Osgoode Hall Law Journal

Volume 5, Number 1 (April 1967)

Article 5

O'Connor v. the Queen, (1966) S.C.R. 619

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CIVIL RIGHTS

O'Connor v. The Queen, [1966] S.C.R. 619.

CRIMINAL LAW—"FULL ANSWER AND DEFENSE"—CIVIL RIGHTS—RIGHT TO COUNSEL.

In recent years, Canadian courts have consistently held that an accused's right to counsel is confined to his trial.[1] He may often receive legal assistance but he cannot count on it. This situation exists despite the fact the Canadian Bill of Rights[2] provides:

> S. 2 . . . no law of Canada shall be construed or applied so as to
> (*c*) deprive a person who has been *arrested* or *detained*
> (i) of the right to be informed promptly of the reason for his arrest or detention
> (ii) of the right to retain and instruct counsel *without delay*.

An opportunity to examine and interpret this section arose in the recent Ontario case of *O'Connor v. The Queen*. O'Connor, while driving his car, was stopped by a policeman, placed under arrest for impaired driving and escorted to a police station. Two breathalyser tests were administered, the results of which were sufficient to convict under normal circumstances.[3] O'Connor was not told that he was under arrest until the tests had been taken and he was being placed in a cell for the night. At that time he requested permission to contact his solicitor and was permitted to make a single telephone call. When informed his solicitor was away, he requested permission to make another call to obtain counsel. This time the police refused. At trial in Magistrate's Court, O'Connor was convicted of impaired driving under s. 223 of the Criminal Code.[4]

On appeal to the High Court,[5] Haines, J. ruled that the breathalyser tests should be excluded from the evidence. Roach J.A. in the

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1 *R. v. Steeves*, [1964] 1 C.C.C. 266, 42 D.L.R. (2d) 335 (N.S. S.C.), *R. v. Cull*, [1965] 3 C.C.C. 123 (Man. C.A.), and *R. v. Piper*, (1965) 51 D.L.R. (2d) 534 (Man. C.A.) went so far as to hold that the trial judge need not inform the accused of his right to counsel at trial. *R. v. Gray*, (1962) 132 C.C.C. 337 (B.C. Co. Ct.) did hold that a suspect had the right to counsel during interrogation once he requests it but there is no duty on the police to inform him of that right.

2 8-9 Elizabeth II, Chapter 44.

3 The results of these tests were recorded as 2.0 per thousand blood alcohol and 1.9 per thousand blood alcohol. 1.5 is sufficient to convict under normal circumstances.

4 S. 223 reads: Everyone who, while his ability to drive a motor vehicle is impaired by alcohol or a drug, drives or has the care or control of a motor vehicle, whether it is in motion or not, is guilty of an indictable offence or an offence punishable on summary conviction.

5 [1965] 1 O.R. 360, 48 D.L.R. (2d) 110. The appeal arose by way of stated case and the Magistrate submitted these questions for the judgment of the court:

(1) Was it right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial to the accused to make his full answer and defense?
(2) Was it right in holding that the refusal by the police to allow the accused while under arrest to contact a lawyer did not amount to a denial of natural justice?
(3) Was it right in convicting the accused under the circumstances when it found as a fact, that he, while under arrest, had been denied the right to contact a lawyer?

Haines, J. in effect, answered each of these questions in the negative.

Ontario Court of Appeal[6] reversed the decision and restored the conviction. An appeal to the Supreme Court of Canada failed.[7]

As treated by each of these courts, the case involves three main issues. First, was there a denial of the accused's right to make a full answer and defense under s. 709 of the Criminal Code? Secondly, was the accused's right to retain and instruct counsel denied under s. 2(*c*) (ii) of the Canadian Bill of Rights? Thirdly, if there was an infringement of either or both of these rights, should the accused be acquitted?

S. 709 (i) of the Criminal Code reads:

> The prosecution is entitled personally to conduct his case, and the defendant is entitled to make his full answer and defense.

Haines J. in the High Court of Ontario held that the refusal by the police to permit O'Connor to obtain counsel was a denial of natural justice and a denial of his right to make a full answer and defense. He was of the opinion that the accused has the right to know the case against him and to confront that case with evidence adduced on his behalf. The right to counsel was requisite. Both the Court of Appeal and the Supreme Court of Canada agreed that the operation of s. 709 is confined to the trial of the accused. Neither court gave reasons for this interpretation of s. 709.

Mr. Justice Haines in the High Court expressed the view that it was the early participation of counsel which lends some reality to the concept of confrontation between the accused and the state. Implicit in his view is the idea that the need for counsel is as important at the interrogation stage as it is at the trial. This opinion was expressed in *Regina v. Gray*[8] and is the basis of recent decisions of the United States Supreme Court.[9] Since there is a need for counsel at the interrogation stage, should not s. 709 of the Criminal Code be interpreted as being applicable to pre-trial events? To say that an accused can make a full answer and defense at trial despite the fact he has had rights abrogated, abridged or infringed during interrogation is a contradiction in terms. The Supreme Court of Canada has given these words a narrow and restricted meaning, which, it is submitted, is wrong.

In deciding the case, Haines J. made reference solely to the conduct of the police in denying to the accused the right to retain and instruct counsel without delay. There was a denial of the right to confrontation at a crucial stage of the criminal process. He was of

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[6] [1965] 2 O.R. 773, 52 D.L.R. (2d) 106. Roach, J.A. held the accused did have an opportunity to make his "full answer and defense" since this phrase relates only to trial proceedings and that the denial of right to counsel did not affect the admissibility of the breathalyser tests. Porter C.J.O. and MacKay J.A. concurred.

[7] Ritchie J. delivered the main judgment. Taschereau C.J.C., Fauteux and Hall JJ. concurred. Spence J. delivered a brief judgment agreeing in result with Ritchie J. but confining his opinion to the questions submitted by the Magistrate.

[8] (1962) 132 C.C.C. 337. (B.C. Co. Ct.).

[9] *Massiah v. U.S.*, 377 U.S. 201 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Miranda v. State of Arizona*, 86 S. Ct. 1602 (1966).

the opinion that had O'Connor been able to retain counsel, the latter may have discovered a defect in the breathalyser apparatus, some physical disability, or requested the taking of a blood test which may have provided some other explanation than the impairment by alcohol.[10] Ritchie J. in the Supreme Court of Canada dismissed this argument by stating that the facts did not suggest the presence of counsel after the tests were administered, would have resulted in ascertaining any factors affecting the admissibility of this evidence. This statement is undoubtedly correct. However, the point is that such a discovery would certainly affect the weight to be given to the breathalyser tests. By providing an alternative explanation of the accused's impairment, the validity of the test results would be questioned, leaving the trier of fact to choose between the alternatives. One could argue then that the accused should be acquitted, not because the results of the breathalyser tests are inadmissible but due to the fact he may have been deprived of the opportunity to present some other explanation.

Ritchie J. also held that it is immaterial that the absence of his lawyer deprived O'Connor of his right to refuse to take the tests since s. 224(3)[11] of the Criminal Code permits the admissibility of such tests notwithstanding failure to warn the accused of that right. The learned judge then relies on the case of *Attorney General of Quebec v. Begin*[12] as establishing the proposition that illegally obtained evidence is admissible.

In effect, the *O'Connor* case decided that the right to counsel commences at trial. It did leave open the possibility that where an accused is not told of the charge against him and the trial court finds he would have made efforts to obtain counsel had he been informed of the charge, any evidence obtained before he is told may be inad-

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10 48 D.L.R. (2d) 110, at 116-117.

11 S. 224 (3) reads: In any proceeding under S. 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.

12 [1955] 5 D.L.R. 394, 112 C.C.C. 209. The issue was whether blood tests were admissible as evidence of drinking. The accused did consent so there was no problem of illegally obtained evidence. Therefore, the statement that illegally obtained evidence, if relevant, is admissible as long as it is voluntary is *obiter* and it was open to the court in *O'Connor* to re-examine the Canadian position on this matter. Secondly, H. W. Arthurs in *Civil Liberties* Vol. 1, No. 2, October 1965, points out that *Begin* was decided five years before the Bill of Rights was enacted. He then suggested that the requirement of "due process" should be read into Canadian criminal procedure. Section 1(a) reads: ". . . the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law." One could argue that since O'Connor was not warned of his right not to take the tests that the conviction was not by due process of law. For an illustration of how the courts have dealt with this matter see *Regina v. Martin,* (1961) 35 C.R. 276, at 289-291.

missible on the ground he was deprived of his right to counsel. That inference was not drawn by the Magistrate in this case.[13]

Finally, does the denial of the right to counsel permit the acquittal of the accused? Haines J. in the High Court stated that Parliament obviously intended that an abuse of the system of criminal justice nullifies the proceedings. Relying on a dictum in *Regina v. Steeves*,[14] Ritchie J. flatly rejects this contention.

The denial of the right to counsel before trial is not a ground for quashing a conviction. The remedies of an accused who is denied counsel during interrogation *may* be civil[15] or criminal.[16] A civil suit is hardly comforting to a man serving a prison sentence nor is it likely to eradicate illegal and unfair police practices. A criminal prosecution of the one who infringed the accused's right to counsel, if stringently enforced (and it is most unlikely that it would be) is more satisfactory since it might act as a deterrent to reduce the number of instances of illegal police practices, but it is not as satisfactory as the American position.

The United States Supreme Court has recognized certain basic legal rights which our Canadian courts have not considered. The Sixth Amendment to the Constitution of the United States reads:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

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[13] 57 D.L.R. (2d) 123, at 131, per Spence, J.: "There may well be cases where the same failure to warn the accused that he is under arrest and to state the charge against him results in the obtaining of evidence which could not otherwise have been obtained. It is not my view that we are in any way bound in the consideration of such cases by the result in the present appeal."

[14] 42 D.L.R. (2d) 335 (N.S.S.C.), [1964] 1 C.C.C. 266. In relying on the *Steeves* dictum, Ritchie J. indicates concern that a guilty person may be acquitted. At page 127 of the report, he quotes from the judgment of Ilsley C.J. in the *Steeves* case: "Reflection on the consequences of such a rule, if it were to exist in, for example, the case of capital murder will indicate, I think, that the relevant provision of the Canadian Bill of Rights cannot mean that."

[15] Coffin J. in *Regina v. Steeves*, [1964] 1 C.C.C. 266, suggests the accused might have a civil remedy. At 279-280 he refers to a number of cases which discussed such a remedy. They include *Commerford v. Board of School Commissions of Halifax*, [1950] 2 D.L.R. 207; *Fry v. W. H. Schwartz & Sons Ltd.*, [1951] 2 D.L.R. 198; *Blevins v. Walker Stores Ltd.*, [1952] O.R. 205, [1952] 2 D.L.R. 142; *Koechlin v. Waugh and Hamilton*, [1957] O.W.N. 245, 118 C.C.C. 24, 11 D.L.R. (2d) 447. However, Haines J. in the High Court rejected the suggestion of a civil remedy since Parliament has no right to confer a civil cause of action. He relies on *Transport Oil Ltd. v. Imperial Oil Ltd.*, [1935] 2 D.L.R. 500, and *Gordon v. Imperial Tobacco Sales Co.*, [1939] O.R. 122, [1939] 2 D.L.R. 27, in support of these statements. He also referred to the note on *Transport Oil Ltd.* in (1941) 19 CAN. BAR REV. 51.

[16] Coffin J. also discusses the possibility of a criminal remedy under s. 107 of the Criminal Code. See page 279 of the report. For a discussion of this topic see TARNOPOLSKY, W. S., THE CANADIAN BILL OF RIGHTS (Toronto: Carswell, 1966), 180-181. It is highly unlikely that such a remedy exists at the present time.

The courts have interpreted this to mean that an accused has the right to counsel at the interrogation stage of a criminal proceeding. A recent case[17] established that a suspect must be told he has the right to the presence of a lawyer prior to any questioning. The remedy for failure to comply with this is acquittal.

At this point, it might be useful to compare the wording of s. 2(*c*) (ii) of the Canadian Bill of Rights with that of the Sixth Amendment.

S. 2(*c*) of the Bill of Rights states that a person who is "arrested or detained" shall not be deprived of the right to counsel. The words "arrested and detained" can only evidence an intention on the part of Parliament to insure that the right to counsel would be available immediately upon arrest or detention. This view is fortified by the concluding words "without delay".

The Sixth Amendment, on the other hand, commences with the words: "In all criminal prosecutions". This phrase suggests that the right to counsel be confined to trial for it is there that an accused is "prosecuted". It is noteworthy that the word "proceeding" is not used. It would encompass every stage of the criminal process. However, it was not employed and there is no mention of a pre-trial stage now that the right to counsel is to be made available "without delay". Yet American law recognizes the accused's right to counsel before he is asked a single question.

A comparison of the two sections leads one to observe that the Canadian provision lends itself more readily to the American interpretation than does the Sixth Amendment itself. Why the Canadian interpretation has not developed in the American tradition is difficult to understand.

If the right to counsel is confined to trial, can the adversary system properly function? This system is alleged to begin when a person is deprived of his freedom in any way, but frustrated unless the suspect is allowed legal advice. The interrogatory stage is weighted heavily in favour of the police and a suspect is usually defenseless without a lawyer. The presence of counsel would insure that the accused is informed of his rights and by obtaining the facts earlier counsel can take advantage of fresh leads and assess the strength of the Crown's case, thus enabling him to prepare a better defense. Only when the accused has this right can the adversary system be said to exist prior to trial. Also, the presence of counsel would be the most complete safeguard against abusive techniques of interrogation.[18] Finally, with counsel present earlier in the criminal proceeding, there should be a great reduction in the number of accused who plead "guilty". The resulting increase in the number of cases that get to trial, will allow more people to make a "full answer and defense"

[17] *Miranda v. Arizona*, 86 S. Ct. 1602 (1966).

[18] This is the basis of Chief Justice Warren's majority opinion in *Miranda*. Most of his judgment discussed the need to eradicate unfair, illegal and brutal police practices.

and to have "a fair hearing in accordance with the principles of fundamental justice" as provided by s. 2(*e*) of the Bill of Rights.[19]

The main objection to the American position is the possibility of unwarranted acquittals resulting from restricted techniques of interrogation. Directly opposed to this argument is the existence of widespread abuses of police power. Do we want a society where police are permitted to break one law in order to enforce another? Surely, there must be a point where law enforcement submits to human dignity. Is it too much to expect that the police obey the law while enforcing it? Liberty may be as much endangered from illegal methods used to convict as from the actual criminals themselves.[20]

CONCLUSION

It is submitted that once an accused requests permission to contact counsel he should be given that opportunity. If he is refused permission then he should be acquitted. The words of the Bill of Rights do not provide that the suspect has the right to the presence of counsel but only that he has a right "to retain and instruct counsel without delay". For the reasons given above, it is preferable that counsel be present during interrogation. However, at the very least, once legal assistance is requested, no more should be done until the accused has been able to contact his lawyer for advice. Only then will s. 2(*c*) (ii) of the Bill of Rights have any meaning and only then can it be said that the accused has had a fair hearing and has been able to make his full answer and defense.

The problem raised in *O'Connor* will require an attempt by the courts to achieve a balance between effective enforcement of the law and protection of the individual from arbitrary or unfair police practices. It is clear that the United States Supreme Court considers the civil rights of an individual more important than the occasional acquittal of a guilty person. It is submitted that the Canadian position should be similar and it is regrettable that the Supreme Court of Canada has passed up this opportunity to achieve that end. In light of present day police practices, the same opportunity will probably arise in the near future. At that time it is hoped the court will reexamine the relevant provisions of the Bill of Rights and give them a meaning more in accordance with their wording, the intentions of the framers, and the human values of our society.[21]

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[19] For discussion of this whole field see (1965) 53 CALIF. L. REV. 337, (1961) 45 MINN. L. REV. 693, 44 KY. L.J. 103, (1963) 48 MINN. L. REV. 1. See also *Escobedo v. Illinois*, 378 U.S. 478, at 488-489 and Law Society of Upper Canada, SPECIAL LECTURES, 1963, at 57.

[20] See *Jackson v. Denno*, 378 U.S. 368, at 385-386, (1964).

[21] There may be hope that the Supreme Court of Canada will yet recognize the right to counsel during the interrogation stage of a criminal proceeding. If O'Connor had been denied counsel before the breathalyser tests were administered the court might have come to a different result. Spence J. in limiting his judgment to the questions submitted by the Magistrate seems to indicate there may be situations where such a right to counsel will be recognized.

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