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R. v. Mascia (Ont. Ct. (Gen. Div.))

Between
Her Majesty The Queen, Respondent, and
Antonio Mascia, Appellant

[1993] O.J. No. 638
DRS 93-12650
Action No. 1570/92

Ontario Court of Justice - General Division
St. Catharines, Ontario
Fedak J.

Heard: January 20, 1993.
Judgment: March 11, 1993.
(24 pp.)

Unemployment insurance — Failure to declare income — Right to remain silent — Admission — Statutorily-compelled information provided — Whether protected against revealing information in criminal proceedings.

The appellant applied for unemployment benefits on July 31, 1989. He received benefits of $189 per week and reported that he had no earnings between April 1 and August 18, 1990. In reality the appellant worked for a construction company between April 8 and August 5, 1990. The appellant had an interview with the respondent on March 14, 1991 in a cubicle enclosed on three sides by bifold separations. Prior to the meeting the appellant was not cautioned as to his right to counsel or that he need not participate in the interview. The appellant admitted that he worked during the reporting period. The respondent would not have been able to prove this without the appellant's admission. The appellant was convicted of ten counts of false reporting contrary to section 103 of the Unemployment Insurance Act and appealed his conviction.

HELD: Appeal allowed. Conviction set aside. The appellant was statutorily compelled to give information because, if the appellant refused to attend and answer questions, his benefits could be cut off and he could be charged pursuant to the Act. Section 7 of the Canadian Charter of Rights and Freedoms included the right to silence and this right arose, even before detention at the investigative stage, when the coercive power of the state was applied against an individual. The respondent had strong suspicions that the appellant falsified his claim and compelled him to answer questions pursuant to the Act, which could have resulted in charges against him. An adversary relationship that gave rise to the right of silence was created when the appellant spoke to the respondent. If the respondent had used this information for its own administrative purposes the appellant's right to remain silent would not have been violated. However, since the respondent used statutorily-compelled information to provide both the grounds and proof of a criminal offence against the appellant, the appellant was conscripted against himself, contrary to his section 7 right.

STATUTES, REGULATIONS AND RULES CITED:

Canadian Charter of Rights and Freedoms, 1982, ss. 1, 7, 10(b), 24(1), 24(2).
Unemployment Insurance Act, R.S.C. 1985, c. U-1, ss. 41(1), 41(5), 41 (6), 103, 105, 105(1), 105(2), 106.

Robert B. Reid, for the Respondent.
Graeme A. Leach, for the Appellant.

FEDAK J.:— Antonio Mascia was convicted of ten counts of false reporting contrary to s. 103 of the Unemployment Insurance Act. He now appeals the decision of His Honour Judge H. Edmonstone on the following grounds:

1. that the learned trial judge erred in finding that the admissions made by Mr. Mascia to Mr. Collins, an investigator employed by the Unemployment Insurance Commission, were voluntary and therefore admissible;
2. that the learned trial judge erred in finding that the appellant's right to be safe from self-incrimination as guaranteed by s. 7 of the Charter of Rights and Freedoms was not infringed and therefore any admissions made to Mr. Collins should be excluded as such admissions would bring the administration of justice into disrepute contrary to s. 24(2) of the Charter of Rights and Freedoms;
3. that the learned trial judge erred in finding that Mr. Mascia was not detained by Mr. Collins during the interview with Mr. Collins and was therefore not entitled to be advised of his right to counsel pursuant to s. 10(b) of Charter of Rights and Freedoms and that the learned trial judge erred in not excluding the evidence so obtained, under s. 24(2) or s. 1 of the Charter.

I. FACTUAL BACKGROUND

The appellant, Antonio Mascia, applied for unemployment benefits on July 31, 1989. Payment of benefits commenced in mid-August, 1989. To continue these benefits the appellant was required to submit reporting cards on a biweekly basis. It is upon these cards that the claimant indicates earnings for any specified bi-weekly period. Ten bi-weekly cards were submitted by the appellant stating that he had no earnings for the twenty week period commencing April 1, 1990 and ending August 18, 1990. Benefits were paid to the appellant, in the amount of $189.00 per week, based upon this confirmation.

On or about February 27, 1991, Mr. John Collins, an investigative officer for would forward the information to his superiors at the Unemployment Insurance Commission and a decision would be made to impose one of three sanctions:

1. a repayment;
2. a repayment and internal fine; or
3. a repayment and institution of charges.

Mr. Mascia did not give evidence on the voir dire.

Mr. Collins admitted that the Unemployment Insurance Commission could not establish that Mr. Mascia had applied for benefits by filing report cards or that he worked for Okon during the same period unless Mr. Mascia admitted such information.

The learned trial judge concluded that the Crown had proved the guilt of Mr. Mascia beyond a reasonable doubt on all counts. His reasons can be summarized as follows:

1. the Notice to Report was used improperly;
2. no threat or inducement existed as the appellant, Mr. Mascia, did not testify that he felt any such hope of advantage or fear or prejudice. Therefore, the statements were voluntary;
3. Mr. Collins was a person in authority to Mr. Mascia (R. v. A.B. (1986), 26 C.C.C. (3d) 17);
4. Mr. Mascia was not "detained" and therefore not entitled to the benefit of being advised of the right to consult with counsel;
5. Mr. Mascia's right against self-incrimination guaranteed by s. 7 of the Charter of Rights and Freedoms was not infringed;
6. that had he, the learned trial judge, found that the rights of the appellant had been infringed, such infringement could be justified.

II. ISSUES AND LAW

A) Was the statement made by the appellant to Mr. Collins voluntary?

It is the appellant's contention that in view of the wrong notice sent to him, he was under the threat or inducement of losing his benefits unless he appeared pursuant to the notice. The notice was in effect a financial threat to Mr. Mascia.

It is the respondent's contention that in addition to the bold print alluded to by the appellant, there is a further provision that is equally prominent in the notice in the following words:

> Important
> If you are unable to report for any reason (for example you have started working) please telephone 688-3663. If you are unable to telephone, return this form immediately showing your reason(s) on the reverse side why you cannot report...
>
> This provides an alternative to appearing.

No further testimony or additional evidence of threat or inducement was offered.

The learned trial judge appeared to apply the test of voluntariness in accordance with the test enunciated by Ibrahim v. The Queen, [1914] A.C. 599 (P.C.). The learned trial judge concluded as he did on all the facts before him. There appears to be no error made by the trial judge. Accordingly, this ground of appeal fails.

B) Was there a breach of the appellant's right to be safe from self-incrimination as guaranteed by s. 7 of the Charter of Rights and Freedoms?

1. The Law

This appeal essentially deals with the scope of s. 7 of the Charter. Particularly, it deals with the question of whether s. 7 protects a person who is statutorily compelled to give information from having that information used against him in a subsequent criminal proceeding. That the statement made to Mr. Collins by Mr. Mascia was statutorily compelled, is, in my opinion, clear. Although the trial judge did not make a finding as to whether Mr. Mascia was statutorily compelled to attend at Mr. Collins' office and answer his questions, the evidence of Mr. Collins indicates that not only could Mr. Mascia's benefits be cut off if he did not co-operate, but that Mr. Mascia could also be charged for not complying with Mr. Collins' direction. Subsections 41(1) and (5), ss. 105(1) and (2) and s. 106 of the Unemployment Insurance Act appear to confirm this view It must therefore be inferred from the evidence and these provisions that the statement was statutorily compellable.

The Supreme Court of Canada contemplated the scope of s. 7 of the Charter in the case of Thomson Newspapers Ltd. et al. v. Director of Investigation & Research et al. (1990), 54 C.C.C. (3d) 417. In Thomson Newspapers, officers of the appellant corporation were ordered to appear before the Restrictive Trade Practices Commission to give testimony under oath and to produce certain records. The orders were issued pursuant to s. 17 of the Combines Investigation Act, which, inter alia, statutorily compelled witnesses to give evidence and provided for contempt of court proceedings if the witness did not answer questions put to him. Section 20(2) of the same Act gave "use immunity" to witnesses by providing that their compelled testimony could not be used against them in subsequent criminal proceedings. The officers of the appellant corporation applied to the court for a declaration that

s. 17 of the Act violated their right to silence under s. 7 of the Charter, and was consequently of no force and effect. The Court held that s. 17 did not violate s. 7.

Lamer J. held that the s. 7 argument could not be sustained, stating that he thought that it was s. 20(2), not s. 17 that should have been challenged. He did state, in dicta, that he agreed with his colleagues that "the specific enumerations in ss. 11(c) and 13 of the Charter are not necessarily exhaustive of the protection afforded by s. 7, and do not prevent residual content being given to s. 7" (at 428).

La Forest J. spoke about the scope of s. 7 in these terms, at 499:

> Sections 11(c) and 13...clearly point to the fact that the privilege or tight against self-incrimination, sometimes referred to as the tight to silence, forms an integral part of the principles of fundamental justice under our legal system. Like my colleagues, I am prepared to agree that s. 7 of the charter may in certain contexts at least provide residual protection provided by ss. 11(c) and 13. The Inability of the appellants to come within either of the latter sections is, therefore, not fatal to their claim.

La Forest J. then held that the power in s. 17 to compel testimony violated a witness' security of the person under s. 7, but held that this violation was not contrary to the principles of fundamental justice since s. 20(2) provided that the testimony could not be used by the Crown in criminal proceedings. La Forest J. also commented in dicta, at 508, that in the absence of a section such as s. 20(2), the compelled testimony would probably not be admissible against the witness pursuant to s. 7 or s. 11(d) of the Charter.

L'Heureux-Dube J. also determined that the Act's compulsion powers constituted a deprivation of "life, liberty and security of the person" pursuant to s. 7 (at 528), but also determined that this deprivation was not contrary to the principles of fundamental justice, since the Act provided a "use immunity" (at 537). Thus, it appears that s. 7 requires that "use immunity" be provided whenever a person is statutorily compelled to testify and his testimony may be used against him in a criminal proceeding.

Wilson J. and Sopinka J., dissenting, held that the Act's power to compel testimony in a situation where the evidence could be used in subsequent criminal proceedings violates a person's right to liberty and security contrary to s. 7 of the Charter. These judges, however, felt that the "use immunity" protection provided in s. 20(2) of the Act did not go far enough as it did not protect the witness against the use of derivative evidence in a subsequent prosecution, which evidence had been obtained as a result of the witness' testimony. Wilson J., when discussing the scope of s. 7 of the Charter, examined the scope of ss. 11(c) and 13. She noted that s. 11(c) only protected the accused against "testimonial" compulsion, and only when "charged with an offence", and that s. 13 only applied if there was a previous "proceeding" which took place (at p. 456-7). Madame Justice

Wilson then concluded, at 457:

> [These sections afford] no protection against such compulsion to a suspect being interrogated prior to any charges being laid. This raises the question whether the state should be allowed to do indirectly what it cannot do directly. [Emphasis added].

Thus, looking at all of the judges' decisions together, it appears that the Supreme Court of Canada agrees that the power to compel testimony in a situation where the evidence could be used against the witness in a subsequent criminal proceeding and where there was no "use immunity" would violate s. 7.

Although the Supreme Court of Canada's decision in Thomson Newspapers is not directly on point as it deals with compelled testimony, and this case deals only with a compelled statement, the comments of the judges in that case, are, in my opinion, relevant.

The Supreme Court of Canada again examined the scope of s. 7 of the Charter in R. v. Hebert (1990), 57 C.C.C. (3d) 1. In Hebert, the accused was arrested and given his rights to counsel. The accused consulted counsel, and then told the police that he wished to remain silent. The police placed the accused in a cell, and subsequently placed an undercover police agent in the cell with him. This agent actively elicited an inculpatory statement from the accused. The Supreme Court of Canada held that although the police could legally have questioned the accused after he had spoken to counsel, the method used by the police violated the accused's right to silence as the police effectively deprived the accused of his right to choose whether to speak to the police or not. By tricking the accused, the police did indirectly what they could not do directly. The accused's right to remain silent under s. 7 of the Charter had been violated.

All of the judges in that case agreed that s. 7 of the Charter, which includes the right to silence, is a broad right which should be given a generous interpretation. (See Wilson J., at 6 and 7; Sopinka J. at 13; McLaughlin J., at 25 and 37). The judges also agreed that the right to remain silent, which is protected as a fundamental principle of justice under s. 7, is broader than both the common law confession rule and the privilege against self-incrimination. (See headnote, at 2).

Sopinka J., left the question open as to whether the right to silence can be interpreted in an even broader manner, when he made this interesting comment, at 16:

> It is not necessary in the present case, however, to trace out every implication of the constitutional right to remain silent. For the purposes of the circumstances of this case, it is sufficient to observe that the right extends at least as far as the common law right. It must be left for subsequent cases to determine whether the constitutional light extends further. [Emphasis added].

Sopinka J., went on to discuss when it is that the right to silence emerges. He stated, at 15:

> The tight to remain silent, viewed purposively, must arise when the coercive power of the state is brought to bear against the individual - either formally (by arrest or charge) or informally (by detention or accusation) - on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual. The right, from its earliest recognition, was designed to shield an accused from the unequal power of the prosecution, and it is only once the accused is pitted against the prosecution that the right can serve its purpose.

Wilson J., accepted Justice Sopinka's views, when she stated, at 6:

> I would respectfully agree with my colleague, Sopinka J., that the right to silence, If it is to achieve the purpose that it was clearly intended to achieve, must arise whenever the coercive power of the state is brought to bear upon the citizen. I think that this could well predate detention and extend to the police interrogation of a suspect. [Emphasis added].

McLaughlin J., with Dickson C.J.C., Lamer J., La Forest J., Gonthier J. and Cory J. concurring, made several important comments regarding s. 7 and a person's right to silence. After reviewing the development of the common law rules on confessions and the common law rules against self-incrimination, McLaughlin J., at 34, concluded:

> Despite their differences, the common law confessions rule and the privilege against self-incrimination share a common theme - the right of an individual to choose whether to make a statement to the authorities or to remain silent, coupled with a concern about the repute and integrity of the judicial process. If the measure of a fundamental principle of justice under s. 7 is to be found, at least in part, in the underlying themes common to the various rules related to it, then the measure of the right to silence may be postulated to reside in the notion that a person whose liberty is placed in jeopardy by the criminal process cannot be required to give evidence against himself or herself, but rather has the right to choose whether to speak or to remain silent.

At 39, McLaughlin J. went further and arrived at a conclusion on the scope of the right to silence in the following terms:

> The common law rules related to the right to silence suggest that the scope of the right in the pre-trial detention period must be based on the fundamental concept of the suspect's right to choose whether to speak to the authorities or remain silent. Any doubt on the question

> is resolved by consideration of related rights protected by the charter, by the charter's approach to the question of improperly obtained evidence, and by the fundamental purpose of the right to silence and related procedural guarantees. In keeping with the approach inaugurated by the charter, our courts must adopt an approach to pretrial interrogation which emphasizes the right of the detained person to make a meaningful choice and permits the rejection of statements which have been obtained unfairly in circumstances that violate that right of choice.
>
> The right to choose whether or not to speak to the authorities is defined objectively rather than subjectively. The basic requirement that the suspect possess an operating mind has a subjective element. But this established, the focus under the charter shifts to the conduct of the authorities vis-à-vis the suspect. Was the suspect accorded the right to consult counsel? Was there other police conduct which effectively and unfairly deprived the suspect of the right to choose whether to speak to the authorities or not?
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> McLaughlin J., also made this important comment, at 33:
>
> From a practical point of view, the relationship between the privilege against self-incrimination and right to silence at the investigatorial phase is equally clear. The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be Illusory. As Ratushny writes (Self-Incrimination in the Canadian Criminal Process (1979), p. 253):
>
>> Furthermore, our system meticulously provides for a public trial only after a specific accusation and where the accused is protected by detailed procedures and strict evidentiary rules. Ordinarily he is represented by a lawyer to ensure that he in fact receives all of the protections to which he is entitled. The accused is under no legal or practical obligation to respond to the accusation until there is an evidentiary case to meet. There is a hypocrisy to a system which provides such protections but allows Them all to be ignored at the pre-trial stage where interrogation frequently occurs in secret, after counsel has been denied, with no rules at all and often where the suspect or accused is deliberately misled about the evidence against him.
>
> [Emphasis added]

Another recent case which considered s. 7 of the Charter was R. v. Beals (1991), 68 C.C.C. (3d) 277 (N.S.Co.Ct.), a summary conviction appeal. In the Beals case, the accused was charged with making false statements under the Unemployment Insurance Act in circumstances not unlike those in the case before this court. However, the accused was advised at the outset that he had a right to retain and instruct counsel and also that he had a right to remain silent. As a result, a s.

10(b) question was never in issue.

The trial judge in Beals, considered the decisions of La Forest J. and Sopinka J. in the Thomson Newspapers case, supra. The trial judge then stated, at 280 of 68 C.C.C. (3d):

> In the case at Bar, the defendant was compelled by statute to give a statement in a circumstance where criminal charges were being contemplated by the investigator. The crown sought to have the statement admitted against the defendant in criminal proceedings. In those circumstances, I am satisfied that the rights of the defendant as guaranteed by section 7 have been infringed.

The trial judge excluded the statements pursuant to s. 24(2) of the Charter.

On appeal,- His Honour Judge Bateman upheld the trial judge's decision. Bateman J. approved of the trial judge's reasoning, and stated, at 280:

> The problem is not that the investigator is empowered to compel the disclosure of information, which is desirable from a regulatory perspective, but rather that the information disclosed is being used in this criminal proceeding. The accused has been conscripted against himself. This flows from the trial judge's finding that the statement was statutorily compelled.

At Mr. Mascia's trial, Edmonstone J. rejected the Beals decision as being non-binding on him, and preferred instead to apply the decisions of the Federal Court, Trial Division in Morena v. The Minister of National Revenue (1991), 90 D.T.C. 6685 and of the Federal Court of Appeal in Tyler v. The Minister of National Revenue (1991) 91 D.T.C. 5022.

The appellant takes the position that the Tyler and Morena decisions followed by the trial judge could be distinguished as they relate to administrative inquiries and not admissions used in the course of an investigation which may form the basis of criminal prosecution, as they were against the appellant in the case at bar.

It is the position of the respondent that Mr. Collins was investigating the background of this particular claim and that the comparisons to the Income Tax Act in terms of verification statement are persuasive and correct to show a reasonable limit on the Charter right. Further, it is the respondent's position that although the appellant was not advised until after the submissions were made that one available option open to the Unemployment Insurance Commission was the laying of charges, Mr. Collins was simply investigating at that stage and the likelihood of recommending that charges be laid was not apparent until after the interview. This latter argument, according to the respondent, is based on the position that there is no common law or statutory rule that obligates an investigator when merely in the investigation stage to tell the interviewee that charges may be laid. [See

Regina v. Esposito (1986), 53 O.R. (2d) 356 (C.A.) and Regina v. Miller (1991) 68 C.C.C. (3d) 517 (Ont.C.A.)].

In the Morena case, Revenue Canada sent the plaintiffs letters requiring the plaintiffs to provide information. At the time the requirements for information were made, there was no evidence of any criminal offence, such as tax evasion, by the plaintiffs. The plaintiffs commenced a proceeding for a declaration that these requirements for information were inconsistent with s. 7 of the Charter.

Pinard J., at 6689 of the decision, considered the jurisprudence with respect to s. 7 of the Charter, and readily agreed, at 6690, that the right to silence has been recognized as a basic tenet of our legal system and as such is protected by s. 7 of the Charter. Pinard, J. further recognized that an accused person has the right to remain silent at the investigative stage as well as at trial.

Pinard J. then stated, at 6690-1:

> It is clear, however, from that judgment and the rest of the relevant jurisprudence, that the right to remain silent cannot exist if there is not a criminal process, be it at an early or at a later stage, that is really involved. Such right, in my view, has therefore no application to a non-criminal situation, where Parliament has expressly imposed an obligation to respond as in subsection 231.2(1) of the Income Tax Act.
>
> .....
>
> The mere suspicion of the plaintiffs' participation in some illicit activities involving another statute, such as illegal sale of wine, is not sufficient, in the circumstances, to confer the required characteristic of formal criminal investigation to what is fundamentally a request made pursuant to the provisions of a specific subsection of the Income Tax Act, which subsection is not, in essence, criminal or quasi-criminal in nature, but purely regulatory.
> Consequently, absent a genuine criminal context, the right to remain silent provided by section 7 of the Charter cannot here be infringed or violated. [Emphasis added].

In the Tyler case, the applicant had been charged with a series of narcotic offences, which prompted Revenue Canada to investigate the possibility that he had failed to report income. Revenue Canada sent him a letter requiring him to provide them with certain information. The applicant applied for a writ of prohibition, fearing that the information he furnished to Revenue Canada would be communicated to the Crown in charge of his narcotics charges, and that the information would be used against him, contrary to his right to silence under s. 7 of the Charter.

Stone J.A., for the court considered the decision of the Supreme Court of Canada in the Thomson Newspapers case, and determined that the right to silence was incorporated in s. 7 of the Charter. Stone J.A. went on to determine that the compulsion of the statements by Revenue Canada would deprive the applicant of his liberty and security of the person under s. 7. This approach, Justice Stone commented, seemed to accord with the analysis contained in Thomson Newspapers, per Wilson J. at 459-461; per La Forest J. at 536, and per L'Heureux-Dube J. at 572-573. Justice Stone, however, stated at 5027, that:

> ...in the context of the tax audit the deprivation does not amount to a breach of the principles of fundamental justice. In the tax audit per se there is no suspect and no accused. The procedure is entirely administrative in nature.

Thus the court determined that the applicant's right to silence would not be violated merely by being compelled to give Revenue Canada information.

Mr. Justice Stone went on to consider the fact that the applicant was facing narcotics charges, and the fact that the information obtained by Revenue Canada could possibly be used by the Crown to prove its case. Stone J.A. stated at 5027:

> ...In my view, any communication of the signed statements to the police in these circumstances would amount to "conscripting" the appellant against himself in a way that would not accord with the principles of fundamental justice in that it would deprive him, as an accused person, of his right to silence.

and, at 5028:

> As I see it, the communication of such compelled information to the police while charges are outstanding, would deny to the appellant his right to silence contrary to the principles of fundamental justice.

Pursuant to this finding the court made an order, under s. 24(1), prohibiting Revenue Canada from communicating the information it received to the R.C.M.P. or any other person.

The only other decision that is relevant is R. v. Spyker (1990), 29 M.V.R. (2d) 41 (B.C.S.C), which appears to be directly on point. In Spyker, the accused was charged with dangerous driving. The Crown attempted to introduce into evidence a statement given by the accused to an insurance adjuster of the Insurance corporation of British Columbia two days after the accident. The accused, as driver of the vehicle involved in the accident, was compelled by law to give the statement to the insurance adjuster. At his trial, the accused argued that the use of the statement violated his s. 7 Charter rights, and argued that it should not be admitted into evidence.

Shaw J., reviewed the facts in the case and explained, at 4344:

> In effect, the accused, by force of law, is being required to provide testimony against himself if I receive this statement in evidence.

> There has been no attack upon the Insurance (Motor Vehicle) Act provisions requiring the giving of the statement. It is well recognized that the provincial government insurance scheme could not property operate unless there is a requirement that insured persons, such as the accused, must co-operate by giving all relevant information concerning accidents.
>
> What is being attacked here is the act of the Crown in offering the statement in evidence.

Shaw J. then considered the Thomson Newspapers and Hebert decisions. He considered that the crux of the Thomson Newspaper decision was that the Combines Investigation Act gave the witness protection by not allowing his evidence be used against himself in a subsequent proceeding, and that the court disagreed only regarding whether this protection was sufficient to satisfy the dictates of fundamental justice under s. 7 of the Charter or not. Mr. Justice Shaw then noted:

> In the case before me there is virtually no protection in the Insurance (Motor Vehicle) Act against the use of the testimony itself, that is, the statement. The Crown's position is that there should be no protection provided by this Court. That does not strike me as being close to the balance between the needs of the state and the protection of the individual reflected in the ...words of McLaughlin J. in Hebert, nor close to the balance reflected in the judgments in Thomson Newspapers....
>
> In conclusion, Shaw J. stated, at 51:
>
> In my opinion, the use by the Crown of the statement given by the accused to I.C.B.C. will be in substance the conscripting of the accused to provide testimony against himself. In my view, it is a principle of fundamental justice that a person cannot be forced to provide the testimony (in this case the statement) which incriminates himself or herself without also being provided with protection that the evidence will not be used against that person in a criminal prosecution. The latter balance, if not provided by the legislation that compels the providing of the information, should be given under s. 24(1) of the Charter.
>
> I invoke that power and rule that the Crown cannot introduce into evidence the statement taken from the accused by the I.C.B.C adjuster.

2. Analysis

Except for Beals, Spyker and Tyler, there are no other cases which are Closely on point.

After reviewing the Hebert decision of the Supreme Court of Canada, it seems quite apparent that s. 7 of the Charter includes the right to silence. This right, according to the Supreme Court of Canada, arises "when the coercive power of the state is brought to bear against the individual". It is when the adversary relationship comes to exist between the state and the individual that the right to silence first emerges. Sopinka J., Wilson J. and McLaughlin J. all appear to accept that the right to silence can arise before detention -- that is at the accusation or investigative stage. The court seems to accept that the right to silence can extend to the point in time at which a suspect is interrogated.

In the present case, the state had strong suspicions that Mr. Mascia had falsified his claims, and consequently compelled him to answer questions pursuant to the Unemployment Insurance Act. The state did this, knowing that if its suspicions were confirmed, one option open to it was to charge Mr. Mascia with falsifying claims and, more importantly, to use Mr. Mascia's statements against him in a criminal trial of those charges. Once the state, as here, suspects the claimant of falsifying his claims and places him in the position that he must answer pertinent questions (under statutory compulsion), the adversary relationship referred to in Hebert is created. Thus, the s. 7 right to remain silent arose when Mr. Mascia was speaking to Mr. Collins.

If the state used the information it obtained strictly for its own administrative purposes, then Mr. Mascia's right to remain silent under s. 7 would not have been violated. This statement of law is supported by the both the Morena decision and the Tyler decision (at 5027), which hold that the right to remain silent does not exist if there is no criminal process involved.

However, where the state, as here, uses information it had statutorily compelled from the suspect to provide both the grounds and the proof of a criminal offence against the suspect/accused, it appears that an accused would be conscripting against himself contrary to his s. 7 Charter right to remain silent. This statement of law is supported by the Beals, Tyler and Spyker decisions. will refer again briefly to the passages in these cases which support the above conclusion.

In the Beals decision, Bateman J., stated at 280:

> The problem is not that the investigator is empowered to compel the disclosure of information, which is desirable from a regulatory perspective, but rather that the information disclosed is being used in this criminal proceeding. The accused has been conscripted against himself. This flows from the trial judge's finding that the statement was statutorily compelled.

In the Tyler decision, Mr. Justice Stone, at 5027 stated:

> ...In my view, any communication of the signed statements to the police in these circumstances would amount to "conscripting" the appellant against himself in a way that would not accord with the principles of fundamental justice in that it would deprive him, as an accused person, of his right to silence.

In the Spyker decision, Shaw J. stated, at 51:

> In my opinion, the use by the Crown of the statement given by the accused to I.C.B.C. will be in substance the conscripting of the accused to provide testimony against himself. In my view, it is a principle of fundamental justice that a person cannot be forced to provide the testimony (in this case the statement) which incriminates himself or herself without also being provided with protection that the evidence will not be used against that person in a criminal prosecution. The latter balance, if not provided by the legislation that compels the providing of the information, should be given under s. 24(1) of the Charter.

In this context, Justice McLaughlin's words in Hebert, at 33, also bear repeating. Justice McLaughlin stated: "The protection conferred by a legal system which grants the accused immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory." [Emphasis added].

In the present case, the state used a statement that it had previously statutorily compelled from the appellant to prove the criminal offence with which the appellant was charged. In my view, this amounts to the conscripting of the appellant against himself, and amounts to a violation of the appellant's right to silence under s. 7. In my view, the appellant's s. 7 rights were violated when the state introduced his previously compelled statement into evidence. Thus, it is my opinion that the trial judge was wrong when he determined that the appellant's s. 7 right to remain silent had not been violated. Therefore, this ground of appeal succeeds.

3. Remedy

This now brings about the question of what to do about this violation. The appellant seems to argue that the statement should be excluded pursuant to s. 1 or s. 24(2) of the Charter. However, in my opinion, neither of those sections should be employed. Section 1 is only to be applied when a statutory provision is being attacked. In this case, no such statutory provision has been attacked. Section 24 (2) is only to be applied in a situation where "a court concludes that evidence was obtained in a manner that infringed or denied" a Charter right. In this case, the evidence was not "obtained" in a manner that violated the appellant's s. 7 Charter right. The way in which the information was obtained, to quote a passage from the Beals case, was "desirable from a regulatory perspective". In this case, the evidence was "used" in a manner that violated the appellant's Charter s. 7 right. In these circumstances, s. 24(2) does not apply.

However, that does not leave the accused without a remedy. In my opinion, the applicant should have requested that the evidence be excluded under s. 24(1) of the Charter. The appellant's deficiency in pleading s. 24(1), is not, in my opinion, relevant, and it is still open for the court to apply s. 24(1) if the circumstances warrant.

Under s. 24(1) a court may grant any remedy which is considered appropriate and just in the circumstances. In R. v. Therens (1985), 18 C.C.C. (3d) 481, a case decided under s. 24(2), the Supreme Court of Canada held that the admission of self-incriminatory evidence obtained by a Charter breach is sufficient to render a trial unfair and sufficient to justify exclusion of the evidence. In my view, the admission of Mr. Mascia's statement would similarly render the trial unfair. In my opinion, it would be inappropriate and unjust in the circumstances to permit the evidence to be admitted. Therefore, the evidence should be excluded pursuant to s. 24(1) of the Charter.

III. CONCLUSION

In my opinion, the learned trial judge was wrong in determining that the appellant's s. 7 rights had not been violated. In my view, they had been violated, and consequently, the evidence should be excluded pursuant to s. 24(1). Accordingly, the appeal is granted and the convictions are set aside.

In view of my findings above, it is not necessary to consider whether Mr. Mascia was detained by Mr. Collins, and therefore whether his s. 10(b) right to counsel may have been infringed.

FEDAK J.

DRS/mjb/DRS/DRS/DRS