

The Top Five - 2005

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



R. v. Orbanski, R. v. Elias, 2005 (SCC)

http://www.lexum.umontreal.ca/csc-cc/en/pub/2005/vol2/html/2005scr2_0003.html

Limits on an individual's Charter right to counsel during a roadside alcohol-screening test

Orbanski was stopped by police after being observed driving through a stop sign without stopping and swerving on the road. Elias was stopped in his vehicle at a random roadside stop. In both cases the officer who approached the vehicle could smell alcohol. Each driver was asked by the police if they had been drinking. Orbanski was also asked to perform a roadside sobriety test, which he failed. Elias failed an approved screening device test. Orbanski and Elias were arrested and neither was advised of their right to counsel prior to being questioned or tested. Both drivers were charged with impaired driving and "driving over 80" contrary to the *Criminal Code*.

Orbanski and Elias both claimed they had been detained by the police and therefore should have been informed of their right to counsel before being asked if they had been drinking and driving. They claimed their rights under s. 10 (b) of the *Canadian Charter of Rights and Freedoms* had been infringed and that this was not a justified limit on their right to counsel under s.1 of the *Charter*.

The issues before the court were whether the accused's had been detained triggering a s.10(b) right under the *Charter*, and if so, whether the police infringement of this right was a reasonable limit given for example the urgency in administering roadside screening tests. An additional issue was whether the police requests for drivers to perform sobriety tests or answer questions about prior alcohol consumption fall within the scope of authorized police action.

At trial, the judge hearing each case held that the accuseds' right to counsel under s.10 (b) were infringed while they were detained and that the limits on the right to counsel arising from the police conduct were not prescribed by law within the meaning of s.1 of the *Charter* therefore the infringement was unjustified. The police evidence was excluded under s.24(2) of the *Charter* in both cases, and the accused were acquitted.

On appeal, the Manitoba Court of Appeal set aside the acquittals and ordered new trials. The Court of Appeal held that s. 10(b) of the *Charter* had been breached and the limit on the right to counsel was not justifiable. However, when deciding the appropriate remedy to apply, the Court held that the evidence should still be admitted anyway, because to exclude it would do greater harm to the administration of justice.

The Supreme Court of Canada, on further appeal, weighed an accused's right to counsel under s.10(b) of the Canadian *Charter of Rights and Freedoms* against the need for society to protect itself from the damage caused by impaired drivers. When detained by the police everyone has the right to counsel under s. 10(b) of the *Charter*. The Court recognized that the right to consult a lawyer is crucial to an accused's ability to exercise his/her rights. As well, being detained by the police deprives an accused of liberty and places him/her at a disadvantage as against the state. However, the s. 1 of the *Charter* provides that the right to counsel is not absolute and can be constrained by reasonable and justifiable limits if those limits are specifically prescribed by law. These limits can be inferred from the general police power to stop vehicles while acting in the execution of their lawful duty. The police were acting in the lawful execution of their duties and responsibilities when they stopped Orbanski after observing his erratic driving. They were also acting lawfully when they stopped Elias even though the stop was random. The scope of justifiable police conduct will not always be defined expressly in a statute. The court concluded that the limit on s. 10(b) right of the drivers in both cases was "prescribed by law."

The court then went on to consider the test set out in *R. v. Oakes* to determine if the limit on the *Charter* right was reasonable and justified. The limit on s.10(b) right was considered to be justified because the objective of reducing the effects of impaired driving is a compelling state objective and the infringement of the right to counsel is rationally connected to that objective. The infringement of the right to counsel in this situation was found to be proportionate and no more than necessary to meet the objective of reducing the effects of impaired driving.

Orbanski and Elias were both found to have been detained by the police under routine police procedures. The administering of the roadside screening test, prior to consulting counsel was held to be a justifiable breach of the accuseds' *Charter* rights. Both cases were returned for a new trial, with the evidence gathered by the roadside screening to be considered by the trial judge.