

CHARTER UPDATE

A CHANGE IN CHARGE REQUIRES A SECOND CHANCE TO CONSULT COUNSEL

Bruce P. Elman

The theme of the denial of "right to counsel" appears to have endless variations. One such variation was the subject of the Supreme Court of Canada's recent decision in **Black v. The Queen**. As is usual in these cases, issues regarding the admissibility of evidence also arose.

The facts in this case are unremarkable. Late on the evening of the 11th of October, 1985, the Halifax police were summoned to an apartment in the Mulgrave Park district. When they arrived, they found Deborah Lynn Tufts with a stab wound near the throat. Based upon information received from those at the scene, the two police officers proceeded to the apartment occupied by Cynthia Virginia Black, the appellant. It was some time before the appellant opened her door. Ms. Black had a cut lip and appeared to be in an intoxicated state.

One of the police officers, Constable Small, advised Ms. Black that she was charged with "attempted murder". He read her the standard police warning and advised her that she had the right to call a lawyer. The other officer, Sergeant O'Neil, recalled that the appellant was told that she was being arrested "for a stabbing".

Ms. Black was taken to the police station and, at approximately 11:58 p.m., was placed in an interrogation room. She asked to speak to her lawyer, one Mr. Digby. Constable Small reached Mr. Digby at his home and advised him that the appellant was in custody and wished to speak to him. The officer, then, passed the phone to Ms. Black and left the room. The conversation lasted for 30 - 40 seconds.

For the next hour and a half, the appellant was left in the interrogation room. At 1:35 a.m., two officers entered to obtain pictures of the appellant and give her a change of clothes. They later returned to retrieve her clothes. On a third occasion, they entered the interrogation room to ask Ms. Black to identify a pair of sandals and a knife. The appellant was co-operative, identifying the sandals. She had no knowledge regarding the knife, however.

At about 1:40 a.m. Detective Benjamin and Constable Ross entered the interrogation room. Later, Detective Benjamin was to testify that Ms. Black appeared "nervous", "upset", and "under the influence of alcohol". Nonetheless, the officers proceeded to advise the appellant that Deborah Tufts had died and that she would now be charged with first degree murder. Ms. Black became emotionally distraught, reacting hysterically to this information. Once she had been calmed, the officers advised her of her rights in the following terms:

I wish to give you the following warning. You must clearly understand that anything said to you previously should not influence you or make you feel compelled to say anything at this time. Whatever you felt influenced and compelled to say earlier you are not now obliged to repeat nor are you obliged to say anything further but whatever you do say may be given in evidence. Do you understand that which has been said to you?

Once again, the appellant became agitated and requested to speak to Mr. Digby. Detective Ross attempted to reach Mr. Digby, but on each occasion the line was busy. Upon being asked whether she wanted another lawyer contacted, Ms. Black responded that she wanted to speak to Mr. Digby as she had spoken to him previously. The appellant did, however, speak to her elderly grandmother for five or six minutes and appeared much more relaxed following this telephone conversation.

Ms. Black asked whether she would be spending the weekend in jail and, when told that she would be, expressed concern for one of her children. She was asked for the location of the knife. She "grinned" and responded that it was "at home". She then gave a statement of an inculpatory nature to the police.

Following this, the police officers took Ms. Black to the hospital where she was treated for her injuries. A blood sample was taken which revealed a very high blood-alcohol level. Subsequently, Ms. Black was taken to her apartment. She went to kitchen drawer, took out a knife, and handed it to the officers indicating that it was the murder weapon.

Later, however, the appellant claimed that the statement she had given the police was untrue. She said that she had given the statement only because Detective had promised her that she would be released on bail if she did so. She claimed that she had invented the story so that she could be released for the weekend.

THE TRIAL: At the trial, Justice Kelly was confronted by two evidentiary issues. First, was the accused's initial statement to the police officers admissible? And second, was the evidence of the discovery of the knife subsequent to the confession admissible? In regard to the first issue, the trial judge focused on whether the accused had been given a full opportunity to consult counsel after being told that Ms. Tufts had died and that the charge was being changed from attempted murder to first degree murder. Justice Kelly noted

(Continued on Page 10)

**(Black v. The Queen
continued)**

that the change in charge "brought about a significant change in her legal position" and that "she was entitled to a further opportunity to consult counsel" under section 10(b) of the Charter. Ms. Black had been denied her right to counsel and, in Justice Kelly's view, the confession she gave to the police had to be excluded.

Subsequently, Justice Kelly had to decide whether to exclude evidence concerning the discovery of the knife. He concluded that the discovery of the knife followed the breach of the accused's rights and, adopting the same reasoning as regards the initial confession, Justice Kelly excluded this evidence as well. In the result, Ms. Black was acquitted of murder but convicted of manslaughter.

ON APPEAL: The Appeal Division of the Nova Scotia Supreme Court, with Justice Jones dissenting, took a different view of the case. In their opinion there was no violation of Ms. Black's right to counsel. If any violation of section 10(b) did occur, it was, according to Justice Pace, a "technical breach" not warranting exclusion pursuant to section 24(2) of the Charter. The majority of the Court ordered a new trial. Ms. Black appealed.

THE SUPREME COURT: The judgment of the Supreme Court is organized around the answers to five questions. Let us deal with them in order:

(1) Did the Appellant fully exercise her right to counsel during the course of her telephone conversation with Mr. Digby at 11:58 p.m.? The Crown argued that Ms. Black had fully exercised her right to counsel when she spoke to Mr. Digby at 11:58 p.m. The change of charge from attempted murder to first degree murder was, according to this line of reasoning, irrelevant. The Supreme Court disagreed. They noted that "an individual can only exercise his section 10(b) rights in a meaningful way if he knows the extent of his jeopardy". Thus the answer to question (1) was "no". The second question followed from the first.

(2) If not, was the appellant given a reasonable opportunity to exercise her right to counsel prior to giving the inculpatory statement? Ms. Black, in the Court's opinion, was not given a reasonable opportunity to consult counsel. The Court noted that the appellant had been reasonably diligent in attempting to obtain counsel. She was entitled to the lawyer of her choice and there was no reason to compel her to obtain a substitute for him. Ms. Black had asserted her right to counsel and, as there was no urgency, she should not have been compelled to make a statement without the opportunity of consulting with her lawyer.

(3) Did the appellant waive her rights? There was no express waiver by Ms. Black of her constitutional rights. Any waiver had to be implied from the circumstances of the case. In rejecting the Crown argument that Ms. Black had waived her

right to counsel, the Court pointed out that she was a known alcoholic, that she had limited intelligence and only a grade four education. In addition, she was drunk when apprehended, registering a high blood-alcohol reading an hour and a half after her arrest. She was emotionally distraught and, at times hysterical, during her interrogation. Even though Ms. Black had initiated the conversation with Constable Ross, the Court was not satisfied that she had waived her right to counsel. Having found a denial of right to counsel and no waiver of the right, the Court next tackled the issue of exclusion.

(4) If there was a breach of the appellant's section 10(b) rights should the inculpatory statement be excluded under section 24(2)? On this issue the Court concluded that the trial judge correctly rejected the inculpatory statement. In the Court's view, admission of the statement would have affected the fairness of the trial and violated the accused right against self-incrimination. The breach of Ms. Black's rights was serious one. The seriousness of the charge of murder, the Court noted, did not require the admission of the confession in evidence. One issue remained.

(5) If there was a breach of the appellant's section 10(b) rights, should evidence regarding the recovery of the knife be excluded? A question arose as to whether the evidence regarding the discovery of the knife was "obtained in a manner that infringed" Ms. Black's rights, that is whether this evidence fell within the ambit of section 24(2) of the Charter. The Supreme Court found that the evidence of the discovery of the knife was "derivative evidence obtained as a direct result" of the appellant's confession. The discovery of the knife was "inextricably linked" to the violation of Ms. Black's right to counsel. Both occurred "in the course of a single transaction". Therefore, the evidence of the discovery of the knife was clearly within the ambit of section 24(2) of the Charter. The question still remained whether the admission of the evidence of the discovery of the knife would bring the administration of justice into disrepute and, therefore, lead to its exclusion.

In answering this question, the Court separated the knife itself from Ms. Black's conduct during its recovery. In regard to the latter, the Court held that Ms. Black's conduct in retrieving the knife and any communication uttered during that recovery had to be excluded on the same basis as the original statement. The knife was a different matter. It was, according to the Court, "real evidence" which existed separate and apart from the breach of the appellant's rights. Furthermore, the Court noted, the knife would inevitably have been uncovered by the police without infringing on Ms. Black's right to counsel.

In conclusion, the Supreme Court granted Ms. Black's appeal and restored the trial verdict.

(Continued on Page 16)

**(Black v. The Queen
continued)**

COMMENT: There are both positive and negative aspects to the decision of the Supreme Court of Canada in **Black v. The Queen**. The Supreme Court's endorsement of the proposition, that an accused must be given a new opportunity to consult counsel when there has been a change in the offence charged, is an important development. There are many reasons supporting such a proposition. Most fundamentally, it is difficult to conceive of a meaningful consultation with counsel in the absence of information regarding the nature of the offence with which the accused is charged. Without information as to the offence charged, there is no opportunity for the accused to exercise fully her right to counsel.

Another welcome element in the Supreme Court's judgment is its affirmation of the notion that no causal connection between the infringement of the accused's rights and the obtaining of the questioned evidence is required for the exclusion of that evidence. The Court endorsed the notion put forward by Chief Justice Dickson in **Regina v. Strachan** ([1988] 2 S.C.R. 980 at 1006) that "all evidence gathered following a violation of a Charter right" should be considered "within the scope of section 24(2)".

The third positive aspect of the judgment involves the exclusion of evidence regarding the accused's words and actions in recovering the knife. This is the logical outcome of

applying the Chief Justice's statements in **Strachan** to the facts of the **Black** case. To the extent that the tests for exclusion of evidence in section 24(2) are, thereby, extended to derivative evidence this part of the Court's decision is an important reaffirmation of the notion that the ambit of the remedial power in section 24(2) of the **Charter** extends beyond evidence obtained directly as a result of a **Charter** violation.

On the discouraging side, however, we see, once again, the Court's almost knee-jerk reaction to the presence of physical evidence. The knife, it might be argued, was as much a part of the "unconstitutional transaction" as was the conduct, verbal and physical, of the accused in leading the police to her apartment and retrieving the knife for them. Diligent police work might have resulted in the recovery of the knife but that does not mean that the Crown should invariably get the benefit of such a presumption. The mere characterization of the knife as "real evidence" should not be determinative of its admissibility. Why is the disrepute attaching to the administration of justice any less problematic in relation to real evidence than any other type of evidence? The Supreme Court has yet to answer this question in convincing fashion.

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The Centre's research activities are complemented by an education programme consisting of public lectures, conferences and publications. The Centre also serves as a clearing house for information and materials relevant to constitutional studies.

The Centre for Constitutional Studies is located at the Faculty of Law at the University of Alberta in Edmonton. The John A. Weir Memorial Law Library possesses an extensive collection of constitutional, comparative constitutional, civil liberties and human rights materials.

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Le Centre d'études constitutionnelles a été institué en automne 1987 grâce aux efforts conjugués des départements d'Histoire et des Sciences politiques, et de la Faculté de Droit de l'Université de l'Alberta. Il reçoit l'appui financier de l'Alberta Law Foundation. Fondé surtout dans le but d'encourager et de promouvoir l'étude interdisciplinaire des questions constitutionnelles, le Centre offre, en plus de ses activités de recherche, un programme éducatif de conférences et de publications. C'est également un centre de documentation qui recueille les données et le matériel relatifs aux études constitutionnelles.

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