Case and Comment

EVIDENCE — TESTS FOR ALCOHOLIC INTOXICATION — ADMISSIBILITY — PRINCIPLES GOVERNING CONFESSIONS — SELF-CRIMINATION.— Again the problem of the admissibility in evidence of blood tests to prove drunkenness has been before Canadian courts. In the recent case of *Rex* v. *McNamara*[1] Mr. Justice Schroeder of the Ontario High Court admitted the evidence in a jury trial and his ruling was expressly approved by the Ontario Court of Appeal.[2] Mr. Justice Schroeder declined to follow the ruling of Mr. Justice Boyd McBride of the Supreme Court of Alberta in *Rex* v. *Ford*,[3] which had been followed by the Quebec Court of Appeal in *Rex* v. *Frechette*.[4]

Both the *Ford* and *McNamara* cases involved charges of manslaughter as a result of automobile accidents. In *Ford*, Boyd McBride J. admitted evidence of an analysis of a blood sample taken from the accused shortly after the accident, but he admitted it only after finding as a fact that a proper warning had been given to the accused by an R.C.M.P. corporal before the blood sample was, with the accused's permission, taken from him. In *McNamara*, counsel for the accused argued that, although the accused had given his permission for the taking of the blood sample, he was not at the time in fit condition to give consent, and therefore, by analogy to the rules governing the admission of confessions, the evidence of the analysis should not have been admitted. The evidence was admitted, however, and the analogy to confessions was denied.

I am not concerned here with the weight to be attached to a blood test for determining the degree of alcoholic intoxication. This matter has already been thoroughly canvassed in two articles in the Canadian Bar Review.[5] The main problem in *Ford* and

[1] [1951] O.R. 6.

[2] *Ibid.*, at p. 11.

[3] [1948] 1 W.W.R. 404. A new trial was ordered by the Appellate Division without giving written reasons: [1948] 1 W.W.R. 656.

[4] (1948), 94 C.C.C. 392, affg. (1948), 93 C.C.C. 111; also *R.* v. *Gagnon* (1951), 10 C.R. 189 (Que.).

[5] Rabinowitch, Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication (1948), 26 Can. Bar Rev. 1437; Letourneau, Chemical Tests in Alcoholic Intoxication (1950), 28 Can. Bar Rev. 858.

McNamara, and cases like them, is whether a blood test is to be treated as a confession, and admitted or rejected in accordance with the rules governing confessions. Also involved is the question whether the admission of a blood test violates the rule against self-crimination.

It is essential at the outset to distinguish the rule excluding confessions (unless certain conditions are met) from the privilege against self-crimination. Professor Wigmore succinctly sets out the difference thus:

> The sum and substance of the difference is that the confession-rule aims to exclude self-criminating statements which are *false*, while the privilege-rule gives the option of excluding those which are *true*.[6] [Italics added]

In *Rex* v. *Ford* Mr. Justice Boyd McBride set down the basis of his ruling as follows:

> I place to the forefront of anything I shall now say my assent to the submission of counsel for the defence that the binding and established rules and principles which govern the admissibility of statements or confessions of an accused person (sec. 685 Criminal Code, R.S.C., 1927, ch. 36) apply to the point here in issue, or if, literally speaking, they do not apply, then the practice is to be settled by the enunciation of principles analogous to them. In my view, that contention is quite sound, if for no other reason than that the accused in the dock here is an innocent man until the Crown succeeds in establishing his guilt to the point of exclusion of any reasonable doubt and that much depends on my own estimate of the credibility of witnesses, in a trial within a trial.[7]

It would seem clear that the learned judge in this statement was thinking only of the rules on confessions. But, having said this, he goes on:

> Firstly there is no power in anyone under our law to compel an accused person to criminate himself. Secondly, and broadly speaking, any statement, confession or *thing done* by an accused person, which might criminate him, at a time when that person is on the verge of being arrested or 'threatened of being charged' or has actually been arrested, must have been made or *done* freely and voluntarily in the technical sense and not as it is sometimes popularily understood.[8] [Italics added]
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> There is one further observation which I perhaps ought to add. I can see no practical distinction or difference in principle in an accused person furnishing criminating evidence against himself by word of mouth or by using his hand to write or sign a confession, and furnishing such criminating evidence by authorizing and assisting in a blood sample being taken.[9]

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[6] 3 Wigmore, Evidence (3rd ed., 1940) at p. 250.
[7] [1948] 1 W.W.R. 404, at p. 408.
[8] *Ibid.*
[9] At p. 410.

Then, after the ruling had been given, the learned judge cited[10] a discussion of the question of "self-incrimination" and the legal and medical aspects of blood tests to determine intoxication in an article by Professor E. M. Morgan.[11]

With respect, it is submitted that the three observations of Mr. Justice Boyd McBride just cited contain the seed of the difficulty that has beset the courts in dealing with the question of blood tests: namely, a confusion between the principles underlying the exclusion of confessions and the principles underlying the privilege against self-crimination. Before any conclusion can be reached the question must be considered separately in each of these two fields of the law of evidence.

The confusion of principles just mentioned has led, it is submitted, to a misapplication of the rules excluding confessions to the admissibility of blood tests in evidence—a misapplication that has been avoided in the *McNamara* case. If it is true that the rules on the admission of blood tests are the same as, or analogous to, the rules on the admission of confessions, it would seem that there should be the same or analogous reasons for the application of those rules in both cases. Confessions comprise one of the exceptions to the rule against hearsay.[12] That in their very nature they are hearsay cannot be doubted since they are presented to the court by witnesses who cannot swear to the truth of their contents and who cannot be cross-examined on them. The rule against hearsay itself is based, in the main, on the absence of an oath and of the opportunity for cross-examination — both of which go to the *accuracy or trustworthiness* of the source of the evidence and hence of the evidence itself.

To follow the analogy put forward, it cannot be contended that blood samples are suspect at their source. The person from whom a blood sample is taken cannot increase its alcoholic content even if he is in "fear of prejudice or hope of advantage".[13]

Confessions are admissible, in exception to the hearsay rule, only when the court is assured that they have been voluntarily made and are free from any taint of untrustworthiness. A voluntary confession is usually said to be received because of the presumption that no person will wilfully make a statement against his interest *unless it be true*.[14] Confessions not voluntary are rejected on the ground that there is a danger that the prisoner may

[10] At p. 412.
[11] "Five Years of Evidence" (1946), 59 Harv. L. Rev. 481, at p. 519.
[12] Phipson, Evidence (8th ed., 1942) p. 212.
[13] *Ibraham* v. *R.*, [1914] A.C. 599, at p. 609.
[14] *R.* v. *Turner*, [1910] 1 K.B. 436; *R.* v. *Mazerall*, [1946] O.R. 762.

have been induced, by hope or fear, to criminate himself *falsely*. Pollock C.B. in *Regina* v. *Baldry* remarked *arguendo*, of the contention for the prisoner that there is a presumption of *law* that confessions so induced are false:

> The law doesn't presume the statement to be untrue, but rather that it is uncertain whether it is true,[15]

and in the judgment he added:

> The ground of exclusion is that it would not be safe to receive a statement under any influence or fear.[16]

In *Boudreau* v. *The King* Rand J. said:

> It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule.[17]

In the *Ford* case Boyd McBride J. said:

> I am also satisfied on the evidence that from the moment of the accident to the giving of the sample, there was not the slightest suggestion of any promise, favour, threat or inducement by anyone, resulting in it being given.[18]

To labour a point already made, could any "promise, favour, threat or inducement by anyone" have affected the alcoholic content of the accused's blood? Could the truth of the evidence obtained by an analysis of that sample be in any way impugned on the ground that hope or fear had affected it?

In *Rex* v. *Voisin* the body of a woman was found in a parcel with a piece of paper on which was written the phrase "Bladie Belgiam". The police, in the course of their investigations, asked the accused to write the words "Bloody Belgian" and he wrote "Bladie Belgiam". He had not been cautioned before the writing. Lush J. remarked *arguendo:*

> There is a difference between the admissibility of a statement and the admissibility of handwriting. A statement may be made under such circumstances that the true facts are not brought out, but it cannot make any difference to the admissibility of handwriting whether it is written voluntarily or under the compulsion of threats.[19]

And, in giving the judgment of the Court of Criminal Appeal, A. T. Lawrence J. said:

> The mere fact that the words were written at the request of police officers, or that he [the accused] was being detained at Bow Street, does not make the writing inadmissible in evidence. Those facts do not tend to

[15] (1852), 2 Den. C.C. 430, at p. 432.
[16] *Ibid.* at pp. 441-442.
[17] [1949] S.C.R. 262, at p. 269. See also *R.* v. *Doyle* (1886), 12 O.R. 347; *R.* v. *Todd* (1901), 4 C.C.C. 514; *R.* v. *Benjamin* (1920), 32 C.C.C. 191.
[18] [1948] 1 W.W.R. 404, at p. 410.
[19] [1918] 1 K.B. 531, at p. 533.

> change the character of the handwriting, nor do they explain the resemblance between his handwriting and that upon the label, or account for the same misspellings occurring in both.[20]

It is submitted that the correct view of this question is stated by Schroeder J. in the *McNamara* case:

> If one were to say that an analogy has to be drawn between the instant case and a case involving the taking of a statement from a man who was labouring under the influence of liquor to such an extent that he was not in control of himself mentally or physically, this question arises, namely, that in the case of a statement or a declaration, it might very well be that the man had reached such a state of irresponsibility that one would not be inclined to regard his statement as free and voluntary or that one would attach so little weight to it that its value as evidence would be negligble. But how can that condition apply to any of the physical characteristics of the accused? Does it make the blood sample taken any less reliable as evidence? Does it in any way affect the quality of his blood except to give it an alcoholic content? Obviously if the man were not suspected of being under the influence of liquor, there would be no reason for the taking of a sample of his blood.[21]

So much for confessions. In the *Ford* case the learned judge seems to have assimilated the rules governing the exclusion of confessions to those governing the privilege against self-crimination. The two are separate and distinct sets of principles. This fact seems to have been appreciated by both trial judge and court of appeal in the *McNamara* case, since no mention of the privilege against self-crimination was made in either judgment.[22] Nor does there seem to be any reason why the principles concerning self-crimination should be considered in deciding on the admissibility of blood tests in evidence.

The privilege against self-crimination rests on the maxim *nemo tenetur seipsum accusare* — no man can be compelled to criminate himself. The extent of the maxim is stated in *Broom's Legal Maxims* as follows:

> It may be stated as a general rule that *a witness in any proceeding* is privileged from answering, not merely where his answer will criminate him directly but also where it may have a tendency to criminate him.[23] [Italics added]

The privilege provides protection to *witnesses*. Professor Wigmore states that the object of the protection is to prevent:

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[20] *Ibid.* at p. 538.

[21] [1951] O.R. 6, at p. 8. Robertson C.J.O., giving the judgment of the Court of Appeal, agrees expressly with Schroeder J., at p. 12.

[22] Compare *R.* v. *Dick*, [1947] O.R. 105, at p. 124 (C.A.).

[23] Broom's Legal Maxims, p. 671. See also *Fisher* v. *Reynolds* (1852), 12 C.B. 762; *R.* v. *Garbett* (1847), 1 Den. C.C. 236.

> the employment of legal process to extract *from the person's own lips* an admission of his guilt, which will thus take the place of other evidence.
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> it is not merely any and every compulsion that is the kernel of the privilege, in history and in constitutional definitions, but testimonial compulsion.
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> The privilege protects a person from any disclosures *sought by legal process against him as a witness.*[24] [Italics added]

Thus a person is also entitled to refuse to produce any documents or chattels under protection of the privilege in response to any form of process *treating him as a witness.* But if such documents or chattels are obtained from him by some process, whatever it may be, that does not treat him as a witness, then they are admissible in evidence against him, even though they may be of a self-criminating nature. Thus in the *Trial of Francis Francia* on a charge of conspiring to take the life of the King, counsel for the accused pointed out that the only evidence against him was certain letters and papers seized from him and objected, "But all that is said arises from himself", to which Pratt J. replied:

> I never knew in my life, but what was done in this case was ordinarily done in the like cases, and ought to be done; and you ought not to go on with invectives to the jury, complaining that his papers are seized, and then that those papers are turned against him. When a correspondence is carried on by letters ought they not to be seized? and if they appear treasonable, ought they not to be kept and made use of against him? We must not sit here to hear invectives against magistrates of the highest quality, for doing that, which if they had not done, they had failed in their duty.[25]

Dillon v. *O'Brien* is another case indicating that the privilege extends only to witnesses under legal process. Here Palles C. B. said, with respect to certain books and documents that were seized and entered in evidence:

> If there be a right to production or preservation of this evidence, I cannot see how it can be enforced otherwise than by capture; if material evidences of crime are in possession of a third party, production can be enforced by the Crown by *subpoena duces tecum*, but no such writ can be effective in the case of the person charged.[26]

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[24] Wigmore, Evidence (3rd ed., 1940), Vol. VIII, pp. 362-363. The United States Constitution, Amendment V, specifically provides that no person "shall be compelled in any criminal case to be a witness against himself". This is popularly called the self-incrimination clause. In contrast, a confession obtained by coercion is held to be inadmissible because it is a deprivation of liberty without due process of law, and so contrary to the due process clause of the 5th and 14th amendments (*e.g.*, *Lee* v. *Mississippi* (1948), 332 U.S. 742).

[25] (1717), 15 How. St. Tr. 897, at p. 966.

[26] (1887), L.R. 20 Ir. 300.

Concerning the production of chattels, there is the Canadian case of *Rex* v. *Angelucci*, where the accused, while in custody, was questioned by police officers who had information that watches had been stolen. He was asked what he had in his pockets and he produced the missing watches. This evidence was held to be admissible. Robertson J.A. said, in addition, however:

> In my opinion the policeman would have been entitled, at the time he asked the question of the accused, to search him, and the watches could then have been used in evidence against him.
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> I do not think that what took place was a confession. The accused was only doing willingly, in answer to the officer's request, what the officer could have found out, without the accused's consent, by searching him.[27]

In effect Robertson J.A. has said that the accused could have been compelled to produce self-criminating evidence. It cannot be contended that there is any difference between evidence obtained from a forcible search of the person of a suspect by an officer and the same evidence obtained by an officer physically coercing a suspect to produce it himself.

Perhaps a better case on this point is *Rex* v. *Brezack*,[28] where two police officers, suspecting that the accused was in illegal possession of drugs, seized him. One of the officers held his arms while the other grasped him by the throat to prevent him swallowing anything he might have in his mouth. After a struggle the second officer succeeded in getting his hand into the suspect's mouth, but he found nothing. Drugs were later discovered in the accused's car and he was put on trial. The court held that what the constable had done was permissible. Any evidence he might have obtained in this way would therefore have been admissible. Would it have been any the less admissible had the constable merely choked the appellant until he had spit it out and thereby incriminated himself?

If the privilege against self-crimination is not restricted to testimonial compulsion, it would seem that evidence as to the accused's conduct, demeanour or appearance obtained extra-judicially should not be used against him. Yet in *Hubin* v. *Rex*[29] the court was of the opinion that the conduct of the accused when charged with the crime on arrest, and when confronted with and

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[27] [1947] 1 W.W.R. 82, at p. 83. Also note that in *R.* v. *Voisin*, *supra*, there is an inference that if the prisoner had not written the words "Bladie Belgiam" on request, he might have been compelled to, and the writing would still have been admissible in evidence. And see *R.* v. *Golden* (1905), 10 C.C.C. 278.

[28] [1949] O.R. 888.

[29] [1927] S.C.R. 442. See also *R.* v. *Christie*, [1914] A.C. 545, at pp. 565-6; *R.* v. *Dimetro and Mitchell*, [1946] 1 D.L.R. 286.

identified by the girl of whom he was alleged to have had carnal knowledge, was such that a jury, or a judge sitting without a jury, might infer from it some acknowledgement of guilt. And in *Preeper* v. *Regina* Gwynne J. stated:

> The opinion of a witness may be given that a certain person appeared to be in fear—that on being held to answer he looked as if he felt badly.[30]

The very appearance of the accused in court has been used against him. In *Rex* v. *Hughes*,[31] where the prisoner was charged with carnal knowledge of a girl under fourteen, the similarity between the accused and the child of the complainant was admitted in evidence and pointed out to the jury. Also in *Rex* v. *Watson*,[32] when the Crown sought to identify three prisoners, it was objected that the attention of the witnesses was too directly pointed to them. But the court held that the prosecution might ask in the most direct terms whether any of the prisoners was the person meant and described by the witness. No one has yet suggested that an accused can remain away from the court room during his trial, or sit in an enclosed dock, lest he incriminate himself.

Another example of instances where incriminating testimony can be compulsorily obtained and used against a man at his trial is where he gives incriminating testimony under statutory compulsion. In *Walker* v. *The King*[33] the appellant, from a conviction for manslaughter, had admitted to a police officer, under the compulsion of section 40(1) of the Ontario Highway Traffic Act,[34] that he was the driver of one of the cars involved in the accident. The Supreme Court of Canada held that this evidence was admissible against him on his trial for manslaughter since the protection from disclosure provided by section 88 was only good in civil proceedings.[35]

Northey v. *The King*[36] was a case involving the Department of Munitions and Supply Act.[37] Under section 18(1) of that Act any information obtained by the exercise of the powers granted in the

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[30] (1885), 15 S.C.R. 401.
[31] (1910), 22 O.L.R. 344.
[32] (1817), 2 Stark. 116. See also *Reg.* v. *Blackburn* (1853), 6 Cox C.C. 333. Identification has also been made in respect of various characteristics of an accused: *R.* v. *Patch* (1806), Wills' Circumstantial Evidence (5th ed.) p. 165 (left-handedness); *R.* v. *Keating* (1909), 2 Cr. App. Rep. 61 (voice); *Shaw's* case (1830), 1 Lew. Cr. C. 116 (footprints). In these cases the report does not indicate whether compulsion was exercised.
[33] [1939] S.C.R. 214.
[34] R.S.O., 1927, c. 251.
[35] See also *Peters & Williams* v. *Turner*, [1948] 1 W.W.R. 412.
[36] [1948] S.C.R. 135.
[37] 1939 (2 sess.) c. 3 (Can.).

Act was protected from disclosure without the consent of the person concerned. By an amendment to the Act[38] section 22 was added, which empowered the Minister to conduct inquiries and, by subsection 5, made it an offence for any person who:

> (c) refuses to give evidence on oath or on solemn affirmation as required by the investigator, or
> (d) refuses, when giving evidence before an investigator under this section, to answer any question which the investigator deems requisite to the full investigation of the matter into which the investigator has been appointed to examine.

The appellants were convicted under section 444 of the Criminal Code for conspiring to defraud the Crown. Evidence obtained previously under section 22 of the Department of Munitions and Supply Act was admitted in evidence against them. On appeal it was held in the Supreme Court of Canada that, *because of section 18(1)*, this evidence was inadmissible. The argument of the Crown had been that, since section 22 had been added at a later date, section 18(1) did not apply to it and there was therefore no protection for evidence given under section 22. Had section 18(1) not applied, the evidence would have been admissible, although it was self-criminating evidence obtained from the accused by statutory compulsion.

The fact that a witness is compelled by statute to answer incriminating questions in one proceeding does not render his answers inadmissible against him in subsequent proceedings.[39] The very structure of the Canada Evidence Act[40] sustains this contention. Section 5(1) removes the privilege; subsection 2 of section 5 provides protection to the witness in subsequent proceedings. If a witness cannot be compelled to incriminate himself with respect to his own subsequent trial, there would be no need for the statutory protection afforded by subsection 2. But it is obvious that such protection is needed. What is more, the protection is only afforded when the accused asks for it and asks for it on the ground that his answer might incriminate him.[41] If he does not object to answer the questions when they are put to him the provisions of subsection 2 do not apply, and the answers are receivable against him in any criminal trial or other proceeding.[42]

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[38] 1943-44, c. 8 (Can.).
[39] *Walker* v. *R.*, footnote 33 *supra*; *Reg.* v. *Coote* (1873), L.R. 4 P.C. 599; *Reg.* v. *Scott* (1856), 1 Dears. & B. 47; *R.* v. *Mazerall*, [1946] O.R. 762, at p. 779.
[40] R.S.C., 1927, c. 59.
[41] *Tass* v. *R.*, [1947] S.C.R. 103; *R.* v. *Mazerall*, [1946] O.R. 762, at p. 780.
[42] *R.* v. *Clark* (1901), 3 O.L.R. 176.

In *Rex* v. *Ford* counsel for the Crown submitted that taking blood samples is much the same as taking fingerprints. Boyd McBride J. said:

> I do not agree at all with that. There is the statutory authority of Parliament entitling the police to interfere with the person of a prisoner for the purpose of finger-printing. It is not suggested that there is any such authority to take blood samples.[43]

In *Rex* v. *McNamara* counsel for the appellant also argued that fingerprinting and photographing are expressly authorized by the Identification of Criminals Act[44] and that, if a blood test is to be permitted, specific statutory authority would have to be found.[45] Both the trial judge and the Court of Appeal ignored this argument. Assuming that fingerprints could otherwise be shown to be of probative value, it cannot be contended that if they were illegally obtained they are inadmissible in evidence. Merely because evidence is obtained illegally does not make it inadmissible.[46]

The testimony of fingerprint experts is opinion evidence and admissible as such.[47] In *Rex* v. *De'Georgio and Servello* Thompson C.C.J. said:

> Under neither the Act nor the orders in council do I find any provision similar to what I find in the case of handwriting; that these prints may be used for the purposes of evidence per se. It may be used for the purposes of assisting the expert to give his opinion, and to explain his opinion but only for that purpose.[48]

He points out that in section 2(3) of the Identification of Criminals Act, which reads, "The signaletic cards and other results thereof may be published for the purpose of affording information to officers and others engaged in the execution or administration of the law", the word "others" is *ejusdem generis* with "officers". Thus there is no provision in the Act making fingerprints evidence. Nor, in any event, does that seem to be the purpose of the Act. Its object is to be found in section 3, which provides:

> No one having the custody of any such person, and no one acting in his aid or under his direction, and no one concerned in such publication, shall incur any liability, civil or criminal, for anything lawfully done under the provisions of this Act.

It is submitted that had this Act never been passed, if an expert witness were able to prove that the fingerprints of an accused are the same as those found on a murder weapon, then those finger-

[43] [1948] 1 W.W.R. 404, at p. 409.
[44] R.S.C., 1927, c. 38.
[45] [1951] O.R. 6, at p. 11.
[46] *R.* v. *Honan* (1912), 26 O.L.R. 484; *R.* v. *Doyle*, footnote 17 *supra*; *R.* v. *Wright*, [1929] 1 W.W.R. 917; *R.* v. *Lee Hai*, [1935] 2 W.W.R. 177.
[47] *R.* v. *Buckingham and Vickers*, [1946] 1 W.W.R. 425.
[48] [1934] 3 W.W.R. 374, at p. 379.

prints would be admissible in evidence against that accused even if they had been obtained from him at the point of a gun. There is nothing in the Act to indicate an intention to alter the law.

An examination of the common law privilege against self-crimination shows that it is an option of refusal, not a prohibition of inquiry. An incriminating question may be asked, but the witness may refuse to answer on the ground that his answer might incriminate him. Furthermore, it is noteworthy that, in determining whether the common law privilege against self-crimination has been infringed, the court looks only to the time when the question was put and not to the time when it is sought on a subsequent trial to make use of the answer.[49] And the infringement, it appears from the authorities set out, must have concerned a question put to the person when he was a witness or under some legal process. On this basis there seems to be no reasonable ground for excluding the evidence of blood samples taken from an accused without his permission before he came under any legal process.

It appears in the light of the foregoing that the Ontario Court of Appeal and Mr. Justice Schroeder in *Rex* v. *McNamara* have taken a correct stand on the question of the admissibility of blood tests as evidence of alcoholic intoxication. It is submitted, with respect, that they have properly ignored and avoided any reference to the privilege against self-crimination. They have also correctly denied any analogy to the principles governing the admission of confessions.[50]

J. S. WOODS*

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LABOUR RELATIONS — PICKETING — ILLEGAL STRIKE — INJUNCTION.— Some time ago a contributor to this Review noted the then current dearth of picketing cases decided by superior courts. No doubt this was attributable to several factors. The advent of collective bargaining legislation promised an end to "recognition" strikes and offered a procedure designed at least to minimize other strikes. Much has been accomplished, but employers have patiently waited to see realized the full benefits offered by the

[49] *R.* v. *Tass* and *R.* v. *Mazerall*, footnote 41 *supra*.

[50] From information available since this comment was written, it appears that the government intends to introduce an amendment to the Criminal Code, which will create a new offence, 'driving while one's ability to drive is impaired by alcohol or any drug, and provide for the taking of chemical tests of a sample of bodily substance for use as evidence in cases involving drunken driving or driving while the ability to drive is impaired by alcohol. It will be interesting to see the detailed provisions of the bill when they are made public.

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legislation. Unfortunately in many instances labour has not seen fit to abide by the conciliation provisions of the legislation. It seems fair to say that most strikes are illegal. A growing impatience on the part of employers with the failure of the legislation to deal adequately with the "illegal" strike may produce a revival of picketing cases in the superior courts.

Three cases recently decided by superior courts merit attention. Two of the three, one from Ontario and the other from British Columbia, are commented on here. The third is an Ontario decision of McRuer C.J.H.C., which has not yet been reported, and comment on it must be reserved for another occasion.

The first case, *Oakville Wood Specialties Limited* v. *Mustin et al.*,[1] may be disposed of rather shortly. Unfortunately the reasons for judgment were delivered orally and little, except in general terms, was said of the principles upon which relief was granted. The facts were simple. The strike occurred at the plaintiff's plant and picketing ensued. The employer brought an action against the individuals concerned and moved for an interlocutory injunction to restrain the defendants from picketing the plaintiff's premises and from doing other acts in connection with the strike. The application was heard by Gale J., who found on the evidence before him that the strike was illegal in the sense that it was not recognized as lawful under the provisions of the Labour Relations Act, 1950, of Ontario. Counsel for the defendants, though not conceding that the behaviour of the defendants was unlawful, apparently did not argue very strenuously that it could be regarded as lawful. The learned judge found abundant evidence to justify the conclusion that irreparable damage was being done to the plaintiff as a result of the strike.

It was argued on behalf of the defendants that the injunction ought not to be granted because there were alternative remedies available to the employer in another forum, namely, by application to the Labour Relations Board for a declaration that the strike was unlawful; by application to the same Board for leave to prosecute the defendants for breach of the Labour Relations Act; or by laying an information under the provisions of section 501(f) of the Criminal Code. Gale J. found the obvious answer to this argument. The loss to the employer would not be cured or compensated by any of these proceedings. None of the other arguments advanced for the defendants needs any serious consideration.

Although the point is not mentioned in the report of the case, it seems clear that the decision must stand for the proposition

[1] [1950] O.W.N. 735.

that, even assuming a common law "right" to picket, the so-called right is conditioned on observance of the provisions of collective bargaining statutes that lay down conditions precedent to its lawful exercise.

At almost the same time in British Columbia Wilson J. had much the same problem before him.[2] In that case the plaintiff, which operated a number of restaurants in Vancouver, brought an action for an injunction and damages for unlawful picketing. The defendants were the president and secretary of the union, as representing the membership of the union, and the union itself. No question was raised over the right to launch the action in that form.[3] The union had been certified as the bargaining agency for the employees of restaurant No. 5. It had not been certified as the bargaining agency for the employees of restaurants Nos. 6 and 7. Collective bargaining for an agreement in respect of the employees in No. 5 had led to conciliation, but before a strike vote was taken as required by the relevant British Columbia collective bargaining statute, the union picketed restaurant No. 5 and also Nos. 6 and 7. An odd circumstance was that during conciliation it was determined that the union no longer represented any employees in No. 5, although under the statute it remained the certified bargaining agent. No strike vote could be taken effectively by the union, and in fact it would appear that no strike had occurred.[4] The trial judge found the picketing to be well conducted and orderly, although it consisted of a fully organized patrol. He found that none of the acts of the picketers constituted a tort—not even what might amount to a common law nuisance — and, after discussing the cases, he came to the conclusion that picketing per se was not unlawful at common law.

At the trial the learned judge was referred by counsel to the provisions of the British Columbia collective bargaining statute containing a general prohibition of activity restricting or limiting production. He held that this general prohibition must be overridden by the provisions of the British Columbia Trade Unions Act, which specifically legalized "peaceful picketing". Having previously found, of course, that the picketing was peaceful, it followed that in his view the picketing could not be enjoined and

[2] *Aristocratic Restaurants (1947) Ltd.* v. *Williams et al.*, [1950] 4 D.L.R. 548.

[3] See the decision of Barlow J. in *Canadian Seamen's Union* v. *Canada Labour Relations Board*, [1951] O.W.N. 192, which distinguishes the cases dealing with the British Columbia legislation.

[4] See the judgment of O'Halloran J. A. in the Court of Appeal, [1951] 1 D.L.R. 360, at p. 369, who treated the picketing as a prelude to strike action.

the action was dismissed save in one respect that is not material to this comment. It should be mentioned here that there is no similar provision in Ontario labour legislation legalizing "peaceful picketing". To my knowledge, British Columbia is the only province that has passed such legislation.

On appeal the judgment of the trial judge was reversed, the picketing enjoined and damages assessed. O'Halloran J.A. observed that the trial judge had made no distinction between the picketing of restaurant No. 5 and the picketing of restaurants Nos. 6 and 7. He held that in respect of the last two restaurants the union was a gratuitous intervenor, without status, and therefore he would at once have enjoined the picketing of those two restaurants and allowed the appeal to that extent. In dealing with the picketing at No. 5, he disagreed with the trial judge's finding that the picketing was peaceful and entitled to the protection afforded by the Trade Unions Act. In his view, although the picketing may have been orderly and well conducted, nevertheless it was an organized patrol and constituted a militant form of picketing that did not come within the protection of the Trade Unions Act.

It is of more interest to the profession in other provinces to note his opinion on the non-observance by the union of the provisions of the collective bargaining legislation before the commencement of picketing. As the writer apprehends his reasoning on this point, he concluded that the British Columbia collective bargaining legislation was passed to avoid economic loss to the community and to maintain social equilibrium. In order to achieve these ends, it granted to unions certain privileges that, standing alone, would have been obnoxious to the common law as being in restraint of trade. At the same time, in granting those privileges, the common law right to strike was abrogated to the extent that recourse to certain provisions of the legislation (conciliation and strike vote) had to be exhausted before strike action could be taken legally. Undeniably these provisions were not followed in the *Aristocratic Restaurants* case and in the view of O'Halloran J.A. the picketing that occurred was therefore illegal and should be enjoined.

Sidney Smith J.A. went further and held that in his view there was no such thing as a "common law right to picket". Picketing was per se illegal, he thought, unless justification could be found for it in some statute. He discussed at length the two decisions of the English Court of Appeal in the *J. Lyons & Sons* and *Ward, Lock and Co.* cases[5] and the decision of the Supreme Court of

[5] [1899] 1 Ch. 255; (1906), 22 T.L.R. 327.

Canada in *Reners* v. *The King*.[6] He also reviewed the other Canadian cases dealing with those decisions, and in the result followed what he conceived to be the view of the court in the *Lyons* case. He could not find that the picketing was justified by the British Columbia Trade Unions Act and therefore, since in his view picketing was illegal, it should be enjoined.

Robertson J.A., dissenting, also dealt with the *Lyons* and *Ward, Lock* cases and the *Reners* case, and expressed the view that, although the question still remained whether or not at common law or under the Trade Unions Act the picketing was lawful, he was of the opinion that it was. He further held that the general prohibition contained in the collective bargaining legislation related only to activities taking place in the employer's place of employment and had no relation to picketing. In any event he did not think that there was sufficient justification to warrant the interpretation that the general prohibition should override the protection afforded by the Trade Unions Act, and held that the Act constituted a defence.

It would serve no useful purpose, and indeed would be beyond the scope of this comment, to consider the question whether a common law "right" to picket exists. This matter has already been adequately treated by Professor Finkelman.[7] It was there suggested that at common law picketing was not unlawful per se and that for it to be unlawful, in the sense of founding civil liability, it must be accompanied by an independent tort or be in furtherance of a conspiracy to injure or a conspiracy to commit a crime. It was further suggested that, although section 501 of the Criminal Code seems to have been used by the Canadian courts as a foundation for civil liability, it ought not to be, since the constitutional division of legislative authority does not permit the Parliament of Canada to establish civil rights by legislating on criminal matters.

Whether that be correct or not, it has seemed to this writer that basically the view of O'Halloran J.A. is sound on one point at least, namely, that provincial collective bargaining statutes are designed to promote industrial peace. Whatever may be the views of employers or unions about one another or about the matters in issue between them, the interests of the community demand that the provisions of the statute designed to promote industrial peace be exhausted before the parties are free to resort to their own

[6] [1926] S.C.R. 499.

[7] Finkelman, The Law of Picketing in Canada (1937), 2 University of Toronto Law Journal 67; (1938), 2 University of Toronto Law Journal 344.

devices. Much has been said, particularly by the administrative tribunals applying such statutes, to the effect that their intent is to encourage collective bargaining. No doubt this is true, but any such purpose is subsidiary to the main purpose, the maintenance of economic stability in the community. Any action that constitutes a violation of an express prohibition in the statutes, or furthers a violation, must perforce be illegal. If it is illegal, is continuing and is causing irreparable damage, why should it not be enjoined?

T. R. WILCOX*

* * *

CUSTODY OF INFANTS — PRINCIPLES APPLICABLE — EFFECT OF FOREIGN JUDGMENT.— In earlier issues of the Canadian Bar Review[1] the decision of the Ontario Court of Appeal in *McKee* v. *McKee* was discussed. The action has since been carried to the Supreme Court of Canada[2] and to the Privy Council.[3] The question in issue was whether a father who deliberately evaded an order of a foreign court, which had awarded custody of an infant to the mother, could, by transporting the infant to Ontario, invoke the aid of the Ontario courts in resisting an application there by the mother for custody.

Briefly, the facts are that by an order of the Superior Court of the State of California, dated August 1st, 1945, following a lengthy hearing, it was ordered that the father deliver custody of the infant to the mother. Appeals and other proceedings were finally disposed of in favour of the mother on the 23rd day of December, 1946. Before the last order became effective, the father removed the infant to a farm near Kitchener, Ontario. It was all but conceded that the father took the infant to Ontario for no other reason than to remove him from any jurisdiction in the United States, and the judgment of the Privy Council was based on this premise. Both parents and the infant were citizens of the United States, and the father did not, until the trial in Ontario, question the jurisdiction of the California court.

As soon as she ascertained the whereabouts of the infant the mother obtained a writ of habeas corpus in Ontario. On the return of the writ at Osgoode Hall, Smily J. directed an issue to be tried as to who should have custody, and the issue was tried before Wells J., who awarded custody to the father. The Ontario Court

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[1] (1948), 26 Can. Bar Rev. 1368 and 1372; (1949), 27 Can. Bar Rev. 99.
[2] [1950] S.C.R. 700.
[3] At the time of writing still unreported.

of Appeal affirmed this judgment, but Robertson C.J.O., who dissented, took the view that in the circumstances the Ontario court ought not to exercise its undoubted jurisdiction further than to return the infant in proper custody to the country whose "subject" he was.

In the Supreme Court of Canada, the court split four to three to reverse the judgment of the Court of Appeal, with Cartwright and Kellock JJ. writing the two judgments. Kellock J., dissenting, reviewed the authorities exhaustively and reached the conclusion that the court had no discretion enabling them in effect simply to deport the infant, but must in every case apply the ordinary law relating to custody of infants. But Cartwright J., who delivered the judgment of the majority of the court, agreed with Robertson C.J.O. and said that, on the material before him, Smily J., instead of directing an issue, should have directed that the infant be delivered to the mother on her undertaking to return with him forthwith to the United States:

> No doubt in Ontario the well established general rule is that in all questions relating to the custody of an infant the paramount consideration is the welfare of the infant. In my respectful opinion, however, no case to which we were referred is authority for the proposition for which counsel for the respondent was forced to contend; that where, as in the case at bar, an infant and both of his parents are citizens of a friendly foreign State in which they all are domiciled and have always resided, when the question of such infant's custody has been fully litigated in the Courts of such State, and those Courts after full and careful hearings have reached a decision that one of the parents is to have custody, the other parent upon such decision being given, by the simple expedient of taking the child with him across the border into Ontario for the sole purpose of avoiding obedience to the judgment of the Court whose jurisdiction he himself invoked and in breach of his own agreement which had been ratified by such Court, becomes entitled as of right to have the whole question retried in our Courts, and to have them reach a new and independent judgment as to what is best for the infant.[4]

This line of reasoning was rejected by Lord Simonds who delivered the judgment of the Privy Council. Whether the father had a right to have the question retried by the Ontario courts was not the matter to be determined:

> It is possible that a case might arise in which it appeared to a Court, before which the question of custody of an infant came, that it was in the best interests of that infant that it should not look beyond the circumstances in which its jurisdiction was invoked and for that reason give effect to the foreign judgment without further enquiry. But it is the negation of the proposition, from which every judgment in this case has proceeded, *viz*: that the infant's welfare is the paramount considera-

[4] [1950] S.C.R. 700, at p. 706.

> tion, to say that where the learned trial judge has in his discretion thought fit not to take the drastic course above indicated but to examine all the circumstances and form an independent judgment, his decision ought for that reason to be overruled. Once it is conceded that the Court of Ontario had jurisdiction to entertain the question of custody and that it need not blindly follow an order made by a foreign Court, the consequence cannot be escaped that it must form an independent judgment upon the question, though in doing so it will give proper weight to the foreign judgment. What is the proper weight will depend upon the circumstances of each case. It may be that, if the matter comes before the Court of Ontario within a very short time of the foreign judgment and there is no new circumstance to be considered, the weight may be so great that such an Order as the Supreme Court made in this case could be justified. But if so, it would be not because the Court of Ontario, having assumed jurisdiction, then abdicated it, but because in the exercise of its jurisdiction it determined what was for the benefit of the infant.
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> It is the law of Ontario (as it is the law of England) that the welfare and happiness of the infant is the paramount consideration in questions of custody. So also it is the law of Scotland, and of most, if not all, of the States of the United States of America. To this paramount consideration all others yield. The order of a foreign Court of competent jurisdiction is no exception. Such an order has not the force of a foreign judgment: comity demands not its enforcement but its grave consideration. This distinction, which has long been recognized in the Courts of England and Scotland and in the Courts of Ontario, rests upon the peculiar character of the jurisdiction and upon the fact that an order providing for the custody of an infant cannot in its nature be final.

In none of the judgments was the jurisdiction of the Ontario court questioned. As stated by Lord Simonds:

> The infant was resident, if not domiciled, in the Province: he was within the King's allegiance and entitled to the protection of his Courts: he was an infant and therefore entitled to the special protection owed by the King as *parens patrias* to infants.

Nor did any of the judgments proceed on the basis that the courts of Canada are bound to follow the judgment of the court of a foreign state as to the custody of an infant who is a citizen of that state. Cartwright J. expressly pointed out that there might be cases when it would be the duty of our courts to refuse to follow the judgment of the foreign court. But this case, he thought, was not one of them.

The real difficulty was that Wells J., whose judgment (to quote Lord Simonds) "in its lucid exposition of the facts and relevant law and in its careful appraisement of the factors which in such a case must be considered, is open to no criticism", had decided that the interests of the infant would best be served by

leaving him with the father. His reasons are convincing. Thus it was no longer an abstract question whether the question of an infant's custody ought generally to be left to the courts of his own country, but rather whether the best interests of the infant could be ignored for the sake of that principle. One is inclined to think that if an appeal had been taken from the order of Smily J. and there had been no issue heard, it would have been easier for the judges to find that the infant should be returned to the United States.

It is to be noted that the Privy Council did not entirely reject the right of a court to follow the course suggested by Cartwright J. But they did limit that right to cases where there has been no conspicuous change of circumstances since the making of the foreign order. The conspicuous changes of circumstances to which they pointed in the present case, and which they said demanded an independent inquiry, were (a) the fact that the foreign order was two years old when the issue came before Wells J., and (b) the change in the physical location of the infant. But, to be practical, these same factors would exist in every similar case. By the time this case reached the Privy Council the judgment of Wells J. was already three years and five months old. If the Privy Council had reached a different result, and the father had immediately taken the infant to another province, a court there would have been bound, by this judgment, to start all over again. One wonders what their Lordships of the Privy Council would say if the case were then to reach them a second time.

As argued in my previous comment, it is submitted that the courts ought not to exercise their jurisdiction unless their protection is wanted and the infant is left unprotected. That is the ground of their jurisdiction. Surely it should be recognized that a friendly, civilized country is competent to deal with its own citizens and that, where there is an order by a court of that country, the protection of the courts of this country is not wanted unless there are special circumstances of greater weight than those mentioned by the Privy Council. To say otherwise is to adopt an insular attitude, premised on the assumption that our courts are better able to deal with the question of the infant's custody than the courts of his own country. This is entirely out of keeping with international comity, and the respect that courts of one civilized country should show to those of another.

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AVIATION LAW — DUTY OF CARE TO MAINTAIN LOOKOUT FOR FUR FARMS — JUDICIAL TECHNIQUE IN DEALING WITH NOVEL FACT PATTERNS.— A decision of considerable novelty has recently been handed down by the Nova Scotia Supreme Court sitting in banco. *Nova Mink Limited* v. *Trans-Canada Airlines*[1] centers on the tortious liability of an airline to property underlying its route, and also serves as an illuminating example of judicial technique in resolving unprecedented fact patterns.

The facts lie within a small compass. The plaintiff was the owner of a mink ranch established in 1946. The ranch lay at the base of a wooded hill of "undetermined size and height" at Musquodoboit Harbour, just inside the southern boundary of the Dartmouth-Sydney airway, which had been established to a width of ten miles under the federal Aeronautics Act in 1943. Although within the airway, the ranch was considerably off the usual track of aircraft. The main building of the ranch had the words "Mink Ranch" painted in white in large block letters on the red roof and yellow and black triangular panels on two corners of the roof; there was also a wooden tower 30-40 feet high with similar yellow and black and white markings on its roof. These markings were in conformity with the specifications set out in an information circular issued by the Department of Transport to civil air pilots and aircraft owners as a result of an agreement with the Canadian National Silver Fox Breeders' Association.

On May 25th, 1948, a Dakota aircraft operated by the defendant company flew over the ranch on a scheduled flight from Sydney to Dartmouth. The pilot had deviated from the normal flight path to avoid a cloud formation and in doing so the aircraft crossed the ranch at an undetermined altitude. The noise of the passage so terrorised the adult mink that they, as is the nature of such animals, destroyed their young. The plaintiff instituted a suit to recover the damage sustained and, in a jury action before Hall J., was awarded the sum of $10,000. The defendant appealed to the Nova Scotia Supreme Court in banco. The Supreme Court, Ilsley C. J., MacDonald, Currie, Parker and MacQuarrie JJ., allowed the appeal, set aside the finding of the jury and dismissed the action.

Naturally, the case has commanded widespread interest in aviation circles, and it has been confidently hailed as settling the troublesome question of an airline's duty to ascertain the location of, or maintain a look-out for, the location of such farms. Typical

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[1] As yet unreported.

of the reaction is this quotation from *Flight*, a leading publication in the field:

> The Chief Justice of the Nova Scotia Supreme Court is reported to have reversed a jury's decision to grant a mink-breeding company $10,000 damages as the result of the loss of a number of animals when a T.C.A. aircraft passed over the farm. It was found that the farm was established after the airline had begun operating on the route and the Chief Justice considered that, in any case, it was not the airline's duty to ascertain the location of mink ranches or fly so high that engine noise would not disturb the animals. This test case is regarded as being very important in Canada where there are, of course, numerous such farms; airline managements in several other countries, too, have been watching the proceedings with interest.[2]

A closer analysis of the case would reveal, however, that self-congratulation by the aviation industry is somewhat premature. Although it is true that the court arrived at a unanimous result, that result was attained by two divergent lines of reasoning among the judges. I suggest that this dichotomy of reasoning seriously undermines the value of the decision as a "test case".

Written judgments were delivered by Ilsley C. J. and MacDonald and Parker JJ. Currie J. concurred with MacDonald J. and MacQuarrie J. concurred in the result. The result of no liability on the part of the airline was attained by a unanimous finding on the facts of the particular case that even the exercise of reasonable care by the crew could not have avoided the damage. The ranch was situated at the base of the opposite side of a hill and the crew could not have seen it in time to take effective action.

On the question of the necessity for the maintenance by the crew of a reasonable lookout for fur-raising establishments, which suffer from this susceptibility to noise, a point of very wide interest in aviation law, there is no such unanimity. MacDonald J., in the course of a comprehensive exposition, finds that the crew were under no duty to maintain a reasonable lookout:

> Accordingly I cannot conclude there was any duty to look for fur-farms on this regularly flown route.

Parker J., on the other hand, arrives at a different conclusion on the existence of a duty. "The facts in evidence in this case clearly indicate that the defendant's servant, the pilot, did owe such a duty to the plaintiff at least to the extent of keeping a reasonable lookout for fur-farms of the type referred to in the information circular, which includes the plaintiff's ranch." The learned judge then went on to dismiss the action on the ground that, even if

[2] Flight, March 9th, 1951, p. 296.

the pilot had maintained a look-out, which admittedly he had not, the damage could not have been averted.

The Chief Justice arrives at a conclusion similar to that of Parker J., but in doing so appears to equate duty with causation:

> Having in mind these facts I cannot say that the defendant did not owe a duty during the whelping season to the owners of mink on ranches properly marked to keep a careful look-out and use reasonable care to avoid such ranches where visible so far ahead of the plane that a detour or rise in altitude or both could be made in time to avoid them. I think there was such a duty, in any event when a plane was flying 'contact'. But I do not think there was such a duty to the plaintiff in this case because as I read the evidence there is none at all that the keeping of the sharpest look-out would have been effective in enabling the defendant to avoid the ranch.

This reasoning postulates a duty, as does Parker J.'s, but the facts of the case operate to destroy the chain of causation. Assuming that there was a duty to maintain a look-out, the duty remains, but on the facts the failure to fulfil the duty was not the proximate cause of the damage. The pilot failed to discharge his duty to maintain a proper look-out; but if he had maintained a look-out he could not have avoided the ranch in time to prevent the damage. In other words, his failure to discharge the duty was not the direct cause of the particular accident. It is important to note that the duty still exists—it is not dissolved by the facts—but the breach is merely rendered irrelevant by the lack of causation.

In effect, the Chief Justice agrees with Parker J. that the pilot of the aircraft was under a positive duty to look out for fur farms. The actual case yields the identical result by either line of reasoning — Parker J. and Ilsley C. J., on the one hand, and MacDonald J., on the other—yet it must be borne in mind that a very slight variation in the fact pattern could lead to diametrically opposite conclusions according to the reasoning employed. Suppose, for example, that the ranch had been situated, not on the far, but on the near side of the hill, so that there is no obstruction of the pilot's view. If the pilot is under no duty then no liability attaches to the airline by his failure to notice the ranch and take the appropriate action. If the pilot is under a positive duty, then his omission to keep a look-out would be the first step in rendering the airline liable. Equally diverse results would be obtained in the more usual case where the ranch is situated on more or less open ground, entirely removed from any hill.

In short, it would be extremely difficult, if not impossible, to extract from this case any ratio on the duty of aircraft pilots to maintain a lookout for fur farms. Two of the five judges would

impose such a duty and the other written judgment concluded that there was no duty. The court, very properly, disposed of the actual case before it. The reasoning employed, however, is so diverse that in future cases it could be cited to support entirely opposite propositions. This potential boomerang quality operates to confine the reasoning as to the question of duty within the four corners of the particular case.

The case raised a number of other problems which lie outside the scope of this comment but which might be mentioned at this juncture. The mink company had not notified the airline of its location but, if it had, what would be the result? Obviously, such notice would re-inforce the imposition of a duty on the reasoning of Ilsley C. J. and Parker J., but it is conjectural whether, by itself, it would lead MacDonald J. to alter his views and attach a duty on the pilot. Further, the decision points up, but does not attempt to resolve, the difficulty of determining what is to be considered as reasonable preventive action by a pilot once he has sighted a fur farm. To what altitude must he climb, how wide a detour must he make over or around the sensitive area?

A contention advanced by the plaintiff, which would have drawn a distinction between an airline operating regularly scheduled flights and a casual aviator, was emphatically rejected by the court. An airline is not required to make initial or periodic searches over its routes for such fur farms; by this ruling, the court has equated the responsibility of an airline in this matter to that of an amateur pilot, who might fly over the area only once or at widely separated intervals. It is at least arguable that the airline, flying the same route day after day, should bear a heavier responsibility. Should it not be required to familiarize itself with those permanent characteristics of the ground underneath so that its operations may be free from the possibility of damage to property?

In wider terms, the case is of interest as an example of the technique by which a court applies already existing legal concepts to an entirely novel fact pattern. The fact pattern had not previously been duplicated; the court was called upon to resolve an entirely unprecedented situation, a *res integra*. Throughout, the court displayed a lively sensibility of its consequent responsibilities. Witness MacDonald J.:

> This case is in many respects one of first impression and it is important that no rule be applied to the operation of aircraft as a relatively new phenomenon affecting human interests which is based on false analogies or on a warped view of public policy.

A standard approach to unprecedented problems is the argument by analogy. Counsel for Trans-Canada Airlines utilized this technique in an attempt to equate the duty of care applicable to an aircraft in flight to the very limited duty applying to a railroad train at a highway crossing.[3] If the analogy had been accepted, aircraft pilots would be bound only by the rule of safety prescribed in the relevant statutes, and the common law would have been powerless to substitute a stricter standard. The comparison was, however, rejected decisively by MacDonald J. on two grounds: first, that there was no real similarity between railways and aircraft in view of the latter's mobility, both vertically and horizontally; and, secondly, an unwillingness, as already stated, to limit the development of the law on this new subject to a standard devised to meet an entirely different situation.

In the absence of a previously existing fact pattern similar enough to function as a guide, what other technique may the court employ? MacDonald J. discards the search for relevant fact situations and turns instead to principles of law. Observing that it is the traditional function of the courts to adapt established rules to new phenomena in terms of social interests and individual rights, he finds:

> There is no inherent reason why the rules of negligence, including the doctrine of duty based on foreseeable risk, should not be applied in general and with such modifications in their evidence as experience suggests.

If I may say so, the opinion delivered by MacDonald J. represents an admirable outline of the approach that courts should adopt when confronted with novel factual structures. The differing rôles of the legislature and the courts are pointed out: if general principles are to be laid down, then that lies within the province of the legislature. The court's sole duty is the resolving of the dispute placed before it. Within this frame of reference, the court has fulfilled its function; it has effectively disposed of the conflict, but by a route that precludes the derivation of any general principles.

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[3] *Columbia Bethulithic Ltd.* v. *U.B.C. Electric Co.* (1917), 55 S.C.R. 1, at pp. 9-13, 29-33.

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