C.A.C. No. 129710

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. Lenihan, 1997 NSCA 56

BETWEEN:

OTIS EDWARD LENIHAN	)	Geoffrey P. Muttart
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Denise C. Smith
	)	for the Respondent
HER MAJESTY THE QUEEN	)	
	)	
Respondent	)	Appeal Heard:
	)	January 28, 1997
	)	
	)	Judgment Delivered:
	)	February 25, 1997
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THE COURT: Appeal dismissed per reasons for judgment of Hallett, J.A.; Chipman and Pugsley, JJ.A. concurring.

HALLETT, J.A.:

This is an appeal from the conviction of the appellant for driving a truck that, with its load, exceeded the maximum permitted on a public highway under the Regulations in force under the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293.

The appeal is direct to this Court on an agreed statement of facts pursuant to the provisions of ss. 829-838 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46.

Section 2 of the **Code** defines the "superior court of criminal jurisdiction" in Nova Scotia as the Supreme Court or the Court of Appeal.

The agreed statement of facts is the same as that agreed upon on the application before the trial judge to exclude, pursuant to s. 24(2) of the **Charter**, evidence of the weight of the truck; the agreed statement of fact is as follows:

> "At 8:40 a.m. on 1 August, 1995 the Appellant was driving a truck on Provincial Highway Number 101 near Wolfville, Kings County, Nova Scotia. That highway was and is a public highway within the meaning of **Motor Vehicle Act** and the truck was a vehicle covered by the legislation in issue.
>
> A peace officer specially appointed to monitor Nova Scotia's highways for overweight vehicles noticed the vehicle being driven by the Appellant and, based on visual observation, had reason to believe that the weight of the vehicle and its load was in excess of the maximum permitted under Section 2(1)(e) of the **Regulations** in issue. The peace officer stopped the vehicle using the emergency equipment on his vehicle. The peace officer then ordered the Appellant to drive the vehicle upon the peace officer's portable scales at the roadside in order to weigh an axle assembly of the vehicle. The Appellant did so and the weight in question, as indicated by the portable scales, was in excess of the aforesaid maximum permitted. The peace officer did not, at any material time, advise the Appellant that he had the right to retain and instruct counsel without delay pursuant to Section 10(b) of the **Charter**."

The trial judge concluded that: (i) the appellant was detained within the meaning of s. 10 of the **Charter**; (ii) he was not informed of his right to counsel nor given an opportunity to exercise such right; (iii) the right to counsel was not limited by necessary implication by s. 192 of the **Motor Vehicle Act**; (iv) the evidence was obtained as a result of the breach of the right to counsel; and (v) that the evidence of the weight of the appellant's truck should not be excluded. The trial judge dismissed the application and convicted the appellant.

Section 192 of the **Motor Vehicle Act** provide as follows:

> 192(1) Any peace officer having reason to believe that the weight of a vehicle and load is in excess of the maximum permitted by any regulations made under this Act, the Public Highways Act or any Act or regulation is authorized to weigh the vehicle either by means of portable or stationary scales, and may require that the vehicle be driven to the nearest scales, in the event such scales are within a distance of 8 kilometres.
>
> (2) The officer may then require the driver to unload immediately such portion of the load as may be necessary to decrease the gross or axle weight of the vehicle to the maximum therefor specified in the regulations.
>
> (3) In lieu of proceeding to such scales, the weight of the load may be determined by a portable weighing device provided by the peace officer and it shall be the duty of the driver of the vehicle to facilitate the weighing of the vehicle and load by any such device.
>
> (4) Any driver who, when so required to proceed to such scales or to assist in the weighing of a vehicle in his charge, refuses or fails to do so shall be guilty of an offence."

The essence of the appeal is that the scale readings were obtained as a result of the inspector detaining the appellant and requiring the appellant to drive his vehicle on to the portable scales without the inspector having advised him of his **Charter** right to counsel. It is asserted that the trial judge, therefore,

erred in admitting the evidence of the weight of the truck and its load as the evidence was "conscripted evidence" and ought to have been excluded by the trial judge pursuant to s. 24(2) of the **Charter** by reason that it would adversely and unfairly affect the trial process and most surely bring the administration of justice into disrepute.

I have reviewed the decision of the trial judge and have considered the submissions of counsel.

The Law

In this appeal we are dealing with a regulatory offence in contrast to a criminal offence.

The judgment of the Supreme Court of Canada in **R. v. Therens** (1985), 18 C.C.C. (3d) 481 in which the Court explained what constitutes a detention under s. 10 of the **Charter** was made in the context of a criminal offence.

The extent of the appellant's right to counsel under the **Charter** is subject to the context in which such a right is asserted.

In **R. v. Wholesale Travel Group Inc.**, [1991] 3 S.C.R. 154; (1991) 84 D.L.R. (4th) 161 the Supreme Court of Canada has stated that concepts developed in the context of criminal offences cannot be automatically applied to regulatory offences. In **Wholesale Travel** Cory J. stated at 84 D.L.R. (4th) 220:

> "...Regulatory offences provide for the protection of the public. The societal interests which they safeguard are of fundamental importance. It is absolutely essential that governments have the ability to enforce a standard of reasonable care in activities affecting public welfare. The laudable objectives served by regulatory legislation should not be thwarted by the application of principles developed in another context."

And at p. 228:

> "There is quite properly a difference or variation between what the principles of fundamental justice require in regard to true crimes and what they require in the regulatory context.
>
> . . . . .
>
> Regulatory schemes can only be effective if they provide for significant penalties in the event of their breach. Indeed, although it may be rare that imprisonment is sought, it must be available as a sanction if there is to be effective enforcement of the regulatory measure. Nor is the imposition of imprisonment unreasonable in light of the danger that can accrue to the public from breaches of regulatory statutes."

In **R. v. Fitzpatrick**, [1995] 4 S.C.R. 154; (1995), 102 C.C.C. (3d) 144 the Court at p. 157 apparently approved the foregoing comments of Cory J. in **Wholesale Travel**.

These remarks or policy considerations apply with equal force in considering the scope and limitations on the appellant's right to counsel in the case under appeal.

In **Collins v. The Queen**, [1967] 1 S.C.R. 265, 33 C.C.C. 1, the Supreme Court of Canada considered the purpose of subsection 24(2) of the **Charter**. It is the seminal judgment on the application of s. 24(2) of the **Charter**. The Court concluded that the purpose of the subsection was to prevent the administration of justice from being brought into further disrepute by the admission of the questioned evidence. The test to be applied is whether the admission of the evidence could bring the administration of justice into disrepute in the eyes of a reasonable person dispassionate and fully apprised of the

circumstances of the case.

The Court held that if the admission of the evidence in some way affected the fairness of the trial then evidence would tend to bring the administration of justice into disrepute and, subject to considerations of other factors, the evidence should generally be excluded. The Court focused on the nature of the evidence obtained as a result of the violation and made a distinction between real as opposed to conscripted evidence.

The Court held that real evidence that was obtained in a manner that violated the **Charter** will rarely operate unfairly for that reason alone as the real evidence existed irrespective of the **Charter** violation.

The Court held that, after a violation of the **Charter**, if an accused is conscripted against himself through a confession or other evidence emanating from him, the use of such evidence would render the trial unfair, for it did not exist prior to the violation of the **Charter** right. To admit such evidence would strike at one of the fundamental tenets of a fair trial; namely, the right against self incrimination.

In more recent judgments dealing with the exclusion of evidence pursuant to s. 24(2) of the **Charter**, the Supreme Court of Canada has focused on whether or not the evidence, be it real or conscripted evidence, would have been found but for the unconstitutional conduct. Such an approach has been applied to exclude real evidence obtained by reason of an unreasonable search (**Mellenthin** (1992), 76 C.C.C. (2d) 481 (S.C.C.)) and derivative real evidence which could not have been obtained but for the witness' testimony in violation of a s. 10(b) **Charter** right (**Burlingham** (1995), 97 C.C.C. (2d) 385 (S.C.C.)). These judgments are distinguishable on their facts from the factual situation we

are reviewing.

In **Mellenthin** the accused was charged with possession of narcotics. At trial the police relied on evidence that had been obtained on a search of the accused's motor vehicle when he had been stopped by the police on a random check stop of vehicles. The Supreme Court held that the narcotics found in a bag on the front seat, after questioning the driver, were real evidence that would not have been discovered were it not for the compelled search. It would affect the fairness of the trial should check stops of motor vehicles be accepted as a basis for warrantless searches and the evidence derived from searches were to be automatically admitted at trial. To admit evidence obtained in an unreasonable and unjustified search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process and bring the administration of justice into disrepute. The Court held that the attempt to extend the random stop program to include a right to search without warrant or without reasonable grounds constituted a serious **Charter** violation.

Mellenthin is distinguishable in that the police officer's search was a very serious breach of the accused's **Charter** rights as the random check stop program was never intended to authorize a search without warrant or without reasonable grounds which were not present on the facts. In the matter we are dealing with, the motor vehicle inspector did not exceed the bounds of the authorizing legislation in stopping the appellant's truck and causing it to be weighed on portable scales.

In **R. v. Burlingham**, the accused had been arrested as a murder suspect. He was questioned by the police. He was permitted to speak to his lawyer who advised him to stay silent. Nevertheless the police interrogation

continued despite the accused's insistence that he did not wish to speak to them. The police indicated to him that if he co-operated the charge would only be that of second degree murder. The accused eventually made a statement and took the police to a river where the murder weapon was later found. He also made an inculpatory statement to his girlfriend. The trial judge admitted the evidence of the gun but excluded certain other evidence. He was convicted of first degree murder. His appeal to the British Columbia Court of Appeal was dismissed. The Supreme Court of Canada allowed the appeal. The Court held that the accused's right to counsel had been violated and all the derivative evidence including the evidence concerning the finding of the gun, the identification of the gun, and the accused's statement to his girlfriend the following day should be excluded. The Court held that the admission of evidence, that could not have been found without the improper conduct by the police, is more likely to affect the fairness of the trial, and thus, ordinarily, should be excluded under s. 24(2) of the **Charter**.

Burlingham is clearly distinguishable from the case we have under consideration as the breach of Burlingham's right to counsel was found to be wilful and flagrant.

In both **Mellenthin** and **Burlingham** the admission of the evidence in face of serious **Charter** breaches and the conscripted nature of the evidence strike at the issue of trial fairness as the evidence would not otherwise have been discovered but for the unconstitutional conduct.

A second group of factors to consider are those going to the seriousness of the **Charter** breach such as whether the police acted in good faith and the availability of other investigatory techniques. The seriousness of the

offence is also a relevant consideration but its relevancy depends on the nature of the **Charter** breach (**Collins**, supra).

The Court in **Collins** concluded that the final factor to consider is whether the administration of justice would be better served by the admission or the exclusion of the evidence. The Court also stated that the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate a charge where there has been a trivial breach of the **Charter**.

A case dealing with an issue not unlike that raised in this appeal is that of **R. v. Simmons**, [1988] 2 S.C.R. 495, (1988), 45 C.C.C. (3d) 296. In that case evidence as to the finding of narcotics carried by the accused, although obtained following a breach of the accused's rights under ss. 8 and 10(b) of the **Charter** could not affect the fairness of the trial as the accused was in no way conscripted against herself and the customs officers, in searching the accused, acted in good faith based on accepted customs procedure. The Court held that the evidence should be admitted.

The Issue

The key argument advanced by counsel for the appellant was founded on the assertion that the truck driver was detained and forced to incriminate himself by driving the truck on the scale without having been advised of his s. 10 **Charter** right to counsel and but for the unconstitutional conduct the evidence of the weight of the truck would not have been discovered.

In **R. v. Fitzpatrick**, the Supreme Court of Canada stated that the rationale behind the principle against self incrimination is as follows:

> In *Jones, supra*, at p. 368 C.C.C., p. 661 D.L.R., the Chief Justice identified the two fundamental purposes behind the principle against self-incrimination as

> being: first, to protect against unreliable confessions, and second, to protect against the abuse of power by the state. He further stated, at p. 374 C.C.C., p. 666 D.L.R., that in his view any limits on the principle against self-incrimination should be determined by reference to these two underlying rationales."

In my opinion, neither of these two fundamental purposes are infringed in the case we have under consideration.

We are not dealing with unreliable confessions. The evidence as to the weight of the loaded truck would be determined with presumed accuracy by the portable scales and would not be dependent on what might be unreliable statements made by an accused under the circumstances of police interrogation.

With respect to the second purpose to protect against the abuse of power by the state, a person who participates in a regulated industry such as trucking certainly does not have an absolute right to be left alone. He must, for the public good, be subject to reasonable inspections to ensure that his vehicle is being operated safely. That is a primary purpose of the weight restriction legislation.

The Court, in **R. v. Fitzpatrick**, made a statement that is particularly appropriate to the questions raised on this appeal. The Court stated at p. 164:

> "The principle against self-incrimination was never intended to assist individuals in committing regulatory offences, and should not be extended to protect the appellant from prosecution in the present case."

The foregoing general observation was made in connection with the requirement for mandatory reports of fish landings for all persons participating in the commercial fishery. However, the observation is equally applicable to commercial truckers who are observably violating weight restrictions on vehicles

on public highways. I do recognize that in **Fitzpatrick** the Court made the point that the mandatory reports of fish landings, while they constituted evidence of a sort that emanated from the accused, were made to assist in the routine administration of the **Fisheries Act** and were not reports by just one person in response to a criminal investigation. That observation does not derogate from the general statement that the principle against self-incrimination was never intended to assist persons in committing regulatory offences.

Disposition

Assuming, without deciding, that there was a detention and, therefore, a requirement to advise the appellant of his right to counsel, I am of the opinion that the trial judge, in exercising his discretion under s. 24(2) of the **Charter**, properly refused to exclude the evidence of the scale readings. The Supreme Court of Canada's judgment in **Collins** dictates that there are three groups of factors to consider in making a determination whether to exclude evidence under s. 24(2). The trial judge considered these factors and I will now do so.

First, as to the fairness of the trial: the admission of the evidence of the truck's scale weight was not evidence that emanated from the appellant; the evidence was real evidence and existed irrespective of the alleged violation of s. 10(b) of the **Charter**. The weight of the loaded truck was not transformed into self conscripted evidence simply because of the participation of the appellant in driving the vehicle on the portable scales. The evidence of the overweight vehicle was under the nose of the inspector. The discovery of the evidence was not as a result of the inspector's assumed unconstitutional conduct in failing to advise the appellant of his s. 10(b) **Charter** right. The weight of the truck would

have been ascertained, even if the appellant had been advised of his right to counsel.

Section 192(3) of the **Motor Vehicle Act** requires the driver of the vehicle to facilitate the weighing of the vehicle on the portable scales. The constitutionality of s. 192 of the **Motor Vehicle Act** was not in issue in this appeal.

Secondly, as to the seriousness of the assumed **Charter** violation, the breach was trivial; it was not flagrant nor egregious. With respect, I disagree with Campbell J.'s findings respecting a similar fact situation in **R. v. Gray** (1987), 67 Nfld. & P.E.I.R. 141 in which he found that the evidence of the weight of the truck was properly excluded by the trial judge pursuant to s. 24(2) of the **Charter**. The trial judge did not make a finding of bad faith on the part of the inspector; the inspector was acting within the parameters of the legislation.

With respect to the third element of the **Collins** test, whether the judicial system's repute would be better served by the admission or the exclusion of the evidence, I have no doubt, that on these facts, society's interest in seeing that trucks are not overloaded and, therefore, unsafe when operating on public highways, is better served by the admission rather than the exclusion of the evidence. This was a minor regulatory offence that involved minimal legal consequences. As noted by Cory J. in **Fitzpatrick**, the objective served by regulatory legislation should not be thwarted by principles developed in the context of criminal proceedings in which there are serious legal consequences that reasonably require that a person detained be advised of his s. 10(b) **Charter** right.

Having considered the **Collins** criteria, I am satisfied that the trial judge

did not err in refusing to exclude the evidence. I wish to reiterate that I have not decided that the appellant had the right to be advised of his right to counsel as guaranteed by s. 10(b) of the **Charter**.

Obiter Dicta

This appeal came before us on the narrow ground that the trial judge erred in admitting the evidence of the weight of the truck. I would not wish it to be thought that this Court agreed that the appellant, in these circumstances, had a right to counsel. That issue was not before us. There was not any evidentiary basis for the trial judge to have done a proper s. 1 **Charter** analysis as the application to exclude the evidence proceeded before him on the very terse agreement of facts that I have quoted in this judgment.

However, I question whether the appellant had a **Charter** 10(b) right to counsel under the circumstances. I tend to think that s. 192 of the **Motor Vehicle Act** of this Province and the Regulations restricting the weight of vehicles permitted on public highways of the Province are designed, not only to preserve the highways but to make them safe for other motorists. While there is no evidence before us, common experience tells us that overloaded transport trucks [and in particular, overloaded pulp trucks] can present a serious danger to other motorists using the highways. The case law tells us that legislation, the objective of which is to make the highways safe, can be justified under s. 1 of the **Charter**, although it infringes a right guaranteed by the **Charter** (**R. v. Saunders** (1988), 41 C.C.C. (3d) 532; and, **R. v. Ladouceur** (1990), 56 C.C.C. (3d) 22; [1990] 1 S.C.R. 1257; 108 N.R. 171).

It would seem to me that if provincial legislation that: (i) authorizes a

police officer to randomly stop vehicles and require the driver to undertake certain co-ordination tests which can have very serious criminal consequences (**Saunders**); or (ii) authorizes a police officer to randomly stop vehicles to check drivers' licenses and insurance, the sobriety of the driver and the mechanical fitness of the vehicle (**Ladouceur**) is justifiable under s. 1 of the **Charter**, then s. 192 of the **Motor Vehicle Act** and the **Regulations** creating the offence of operating an overweight truck on a public highway in this Province could also be justified as a reasonable limit on the s. 10 right to counsel arising upon a stop of the overweight truck for the purpose of weighing it. I doubt that the framers of the **Charter** could ever have intended that every time a peace officer stops a motor vehicle for a minor traffic violation that the motorist was to be advised of his right to counsel.

The appeal ought to be dismissed.

Hallett, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.

C.A.C. No. 129710

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

OTIS EDWARD LENIHAN

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY:

HALLETT, J.A.