IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Rhyno. 2010 NSPC 24

Date: March 4, 2010
Docket: 1826873, 1826874
Registry: Halifax

Between:

Her Majesty the Queen

v.

Duane Alan Rhyno

Judge:	The Honorable Judge Jamie S. Campbell
Decision:	March 4, 2010
Charge:	CC 253(b); CC 253(a)
Counsel:	Rick Hartlen, counsel for the Crown Stanley MacDonald, counsel for the Defendant

1) The legal issue involved in this matter is one that is working its way through the levels of courts across the country. Eventually it will be resolved, just not here and not now.

2) That issue is whether the amendment to s. 258 Criminal Code, contained in the Tackling Violent Crime Act, S.C. 2008, c. 6 (Bill C-2) applies to offences that are alleged to have occurred before the effective date of the legislation. If the amendment is considered to be a substantive one, in that it removes a defence that would otherwise have been available, it should not have retrospective application. If it is a procedural matter, then it can apply retrospectively.

3) Judges, particularly my colleagues in this Court, Judges Sherar and Burrill have reached opposite conclusions.

4) The accused in this matter is Duane Alan Rhyno. On September 25, 2007 he was charged with impaired driving and operating a motor vehicle with an illegal blood alcohol content. Mr. Rhyno gave notice to the Crown of his intention to call "evidence to the contrary". The purpose of that evidence would be to rebut the statutory presumptions of accuracy and identity. It is anticipated that the evidence would consist of his own testimony concerning his consumption of alcohol on the

day in question and the testimony of an expert in the area of the absorption, distribution and elimination of alcohol and the operation of the instrument used. The purpose of that evidence would be to establish the "Carter defence", named after the Ontario Court of Appeal decision in *R.* v. *Carter* (1985), 19 C.C.C. (3d) 174.

The Carter defence:

5) When this offence is alleged to have occurred, 25 September 2007, section 258 of the Criminal Code provided that once certain facts had been proven, the level of blood alcohol concentration established by the taking of breath samples, was presumed to have been the blood alcohol level at the time the offence occurred. The Crown then did not have to bring expert evidence to prove that. This is the perhaps confusingly named "presumption of identity". It has nothing to do with anyone's identity, but does have to do with the presumption that the level at the time of the test was identical to the level at the time of the alleged offence.

6) The Carter defence enabled the accused person to bring "evidence to the contrary" to attempt to raise a reasonable doubt about the level of blood alcohol at the time of the offence. This would often involve evidence from the accused

person as to his or her alcohol consumption and opinion evidence from a toxicologist to establish that if the accused had been drinking as he or she claimed, the blood alcohol level would not have been as indicated by the analyzed breath sample.

Bill C-2:

7) Bill C-2 was enacted on 2 July 2008. It provides that the breath sample is conclusive proof of the blood alcohol level at the time of the alleged offence unless the instrument malfunctioned or was improperly operated, the malfunction or error resulted in the reading indicating that the accused was over the legal limit and the accused's blood alcohol level would not have been over the legal limit at the time he or she was driving or in the care and control of a motor vehicle.

8) Bill C-2 also provides that testimony cannot be given with respect to the alcohol consumption of the accused person or his or her rate of elimination of alcohol. It precludes the calculation of the blood alcohol concentration of the accused based on those factors as a way of showing that there was a problem with the instrument or the procedure. The accused can lead evidence to show that something else happened between the time of the alleged offence and the taking of

the breath samples.

Statutory Interpretation:

9) As a general rule statutes are not to be construed as having retroactive operation unless that legislative intention is made clear. The rule does not apply to laws that relate only to procedural or evidentiary matters. A person does not have a "vested right" in a procedure or in the manner of proof that can be used against him or her.

10) The issue is then whether the amendments contained in Bill C-2 are matters of substantive law or matters of evidence or procedure.

Differing Interpretations:

11) Justice Duncan in *R.* v. *MacDonald,* [2008] O.J. No. 4297 (Ont. C. J.) put the matter succinctly.

> "Since July 2 there has been an avalanche of thoroughly researched and well reasoned decisions on the retrospectivity point.... Little can be added to the discussion contained in

> these cases and the authorities cited therein. They demonstrate that characterization of the amendments as evidentiary/procedural versus substantive, as affecting vested rights or not, is an exercise that does not yield a simple or conclusive answer. Learned judges reading the same legislation and relying on the same case of higher authority have come to different conclusions. As Fontana J. put it in R. .v Hayes, [2008] O.J. No. 4095, 2008 ONCJ 494, " there is as good a reason for viewing it one way as there is for anther."

Prospective Application:

12) In *R.* v. *Primrose*, [2008] N.S.J. No. 613 Judge James Burrill found the amendments to have affected substantive rights. He found that the amendments had "essentially legislated away that which allowed the former legislation to pass constitutional muster". He stated that the Carter defence is what had saved the legislation from constitutional challenge, and that making the defence insufficient in and of itself, would be a substantive change to a constitutional right.

13) A previously available defence is said to have been practically eliminated. While an accused can still rebut the presumption, the defence has, by the amendment, been rendered impractical. The legislation was found to be constitutional because of the availability of the Carter defence. It has been argued that the amendments interfere with the fundamental principle regarding the

admissibility of evidence. Evidence of consumption of alcohol, which was both logically and legally relevant has become excluded. The practical implication for the accused is that he or she must now provide evidence at trial that he or she would not have known would be required when the incident occurred.

Retrospective Application:

14) In *R.* v. *Delorey*, [2009] N.S.J. 1, Judge Sherar reached the opposite conclusion. He adopted the reasoning of Justice Hearn in *R.* v. *Slen*, [2008] O.J. No. 4394.

15) Justice Hearn found that a "change of procedure or rule of evidence can operate retrospectively even where it abridges a strategic advantage available to a defendant". para. 34 While the position of the accused person at trial has been adversely affected, what has been altered is that where test results are challenged the type of evidence led in support of the Carter defence will not be capable of rebutting the presumption on which the Crown relies. The legislation preserves the ability to challenge the accuracy of the readings provided that some evidence is available beyond the typical "Carter" evidence to show that the machine malfunctioned or was improperly operated.

16) The elements of the offence have not been altered nor has the burden of proof been changed. The presumption of innocence has not been disturbed. It is argued that the amendments do not eliminate a defence that was previously available. The accused can still rebut the presumption. It is only the method of proof that has changed.

Ontario Court of Appeal:

17) Decisions of Ontario Court of Appeal are, while not binding on courts in Nova Scotia, very persuasive authorities. That Court has addressed the matter in *R.* v. *Dineley* 2009 ONCA 814.

18) The Court held that the amendment of Bill C-2 did not take away the Carter defence but added to its requirements. The accused can still can lead evidence that his consumption should have been under the legal limit, but he must also show an instrument or operator mistake that would have resulted in the breath readings being erroneous. The additional requirements were essentially evidentiary in nature.

19) The Court held that the comments about the Carter defence being "effectively neutered", or practically abolished were both speculative and overstated.

> "The Carter defence has not been virtually eliminated, neutered or abolished. It has been changed, but it survives in a different form, subject as always to the ingenuity of defence lawyers and the new jurisprudence that the courts will inevitably enunciate." para. 26

20) The legislation requires the defence to address the reliability of the instrument in order to get an acquittal. It does not direct the content of the evidence necessary to raise a reasonable doubt.

21) The Ontario Court of Appeal held that the legislation should have retrospective effect because it merely alters the content of a defence rather than removing or eliminating a defence.

Conclusion:

22) Two interpretations are reasonable. Everything that can be said in support of either position has been said, re-said and carefully interpreted. Neither view is

illogical. A choice still has to be made between two reasonable options.

23) Mr. MacDonald, on behalf of the accused has urged me to decline to follow the Ontario precedent. If the Ontario Court of Appeal had been overtaken by its first and only collective spasm of irrationality, and if I were to somehow be the first Provincial Court judge in the country to be confronted with the published proof of that unique instance, it is a windmill at which I might well be inclined to tilt. As it stands, the decision in *R.* v. *Dineley* (supra) is, to no one's surprise, entirely reasonable. Given a choice between two reasonable interpretations it is appropriate, for me at least, to defer to the Ontario Court of Appeal. The decision is persuasive authority. I am persuaded by it.

24) I find then that the provisions of Bill C-2 should be read retrospectively.

J