S.C.C. No. 02724

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Freeman, JJ.A.

Cite as: R. v. Girard, 1993 NSCA 44

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	William D. Delaney
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	
FRANCOIS GIRARD	)	John A. Black
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Appeal Heard:
	)	January 27, 1993
	)	
	)	
	)	Judgment Delivered:
	)	February 12, 1993

THE COURT: The appeal is allowed, the acquittal is set aside, the conviction is entered and the matter is remitted to the Provincial Court for the imposition of sentence as per reasons for judgment of Chipman, J.A.; Hallett, J.S., concurring; and Freeman, J.A., dissenting by separate reasons.

CHIPMAN, J.A.:

This is an appeal by the Crown from the acquittal of the respondent in Provincial Court on a charge that he had the control of a motor vehicle while the quantity of alcohol in his blood

exceeded 80 milligrams per 100 millilitres of blood contrary to s. 253(b) of the **Criminal Code**.

The respondent was a member of the Canadian Armed Forces stationed on a ship based in Halifax. On December 13, 1991 at about 1:15 a.m., the Halifax City Police encountered him on Fern Street in the city. He was seated in the driver's seat of a red Nissan truck with the keys in the ignition. It was parked on the sidewalk. At this time and following his exit from the truck, the police officers noticed obvious signs of impairment by alcohol.

Constable Robertson read the standard breathalyzer demand to which the respondent replied that he understood. The constable then gave the respondent the standard police caution and his s. 10(b) **Charter** rights. He asked the respondent if he understood and again he said that he did. The respondent was taken to the station at about 1:38 a.m., placed in a holding cell and provided with a telephone book and a list of Legal Aid lawyers. Robertson who spoke no French had spoken in English to the respondent who seemed, in spite of his signs of alcoholic impairment, to understand. The respondent had told him in English, in which the officer detected no accent, that the two citizens who apprehended him following his flight from the scene of an accident were crazy and that they were "after him". After being provided with the phone book and the list, the respondent then said that he wanted a French speaking lawyer. Robertson knew of none, but made a couple of calls from the list of Legal Aid lawyers and received no help. After consulting his sergeant he called a French speaking member of the Forces, Joseph Paradis, to act as a translator. Paradis arrived at 2:00 a.m. He read to the respondent in French the breathalyzer demand, the police caution and the **Charter** rights. The two of them spoke in French extensively. The respondent then advised Robertson and Paradis that he did not want a lawyer and was prepared to take the test. The breathalyzer was prepared and the first sample taken at 3:01 a.m. - very close to the two hour limit. Results of the two readings at 3:01 a.m. and 3:18 a.m. were 130 and 140 milligrams per 100 millilitres of blood respectively.

Joseph Paradis was a member of the military police and so identified himself to the respondent. He testified that he was French speaking. He came to the station and spoke to the respondent in French. He advised him of the names and numbers of Legal Aid lawyers. The

respondent asked if it was possible to contact a French speaking lawyer and Paradis stated that it would be possible. It was at that time that the respondent said that he did not wish to contact a lawyer. He conceded on cross-examination that he was not able to say that there was or was not French speaking counsel in fact available either at 2:00 a.m. or at any other time. In any event, the respondent declined to consult counsel and agreed to take the test. Paradis then explained to him in French the procedures for setting up the breathalyzer. The results of the analysis were given to and explained to the respondent in French.

The respondent testified through an interpreter. He said that he understood just basic words in English. On the evening in question, he had had four or five beers prior to returning in his vehicle to the ship on which he was stationed. On the way, he became distracted while changing a tape and ran into a parked car on Isleville Street. Fear of the two witnesses who arrived at the scene prompted him to flee. He was apprehended by them and then fled again in his vehicle only to be caught when blocked by some parked taxis on Fern Street. The police arrived. He was taken to the station. He asked for a French speaking lawyer. The police officer said that he would try to get someone, made a telephone call and told him that none were available. Constable Robertson did not tell him he could make a long distance telephone call. He did not ask if he could do so and he was never told that he could not. He was given a telephone book. He looked at only a few of the many pages of lawyers and saw no French names. He checked no further. Joseph Paradis arrived and told him that there were no French speaking lawyers available. He decided to take the test. On cross-examination the respondent conceded that the working language of his ship was English.

The respondent was charged with impaired driving, failing the breathalyzer and leaving the scene of an accident. At the conclusion of the evidence, his counsel argued that the breathalyzer readings were inadmissible by reason of the violation of the respondent's **Charter** rights to counsel. It was submitted that the failure to provide a French speaking lawyer on his request amounted to such a violation. Among other things he was not told that he could make a long distance call to obtain one. He had never asked to do so.

The Provincial Court judge dismissed the impaired driving charge, entered a conviction for leaving the scene of the accident, and granted the respondent's **Charter** application to exclude the breathalyzer readings, thus resulting in dismissal of that charge. He said:

> "I find on the basis of the evidence before the court that I am not satisfied beyond a reasonable doubt that the accused was given his right to consult . . . retain and consult with counsel in the matter. I have some difficulty in a city that has . . . city in a bilingual/bicultural country that has the armed forces that we have here with the . . . concept that number one, the police are not going to have more readily available some one to translate for some one, particularly in our second official language. And number two, once they undertake to assist the person in locating lawyers, that they can't direct him to, either particular lawyers or people practicing criminal law in particular firms who can the necessary things to direct them to French speaking counsel . . . What I am saying is the police having undertaken to assist him and in particular in regards to his right to consult a lawyer, I don't think it's a matter of a lawyer of his choice. I think it is a matter of a lawyer who was able to communicate with him in his mother tongue and I am not satisfied under all the evidence that's here that there were appropriate attempts to assist the accused or to allow the accused access to counsel in his native tongue so that he could be properly informed of his rights in the matter."

The trial judge has erroneously placed the burden on the Crown to establish beyond a reasonable doubt that there was no breach of the **Charter** right to counsel. The burden was on the respondent to establish this breach. The decision to exclude the breathalyzer readings must therefore be set aside. It remains to be determined whether the matter should be remitted for a new trial or whether this court can make a determination on the evidence whether the respondent could satisfy the burden of establishing that he was denied his right to counsel. On consideration I would adopt the latter course because I am satisfied that on the record the respondent's case cannot be made out.

As was said in **The Queen v. Prosper** (1992), 113 N.S.R. (2d) 156 at p. 163 whenever counsel is not readily available the question will arise whether, before questioning the detainee or attempting to get him to submit to any procedure which may incriminate him, there was afforded a reasonable opportunity to consult counsel. What is reasonable depends on the circumstances and among the circumstances here was the fact that the two hour time limit during which the breathalyzer readings taken can be **prima facie** evidence was rapidly coming to an end.

The respondent did not deny Constable Robertson's evidence that he said he understood the caution and **Charter** rights to counsel when given in English. They were given again in French. The respondent was given the telephone book and the list of Legal Aid lawyers. There is no evidence that French speaking lawyers were not available through these avenues. The evidence discloses no attempt on the appellant's part to find a French speaking lawyer with these tools or through any other means. His position simply was that the police had a duty to do all of this for him. The case of **Brydges v. The Queen**, [1990] 1 S.C.R. 190 is at most authority for the proposition that the **Charter** imposes upon the police the obligation to advise the accused what is available to him by way of legal services and give him a reasonable opportunity to seek the advice of counsel. The **Charter** does not impose upon the police the obligation to provide the services. In the circumstances here the police did all that was reasonably required of them. There may be cases where affording a reasonable opportunity to consult counsel imposes a duty on the police to do more, but this is not one of them.

The respondent has failed to establish that he was unable to contact French speaking counsel. He had the opportunity but made virtually no effort to do so. He elected to take the test. In my opinion, he has failed to satisfy the onus upon him of proving a **Charter** violation.

I would admit the evidence of the breathalyzer readings. They prove the guilt of the respondent beyond a reasonable doubt.

I do not wish to leave this subject without stating the desirability of police forces in this province having available the names of French speaking counsel, either in the local area or if there are none, within reach by long distance telephone.

I would allow the appeal, set aside the acquittal and enter a conviction on the charge under s. 253(b) of the **Criminal Code** and remit the matter to the Provincial Court for the imposition of sentence.

J.A.

Concurred in:

Hallett, J.A.

FREEMAN, J.A.: (Dissenting)

I am not able to agree with the conclusion of Mr. Justice Chipman that the appellant was afforded the right to retain and instruct counsel as guaranteed by s. 10(b) of the **Canadian Charter of Rights and Freedoms**. The failure by police to give him a reasonable opportunity to speak with a lawyer in French was an infringement of his right.

The respondent Francois Girard is a French-speaking member of the armed forces stationed aboard the H.M.C.S. Algonquin at Halifax. On December 31, 1991, his car hit a parked vehicle and he was pursued by two citizens; as a result he was charged with driving with an illegal blood alcohol level contrary to s. 253(b) of the **Criminal Code**; care and control of a vehicle while impaired, s. 253(a); and leaving the scene of an accident, s. 252(1)(b).

He was acquitted on the first two charges but convicted on the third. On the second charge the trial judge, His Honour Albert Bremner of Provincial Court, entertained a reasonable doubt on the evidence. The first charge is the subject of this appeal by the Crown. Judge Bremner made the following remarks:

"I find on the basis of the evidence before the court that I'm

> not satisfied beyond a reasonable doubt that the accused was given his right to consult . . . retain and consult with counsel in the matter. I have some great difficulty in a city that has the armed forces that we have here with the ahh . . . concept that number one, the police are not going to have more readily available someone to translate for someone, particularly in our second official language. And number two, that once they undertake to assist the person in locating lawyers that they can't direct them to, either particular lawyers or people practicing criminal law in a particular firm who can do the necessary things to direct them to French speaking counsel. . . . What I'm saying is, that the police having undertaken to assist him, and in particular in regards to his rights to consult a lawyer, I don't think it's a matter of a lawyer of his choice. I think it's a matter of a lawyer who is able to communicate with him in his mother tongue. And I'm not satisfied under all the evidence that's here that there were appropriate attempts to assist the accused or allow the accused access to counsel in his native tongue so that he could be properly informed of his rights in the matter. Therefore, I am dismissing the charge of failing the breathalyzer. I do that on the basis of his right to counsel."

The Crown has appealed on the following grounds:

> " 1. That the learned Provincial Court Judge erred in law in holding the respondent's right to retain and instruct counsel under s. 10(b) of the **Canadian Charter of Rights and Freedoms** had been infringed or denied by reason of the failure of the police to provide the respondent with access to a French-speaking lawyer.
>
> 2. That the learned Provincial Court Judge erred in law in excluding the evidence of the results of the analysis of the samples of the breath of the respondent under s. 24(2) of the **Charter**."

Upon his arrest Mr. Girard was given the breathalyzer demand and the police warning, and informed of his right to counsel, all in English. The police officer, Constable Paul Robertson, spoke no French but he was satisfied that Mr. Girard understood. Mr. Girard complained in English about the two men who had chased him and Constable Robertson detected no accent. Mr.Girard was taken to the Halifax police station and placed in a holding cell with a telephone and a list of legal aid lawyers. He began speaking to police in both French and English and said he wanted a French-speaking lawyer.

Constable Robertson said he did not know of any French-speaking legal aid lawyers. "I did make a couple of calls from our list of legal aid lawyers which could not help." He consulted with his sergeant and called the military police for a translator. Private Joseph Paradis, a member

of the military police, arrived a few minutes later.

Constable Robertson said he had been called in for several reasons: "to help him get a lawyer, to verify exactly what I was saying he was understanding, and to . . . . just to explain the whole procedure in French."

In his testimony Private Paradis said he explained in French to Mr. Girard "that I was with the military police and I was French speaking and I was there to assist him." He said that, in French, he repeated the police warning, explained Mr. Girard's right to counsel and read him the breathalyzer demand from his notebook, beginning: "Under Section 253 of the **Criminal Code** I require that you provide some samples of your breath . . . "

Private Paradis said Mr. Girard asked if it would be possible to contact a French lawyer and he replied "yes, it would be possible." On cross-examination he said he was not sure there were any French speaking lawyers in the area. He did not think any would be available at two o'clock in the morning, and apparently he told this to Mr. Girard. He said Mr. Girard

> ". . . declined to do so at that point in time and I asked him if he wished to contact one. I mean, you know, I pointed out to the paper and the phone book at that time. And it was at that time where he said he did not want to."

He informed Constable Robertson that Mr. Girard "did not wish to contact a lawyer at that time." The respondent was given the breathalyzer test and Private Paradis explained the results.

The following is from the direct examination of Mr. Girard, testifying through an interpreter;

> "Q. At the police station do you recall any conversation with Constable Robertson concerning lawyers?
>
> A. Yes, I asked for a French-speaking lawyer.
>
> Q. What was his response?
>
> A. He said he was going to try. He made a phone call and he told me that none were available.

. . .

Q. Did Constable Robertson tell you that you had the right to make long distance calls to speak to a lawyer?

A. No.

Q. Did you ask Constable Robertson whether you could make long distance calls to speak to a lawyer?

A. There were no phone numbers . . . such phone numbers available. The only place where I could call was Halifax.

Q. Do you recall speaking to Private Paradis ahh . . . once he arrived at the police station?

A. Yes.

Q. What do you remember of that conversation?

A. He told me that he was not a lawyer, that he was just here for translating purposes and that he was here to help me if I wanted to see a lawyer and if I wanted to see a lawyer.

Q. Did Private Paradis tell you that there were French speaking lawyers available?

A. No he told me he did not know any, that he was just there for the purpose of translating.

Q. After Constable Robertson told you that there were none available, did any one at the station at any time tell you anything otherwise?

A. No.

Q. Did anybody at the station at any time that evening tell you that you could make long distance calls or contact a lawyer?

A. No.

Q. Why wouldn't . . . why wouldn't an English-speaking lawyer, if you had been able to reach one, been good enough?

A. Because I do not . . . I do not understand everything completely or fully. So if I miss some of the information, that's not very good for me."

Section 10 (b) of the **Charter** guarantees that:

"Everyone has the right on arrest or detention to retain and

instruct counsel without delay and to be informed of that right."

That right is meaningless if the detained person and his counsel cannot understand one another. When a detainee speaks neither English nor French, it may be necessary to utilize the services of a translator, but a translator should not be required if the detained person wishes to instruct counsel in one of the official languages of Canada. In any event, Mr. Girard could not have been expected to retain and instruct an English-speaking lawyer using Private Paradis as a translator.

Private Paradis was a member of a police force present at the instance of the arresting officer. He was performing the police function of ensuring that Mr. Girard understood the warning, his right to counsel, and the breathalyzer demand. He was not an appropriate person to translate between Mr. Girard and an English-speaking lawyer. Such a privileged conversation must take place out of earshot of the police: a police officer is an impossible choice as translator between a detainee and his counsel. The right to privacy during such communications is well settled. See for example **R. v. Dempsey** (1987), 77 N.S.R. (2d) 284 (N.S.S.C.A.D.)

Mr. Girard's request was not unreasonable, unusual, nor difficult to comply with. His level of proficiency in English is not a material consideration. As a matter of course he should have been afforded an opportunity to reach a French-speaking lawyer if he wished to do so. The police should have ensured that he was provided with a list including one or more French-speaking lawyers, and their telephone numbers. If none was available locally, they were available by telephone at long distance.

Instead he was told by two police officers that they did not know of any lawyers who spoke French. In a country with two official languages of equal status, that is not acceptable. Confronted with that obstacle, Mr. Girard agreed to take the breathalyzer test without consulting counsel. In those circumstances, I am not satisfied, and Judge Bremner was not satisfied, that he waived his right to counsel.

A request for French speaking counsel in any English-speaking community in Canada is a predictable likelihood, and one for which it is entirely reasonable to expect that police should

be prepared. **Brydges** requires that detained persons be advised of legal aid or other facilities for obtaining counsel cost free at the time of arrest or detention. Police officers now routinely provide the names and telephone numbers of legal aid lawyers to detained persons. A minimal amount of consultation between police and legal aid organizations should be necessary to ensure that such lists include names of French speaking lawyers, either on the legal aid staff or available on a legal aid basis.

If French-speaking lawyers are in short supply in this province, which might be news to the local Juristes Francophones section of the Canadian Bar Association, it is all the more important that every police office should have a list of them to provide to persons in Mr. Girard's situation.

That duty of police to provide detained persons with a reasonable opportunity to retain and instruct counsel has been expressed by the Supreme Court of Canada on many occasions. See e.g. **R. v. Manninen** (1987), 58 C.R. (3d) 97, 3 C.C.C. (3d) 385 (S.C.C.). In **R. v. Bridges** [1990], 1 S.C.R. 190' 103 N.R. 282; 104 A.R. 124; 53 C.C.C.(3d) 330; 74 C.R. (3) 129, Lamer, J. restated the duty at p. 341 (C.C.C.):

> " As a result, s. 10(b) of the **Charter** imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must give the accused or the detained person a reasonable opportunity to exercise the right to retain and instruct counsel, and second, the police must refrain from questioning or attempting to elicit evidence from the detainee until the detainee has had that reasonable opportunity. The second duty includes a bar on the police from compelling the detainee to make a decision or participate in a process which could ultimately have an adverse affect in the conduct of an eventual trial until the person has had a reasonable opportunity to exercise the right to counsel: **R. v. Ross** (1989), 46 C.C.C. (3d) 129, [1989] 1 S.C.R. 3; 67 C.R. (3d) 209."

In my view the police failed to provide Mr. Girard with such a reasonable opportunity. The essence of the right to counsel is communication, and that must be carried out in a language in which the detainee is comfortable.

When there is no language problem, it is enough for police to provide a list of names

and telephone numbers of legal aid counsel and counsel in private practice, a telephone, and a place to carry on a private conversation. There can be no guarantee that a detained person can actually reach counsel at a given time, but the reasonable opportunity must be provided. See **Prosper** 113 N.S.R. (2d) 156, in which a detained person waived his right and took a breathalyzer test after a series of unsuccessful attempts to reach a lawyer with the co-operation and assistance of police, who provided him with a list of legal aid lawyers in good faith. If the list provided to Mr. Girard had included names of lawyers noted as proficient in French, he would have little ground for complaint.

It cannot be said, in the present circumstances, that Mr. Girard failed to exercise due diligence. In the present circumstances, his assertion of his right to counsel was enough. His unmet request imposed a burden upon the Crown to prove beyond a reasonable doubt that he had unequivocally waived his right. That is the standard Judge Bremner correctly applied. See **R. v. Leclerc** (1989), 67 C.R. (3d) 209, 46 C.C.C. (3d) 129 (sub nom. **R. v. Ross**) S.C.C.; **Clarkson v. R.** (1986), 50 C.R. (3d) 289, 25 C.C.C. (3d) 207 (S.C.C.); **R. v. Brydges** (12990), 74 C.R. (3d) 129, 53 C.C.C. (3d) 330 (S.C.C.).

I would agree with Judge Bremner that Mr. Girard's right to counsel was infringed. Therefore it must be determined whether the results of the breathalyzer test taken following the infringement are properly excluded under s. 24(2) of the **Charter**.

I agree with my brethren Chipman, J.A. in **Prosper** and Hallett, J.A. in **R. v. Brown** (1991), 107 N.S.R. (2d) 349 (C.A.) that the breath sample is "more correctly categorized as self-incriminating evidence than real evidence."

Hallett, J.A. stated at p. 353:

> "In my opinion, the analysis of the blood analysis in this case, although real evidence, is more correctly categorized as self-incriminating evidence as it emanated from the respondent and therefore its admission into evidence would go to the very fairness of the trial."

Moreover, it is evidence against the accused conscripted from him by the coercive

power of the state.

Section 254 (5) of the **Criminal Code**

provides:

> "Every one commits an offence who, without reasonable excuse, fails or refuses to comply with a demand made to him by a peace officer."

A person who is given a demand finds himself in a tight corner with few options, a circumstance that lends a special importance to his right to counsel. It is not proper to speculate as to what advice he might be given--see **R. v. Elshaw** (1991), 67 C.C.C. (3d) 97. The statement of an accused who spoke little English was excluded by Doherty, J. of the Ontario High Court of Justice (as he then was) in **R. v. Lim and Nola** (1990) 1 C.R.R. (2d) 148 because police officers took no steps to ensure he understood his right to counsel.

The evidence must be considered in the light of strong statements by the Supreme Court of Canada that "the use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded"--McLachlin, J. in **R. v. Evans** (1990), 63 C.C.C. (3d) 289 quoting Lamer, J. (as he then was) in **R. v. Collins** (1987), 33 C.C.C. (3d) 1.

In **R. v. Strachan** (1991), 67 C.R. (3d) 87 Chief Justice Dickson rejected the need for a causal connection when self-incriminating evidence was gathered following a violation of a **Charter** right, including a right to counsel:

> "In my view, all of the pitfalls of causation may be avoided by adopting an approach that focuses on the entire chain of events during which the **Charter** violation occurred and the evidence was obtained. Accordingly, the first inquiry under s. 24 (2) would be to determine whether a **Charter** violation occurred in the course of obtaining the evidence."

In his often quoted statement in **Collins,** Lamer, J. cited the judgment of LeDain, J. in **Therens** (1985), 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 493, [1986] 1 S.C.R. 383 at p 512 C.C.C., p. 686 D.L.R., p. 652 S.C.R.:

> "The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent of or a merely technical nature, or whether it was deliberate, wilful or flagrant."

In my view the infringement of Mr. Girard's right to counsel was relatively serious. He invoked the right and was not able to exercise it as a result of failure by the police to fulfil their duty of providing him with a reasonable opportunity to do so. He was not forceful in asserting it after he was told the police knew of no French-speaking lawyers, but he may have considered there was no point in pressing the matter further. I am not prepared to say that Judge Bremner was wrong in excluding the evidence under s., 24(2). I would dismiss the appeal.

Freeman, J.A.