

Chapter Update

**SUPREME COURT OF CANADA IN
BRYDGES EXPANDS RIGHT TO COUNSEL**

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On the 29th of March, 1979, Elizabeth MacLeod, a retired school teacher, was murdered in her own home in Edmonton. For six and a half years, no arrests were made in connection with the case. On the 16th of December, 1985, William Brydges, a twenty-two year old Albertan, was in Strathclair, Manitoba visiting with his step-father. Brydges had only a minor criminal record: one conviction for impaired driving and another for failing to appear for fingerprinting in relation to the same offence. Detective Ron Harris of the Edmonton City Police was also in Strathclair on that day. He was there to arrest Bill Brydges for the murder of Elizabeth MacLeod. Harris' interrogation of Brydges following his arrest formed the factual context for an important Supreme Court of Canada decision on the scope of the right to counsel.

The Interrogations:

After his arrest in Strathclair, Brydges was transported to the R.C.M.P. detachment in Brandon. Upon their arrival in Brandon, Detective Ron Harris began his first interrogation of Bill Brydges. It went as follows:

Ron: Okay Bill, this is your copy of the warrant I was telling you about okay. ... There is a couple of things I want to go over with you. Okay first of all ah, you acknowledge the fact that... I placed you under arrest for this murder.

Bill: Um hum.

Ron: Ah I informed you there that ah, it was our duty to inform you that you had the right to instruct counsel. And I asked you if you understood what that meant. And you said yes.

Bill: Yeah.

Ron: Okay. Ah...You didn't want to phone a lawyer out there. Ah you can phone one from here if you want. **If you know one.**

Bill: I don't know of any.

Ron: Did you want to try and get a hold of one here.

Bill: Well. Do they have any free Legal Aid or anything like that up here?

Ron: I imagine they have a Legal Aid system in Manitoba. I'm ...

Bill: (Unintelligible)

Ron: ...not familiar with it but...

Bill: Won't be able to afford anyone, heh? That's the main thing.

Ron: Okay. You feel ah there's a reason for you maybe wanting to talk to one right now.

Bill: Not right now no.

Ron: Okay. Ahh. I'm gonna read from this blue card again.

Bill: Okay. [Emphasis Added]

Detective Harris read the standard police warning to the accused. Brydges acknowledged that he understood the warning. Then the questioning regarding the circumstances of the offence began. According to the Crown, a number of inculpatory statements were made by the accused. Brydges, however, interrupted the flow of questioning and the following exchange took place:

Bill: I just think that I should talk to someone. Maybe from Legal Aid or something then I. (Pause) Is that gonna be possible for me to get a hold of someone.

Ron: I can try and arrange it, sure.

Bill: I'd like to try to talk to someone first.

Ron: Okay.

Bill: And that way, I might feel, feel a little bit easier about talking.

Ron: About what happened?

Bill: About everything, yeah.

Ron: Okay. I don't know if I can get a hold of a Legal Aid lawyer.

Bill: I can't afford anyone else.

Ron: But well, what, I don't think their gonna charge you for advise. (Pause) Do you want me to try and get one?

Bill: Yeah, if you can get a Legal Aid, first.

Ron: Do they have Legal Aid in Manitoba?

Bill: I don't know, I don't know.

Ron: Okay, I'll check.

Following this conversation, the detective obtained a list of Legal Aid lawyers and contacted one who attended at the detachment and interviewed Brydges. After this consultation, Detective Harris tried to continue his interrogation of Brydges. Brydges, on the advice of counsel, refused to answer any further questions.

The Trial:

Brydges' trial before Justice Wachowich of the Alberta Court of Queen's Bench, sitting with a jury, began on the 12th of January, 1987 and concluded on the 20th of the same month. As the trial opened, the prosecution led circumstantial evidence implicating the accused in the murder of Elizabeth

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(Brydges continued)

MacLeod. On the fourth day, the trial entered a voir dire to test the admissibility of the statements made by Brydges to Detective Harris. These statements were the heart of the Crown's case against Brydges. At the conclusion of the voir dire Justice Wachowich excluded the statements. Justice Wachowich was of the view that Brydges, in spite of some equivocation, had requested the assistance of counsel but was unsure if he could afford one, not knowing whether Legal Aid was available. The trial judge held that Detective Harris, in not advising Brydges regarding the availability of Legal Aid, failed to provide the accused with a reasonable opportunity to exercise his Charter right to retain and instruct counsel. Furthermore, Justice Wachowich determined that the admission of the statements in these circumstances would bring the administration of justice into disrepute. Consequently, he excluded the statements from evidence. At this point, the prosecution concluded its case offering no further evidence. Defence counsel applied to have the case taken away from the jury on the basis that there was no evidence upon which a reasonable jury, properly instructed, could reach a verdict of guilty. Justice Wachowich instructed the jury to return a verdict of not guilty, which they did after a short deliberation.

The Court of Appeal:

The Crown appealed Justice Wachowich's decision. The Alberta Court of Appeal, Justice Herradence dissenting, overturned the trial verdict and ordered a new trial. The Court's decision was based upon three propositions. First, the Court concluded that there had been no restriction on Brydges' right to counsel. The majority disagreed with the trial judge's finding that the accused had requested counsel and that he had been concerned about the affordability of such counsel. They were of the opinion that the accused had failed to prove that there had been a breach of his rights. Furthermore, as far as the majority was concerned, when the accused said "Not right now, no" he had clearly waived his right to counsel and "elected to go it alone".

The second proposition advanced by Justice McClung, writing for the majority, was that before the evidence could be excluded under section 24(2) of the Charter a causal connection between the violation of the right and the obtaining of the evidence had to be established. The majority found no causal connection. Finally, the majority held that considering the merits of exclusion, the evidence, in any event, ought not to have been excluded.

Justice Herradence dissented. In his view, it was unnecessary to consider whether Brydges had been permitted a reasonable opportunity to retain and instruct counsel because the police had failed in their duty to properly inform the accused of his rights. When the accused indicated that he

could not afford a lawyer without Legal Aid, Detective Harris should have immediately looked into the availability of Legal Aid and promptly advised Brydges of how he could contact a lawyer. Justice Herradence noted: "The alacrity with which counsel was produced after the Respondent's statement was recorded demonstrates that such information was readily at hand".

Having adopted this view of the case, the issue of the accused's waiver of his rights was simplified. In Justice Herradence's opinion, Brydges could not waive his right to counsel because he had never fully understood the extent of the right. He concluded by holding that the evidence was properly excluded by the trial judge. Justice Herradence's dissent provided Brydges with his appeal as of right to the Supreme Court of Canada.

The Supreme Court of Canada:

The Supreme Court of Canada overturned the decision of the Alberta Court of Appeal and re-instated the decision of Justice Wachowich. The Court unanimously held that there was ample evidence to support the trial judge's finding that Brydges had requested counsel but was under the impression that his inability to pay for a lawyer precluded him from retaining one. All members of the Court were of the opinion that, in the circumstances of this case, the police were under a duty to inform Brydges of the existence of Legal Aid and duty counsel. Detective Harris' failure to do this was a denial of the accused's right to counsel.

Furthermore, the entire Court was of the opinion that there could be no waiver of the right to counsel in this case as the accused did not fully understand the extent of his right to counsel. Therefore, Brydges was not in a position to carefully weigh the consequences of waiving his right to retain and instruct counsel at that time.

Finally, the Court was also unanimous in holding that the evidence was properly excluded pursuant to section 24(2) of the Charter. In discussing this issue, the Court made two important points. First, under section 24(2) there is no requirement that the accused demonstrate a causal connection between the violation of the right and the obtaining of the impugned evidence. According to the Court, section 24(2) arises whenever a rights violation occurs during the course of gathering evidence. Second, the mere fact that the charge is a serious one provides no justification for admitting the evidence if the violation is a serious one and the fundamental fairness of the trial is at stake.

The judgement of the Supreme Court did not end here, however. In an unusual twist, a majority of the Court (Justice LaForest excluded) placed police forces on notice

that as part of the informational component of the constitutional guarantee of the right to counsel, any person arrested or detained must be advised of the existence and availability within the jurisdiction of Legal Aid and duty counsel systems. A thirty day grace period was provided to police forces to implement this ruling.

Observations:

This is a most important judgement on the extent of the constitutional guarantee of right to counsel in Canada. The Court has essentially expanded the scope of the duty upon the police when informing an accused of his right to counsel. Police are now obliged to inform the detainee of the existence of Legal Aid schemes and how to make use of them. This is a recognition of the fact that most individuals coming before our criminal courts are indigent and must rely on the applicable Legal Aid or duty counsel system. As a corollary, it is an acknowledgement of the fundamental role played by provincial Legal Aid plans in the administration of justice. At its heart the Court's judgement says: If you do not inform the detainee about Legal Aid, you are not really informing him/her about the right to counsel.

This judgement is equally important on the exclusion of evidence issue. The Court indicates, in the strongest possible terms, that section 24(2) of the Charter does not require a causal connection between the violation of a constitutionally-protected right and the impugned evidence. It will be sufficient if the accused shows that the violation occurred during the gathering of the evidence. Secondly, the Court indicates that it is no bar to a successful section 24(2) application that the offence charged is a serious one. Trial courts and provincial courts of appeal can no longer use these arguments to restrict the scope of exclusion of evidence under section 24(2).

The Supreme Court has, once again, demonstrated its concern with the scope and integrity of the constitutional guarantee of the right to counsel. *Brydges v. The Queen* will have important consequences in the administration of our criminal justice system.

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GREFFE v. THE QUEEN: JUST BECAUSE EVIDENCE IS REAL DOESN'T MEAN IT IS ADMISSIBLE

The Supreme Court of Canada recently overturned another Alberta Court of Appeal decision concerning the exclusion of evidence pursuant to section 24(2) of the Charter. Based upon confidential information received from the R.C.M.P., Customs officers searched Marc André Greffe upon his arrival from Amsterdam at Calgary International Airport. They suspected that Greffe was transporting heroin into Canada. The officers conducted a search of the accused's clothing and baggage and then a strip search. These visual and personal searches produced no drugs.

Only at this point in time was the accused arrested, for outstanding traffic warrants, and advised of his right to counsel. He was also informed that he would be taken to a hospital where a doctor would perform a body search. During the course of the doctor's search a condom containing heroin was removed from the accused's anal cavity. The accused was charged with one count of unlawfully importing heroin into Canada and one count of unlawful possession of heroin for the purpose of trafficking.

On the evidence presented at trial, it was generally accepted that there had been a denial of the accused right to counsel (s.10(b)) as well as a violation of his right to be free from unreasonable search and seizure (s.8). Thus the trial turned on whether the evidence of the heroin -- obtained as it was after the accused's s. 10(b) and s. 8 rights had been infringed -- should be excluded. The trial judge excluded the evidence and an acquittal followed. The Crown appealed and the Alberta Court of Appeal overturned the trial judge's decision. The Supreme Court of Canada, by a 4 - 3 majority, re-instated the trial judge's ruling.

Although there is much of interest in the case, perhaps the most significant aspect of the Supreme Court of Canada's judgement concerns the treatment of "real evidence". Much had been made at the

Court of Appeal of the fact that the tainted evidence (the heroin) was "real", or physical, evidence which existed irrespective of the rights violations. The proposition that the admission of real evidence is less constitutionally problematic than the admission of other types of evidence had its origin in an obiter statement in the case of *Collins v. The Queen* [1987] 1 S.C.R. 265. The reasoning ran something like this: the purpose of excluding illegally obtained evidence under section 24(2) of the Charter is, at least in part, to ensure a fair trial. To admit evidence, such as a confession, which depends upon a Charter violation for its existence would be unfair. On the other hand, it is not unfair to admit real evidence, such as drugs, the existence of which pre-dates the Charter violation.

In this case, the drugs found in Greffe's anal cavity were excluded even though their existence pre-dated the violations of the accused's rights. The majority in the Supreme Court noted that "fairness" is only one factor to be considered. In this case, according to the majority, special emphasis should have been placed upon the seriousness of the violations. And the majority was of the opinion that there had been very serious violations of Greffe's constitutional rights. Thus the majority re-instated the trial judge's ruling to exclude the evidence of the heroin found as a result of the anal search.

The message is clear: Just because evidence is real doesn't mean it is admissible. In determining admissibility under s.24(2) a trial court must, regardless of the type of evidence presented to it, balance the following concerns: the fairness of the trial, the seriousness of the rights violation, and the effect of exclusion on the integrity of the administration of justice. Therefore, notwithstanding the heinous nature of the offence, the Court was duty bound in this case to exclude the evidence. [B.P.E.]