Indexed as:

R. v. Porter

Between
Her Majesty the Queen, and
John Terrance Porter

[1992] O.J. No. 2940
Action No. 6615A/91

Ontario Court of Justice - General Division
Whitby, Ontario
Murphy J.

April 21, 1992
(39 pp.)

Criminal law — Evidence — Admissibility of accused's statements — Voluntariness — Factors to be considered in excluding evidence for violation of accused's rights under Canadian Charter of Rights and Freedoms — Searches — Legality — Relevance of consent — Right to retain counsel — Right to remain silent — Freedom from unreasonable search and seizure — Proof of violations.

The accused was pulled out of his car to the ground by three police officers. While he was lying face down, one of the officers read him his right to counsel and the caution. The accused was then taken to the cruiser where he made some statements to the police. At the station, he spoke with a lawyer at his request and the lawyer later attended to speak with him. Subsequently, he was interviewed by two detectives. The next morning, the accused was taken to the interview room before his appearance in court. At issue in the voir dire was whether the statements made to the police officers in the cruiser and the interview room were admissible. Twenty-five days before his arrest, the accused was stopped in Vancouver for speeding. The police officers asked him if they could search his car to which he agreed. The main issue was whether the statements made to the police in the cruiser and in the interview room were admissible. There was also an issue as to whether the police officers who did the search in Vancouver could give admissible evidence of what they saw.

HELD: The statements to the police were voluntary and there was no violation of the right of the accused to retain counsel. He was promptly advised of his rights and had sufficient time to consider those rights. The search of the accused in Vancouver was not reasonable under the circumstances and amounted to a violation of section 8 of the Canadian Charter of Rights and Freedoms.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 7, 8, 10(b), 24(2).
G. O'Driscoll and R. Evans, for the Crown.
A. Bryant and D. Doucette, for the Accused.

MURPHY O.C.J. (Orally):— A voir dire was held to determine the admissibility of certain statements made by the accused on three different occasions. Firstly, statements made at the time that the accused was arrested at the park. Secondly, the interview at the police station shortly after the arrest on the evening of the arrest. Thirdly, statements made by the accused in the interview room the following morning prior to being taking to court for an appearance.

We have two applications. We have the application of the Crown to have these statements admitted as voluntary statements. We have the application on behalf of Mr. Porter that these statements should not be admitted into evidence as there was a violation of his right to counsel, s. 10(b), and a violation of the accused's right to remain silent as provided by s. 1 of the Charter of Rights. It was agreed by both counsel that the evidence we heard on the Crown's application would be applied to Mr. Porter's application.

The court is mindful of Mr. Justice Tarnopolsky's warning in R. v. Voss, 50 C.C.C. (3d) 58.

There is a danger when dealing with both the voluntariness issue and a s. 10(b) challenge that the two will not be kept distinct. The issues are more distinct than simply requiring different tests and burdens of proof. Although both are aimed at maintaining fairness in the process, the issue of voluntariness is concerned with intimidation or inducement in eliciting statements, while detention has more concern with police control over an accused's movements. It is, therefore, essential that the two be decided separately, in form as well as in concept.

THE FACTS

Constable Ann Trudel received a radio message to be on the lookout for a motor vehicle with a New Brunswick licence. She found such a car in the parking lot near the lake. She did not approach the car and she did not think there was anyone in the car. She called for backup. Constables Dancey and Findlay responded to her car. Constable Dancey talked to Constable Ann Trudel and then approached the passenger side of the vehicle.

Dancey saw the accused in the driver's seat and he appeared to be sleeping. He opened the passenger's door. Dancey immediately told Porter, on his evidence, that he was under arrest, put his hand on him and told Porter to get out of the car. When Porter replied, "Let go of my arm," Dancey physically removed Porter from the car through the passenger door, put Porter on the ground, face down. Constable Findlay assisted him in this manoeuvre and Constable Ann Trudel helped by putting handcuffs on Mr. Porter.

Constable Dancey indicated that he read Porter his rights to counsel, including a reference to Legal Aid, and that he gave Mr. Porter a caution. Dancey indicated he read the rights and caution from printed cards that he had in his notebook. Constable Ann Trudel indicated that she did not see Dancey looking at any card but did hear Dancey mention rights and heard Dancey tell Porter that he didn't have to say anything. Constable Findlay was not asked any questions on this issue.

Constables Dancey and Findlay assisted Mr. Porter up from the ground. Dancey took Porter to the cruiser and put him into the police cruiser and took him to the station. The total time taken from the time that Dancey arrived until he left was not a great deal of time. While in the cruiser before leaving, Dancey asked Porter if he realized what he was under arrest for and Porter made no reply. When Dancey told Porter that he was under investigation for murder, Porter replied, "No way."

Dancey and Findlay took Porter to an interview room at 17 Division. Detectives MacDonald and Adams took over the investigation. Detective MacDonald indicated that he asked Constable Dancey, in Porter's presence, whether he had given him his rights to counsel and did he caution him, and that Dancey replied in the affirmative.

MacDonald asked Porter, "Are you feeling okay?" He indicated he did so because there was blood on Porter's clothes and glasses and it was his custom to ask anyone at the beginning of the interview a similar type of question. MacDonald asked Porter about his knowledge of the victim and he asked him about his knowledge of the house where the deceased was killed. Detective Adams thought that the question about Mr. Porter's health was asked because Porter kept looking down at his feet and he would pause some time before responding to questions. MacDonald indicated he also asked Porter "if you were given your rights". MacDonald also told Porter to "listen to me. You are under arrest for murder," and that Adams had told Porter, "Let's act like men, not like kids. Do you understand?"

About one third into the interview, Mr. Porter indicated, "They told me I have rights. I want to call a lawyer." When asked who, Mr. Porter gave the name of a lawyer in Medicine Hat. Detectives MacDonald and Adams offered to get a local lawyer. They mentioned a number of lawyers" names. Mr. Porter accepted their invitation and retained a local lawyer, Mr. Espey, from the list of names suggested. Detective Adams arranged for Mr. Porter to have a private telephone conversation with Mr. Espey. This called lasted about ten minutes and Detective MacDonald indicated that he had talked to Espey afterwards and that Espey had indicated to MacDonald that he would attempt to contact one of his partners. Detective MacDonald indicates that he was not told by Mr. Espey that he was not to continue to talk to Porter, nor was he told that a lawyer would be coming to the police station to talk to Porter.

Porter returned to the interview. Detective MacDonald asked Porter some routine questions and information similar to that needed for an arrest report; the name, address, height, weight, place of birth, who his mother was. Detective MacDonald thought that Porter had said Gaspé, Nova Scotia as his place of birth while the identification that was located on Mr. Porter indicated his place of birth as Glace Bay, Nova Scotia.

Constable Sullivan, an identification officer, attended in the interview room to take a photo of Mr. Porter. He also obtained a blood sample, two hair samples, one pulled and one combed. Mr. Porter consented to giving these items and these samples.

Mr. Kimball, a lawyer from Mr. Espey's office did attend at the police station and did speak to Mr. Porter for about 50 minutes. It was Detective MacDonald's evidence that Mr. Kimball, after the interview, inquired only about Mr. Porter's court appearance the next day.

Detective MacDonald had asked Porter whether he wished to take a breathalyzer test, which Mr. Porter refused, and that Detective Adams asked how much he had to drink and Porter indicated he would like to speak to his lawyer before answering that.

Porter was lodged in the cells for the night and the next morning, MacDonald took Porter from the cells and then took him back to the interview room before taking Porter for a court appearance. Detective Adams was present and Adams asked Mr. Porter what he wanted to do with his car and did he know that the tow people would auction the car if the car was in storage for 90 days. Mr. Porter indicated to Detective Adams that he should talk to his lawyer about the car. Detective MacDonald then told Porter, "Listen, Terry, you have to come up with some story. You know that." MacDonald indicated that Porter nodded his head up and down.

Dealing with the issue of voluntariness, the onus is on the Crown to prove the statements made were voluntary. The meaning of the term voluntary has been the subject of a number of cases. The starting point is a line of cases commencing with Ibrahim v. R. [1914] A.C. 599 which indicates for a statement to be voluntary, it must be made free of any threats or promises by a person in authority which would induce the statement. In addition, a statement, to be voluntary, must come from an operating mind as discussed in Horvath v. The Queen (1979) 44 C.C.C. (2d) 385. As Mr. Justice Tarnopolsky indicated in Voss. supra, the issue of voluntariness is concerned with intimidation.

SUBMISSIONS OF THE DEFENCE

It is the defence submission that there is reasonable doubt that Mr. Porter had an operating mind, whether he was aware of what was going on. There is a doubt in Constable Ann Trudel's evidence that the accused was ever read his rights or given a caution as Constable Dancey indicated that he had read from a printed card. The accused appeared to be sleeping and that he was aroused from this sleep at the time of the arrest and that he made no response to Dancey in the car or when told of his right to counsel or given a caution.

As the defence pointed out, Detective MacDonald was so concerned about Mr. Porter's condition that he asked him how he was feeling, and we have Constable Adams' evidence that Mr. Porter was looking continually, with his head down, at his feet and that there was a considerable pause before he would answer any of the questions. MacDonald was also concerned whether Porter was comprehending or realizing the situation when he indicated, "Listen to me. Do you realize what you are under arrest for?" to which Porter made no reply. When

he was told that he was under investigation for murder, Porter replied, "No way." This is an indication that Porter had no appreciation of why he was pulled out of the car. Porter was asleep in the car and was not awake and was not working with an operating mind. There was difference in Detective Adams' evidence as opposed to Detective MacDonald. Adams indicated that Porter was looking at his feet and not making eye contact with Detective MacDonald. Detective MacDonald indicated there was eye contact between himself and Porter.

It is the Crown's submission that all the statements were free and voluntary.

FINDINGS

I find as a fact that Constable Dancey did read Mr. Porter his right to counsel, including the right to Legal Aid, and read a caution from printed cards. I prefer Constable Dancey's evidence over that of Constable Ann Trudel on that point. I am satisfied the Crown has proven that all the statements made by Mr. Porter were voluntary. They were made free of any threat or promises and the statements were made by an operating mind.

CHARTER VIOLATION

The right to counsel and the right to remain silent. The onus is on the accused to prove on a balance of probabilities that his rights under the Canadian Charter of Rights were violated. The law requires that the police not only advise Mr. Porter of his rights to counsel but that Mr. Porter be given some opportunity to consider whether to exercise his rights. The police cannot read his rights and then immediately start to ask questions. The rights were read to Mr. Porter when he was face down on the asphalt in the parking lot after he had been pulled out of the car. There was a short time that Porter was assisted from that position and taken to the cruiser and put in the cruiser. Constable Dancey asked some questions when Porter was in the cruiser. It is the defence submission that not sufficient time was given for Mr. Porter to consider his rights.

At the station, the defence argues that there was no urgency to question Mr. Porter; that his physical condition was such that he should not have been questioned; that there was always concern about Mr. Porter's health when MacDonald asked him how he was feeling. Instead of waiting to be sure that Porter was feeling better, the two detectives put questions to Mr. Porter. Porter, during the interview, did indicate, "They told me I have my rights," and he indicated he wanted to speak to a lawyer. Mr. Porter, in effect, was expressing his right to remain silent. The expression of a desire to retain a lawyer should have been respected and no further questions should have been put to Mr. Porter after he did ask for a lawyer.

The next morning, it is the defence position that no proper purpose was served by bringing Porter back to the interview room. It was not a necessary step in taking Porter for his court appearance. Porter had talked to his lawyer. He had told them the previous evening, the question of consumption, that he wanted his lawyer present. That morning, Mr. Porter again asked if he still had his rights and the defence argued this was the equivalent of his again expressing his right to remain silent. Detective Adams' questions about the car may be innocuous but Detective MacDonald's question was a baiting question inviting Porter to incriminate himself.

It is the Crown position that there was no violation of the accused's Charter rights, that Porter was advised of his rights; that Mr. Porter understood his rights. It was Porter who introduced the question of rights partway into the interview when he indicated, "They gave my rights and I want to call a lawyer," and on other occasions he referred to his rights, at least on two other occasions. It is the Crown's position that Mr. Porter was given a reasonable opportunity to exercise the rights at the scene and in fact, he did exercise his right to counsel at the station and the police assisted him in putting Porter in touch with a lawyer. There is no obligation upon Detectives MacDonald and Adams to stop putting questions to Mr. Porter after he expresses a desire to speak to a lawyer or any requirement, after he spoke to the lawyer, to cease putting any questions. It was Detective MacDonald's evidence that he was not told by Mr. Espey or Porter that a lawyer would be coming to see Porter, nor was he told that he shouldn't ask Mr. Porter any questions.

THE LAW

In R. v. Anderson, 10 C.C.C. (3d) 417, at page 431:

> I am of the view that, absent proof of circumstances indicating that the accused did not understand his right to retain counsel when he was informed of it, the onus has to be on him to prove that he asked for the right but it was denied or he was denied any opportunity to even ask for it.

In R. v. Manninen, 34 C.C.C. (3d) 385, the right to counsel under s. 10(b) imposes obligations upon the police. At page 391:

> In my view, s. 10(b) imposes at least two duties on the police in addition to the duty to inform the detainee of his rights. First, the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay.

At page 392:

> Further, s. 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel.

In R. v. Woods, 49 C.C.C. (3d) 20, the police attended at the accused's home where he was arrested for murder and cautioned and informed of his right to obtain and instruct counsel without delay. The accused was asked if he understood his rights and replied he did. The accused was immediately asked, "Did you stab a guy in Toronto?" The court held there that the time which passed between the appellant's indication that he understood his right to counsel and Constable Telfer's next question was very short. The trial judge held that the accused's s. 10(b) rights were not violated with the possible exception of the question put to the appellant immediately after his arrest. The Ontario Court of Appeal held that it was fundamental that once a detainee has been informed of his to counsel, some reasonable time should be allowed to permit him to consider his rights before any questioning begins if for no other reason than to be satisfied that the detainee fully understood his rights. The trial judge found that the time gap between the advice as to the rights following his arrest and the next somewhat provocative question was inappropriately short.

I find that there was no violation of the accused's right to counsel. I find that Porter was advised of his rights. I find that at the scene, at the time of the arrest, there was sufficient time for the accused to consider his rights. The rights were put to him while he was on the ground and there was some time from that time after he was helped up and taken to the car. The questions asked by Constable Dancey were not provocative in the same manner as in the Woods case. I find that Mr. Porter understood his rights and I find he had a reasonable time to consider his rights.

I find at the station there was no violation of his right to counsel. Porter was advised of his rights at the scene and this was confirmed in his presence at the station and he clearly understood his rights and he was the one that raised the question of rights and he was given an opportunity to exercise his rights.

Dealing with the right to remain silent, s. 7 of the Charter. After Mr. Porter expressed a desire to speak to a lawyer, certain questions were put to Mr. Porter. The routine questions similar to those of an arrest report, I find, were proper. The question taken in regard to a breathalyzer test and the question concerning what he had to consume were a violation of Mr. Porter's right to remain silent. Porter expressed that right when he indicated that he wanted his lawyer present when the question on how much he had to consume was put.

The questions the next morning that Detective Adams put were innocuous and not a violation of his right to remain silent. The question that Detective MacDonald put was a violation of his Charter rights. It was objectionable not only as a baiting question but clearly it indicated he had asked about his rights again and indicated even to Detective Adams that he wanted those when the question about the car was discussed.

Should that evidence be excluded under s. 24(2) of the Charter? The onus is on Mr. Porter. The factors that the court has to consider is set out in R. v. Collins (1987) 33 C.C.C. (3d) 1. The factors are grouped into three main headings:

1. The fairness of the trial;
2. The seriousness of the breach;
3. The effect that excluding the evidence could have on the results of the trial.

Dealing with the fairness of the trial, the evidence here is not real evidence. It is an example where the accused is rather conscripted against himself. In cases where the accused has conscripted himself it is usually excluded as it does go to the issue of the fairness of the trial. The right that the court is concerned with was serious. The officer continued to ask questions after Mr. Porter's assertion of his right to remain silent. I am not convinced that the exclusion of that evidence would have a serious effect on the outcome of the trial.

Balancing those three factors, I am satisfied that the admission of those questions and answers would bring the administration of justice into disrepute based upon the dispassionate and impartial person, and I will exclude those questions that Detective MacDonald had on the next morning and I will exclude the question concerning a breathalyzer test and the question concerning how much he had to consume.

THE SEARCH IN VANCOUVER

The facts. On January 11th, about 25 days before the alleged murder, two members of the Vancouver Police Department pulled over a motor vehicle for speeding in Stanley Park at 5:00 a.m. The vehicle was driven by the accused. After obtaining the accused's Alberta driver's licence, one of the officers did a CPIC check on the accused. It revealed that Mr. Porter had two outstanding warrants from Alberta, one outstanding warrant from Ontario and all three warrants were not returnable in British Columbia. Information was also received that Mr. Porter was on probation because of unlawful confinement.

Constable Christie talked to the accused outside his car. The accused denied he had been speeding. He indicated he had been parked in the parking lot for some ten minutes. Mr. Porter also denied that he had a criminal record.

Constable Emerslund asked Mr. Porter if they could search his motor vehicle. Mr. Porter agreed. Constable Christie did the search. The vehicle was a Honda hatchback with New Brunswick licence plates and it appeared that this was the same vehicle that Mr. Porter was found in, in Oshawa, on the day of the alleged murder. The back seat had a hatchback area. Both areas were filled with clothes, garbage bags and tools. The officer found a round spike the diameter of a Loony coin on the floor of the front seat. Located among the article in the rear in the hatch area was a roofer's hammer that had a blade on one end and a hammer on the other end. Constable Christie held both articles op for the other officer to see. The police did seize two hotel keys for a hotel that the accused did not live in, although he indicated that his girlfriend did. They told Mr. Porter that they were taking the keys to the hotel desk and if he was entitled to the keys, that the hotel desk clerk could return the keys to him. Constable Christie gave Mr. Porter a speeding ticket and Mr. Porter went on his way.

Can the police officers give evidence as to what they saw during the search of Mr. Porter's vehicle? It is the Crown's position that the tools, the spike and the roofer's hammer, were capable of causing the injuries inflicted upon the deceased. The Crown also alleges that a search of the Porter vehicle within hours of the murder in Oshawa, although there were still piles of clothes and tools and garbage bags in the back of the car, there was no spike nor roofer's hammer.

Were the accused's rights under s. 8 of the Charter of Rights violated and if they were violated, should the evidence be excluded under s. 24(2)? The onus is on the accused to satisfy the court that his rights were violated. If the search was a warrant less search, then there is a presumption that the search is unreasonable and the onus is on the Crown to show a warrant less search is a reasonable search.

The issue is one of consent search. The police officers asked permission to conduct the search. The Crown concedes that as a result of the Ontario Court of Appeal decision in R. v. Wills, unreported, released February 20th, 1992, that the search was not consensual. The search did not meet test five and six as set out in Wills. Those tests are:

(v) the giver of the consent was aware of his or her right to refuse to permit the police to engage in the conduct requested; and,
(vi) the giver of the consent was aware of the potential consequences of giving the consent.

The officers gave evidence that they were following the proper Vancouver Police procedure when they considered and conducted the search and to their minds, it was a consensual search. The Crown points out that perhaps even in Ontario et the date of the search, the police officers would have thought they were conducting a proper and legally consensual search.

It was the officers' evidence that when they stopped the vehicle at about 5:00 a.m. In an area known as Stanley Park, it was a location that has problems with illegal drugs, sexual assaults and robberies. There is no evidence that they were investigating any particular crime when they searched Porter's vehicle, nor is there any evidence that when they stopped Porter's vehicle it was for any other reason than speeding.

Was the search reasonable? if the search is reasonable, there is no breach of s. 8 of the Charter. It is the Crown's position that the search is reasonable. A search will be reasonable within the meaning of s. 8 of the Canadian Charter of Rights and Freedoms if it is authorized by law if the law is reasonable and if the manner in which the search was carried out is reasonable.

It is the Crown's position that the court must look at the total circumstances to arrive at any conclusion whether the search is unreasonable or not. It referred the court to R. v. DeBot, 52 C.C.C. (3) where it was held that the court in determining sufficiency of grounds it is required to consider totality of the circumstances. The Crown argues on the facts of this case, where we have two officers on general patrol at 5:00 a.m. in Stanley Park, where the facilities of the park have been closed for six hours, that the park is an area of concern for criminal activity, that there are other members of the public present in the parking lot, that Mr. Porter was less than frank with the officers about speeding and about his criminal record. Mr. Porter was fidgety. He had been in Vancouver less than one week. The vehicle had New Brunswick plates and Porter had an Alberta driver's licence. There were outstanding warrants from Ontario and from Alberta. The CPIC Information indicated a caution that Mr. Porter could be violent and likely to escape.

The Crown argues the police have a duty to protect the people in the park, a duty to find out all they can about this man. The police obtained Mr. Porter's consent for the search, the search was done in Mr. Porter's presence and it was done in an unobtrusive manner. It was done in a reasonable manner. Mr. Porter was not arrested, he was not searched himself, and that on the date that the search did take place, it was proper in British Columbia and may still be proper in British Columbia.

It is the Crown's position that the search conducted was a valid, common law search. The Crown relies on the decision of R. v. Boyd, 46 C.C.C. (2d) 433. That case involved the search of a motor vehicle where the police found an open can of beer and the accused was issued with a summons under the Nova Scotia Liquor Control Act. The accused was subject to a pat-down search where the officer found a small quantity of narcotics and the issue before the court was, was the search of the individual a reasonable search. It was argued that the search of the accused was contrary to s. 8. The court held that where there was a power to arrest there is a power to search. The accused was not arrested but the accused was detained. He was in the custody of the police at the time of the search. The detention could be regarded as a de facto arrest carrying with it the common law right to search the accused as an incident of arrest. The officer indicated that he was doing the search of the individual for the purpose of finding liquor.

It should be noted that there was no evidence before the court which indicated that there was a power of arrest under the B.C. Highway Traffic Act and there is no evidence advanced that the officers were searching the vehicle because of the speeding charge. The officers were not asked the reasons why they conducted the search.

The Crown also relies on Cloutier and Langlois, 53 C.C.C. (3d) 257. in that case, two police officers were charged with assault after conducting a frisk search of a citizen. The court held that the police have a power to search a lawfully arrested person and to seize anything in his possession to guard the safety of the police and the person.

The Crown submits if there is a right to search a person when there is a detention, the equivalent of arrest, then the police officers have a right to search a vehicle where the driver has been detained; that the detention is the equivalent of the arrest. The case before us can be distinguished from R. v. Boyd. supra. As I indicated, we do not know why the officers searched the vehicle while in Boyd the search was for liquor.

During the course of argument, I made the suggestion that the two police officers were engaged in good police work. Defence counsel did not disagree. The Crown seized upon that suggestion and submitted that good police work should not constitute a breach of someone's rights. The police have a right to search when they find themselves in this situation, but we are dealing with different standards on the issue of whether the search is reasonable. It might well be in the interest of the citizens of Vancouver for the police to find out all they can about a recent visitor to the city with Mr. Porter's background. It does not necessarily make the search reasonable.

As the court pointed out in R. v. Wills, supra, a police officer's erroneous although reasonable belief that an individual consented to a seizure can no more make the search reasonable than can the officer's reasonable belief that a particular situation, statute or other law authorized a certain search and seizure.

I am not satisfied that the search was reasonable under these circumstances and there was a violation of Mr. Porter's rights under s. 8 of the Charter. Once the consent is set aside, there is no justification for the search.

Dealing with s. 24(2), has Mr. Porter satisfied, on a balance of probabilities, that the result of the officer's search should be excluded? The test that the court must look at is set out in R. v. Collins, 33 C.C.C. (3d) 3 to determine whether, in all of the circumstances, the admission of the evidence could bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case.

Some of the factors the court should consider: What kind of evidence was obtained? What Charter right was infringed? Was the Charter violation serious or was it merely of a technical nature? Was it deliberate, wilful, flagrante or was it inadvertent or committed in good faith? Did it occur in circumstances of urgency or necessity? Were there other investigating techniques available? Would the evidence have been obtained in any event? is the offence serious? Is the evidence essential to substantiate the charge? Are there other remedies available?

The court goes on to group those factors into three headings.

1. The effect on the fairness of the trial.
2. The seriousness of the Charter violation.
3. The effect of excluding the evidence on the outcome of the trial.

The fairness of the trial. The important factor is whether the evidence is real evidence. As the court in Collins indicated, real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone if the real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair.

Counsel for Porter has submitted that the law has been extended in R. v. Klimchuh, 67 C.C.C. (3d) 387, that while the admission of unconstitutionally obtained real evidence would normally not affect the fairness of the trial, that does not mean that admitting such evidence would never bring the administration of justice into disrepute. On that case there was a search of the accused's motor vehicle which turned up burglary tools. The officer not only did not have a warrant to search the vehicle but he had no reasonable and probable grounds to obtain a warrant. The court held that the seriousness of the Charter violation was unmitigated by any

consideration of good faith on the part of the officer. They were not acting on any statutory authority to conduct the search.

Counsel for Mr. Porter also relies on the decision of R. v. Kokesch, 61 C.C.C. (3d) 207. in that case, the Crown sought to introduce evidence obtained as a result of the execution of a search warrant of the accused's home. The police suspected that the accused was growing marijuana. They trespassed on his land. They were not able to see anything but they did detect an odour of marijuana. The police used that information to obtain a warrant. It was information they obtained from the trespass. The officer indicated that he had no reasonable and probable grounds to obtain the search warrants until after he had conducted the perimeter search.

The majority in the Supreme Court held that although the evidence that was found was real evidence, its exclusion would not be required for the fairness of the trial. The breach of the accused's right was a serious violation of the accused's rights under s. 8. The concern of the court was the resort by the police to trespass. The majority held that the evidence, although real and was required for a conviction, should be excluded. The Charter breach was not technical nor minor.

Is the evidence real in the facts before us? Counsel for Mr. Porter submits that the evidence is not really real evidence, that it is something in between. Counsel compares the facts in our case with a person who is asked to participate in a line up, that he is conscripted against himself. I find the results of the search by the two police officers to be real evidence and I find that the conduct of the two officers in searching the vehicle was performed in good faith. They conducted the search on the basis of what they thought was a legally consented to search and the search was done before the decision in Wills.

In R. v. Kokesch, supra, the issue of good faith of the police officer was discussed and he is acting in good faith if he acts in the result of an entirely reasonable misunderstanding of the law. In that particular case, a trespass did not qualify. There could be no misunderstanding of the law of trespass that would allow the officer to....

Dealing with the seriousness of the breach. S. 8 is an important right. The breach was not deliberate for the officers were acting on what they thought was a valid consent.

The final consideration is the effect of excluding the evidence. The administration of justice could be brought into disrepute by the exclusion of evidence essential to substantiate the charge and thus lead to an acquittal of the charge. Mr. Porter's counsel has indicated that there was a murder and that his client is responsible but he is responsible at a reduced level to the degree of manslaughter. In addition, Mr. Porter is not responsible for manslaughter by the reason of a mental disorder. I must, however, look at the exclusion as it affects the charge before the court, which is a charge of first degree murder.

The Crown's position is that the evidence is important on the charge of first degree murder, that it is relevant to the issue of planning and deliberation. It is the Crown's position that it is relevant on the issue of the mental disorder. The alleged offence occurred, I think, on February 5th which is some 25 days after the search took place. It is the Crown's position that the search of the Porter vehicle on February 5th did not reveal the presence of a spike or a roofer's hammer.

In summary, I must balance the three factors.

1. The evidence is real and the fairness of the trial is not affected.
2. The breach was not serious. The police acted in good faith. The evidence is relevant to the charge before the court.
3. I cannot suggest that evidence is that serious that it would affect the outcome of the trial.

I must balance those three facts. Would the reasonable, dispassionate, fully informed member of the public feel that the administration of justice was brought into disrepute if this evidence was excluded? The onus is on the accused on a balance of probability and I find that the defence has not satisfied the onus and that evidence should not be excluded.

I would make this caution that any information that the police obtained from the CPIC at this time should not be put to the jury, although that information may later become available as I gather the defence - but at this time that evidence should not be, either his criminal record or the warrants that are outstanding, nor the caution concerning that he was dangerous.

MR. BRYANT: Your Honour, may I seek some guidance as anticipate from my friend's earlier comments, he proposes to call these two witnesses virtually as witnesses one and two if they can arrive on time, these witnesses, as you will recall, went on to return the keys to the Patricia Hotel if memory serves me correctly and...

THE COURT: He was staying at the California Hotel.

MR. BRYANT: He was staying at the California but the disclosure reveals to me they obtained some information but it is not at all clear as to whether or not they obtained documentation to corroborate documents found on Mr. Porter's person at the time of his arrest. In other words, I...

THE COURT: The licence, you mean?

MR. BRYANT: Well, I am thinking of the...

THE COURT: There was the application for welfare in someone else's name.

MR. BRYANT: I am thinking more of the registration at the hotel and that type of thing because I am going to be wanted to put into evidence a fair bit of information about where Mr. Porter was during the month of January. So, I am going to be putting questions to them as to whether or not they saw a particular document, for instance, the likes of which were seen or later found in Mr. Porter's...

THE COURT: Those two blue Co-op folders?

MR. BRYANT: ...Co-op folders and I think maybe in his wallet. I can't remember which one they actually came out of but there are questions relating to their subsequent investigation or lack thereof that I will be seeking to question about.

THE COURT: I suggest that you discuss it with the Crown. If you can't reach any agreement on those matters, then you can bring it back to me for a ruling.

MR. BRYANT: All right, sir, thank you.

THE COURT: We are ready to proceed tomorrow. As indicated, I will be reviewing with the jury a reasonable doubt and other matters.

MR. BRYANT: All right, sir.

THE COURT: But I will also be putting the defence and the meaning of your plea as indicated.

MR. O'DRISCOLL: Just before we close for today, I have given to Mr. Bryant, having reviewed earlier today a list of proposed admissions, in view of the plea that has been entered again before the new jury, I have given him a typed list of it with an opportunity to review it overnight and there really appear to be only some reservation regarding one minor point and at some point tomorrow morning I will clarify those and then my friend...

THE COURT: You will have the evening to review them and then you can advise us tomorrow morning.

MR. BRYANT: Yes, and I propose that the defence read the admissions in in accordance with those provisions of the Code that set out that particular option and then my friend can accept the admissions and we carry on from that point.

THE COURT: Thank you for your assistance and help. I thank the staff for a long and difficult day.

DRS/DRS/DRS