlinson*<sup>36</sup> was sentenced to pay a fine. After he left the courtroom, the judge purported to add a term of imprisonment in default of payment. On a motion to quash the conviction and sentence, Smith, J. agreed, as the authorities require,<sup>37</sup> that the sentence is part of the trial. Since the sentence of imprisonment in default of payment is not mandatory, it forms, Smith, J. held, no part of the sentence and hence no part of the trial. Thus failed by logic, Mr. Justice Smith, concluding that there had been no violation of the presence requirement, dismissed the motion.

#### (ii) *Exceptions*

Section 577 permits the absence of the accused in three different circumstances. The most common is the removal of the accused during the trial of an issue of whether he is fit to stand trial.<sup>38</sup> There appear to be no cases articulating the scope of the second exception, the removal of the accused for misconduct.<sup>39</sup> In keeping with the concerns prompting the presence requirement in the first place, this exception plainly does not provide for the exclusion of the accused as punishment for misconduct nor where the misconduct is a mere nuisance. In terms, the trial judge must be confronted with a situation in which ". . . to continue the proceedings in the [the accused's] presence would not be feasible."

Lastly, the court in proper circumstances may permit the absence of the accused.<sup>40</sup> Again, there are no cases establishing boundaries here. From time to time, there have been attempts to cure the accused's absence from some part of his trial by recourse to this section. In *Page*,<sup>41</sup> it was held that proceedings continued in the absence of the accused, although so conducted on application of his counsel but without his authority, were fatally flawed. In the earlier case of *Meharg*,<sup>42</sup> the trial judge, with the registrar and a stenographer, consulted with the jury in the jury room. The jury's request for a

<sup>35</sup> *Lalonde*, *supra*, note 31.

<sup>36</sup> [1971] 2 W.W.R. 479; 2 C.C.C. (2d) 97 (B.C.S.C.).

<sup>37</sup> *Lawrence v. The King*, [1933] A.C. 699 at 708.

<sup>38</sup> S. 577(2)(c).

<sup>39</sup> S. 577(2)(a).

<sup>40</sup> S. 577(2)(b).

<sup>41</sup> [1969] 1 C.C.C. 90; 64 W.W.R. 637 (B.C.C.A.).

<sup>42</sup> (1921), 38 C.C.C. 307.

consultation was read in open court in the presence of the prisoner. The judge invited counsel to attend, but at the suggestion of defence counsel, the judge was unaccompanied by counsel. The majority of the Court agreed with Meredith C.J.O. that the prisoner was bound by his counsel's waiver; Hodgins J.A., dissenting in part, doubted this point. In light of *Rufiange*<sup>43</sup> the authority of *Meharg* must be doubted even more strongly. Only two of five judges who sat in the former case addressed the point; they held, however, that a new trial must be ordered where the judge and counsel consulted with the jury in the accused's absence. The Chief Justice pointed out that the provision of s. 577(2)(b) is mandatory, that it goes to jurisdiction and that the record in the case showed no *request* from the accused to be absent.

### (iii) *Effective Presence*

There are cases in which the accused, while physically present, is yet incapable of comprehending the case against him or of conducting his own defence. These cases normally involve mental imbalance at the time of the trial and are dealt with under the rubric of "fitness to stand trial". As they are somewhat tangential to our concern, and as there is recent writing on the subject,<sup>44</sup> we do not treat them here.

There are, however, other problems which may be encountered. Lord Reading indicated in *Lee Kun*, the leading case, that in cases of deafness, dumbness or inability to comprehend the language of the trial, it is incumbent on the trial judge to see to it ". . . that proper means are taken to communicate to the accused the case made against him and to enable him to make answer to it".<sup>45</sup> An even stricter position is required by s. 2(g) of the *Canadian Bill of Rights*:

2. . . . no law of Canada shall be construed or applied so as to  
(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

The accused in *Reale*<sup>46</sup> was, over the objection of his counsel, not allowed the assistance of an interpreter during the charge to the jury, apparently for fear that the jurors might be distracted thereby. A judgment of the whole court (Gale, C.J.O., Jessup and Martin, J.J.A.) notes that the earlier Canadian cases did not recognize an absolute right in the accused to have the whole of the evidence translated. Nor does *Lee Kun* support such a strict rule where the accused is represented by counsel. The Court held, however, that, waiver apart, the *Bill of Rights* operates to make the translation a fundamental right, the denial of which is an error not curable under s.613(1)(b)(iii).<sup>47</sup>

<sup>43</sup> (1964), 43 C.R. 12 (Que. C.A.).

<sup>44</sup> Project on the General Principles of the Criminal Law, *Fitness to Stand Trial* (Ottawa: Law Reform Commission of Canada, 1973).

<sup>45</sup> *Lee Kun*, [1916] 1 K.B. 337 at 342; 11 Cr. App. R. 293; 25 Cox C.C. 304 (C.A.).

<sup>46</sup> [1973] 3 O.R. 905.

<sup>47</sup> *Id.* at 916.



*Proposition Two: The Accused is Entitled to Conduct His Defence Personally or by Counsel*

The *Code* clearly enunciates the accused's right to make full answer and defence by counsel. The strength of this abstraction is from time to time tested by harsh reality — the absence of counsel, or of counsel of the accused's choice, at a stage when the matter is ready to proceed to trial. The accused might have not retained counsel, he may have retained counsel who has not appeared, or he may have retained counsel whom he now wishes to discharge. In each case, the question might be posed by asking whether the accused is entitled to a postponement in order to instruct counsel. It would be more direct, however, to ask whether the accused has an absolute right to the counsel of his choice and if so to recognize the adjournment as the natural emanation of that right.

The tendency to pose the question first in terms of the right to an adjournment raises the s. 534(5) rule which declares that "An accused is not entitled as of right to have his trial postponed . . ." The section makes adjournments and their terms discretionary, a position not on its face consonant with the s. 577(3) provision nor with s. 2(c)(ii) of the *Bill of Rights*.<sup>48</sup> At all events, consistency with s. 577 and adherence to the interpretive injunction of s. 2(c)(ii) of the *Bill of Rights* seem to require that the words "for any other reason" in s. 534(5) be strictly construed in the accused's favour wherever a postponement is sought for the *bona fide* purpose of retaining or instructing counsel.

There appears to be no reported Canadian case of a prisoner being forced to trial completely deprived of time to instruct counsel. The magistrate in *Hallchuk*<sup>49</sup> convicted the accused of a liquor offence on a first appearance although he had a telegram from counsel asking that the matter be remanded until he arrived by train. Galt, J. had no difficulty discharging the prisoner on a motion for *habeas corpus*.

In a second group of cases, the accused were tried without counsel because counsel withdrew upon the denial of a reasonable request for an adjournment. In *Talbot*,<sup>50</sup> the accused, who was arrested three days before his trial, first met his lawyer the day before. On the day of trial, a request for a postponement to prepare the defence was refused. On appeal, a new trial was ordered. In *Dow*, counsel for the accused was unable to be present at the opening of the preliminary inquiry because of sickness. His partner, who came to explain the absence of retained counsel and who knew nothing of the case, withdrew when the postponement he requested was refused. Some part of the preliminary inquiry was conducted while the unrepresented ac-

<sup>48</sup> Nor, it might be said, is s. 43 of Bill C-71 (1975), which would add a section as follows:

s. 440.1 (1) The validity of any proceeding . . . is not affected by  
(a) any failure to comply with the provisions of this act relating to adjournments or remands . . .

<sup>49</sup> [1928] 1 D.L.R. 731.

<sup>50</sup> [1966] 3 C.C.C. 28 (Q.C.A.).

cused stood mute. Aikins, J. held that the accused had been denied the right to make full answer and defence and that this was a denial of natural justice, a violation of a "fundamental principal of justice",<sup>51</sup> and was sufficient to justify the grant of a writ of prohibition.

The majority of the Alberta Court of Appeal is quite supine in its indifference to the interests of the accused in the recent case of *Gilberg*.<sup>52</sup> Although the judgments of the majority hardly merit the validating effect of detailed attention, some of the more conspicuous miscalculations ought to be interred with dispatch.

The accused was charged with theft over \$200.00, for which he might be imprisoned for up to ten years. The record of previous postponements was, as Clement, J. A. suggested, "well-nigh scandalous." There had been six in all, spread over several months. Each time, the postponement was by consent of both counsel; in one case, the Crown, knowing in advance and not opposing a defence motion to postpone, nonetheless assembled all its witnesses because, unlike some other jurisdictions, no procedure was available to do otherwise.

There is no suggestion that this cavalier performance by counsel, roundly scored in all three judgments, sprang in any way from the fault of the accused; for all we know, as Prowse, J.A. remarks in dissent, he might well have preferred to proceed on the earlier occasion when his counsel was ready but the Crown was not. In any event, he must have been surprised when on the morning in question, his counsel, apparently unaware of the trial date through what the judges variously described as a "slip-up" and "inadvertence or neglect", did not appear. A student appeared later in the morning to explain his principal's absence and to ask for an adjournment. The Crown, witnesses at the ready, expressed some concern, but did not press that the matter go on. The Court, in view of the record, ordered the matter to go and adjourned only after the Crown had closed its case. The defense ultimately secured a writ of prohibition.

In issuing the order below, Shannon, J. concluded that the accused had been denied the right to appear by counsel and hence to make full answer and defence.<sup>53</sup> Relying on *Re R. and Croquet*<sup>54</sup> and authorities reviewed therein, he held that this denial of natural justice mandated a writ of prohibition.

It is submitted with respect that the reasons of the majority fail sensibly to advance the inquiry. McDermid, J.A. would have us believe that if there were an error, it would be "the improper exercise of jurisdiction which gives no right [to prohibition]".<sup>55</sup> Beyond reiterating the obvious value of expedi-

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<sup>51</sup> [1972] 4 W.W.R. 724; 19 C.R.N.S. 148; 8 C.C.C. (2d) 307 at 311.

<sup>52</sup> (1975), 53 D.L.R. 441.

<sup>53</sup> [1974] 2 W.W.R. 474; 26 C.R.N.S. 201; 15 C.C.C. (2d) 125.

<sup>54</sup> (1972), 8 C.C.C. (2d) 241; 21 C.R.N.S. 232; [1972] 5 W.W.R. 285; aff'd 12 C.C.C. (2d) 331; 23 C.R.N.S. 374; [1973] 5 W.W.R. 654.

<sup>55</sup> *Supra*, note 53 at 445.

tion, he gives no reason for his holding. He does not deem it necessary to refer to recent authority which takes the other view, *Dow*<sup>56</sup> which is directly on point and *Re R. and Croquet*<sup>57</sup> which was relied upon below and which concludes, after a review of the authorities, that prohibition lies for any violation of fundamental principles of justice.

Both Clement and Prowse, J.J.A. except themselves from Mr. Justice McDermid's holding on the prohibition issue.<sup>58</sup> In any event, it forms no part of His Lordship's *ratio* as he holds that the Judge was justified in refusing the adjournment. Now this is a point on which reasonable persons might differ, but Mr. Justice McDermid's reasons are hardly persuasive.

First, he relies on *Deacon* for the proposition that

I would respectfully point out that, when the right was given to an accused person in felony cases to be defended by counsel, his acts and omissions become the acts and omissions of the accused, and the accused is bound thereby.<sup>59</sup>

That holding was directed to counsel's "microscopic *post mortem*" on appeal of the trial judge's charge where he had omitted to take any objection at the trial. The wrenching of these words from their context and their wooden application to a situation in which the omission complained of is counsel's omission to show up for the trial is hardly dispositive of the issue.<sup>60</sup>

After again extolling the need of expedition, Mr. Justice McDermid is dishearteningly abrupt in toting up the other side of the ledger. True, cross-examination is important to the defence, "But every day there are trials where accused are not represented by counsel."<sup>61</sup> Here, there is no evidence that the Court did not discharge its duty to be solicitous of an unrepresented accused.

Both McDermid and Clement, J.J.A. doubt the relevance of the *Bill of Rights*; the former dismisses it in these words:

Here the accused clearly had retained and instructed counsel, and it was the fault of counsel that he was not present at the trial.<sup>62</sup>

This failure to give meaningful content to the right embodied in s. 2(c)(ii) and to take the injunction of the opening of s. 2(c)(ii) is still less shocking than what Mr. Justice Clement would have us believe about the scope of "full answer and defence":<sup>63</sup>

The right of an accused to make full answer and defence in person or by counsel given by s. 577(3) arises "after the close of the case for the prosecution". This was accorded to Gilberg in full measure in the exercise of the discretion under s. 501". [i.e. when the accused was granted an adjournment after the Crown closed its case].

<sup>56</sup> *Supra*, note 51.

<sup>57</sup> *Supra*, note 55.

<sup>58</sup> The former at 452, the latter at 459.

<sup>59</sup> (1947), 87 C.C.C. 271 at 335; 3 C.R. 129; [1947] 1 W.W.R. 545.

<sup>60</sup> *Supra*, note 57 at 447.

<sup>61</sup> See, A. Grunis, *Incompetence of Counsel in Criminal Cases* (1974) Crim. L. Q. 288.

<sup>62</sup> *Id.* at 447.

<sup>63</sup> *Id.* at 451; the words in brackets are mine.

If there were no annotation of the *Code* close by, one wonders why His Lordship was not troubled by the passage in the judgment below which sets out the trite learning that:

If an accused person wants to exercise that right [to make full answer and defence] through counsel it is essential that his counsel be present to advise him, cross-examine witnesses and make representations on his behalf throughout the whole of the proceedings; . . .<sup>64</sup>

As it appears to be the order of the day, Clement, J.A. then takes out of context this passage from *Ewing and Kearney*:

Our law has not required that every accused person be defended by counsel, but rather that, with or without counsel, he or she be afforded a fair hearing. To ensure that result the superior Courts have constantly reviewed cases where it has been alleged that a fair hearing had not been provided.<sup>65</sup>

Now that was a case in which the accused, unable to afford to instruct counsel, sought to prohibit proceedings until a lawyer was provided. The Court there held that the accused's right to appear by counsel was not a right to be provided with counsel and that if he had no counsel, there was no error as long as his trial was fair. Whatever may be the merits of that view, it is surely not addressed to the question here.

To hold as His Lordship does that prohibition will not lie in the circumstances as long as the trial is fair is contrary to reason and authority. Section 577(3) does not entitle the accused to the assistance of counsel or to a "fair trial" without the benefit of counsel, at the option of the trial judge. None of *Dow*,<sup>66</sup> *Johnson*,<sup>67</sup> *Pickett*<sup>68</sup> nor *Butler*<sup>69</sup> hold that the breach of this fundamental right is curable by an otherwise fair trial or by the accused's failure to show prejudice. What then is the authority for the view that in these circumstances:

The fundamental justice for an accused is a fair trial; counsel is not always a necessary concomitant to a fair trial and has not been shown to be so in this case.<sup>70</sup>

This disquieting insouciance to the rights of an individual accused of a serious crime rang no bells in the Supreme Court of Canada on motion day; Martland, Ritchie and Dickson, JJ. inexplicably dismissed a motion for leave to appeal.

There are cases which are treated as if they involved the vindication of an accused's right to counsel of his choice. In fact, these are cases in which the accused, while represented in some way by counsel, has nonetheless been denied the right to instruct counsel. He has, in effect, been forced to trial

<sup>64</sup> (1974), 15 C.C.C. (2d) 125 at 129-30.

<sup>65</sup> (1973), 15 C.C.C. (2d) 107 at 111; 25 C.R.N.S. 130 at 134-35, [1974] 1 W.W.R. 57 at 62; aff'd 18 C.C.C. (2d) 356; 49 D.L.R. (3d) 619; [1974] 5 W.W.R. 232.

<sup>66</sup> *Supra*, note 51.

<sup>67</sup> (1973), 11 C.C.C. (2d) 101; 21 C.R.N.S. 375; [1973] 3 W.W.R. 513.

<sup>68</sup> (1971), 5 C.C.C. (2d) 371; [1972] 1 O.R. 638.

<sup>69</sup> (1973), 11 C.C.C. (2d) 381.

<sup>70</sup> *Supra*, note 53 at 453.

without counsel. In *Butler*,<sup>71</sup> the accused appears to have been assisted by legal aid duty counsel after his own lawyer failed to appear. In *Pickett*,<sup>72</sup> the accused was represented by an inexperienced young solicitor who had been sent to explain his senior's absence and to ask for an adjournment. The Ontario Court of Appeal summarily quashed both convictions.

There is one further case in which the accused was forced on without counsel which deserves comment.<sup>73</sup> The facts in *Mulligan* arose in an unusual way. The accused retained one McKeown. His trial came on before Martin, Co. Ct. J., also a principal in the case of *Spataro*<sup>74</sup> (below). Unfortunately, some nineteen months earlier this solicitor had been found in contempt of His Honour Judge Martin.<sup>75</sup> He was sentenced to pay a fine and to imprisonment in default of payment.

In the course of concluding the contempt proceedings Martin Co. Ct. J. had this to say: "I observe that no apology is forthcoming from Mr. McKeown and he will apologize in open court and unless and until he does apologize unequivocally in open court he will not appear in court or in chambers before me".<sup>76</sup>

McKeown did not apologize; the accused maintained his right to choose his lawyer; Martin, Co. Ct. J. was adamant so the accused was forced on without counsel.

One might heartily agree with Keith, J., before whom the application for prohibition came on, and hope that this is an incident which will ". . . never again be repeated in the history of the administration of justice in this Province".<sup>77</sup> However, neither the conceded right of the accused to counsel of his choice, nor the fact that Judge Martin embarked on the trial in the face of the application for the writ persuaded His Lordship to grant the order. Why? Because "I do not think the function of the Court can be emasculated by conduct of this sort" (presumably, Keith, J. is referring here to the conduct of the solicitor rather than that of the judge).<sup>78</sup> We are not told why this consideration overrides the accused's rights. Nor, oddly enough, is there any inquiry whatsoever into the lawfulness of the 'order' excluding the solicitor. In the view of one commentator, the 'order' excluding the solicitor was quite illegal.<sup>79</sup>

*Spataro*<sup>80</sup> is an equally extraordinary case, involving an order from the

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<sup>71</sup> *Supra*, note 69.

<sup>72</sup> *Supra*, note 68.

<sup>73</sup> *Re Mulligan* (1971), 15 C.R.N.S. 382; 14 Crim. L. Q. 113; see Martin Teplitsky, *The Legality of Barring Counsel from a Court Until He Purges His Contempt* (1971), 15 C.R.N.S. 384.

<sup>74</sup> [1974] S.C.R. 253; (1972), 7 C.C.C. (2d) 1; 26 D.L.R. (3d) 625.

<sup>75</sup> *McKeown v. The Queen*, [1971] S.C.R. 446; 2 C.C.C. (2d) 1; 16 D.L.R. (3d) 390.

<sup>76</sup> (1971), 15 C.R.N.S. 382 at 382-83.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 383.

<sup>79</sup> Teplitsky, *supra*, note 73.

<sup>80</sup> *Supra*, note 74.

same trial judge whose order was at issue in *Mulligan*.<sup>81</sup> The accused was charged with six counts of arson; the same counsel appeared for him at the preliminary inquiry and at trial. At the outset of the trial, motions for change of venue and severance of the counts were refused. The transcript next shows the accused saying "I want a postponement" and then "(Interrupting) Change of lawyer". After consultation with his client, counsel addressed the Court:

Your Honour, Mr. Spataro instructs me that he wishes to discharge me. He is not prepared to accept my advice on a matter.

The Court replied:

I may say, so far as Spataro, you have been acting for him all along and, Mr. Spataro, I don't permit the accused to discharge his counsel at the last minute and I don't permit counsel to withdraw and so you will go on and Mr. MacKay will act for you. That is my order.<sup>82</sup>

Mr. Justice Judson, for himself, Martland and Ritchie, JJ. held:

. . . first, that there was no unequivocal discharge of counsel; second, that what happened was a manoeuvre to frustrate the ruling [of] the trial judge that there would be no change of venue (which would involve a postponement of the trial) and no severance of the counts; and third; that there was a reaffirmation of the retainer.<sup>83</sup>

It is less than edifying to see the majority deal with serious questions of law by making problematic findings of fact. First, with respect to the discharge, Spence, J. in dissent notes that:

. . . there can be no doubt that the intention of the appellant to discharge his counsel was clear and unequivocal . . .<sup>84</sup>

If the accused was inarticulate, his counsel was perfectly precise. Moreover, the trial judge, as his reply indicates, clearly understood that the accused was discharging his counsel.

Second, one doubts the validity of the finding of *mala fides*. True, it is suspicious in context. But, again per Spence, J.,

. . . the only evidence on the subject [the transcript], merely leaves that to be conjecture and it might well be that the accused had other serious disagreement[s] with counsel.<sup>85</sup>

In truth, no one knows because, as Laskin, J. (as he then was) remarked in brief reasons concurring in Mr. Justice Spence's dissent:

. . . the trial judge . . . made no attempt to explore the situation in order to determine whether or how the dilemma could be solved. In my opinion, it was his duty to consider the request of the accused even if in the result the accused might have to conduct his own defence.<sup>86</sup>

What, in any event, is the authority for the order that the accused *must* accept a particular solicitor as counsel? There is none, as far as can be found; it is a

<sup>81</sup> *Supra*, note 73.

<sup>82</sup> *Supra*, note 74 at 255-56.

<sup>83</sup> *Id.* at 258.

<sup>84</sup> *Id.* at 265.

<sup>85</sup> *Id.* at 267.

<sup>86</sup> *Id.* at 272.

proposition of entire novelty. The majority finesses the question with its third holding that the accused 'reaffirmed' the retainer. Yet, as Mr. Justice Spence replies:

However, there is little else that the appellant or Mr. MacKay, as his counsel, could have done. For Mr. MacKay to have attempted to withdraw after the judge's ruling would have left him open to immediate proceedings for contempt of court . . . . I do not think it could have been expected of [Spataro] that he continue to interrupt the trial by raising objections to the learned trial judge's ruling.<sup>87</sup>

The detailed holdings fortunately do serve to limit *Spataro* to its precise facts. It might easily be distinguished from all those cases in which there is no suggestion of *mala fides*, as in the later case of *Johnson*<sup>88</sup> where Nemetz, J.A. did distinguish *Spataro*, holding there that the accused, who discharged his counsel the morning of the trial and was forced on without counsel, was the victim of a miscarriage of justice.

Yet for all the silver lining, reading the majority judgment is a maddening adventure. If one of the roles of the highest court is to protect individual liberties, should it be so quick to accept as evidence of *mala fides* the accused's exercise of his lawful right to a motion for a change of venue and a severance? If one of the roles of the highest court is to teach lower courts, by its example, how judges ought to decide questions of law, ought nearly baseless assertions of fact and unsupported declarations of entirely new principles to be allowed to insinuate themselves unnoticed in the place of legal reasoning? Is the majority so slow to perceive its duty to give practical guidance to lower courts that the suggestion that Judge Martin might have troubled himself to ask Spataro the nature of his difficulty never occurred to Martland, Judson or Ritchie, JJ.?

*Proposition Three: Within the Framework of the Rules of Evidence, Defence Counsel's Conduct of the Defence Ought Generally to be Unimpeded by the Trial Judge.*

The problems in this area most often arise when the trial judge improperly restricts the defence's cross-examination of Crown witnesses. In some cases, the trial judge makes what is basically an evidentiary error. In *Abel*,<sup>89</sup> for example, the trial judge erroneously refused to permit defence counsel's attempt to impeach a Crown Witness by putting to him certain inconsistent statements made on a voir dire. In another case,<sup>90</sup> the trial judge ruled that a certain question put to impeach a witness could not be put until counsel undertook to call a witness to verify the adverse inference implicit in the question.

Sometimes, however, trial judges have restricted cross-examination in

<sup>87</sup> *Id.* at 265-66.

<sup>88</sup> [1973] 3 W.W.R. 513; 11 C.C.C. (2d) 101; 21 C.R.N.S. 375.

<sup>89</sup> (1955), 23 C.R. 163; 115 C.C.C. 119; *semble*, *Cormier* (1974), 25 C.R.N.S. 94 (Que. C.A.).

<sup>90</sup> *Travers* (1966), 57 W.W.R. 257.

apparent disregard of the well established principle, crystallized in Wigmore's memorable words: ". . . [cross-examination] is beyond any doubt the greatest legal engine ever invented for the discovery of truth."<sup>91</sup> Substantially the same view is well ensconced in Canadian jurisprudence. In the much cited case of *Anderson*, the Manitoba Court of Appeal, ordering a new trial, held:

Cross-examination is a powerful weapon of defence, and often its sole weapon. The denial of full opportunity to sift and probe the witnesses of the opposing side has always been regarded with extreme disfavour by British Courts of justice.

Cross-examination may be insisted on for a number of purposes: First, to bring out facts as to which a witness has not been asked to testify, or is anxious to conceal; Second, to show that the witness is unworthy of belief; Third, to adduce facts in mitigation of sentence. Fourth, to adduce facts which in the case of a guilty person may minimize his offence and assist in the rehabilitation of his character.<sup>92</sup>

That was a case in which the appellate court held that the defence had not been given proper latitude on cross-examination.<sup>93</sup>

In other cases, the trial judge may unduly interfere in the cross-examination by frequent interruption. While he may ". . . check cross-examination if it becomes irrelevant, or prolix, or insulting . . ."<sup>94</sup> or may urge counsel to speed up,<sup>95</sup> it is equally well established that the trial judge ought not, in effect, to take over the cross-examination.<sup>96</sup>

It will be noted that a trial judge's failure in this regard will frequently result in a new trial, as an appellate court may be poorly placed to divine the course the trial might have taken but for the trial judge's error.<sup>97</sup>

*Proposition Four: Where the Accused has no Counsel, the Trial Judge is Obligated to Assist Him Throughout the Trial and Put His Defence to the Jury.*

In 1930, Mr. Justice Riddell of the Ontario Court of Appeal was moved to comment that ". . . the saying that the Judge is counsel for the prisoners has lost much of its significance and has become largely metaphorical."<sup>98</sup> As an empirical proposition, His Lordship was on shaky ground. Recent data indicates that, considering cases of all types, approximately 53% of the accused in Provincial Court in Toronto were unrepresented at the disposition stage of their cases. In *Criminal Code* matters, the figures were 52.1% un-

<sup>91</sup> *Wigmore* (3d ed., 1974) § 1367 at 32.

<sup>92</sup> [1938] 2 W.W.R. 49 at 53; 70 C.C.C. 275 at 278.

<sup>93</sup> *Semble, Pilon* (1973), 23 C.R.N.S. 392 (Que. C.A.); *Marcotte*, [1964] B.R. 155 (Que. C.A.).

<sup>94</sup> *Anderson*, *supra*, note 1 at 54

<sup>95</sup> *West* (1925), 57 O.L.R. 446; 44 C.C.C. 109 (C.A.).

<sup>96</sup> *Cain* (1936), 25 Crim. App. Rep. 204; *Ignat* (1965), 53 W.W.R. 248 (Man. C.A.).

<sup>97</sup> E.g. *Simmons*, [1923] 3 W.W.R. 749; *Anderson*, [1938] 2 W.W.R. 49; 70 C.C.C. 275; *Ignat*, *id.*

<sup>98</sup> *Fontaine* (1930), 53 C.C.C. 164 at 165 (O.C.A.).



represented in summary matters and 28.1% unrepresented in indictable matters.<sup>99</sup>

The question of the proper role of the trial judge nonetheless arises from time to time. In the case of *Darlyn*, O'Halloran, J.A. stated:

There are two traditional common law rules which have become so firmly imbedded in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed. The first is, that if the accused is without counsel, the Court shall extend its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect.<sup>100</sup>

This is not the only modern case in which a Canadian trial judge was found wanting in even-handedness, a particularly serious matter when the accused is unrepresented.<sup>101</sup> In other instances, *bona fides* notwithstanding, trial judges have failed to discharge their duty of presenting the full force and effect of the defence.<sup>102</sup> The problems associated with the proper remedy where the accused as not been *adequately* represented merit extensive discussion in their own right. Here it might be noted that the courts have not been so acute to protect the accused in circumstances where, for example, accused's counsel has failed to make timely objections.<sup>103</sup>

### 3. Conclusion

What is striking about the full answer and defence cases, taken as a whole, is the clarity and firmness of the courts' resolve to recognize the adversary nature of our criminal justice system and then to insist on conformity with the propositions logically comprehended by such a system.

The adversarial nature of the proceedings are nowhere more clearly seen than in the absolute requirement of the presence of the accused in serious cases. This requirement recognizes, it is submitted, the sheer impossibility of justice under our procedure in the event that the whole evidence should come from the prosecution. The second proposition, that the accused is entitled to conduct his defence personally or by counsel, highlights a practical judgment flowing from the complexity of our procedure in criminal cases. Aberrant decisions aside, the thrust of our jurisprudence is to affirm what is painfully obvious to anyone who has ever set foot in a criminal court — the whole scheme of evidence and procedure cannot be manipulated by lay persons in such a way as to guarantee either the integrity of the fact-finding process or the protection of the rights of the accused.

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<sup>99</sup> Robert G. Hann, *Decision Making in the Canadian Criminal Court System: A Systems Analysis* (Toronto: Centre of Criminology, U. of T. Press, 1973), at 137 ff., particularly Table 4.17.

<sup>100</sup> *Darlyn* (1947), 88 C.C.C. 269 at 271-72.

<sup>101</sup> See, *Pavlukoff* (1953), 106 C.C.C. 249; *Denis*, [1967] 1 C.C.C. 196; *McCormick* (1961), 35 C.R. 222 (B.C.C.A.).

<sup>102</sup> See, *Hunchuck* (1952), 103 C.C.C. 252; 15 C.R. 386; *Huebschwerlen*, [1965] 3 C.C.C. 212 (Y.T.C.A.).

<sup>103</sup> *Deacon* (1947), 87 C.C.C. 271; 1 W.W.R. 545 (rev'd on other grounds [1947] S.C.R. 531; 89 C.C.C. 1); *German*, [1947] O.R. 395; 89 C.C.C. 90.

The last two propositions gloss the first two. The wide latitude given the defence indicates a preference for both the reality and appearance of judicial impartiality. As well, it no doubt reflects a functional adjunct of the adversary system — that neither the system nor the accused can have confidence in the process unless the latter has been given the fullest opportunity to put his case as far as possible in the manner he sees fit. The obligation on the trial judge to assist the defence where the accused is unrepresented compromises the thrust of the preceding proposition and entails further recognition of the disadvantaged position of the unrepresented accused.

The argument of this article is that those same concerns are at play in the pre-trial arena. To be sure, a different series of practical judgments must be made. They ought to be made, it is suggested, by an inquiry calculated to determine at what stages of the pre-trial process those values so clearly affirmed in the full answer and defence cases will be put at risk if the accused is unrepresented.

Again, none of this dispenses with the making of practical judgments. If, for example, the full answer and defence cases tell us that the integrity of the process requires that the accused receive, through the medium of counsel's advice, the entire protection the system has to offer, the courts would still be required to judge when the suspect ought to be advised, for example, of his right to counsel's advice. As soon as he becomes a suspect? Once he is the prime focus of police investigation? Not until formal accusation? What is important is that these questions not be treated as being completely foreign to our lengthy jurisprudence on full answer and defence at trial. They ought to be seen instead as a new setting requiring the elaboration of old and well understood principles.

### C. THE PRE-TRIAL RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS IN CANADA.<sup>104</sup>

In 1972 the Supreme Court of Canada handed down a decision which in the result appeared to strike a somewhat unexpected blow in favour of the enforcement of a pre-trial right to counsel. *Brownridge*<sup>105</sup> was not without its difficulties, yet it did vindicate the accused's right. In 1974 in the case of *Hogan*,<sup>106</sup> the same court resiled from the shadow of that right with a start reminiscent of the one which followed *Drybones*.<sup>107</sup>

The purpose of this part is to analyse the judgment in the case of

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<sup>104</sup> See, Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (Toronto: McClelland and Stewart, 1975) at 244 ff; Brian Donnelly, *Right to Counsel* (1968-69), 11 *Crim. L. Q.* 18; Brian Grosman, *The Right to Counsel in Canada* (1967), 10 *Can. Bar J.* 189; Sandra L. Enticknap, *Civil Rights — Right to Counsel* (1972-73), 37 *Sask. L. Rev.* 300.

<sup>105</sup> *Supra*, note 6.

<sup>106</sup> *Supra*, note 7.

<sup>107</sup> [1970] S.C.R. 282; 3 C.C.C. 355; 9 D.L.R. (3d) 473; 10 C.R.N.S. 334; 71 W.W.R. 161.

*Hogan* from the point of view of the jurisprudence, particularly *Brownridge*, which preceded it. We begin with the latter case.

### 1. *Brownridge*

In *Brownridge*, the Supreme Court of Canada decided that the power of the police to require a suspect to give a sample of his breath would have to be girdled at least sufficiently to make room for the suspect's right to retain and instruct counsel without delay. Any such affirmation of the rights of the accused in criminal cases is gratefully received. Yet, the reasoning of the majority but feebly illuminates the gray area of the conflict between due process and crime control values,<sup>108</sup> between the vitality of individual rights and the efficient working of the criminal justice machinery. One is forcibly drawn to the acid comment of O'Hearn, Co. Ct. J.:

After reading the reasons [of the Supreme Court in *Brownridge*], I had the irresistible impression, if I may say with the utmost deference and respect, of a bridge hand from which all trumps have vanished. To put it more prosaically, I have found it extremely difficult, if not impossible, to pin down the dominant reasoning behind the judgment.<sup>109</sup>

The facts of the case are these. *Brownridge* was arrested for impaired driving. A demand for a sample of his breath was made at about 1:00 a.m. The accused asked to consult with his lawyer to seek advice on whether he ought to comply with the demand. The request was denied, so the accused refused to take the test. He was convicted of an offence under s. 223(2) [now s. 235(2)].

Mr. Justice Ritchie wrote a plurality judgment,<sup>110</sup> holding that *Brownridge's* right had been violated and that in the circumstances the denial provided a reasonable excuse for his failure to comply with the request. Mr. Justice Laskin,<sup>111</sup> concurring in the result but rejecting the plurality approach, argued for a more forthright balancing of the competing claims of the breathalyzer and the Bill of Rights. Mr. Justice Pigeon<sup>112</sup> held in dissent that the s. 2(c)(ii) right did not come into play as the accused had not been "arrested or detained".

Without argumentation, Pigeon, J. declares that the legal situation

. . . of a person who, on request, accompanies a peace officer for the purpose of having a breath test taken is not different from that of a driver who is required to allow his brakes to be inspected or to proceed to a weighing machine under s. 39 (b) or s. 78 (3) of the Highway Traffic Act, R.S.O. 1970, c. 202.<sup>113</sup>

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<sup>108</sup> Herbert Packer, *The Limits of the Criminal Sanction* (Palo Alto: Stanford Univ. Press, 1968). Packer uses "Crime Control" to describe that value system which places primary emphasis on the repression of criminal conduct while the "Due Process" model emphasizes strict compliance with the formal rules relating to the guilt-affixing process. See at 149 ff.

<sup>109</sup> *Jones* (1973), 9 C.C.C. (2d) 5 at 8; 20 C.R.N.S. 58 at 61.

<sup>110</sup> Fauteux, C.J.C., Martland and Spence, JJ. concurring.

<sup>111</sup> Hall, J. concurring.

<sup>112</sup> Abbott and Judson, JJ. concurring.

<sup>113</sup> *Supra*, note 6 at 429.

Our curiosity as to why a serious criminal offence ought to be assimilated to a provincial regulatory enactment is never assuaged. The extra interference with the accused's person in administering the test is ignored.

Even on its own terms, the argument that the suspect in these cases has not ordinarily been "arrested or detained" is weak. It is true enough that one may be under a duty to perform some act at the behest of a peace officer without being under arrest.<sup>114</sup> In this case, however, the duty only arises

Where a peace officer on reasonable and probable grounds believes that a person is committing, or at anytime within the preceding two hours has committed, an offence under s. 234 (impaired driving) . . . .<sup>115</sup>

Can it be seriously asserted that an individual who is believed on reasonable and probable grounds to have committed an offence within the previous two hours, who accompanies a police officer and who, Pigeon, J. concedes, could be taken forcibly into custody if he refused to accompany the officer, is not under arrest? If not, then one would have to hold that where a peace officer had *maliciously* demanded an individual to accompany him to supply a sample of his breath there was no false imprisonment — an unlikely proposition.

It would not take a case of rampant realism to suspect that beneath this strained reading there lurked a hidden premise or perhaps a policy preference. It does emerge that Pigeon, J. is concerned that granting the right to counsel may protract events beyond the two hour limit set out in s.237(1)(c). With what result?

When the accused having spoken to his lawyer finally asked for an opportunity to give a sample of his breath, the result of the test, if taken, would not have been available evidence against him.<sup>116</sup>

First, this is a conclusion of law which ought to have been reasoned rather than pronounced. Next, there was some conflict of authority on the point at the time *Brownridge* was decided which might have been addressed. Third, the weight of authority now is that the certificate of analysis is admissible even where the test is taken more than two hours after the demand.<sup>117</sup> What the Crown may lose is the benefit of the rebuttable presumption of s.237(1)(c) which dispenses with Crown proof of the relation between the test results and the accused's blood-alcohol level at the time of the alleged offence.

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<sup>114</sup> A better example might have been *Code*, s. 118:

Every one who

(b) omits, without reasonable excuse, to assist a public officer or peace officer in the execution of his duty in arresting a person or preserving the peace, after having reasonable notice that he is required to do so, . . . is guilty of [an offence] . . . .

<sup>115</sup> *Code*, s. 235(1).

<sup>116</sup> *Supra*, note 6 at 430.

<sup>117</sup> See *Hamm* (1973), 15 C.C.C. (2d) 32 (Sask. C.A.) overruling *Kwasnitza* (1971), 1 C.C.C. (2d) 473; 14 C.R.N.S. 82; [1971] 2 W.W.R. 557; *semble*, *May* (1971), 5 C.C.C. (2d) 213; 16 C.R.N.S. 392; [1972] 1 W.W.R. 54 (Alta. C.A.) and *Pickles* (1973), 11 C.C.C. (2d) 210 (Ont. C.A.).

Lastly, it is important not to completely lose perspective on the *Code's* handling of the problem of the drinking driver. The whole of the s. 236 offence, does nothing more than create what in effect is an irrebuttable presumption of impairment. Like many other *Code* definitions, it is an arbitrary drawing of a line to make the harm to be prevented more capable of definition and the criminal process more amenable to administration. Here, the harm attacked is the damage wrought by the impaired driver. Parliament has seen fit to make it clear that a given proportion of alcohol to blood closely enough approximates the physical *state* to be avoided if the ultimate harm is to be avoided; likewise, the rebuttable presumption of s. 237(1) (a) entails a policy judgment that a good deal less than actual driving closely enough approximates the impugned *act*. But even if the Crown were absolutely barred from proceeding under s. 236 because of problems of proof caused by failure to comply with s. 237(1)(c)(ii), it might still proceed under a charge of impaired driving — exactly what it would have done in the pre-breathalyzer era. Mr. Justice Pigeon's view notwithstanding, all would not be lost; only a special mode of proof has fallen away.

So, it is for an inarticulate policy preference predicated on a questionable view of the law that Pigeon, Abbott and Judson, JJ. would then have us believe that Brownridge did not have the right to retain and instruct counsel without delay even though he *was* a person arrested or detained, that being a prerequisite to the operation of the right!

I fail to see any reason for which a motorist suspected of impaired driving would be entitled to require the opportunity of obtaining legal advice before submitting to a breath test if under arrest at that time, while he would not have had such a right if not under arrest.<sup>118</sup>

The plurality judgment devotes only one sentence of *ratio* to support of the assertion that the constable's refusal of the accused's right to retain and instruct counsel without delay constituted a reasonable excuse for Brownridge's refusal to take the test:

Having regard to the provisions of the *Bill of Rights*, s. 223(2) of the *Criminal Code* is required to be construed and applied in this sense so that, unless it is apparent that an accused person is not asserting his right to counsel *bona fide*, but is asserting such right for the purpose of delay or for some other improper reason, the denial of that right affords a "reasonable excuse". . . .<sup>119</sup>

The only reference to case law establishes the inapplicability to the present case of two English Court of Appeal decisions interpreting the *Road Safety Act*, 1967.<sup>120</sup>

Mr. Justice Ritchie does not address Laskin, J's, objection to the "reasonable excuse" solution:

. . . I regard the phrase "without reasonable excuse" as adding a defence or a bar to successful prosecution which would not be available without those words, but not as encompassing defences or bars that would exist without them. For

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<sup>118</sup> *Supra*, note 6 at 430.

<sup>119</sup> *Id.* at 421.

<sup>120</sup> *R. v. Clarke*, [1969] 2 A11 E.R. 1008 and *Law v. Stephens*, [1971] R.T.R. 358.

example, a right of diplomatic immunity from the domestic criminal law would exist regardless of the absence of the words "without reasonable excuse"; and similarly, in my view, is s. 2(c)(ii) of the *Canadian Bill of Rights* sets up a bar, it is one which is independent of the presence of the words in question. It would be strange, indeed, if the effect of the immunity above mentioned or of the *Canadian Bill of Rights*, was vitiated by repeal of the words "without reasonable excuse."<sup>121</sup>

Mr. Justice Laskin argues that it is a matter for choice between the requirement of s. 235(1) that, in the indicated circumstances, a person provide a sample of his breath 'forthwith or as soon as practicable' and the injunction of the *Bill of Rights* that the suspect be allowed to retain and instruct counsel 'without delay'.<sup>122</sup> His policy preference, he holds, is for the imperative of s. 2(c)(ii) of the *Bill of Rights*. In this case, the police could 'quite probably' have acceded to the request and still have taken the sample within the two hour period within which the analyst's certificate would be admissible as *prima facie* proof of the alcohol level of the accused's blood.<sup>123</sup> Even if this were not possible, Mr. Justice Laskin would balance the competing claims in favour of the right of the suspect to see his lawyer:

I cannot be persuaded that it is more important for the Crown, to whom ordinary modes of proof are available, to have the benefit of a rebuttable presumption through an analyst's certificate than it is for an accused to have the benefit of counsel.<sup>124</sup>

I take it to be implicit in this that different facts and hence different concerns might tip the scales differently in another case. His position, based on his judgment in *Brownridge*, is not one of the absolute primacy of the *Bill's* guarantees.

Ritchie and Laskin, JJ. agree that the s.2(c)(ii) right does operate in the circumstances and that its violation vitiates the conviction. It is in the process of interpreting, of formulating the protection, that the difference arises. In the end, Laskin, J. relies on the notion that the assertion of a protected interest cannot itself be made criminal without impermissible violence to that interest.<sup>125</sup>

Mr. Justice Laskin states that the principle of s. 2(c)(ii) operates, as does the principle of diplomatic immunity, to qualify the seemingly mandatory language of s. 232. As a rule of interpretation, this should be clear. For example, the unqualified use of the words "any person who" throughout the *Code* does not trick any astute student of criminal law into ignoring the operation of the definition section which saves harmless those persons of only six years of age.

The same interpretive tool is clearly operative in the *Bill of Rights* con-

<sup>121</sup> *Supra*, note 6 at 434.

<sup>122</sup> *Id.* at 435.

<sup>123</sup> *Id.* at 436.

<sup>124</sup> *Id.* at 437.

<sup>125</sup> *Id.* at 437-38.

text. Suppose that Parliament were to purport to enact a statute which read as follows:

*Example 1. Any person who assembles with any other person or persons for the purpose of practising any religion is guilty of an offence punishable on summary conviction.*

*R. v. Drybones*<sup>126</sup> is authority for the proposition that since such a statute cannot be construed or applied consistently with the protection accorded by the combined operation of ss. 2 and 1(c) of the *Canadian Bill of Rights* it is inoperative.

A modestly more difficult situation arises where the rule to be subjected to the scrutiny of the *Bill of Rights* conflicts with the latter's injunctions only in some incidents of its possible application.

*Example 2. 1. Where any assembly disturbs the peace, a police officer may, by demand, require that it disperse forthwith.*

*2. Any person who refuses to comply with a demand made under subsection (1) is guilty of an offence.*

Suppose that a police officer enters a place of worship in the middle of a service and, on the basis that the organ music is disturbing the neighbours, orders the dispersal of the assembly. A number of the faithful refuse and are convicted of the offence under section 2.

The 'right' of the neighbours to be spared religious music cannot, in the circumstances, be harmoniously intertwined with that of the zealot to make it. Neither is absolute but each demands content. Given a conflict, it is idle to hide the need for a choice. The imperative of the judicial role is that the choice be a reasoned one. Supposing without elaboration that in *Example 2* the right of the worshippers ought to prevail, how does the 'remedy' evolve?

In construing and applying the operative words "disturbing the peace", care must be taken to prevent their overreach, to limit their meaning so "as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of [the freedom of religion]". This technique is well known to Canadian judicial reasoning.<sup>127</sup> The convictions ought not then to be quashed because the accused had a reasonable excuse for refusing to comply with the officers' demand. Nor need an acquittal be grounded on a theory that any violation of an individual's right vitiates a related criminal conviction.

Rather, the accused ought to be acquitted because the Crown cannot make out the *actus reus* of the section 2 offence. It must prove (1) a

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<sup>126</sup> *Supra*, note 107.

<sup>127</sup> I am indebted to my colleague Sidney R. Peck for drawing my attention to some instances of the use of the interpretive device which assumes that it is the intention of the legislature to enact competent laws. I note two examples, the first in constitutional law, the second in a *Bill of Rights* case: *McKay v. The Queen*, [1965] S.C.R. 798 (per Cartwright, J. for the majority) and *Koss v. Kohn* (1962), 30 D.L.R. (2d) 242 (per Norris, J.A., dissenting).

refusal (2) of a demand (3) by a peace officer (4) made pursuant to section 1. The last of these it cannot prove as there was no "disturbing the peace" within the meaning of section 1. Whatever may be comprehended by those words, our 'choice' impels us to the view that they do not include that disturbance normally associated with the reasonable practice of religion.

The argument then is that in cases like *Brownridge*, we are concerned not with any collateral attack to vitiate the conviction, but rather with the problem of defining the crime itself. Given that the right to make the demand "forthwith" must be construed so as to make room for the right to instruct counsel "without delay", then acquittal results because there was no proper demand.

None of this, we hope, is mere academic quibble. The mischief in the "reasonable excuse" shortcut of the majority is this: the failure to address the conflict between the demands of the *Code* and the injunctions of the *Bill of Rights* blinded the majority to the similarity of *Hogan* to *Brownridge*. That is, if it is so clearly more important that the right to counsel be vindicated than that the breathalyzer be administered without delay, why is the inquiry into the competing demands of 'right to counsel' against 'admissible if relevant' seen as raising a completely different question?

### 3. *Hogan*<sup>128</sup>

At 1:30 a.m., the appellant's car swerved over a sidewalk. He was stopped by a police officer who determined after brief questioning that the accused might be intoxicated. Pursuant to *Code* s. 235(1), he demanded that the accused accompany him to the police station to give a sample of his breath. The accused and his girlfriend were driven to the station in the constable's car; at Hogan's request, the woman telephoned his lawyer.

The lawyer arrived at the police station while the accused was waiting to give his breath sample. The appellant heard his voice from just outside the room in which he was waiting. His testimony, taken as true, was that

I requested to [sic] Constable MacDonald to see my counsel before taking the test and I was told that I didn't have any right to see anyone until after the test and if I refused the test I would be charged with refusal of the breathalyzer.<sup>129</sup>

So, he gave a sample of his breath; the finding was that his blood contained 230 milligrams of alcohol per 100 millilitres of blood.

*Brownridge*<sup>130</sup> is clear authority for the proposition that had Hogan persisted in his refusal to take the test, he would have been guilty of no offence. The issue in *Hogan* was this: given that he took the test, was the evidence nonetheless admissible notwithstanding the unlawful denial of his right to counsel.

Mr. Justice Ritchie again takes up the gauntlet, this time for a majority.

<sup>128</sup> (1975), 18 C.C.C. (2d) 65 (S.C.C.).

<sup>129</sup> *Id.* at 68.

<sup>130</sup> *Supra*, note 6.



Brief reasons concurring in the result were written by Pigeon, J. Mr. Justice Laskin delivered a dissenting opinion to which Spence, J. added a brief concurring note.

Ritchie, J. distinguished *Brownridge* on the basis that the latter was a case where the accused was convicted of refusing to comply with a demand.<sup>131</sup> He characterized it as one in which "the only question to be determined was whether his having been denied the right to retain and instruct counsel constituted a 'reasonable excuse' for such refusal."<sup>132</sup> Neither, he states, in apparent recognition that Laskin, J. had proceeded rather differently in *Brownridge*, is it a case in which, to use Laskin, J.'s words in that case,

. . . the refusal of the accused to give the breath sample until he had an opportunity to consult a lawyer . . . was the foundation of the charge and conviction . . .<sup>133</sup>

Here, there was "no causal connection" between the transgression of the accused's rights and the conviction ultimately recorded. Mr. Justice Laskin, as we shall see, agrees that the issue in *Hogan* "goes a little deeper" than that presented in *Brownridge*.

To establish the inapplicability of the latter case is not to answer the admissibility question. The central pillar of the majority judgment then is that the evidence is admissible under the common law test of *R. v. Wray*<sup>134</sup> as it is relevant and in fact "the only evidence upon which the appellant could have been convicted of the offence of which he was charged."<sup>135</sup> He adds that its admission can hardly be regarded as unfair when the police considered the accused to be intoxicated and where the accused admitted that he had had "a good pint of rum."<sup>136</sup> Lastly, he concludes that any rule of absolute exclusion of evidence obtained in violation of the *Bill of Rights* stems from American reasoning which finds no analogies in our constitution and is in derogation of the common law rules.

Mr. Justice Ritchie does not scruple to ignore the pervasive criticism of the Court's judgment in *Wray*.<sup>137</sup> This is disappointing in a number of

<sup>131</sup> (1975), 18 C.C.C. 65 at 69.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 70; the quoted words are *per* Laskin, J. (1972), *supra*, note 6 at 437-38.

<sup>134</sup> [1971] S.C.R. 272; 11 C.R.N.S. 235; [1970] 4 C.C.C. 1; 11 D.L.R. (3d) 673.

<sup>135</sup> (1975), 18 C.C.C. 65 at 71.

<sup>136</sup> *Id.*

<sup>137</sup> See, Darrell W. Roberts, *The Legacy of Regina v. Wray* (1972), 50 C.B.R. 19 in which the author, after exhaustive analysis of cases and articles (none of which finds its way into the majority judgment in *Hogan*) concludes at 37, *inter alia*:

The unfortunate part about the development of the law in this area, if one can be so direct, is that it occurred without any explicit examination or discussion by the courts, and in particular by the Supreme Court of Canada, of the fundamental principles involved.

For even more extensive references to *Wray* and the literature generally, see *The Exclusion of Illegally Obtained Evidence*, a study paper prepared by the Law of Evidence Project, Law Reform Commission of Canada (Ottawa: Information Canada, 1974) 31-32. (This latter work appeared after the judgment in *Hogan*.)

respects. First, it is important in those areas in which there has been writing that the Court be prepared to answer its critics. Judging is a collaborative process necessarily engaging the labour not only of judges, but also of the bar and academic lawyers. Often, of course, there is no helpful Canadian literature on matters presented for adjudication. Here, though, the simple reiteration of the rule in *Wray* in the face of a cogent critical literature, absent even the courtesy of explaining why the critics are mistaken, must make writers wonder who, if anyone, is reading.

Second, and more important than the slight of the friendly critic, is the reaffirmation of the pernicious principle of *Wray*. In my view, our Court's readiness, notwithstanding the *Bill of Rights*, to admit both real evidence of the accused's wrongdoing as well as the testimonial evidence which led to the uncovering of the real even where it was "procured by trickery, duress and improper inducements"<sup>138</sup> is, to speak plainly, an embarrassment. We can only suppose that if the accused had been tortured, the evidence would be admitted and as much of the victim as remained intact would be sent to seek his private law remedies.

It would be tiresome to presume to enter the debate on the admissibility of illegally obtained evidence. Still, it must be observed that the majority knocks down a straw man when it discounts an American rule of absolute exclusion. First, the Americans seem to have stepped back from absolute-ness, which may ultimately come to be regarded as a transitory phenomenon firmly situated in its own time and place.<sup>139</sup> Second, the rejection of absolute exclusion does not *ipso facto* legitimate the polar opposite position of "admissible if relevant".

Even if the abundant academic literature were to be discounted, the Ouimet Report<sup>140</sup> recognized in 1969 that some intermediate position was not beyond the grasp of reason. A recent federal Law Reform Commission report, published after *Hogan*, grapples with the issue and emerges with a result more subtle than either absolute exclusion or inevitable admissibility. A wisely reformed rule, it says, would

1. . . . recognize as a base principle that an irregularity in obtaining evidence is

<sup>138</sup> (1970), 9 C.R.N.S. 131 at 133 (Ont. C.A.).

<sup>139</sup> See, *The Pretrial Right to Counsel* (1974), 26 Stan. L. Rev. 398 discussing *Kirby v. Illinois*, 406 U.S. 682 (1972) and *U.S. v. Ash*, 413 U.S. 300 (1973); *Harris v. New York*, 91 Sup. Ct. 643; in *Some Anxious Observations on the Candour and Logic of the Emerging Nixon Majority* (1971), 80 Yale L. J. 1198, Alan Dershowitz and John Hart Ely deliver themselves of a biting critique of the process by which the Court decided that statements elicited in violation of the accused's right to be advised of his right to counsel at pre-trial interrogation were nonetheless admissible for the "limited" purpose of impeaching his credibility; Schrock and Welsh, *Up from Calendar: The Exclusionary Rule as a Constitutional Requirement* (1974), 59 Minn. L. Rev. 251 discuss the most recent alterations to "absolute exclusion"; the very recent decision in the U.S. Supreme Court to grant *certiorari* in a case in which the Court of Appeals (8th. Circ.) upheld the exclusion of illegally obtained evidence may indicate that the Court is presently of a mind to review the whole matter of absolute exclusion: see *Wolff v. Rice* (1975), 44 L. W. 3022.

<sup>140</sup> Ouimet et al., *Report of the Committee on Corrections* (Ottawa: Queen's Printer, 1969) at 79 ff.

not in itself a reason for exclusion if the evidence in question meets the other conditions for admissibility such as relevance and credibility;

2. allow . . . a judge to exercise a discretion to depart from this basic principle and refuse to admit evidence obtained through a serious violation of a substantive law of fundamental right if, considering the circumstances and the gravity of the charge against the accused, the violation is the result of a deliberate voluntary act committed in bad faith, its admission would constitute a serious injustice to the accused or bring the administration of justice into disrepute; furthermore, as a possible expansion to this judicial discretion, to give the judge the power simply to dismiss the charge against the accused.<sup>141</sup>

Curiously, the majority does not address itself to the question begged in its approach to the facts of *Hogan*. They rely on a common law rule of evidence which says that, in general, evidence is admissible if relevant. How, we are bound to ask, can that rule be construed and applied to the facts of this case in all its primordial literalness without 'abrogating, abridging or infringing' the right to retain and instruct counsel without delay? The common law rule is arguably a "law of Canada" as section 5 of the *Bill of Rights* includes in that definition ". . . any law in force in Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada".

Can the rule of evidence be read consistently with the injunction of section two of the *Bill of Rights* if it is taken to include the words underlined below?

All relevant evidence is admissible *even if obtained in deliberate and knowing violation of the accused's right to counsel.*

Reference to the Law Reform Commission might lead one away from a rule of absolute exclusion, while leaving room for the judgment that in some cases, admission of the evidence does 'abrogate' the right and in others it does not. Developing jurisprudence might distinguish the serious violation from the trivial, the intentional from the unintentional, the systematic from the isolated incident. Here, the judgment of the majority must positively encourage the violation of the rights of accused persons in *Hogan's* position. That is so because, on these peculiar facts, as Ritchie J. himself indicates, the illegally obtained evidence is the only proof of the charge in every case. Were it excluded, the police would have no incentive whatsoever to seek such evidence through violation of the accused's rights.

Laskin, J., on the other hand, begins by asserting the accused's right to consult with his lawyer before the test was administered. The question, he suggests,

is whether the vindication of this right should depend only on the fortitude or resoluteness of an accused so as to give rise to a *Brownridge* situation, or whether there is not also an available sanction of a ruling of inadmissibility . . .<sup>142</sup>

The latter course, he concludes, is the proper one in pursuit of the "statutory policy" of the *Canadian Bill of Rights* where the Crown seeks to avail itself of a "special form of proof" obtained in "deliberate violation" of

<sup>141</sup> *Supra*, note 137 at 29.

<sup>142</sup> (1975), 18 C.C.C. 65 at 75.

an individual's rights. He concludes a lengthy analysis of the problems associated with illegally obtained evidence with this passage:

In the light of . . . [Drybones] . . . , it is to me entirely consistent, and appropriate, that the prosecution in the present case should not be permitted to invoke the special evidentiary provisions of s. 237 of the *Criminal Code* when they have been resorted to after denial of access to counsel in violation of s. 2 (c) (ii) of the *Canadian Bill of Rights*. There being no doubt as to such denial and violation, the Courts must apply a sanction. We would not be justified in simply ignoring the breach of a declared fundamental right or in letting it go merely with words of reprobation. Moreover, so far as denial of access to counsel is concerned, I see no practical alternative to a rule of exclusion if any serious view at all is to be taken, as I think it should be, of this breach of the *Canadian Bill of Rights*.<sup>143</sup>

#### 4. Conclusion

I do not think it possible to criticize too strongly the inadequacy of the majority judgment. In his "good pint of rum" aside, Mr. Justice Ritchie further documents the often heard academic lament that the Supreme Court is too disposed to circumvent difficult issues of principle by recourse to some sense of the equity of the individual case. The search for justice in the individual case becomes a tarnished virtue when transmuted into a substitute for the execution of the proper role of the highest court in the land — the reasoned articulation and elaboration of principles applicable to the case at hand.

The point of having 'a case at hand' is that it requires that these principles to be forged in the heat generated by real life. The burden of doing justice in the individual case converts what might otherwise be a speculative endeavour into one that is carried on in the cold light of day in front of the compelling audience of interested parties. Yet, the system as a whole will find little comfort in poor reasoning, even if Mr. Hogan is prepared to admit he was drunk. Mr. Brownridge probably does not know a reasonable excuse from an *actus reus*. His undoubted satisfaction at eventual acquittal on whatever grounds is small consolation to those who are discouraged by the majority's continual recourse to the shortest route.

Indeed, the critique is properly lodged on higher ground than academic pique in the face of inelegant reasoning. In the end, it is argued, reason is that hallmark of judicial dispute settlement which anchors the judges' claim to legitimacy as the final arbiters of certain social conflict:

Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared to meet itself the test of reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength and the weakness of adjudication as a form of social ordering.<sup>144</sup>

If the process declines to lay bare its first premises, to articulate clearly its principles and to elaborate persuasively the reasoning upon which an interpretation is based, it must slowly relinquish its claim to primacy.

<sup>143</sup> *Id.* at 81-82.

<sup>144</sup> Lon Fuller, *The Forms and Limits of Adjudication* (unpublished) 13.

