## Re Laporte and The Queen

In *Re Laporte and The Queen*[1] Mr Justice Hugessen was faced with a situation which was without precedent in Canadian Criminal Law. He was called upon to decide whether it was within a lower court's jurisdiction to issue a search warrant requiring a police suspect to involuntarily undergo surgery to remove a bullet, needed for evidentiary purposes, which was lodged inside his body.

The petitioner, who sought a writ of certiorari to set aside a search warrant issued by Laganière,J., had been arrested on July 26, 1971 in connection with a matter which apparently was unrelated to the present case. However, the police had some reason to suspect that the petitioner had been involved in a holdup which had occurred eighteen months earlier. Scars on Laporte's neck and shoulder resembled bullet wounds and subsequent x-rays revealed the presence of a foreign metallic body embedded in Laporte's shoulder which corresponded in size and shape to a .38 calibre slug. It was obvious that it could not be removed by minor surgery but only under conditions involving the administration of a general anaesthetic. This would have involved a certain amount of risk to the petitioner.

Laganière,J. had authorized the search warrant under the provisions of section 443(1) of the Canadian *Criminal Code,* which provides that a judge may issue a warrant to search "a building, receptacle or place" if he is satisfied that there is reasonable ground to believe that "anything that there is reasonable ground to believe will afford evidence with respect to a commission of an offence against this Act" is therein located.[2] The learned justice interpreted the word "receptacle" to include a human body. Hugessen,J. rejected this interpretation of the word and reversed the decision of Laganière,J., finding that he had no jurisdiction to issue the search warrant.

Before discussing the principal question of jurisdiction, Hugessen,J. rejected three subsidiary arguments advanced by the petitioner. The first was that the warrant should be set aside because it contravened section 2(d) of the *Canadian Bill of Rights,*[3] which provides a privilege against self-incrimination. However, Hugessen,

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[1] (1972), 29 D.L.R. (3d) 651 (Que. Q.B.).
[2] R.S.C. 1970, c.C-34.

J. rejected this argument because it was held in *R.* v. *Wray*[4] that this protection covers only statements made by the accused. It does not extend to evidence obtained from an accused by extraction, as, for example, a blood sample.[5] The petitioner also suggested that the search warrant was in breach of section 2(b) of the *Canadian Bill of Rights*, which prohibits the imposition of cruel and unusual treatment or punishment. But since thousands of surgical operations are performed each day, and are considered neither cruel nor unusual, this contention did not succeed. Finally, the petitioner urged the revocation of the search warrant on the grounds it did not name the doctors who were to carry out the operation as section 443 seems to require. This was also rejected by the court since the police officers were named and the doctor would merely act as their agent.

Unlike the superficial treatment accorded the subsidiary questions, the main issue of whether there exists jurisdiction at common law or under the *Criminal Code* to issue such a search warrant was discussed at length. The paucity of Canadian legal opinion on the subject led to an examination of two American cases. In the unreported *James L. Crowder* case, Curran,C.J. of the District Court of the District of Columbia authorized the issuance of a search warrant for the surgical removal of what was thought to be a bullet "lying superficially beneath the skin". However, a search warrant for a similar bullet in Crowder's left thigh was not granted "because this procedure might cause the reduction of use or function of his left leg". The decision was based on *Schmerber* v. *California*, in which the Supreme Court of the United States ruled that the results of a blood test taken without the consent of the appellant were admissible as evidence and did not violate the "unreasonable search and seizure" provision of the American Constitution.[6] The Court placed emphasis on the nature of the operation itself. Since the taking of a blood sample was considered to be a simple task involving very little risk, it was not considered to violate the individual's rights. The distinction in the *Crowder* case between a deeply and a superficially embedded bullet was ob-

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[3] R.S.C. 1970, App. III.

[4] [1971] S.C.R. 272; [1970] 4 C.C.C. 1.

[5] *A.-G. Que.* v. *Begin*, [1955] S.C.R. 593; 112 C.C.C. 209.

[6] 384 U.S. 757 (1966). See also *Denton* v. *U.S.*, 310 F.2d. 129 (1962, Ariz. C.A.); *Lane* v. *U.S.*, 309 U.S. 681 (1939); and *U.S.* v. *Michel*, 158 F.Supp. 34 (1957, Tex. D.C.). But in other American cases, similar searches have been held contrary to the Bill of Rights: *Rochin* v. *California*, 342 U.S. 165 (1952); *U.S.* v. *Willis*, 85 F.Supp. 745 (1949, Calif. D.C.).

viously drawn from the distinction espoused by the Supreme Court in *Schmerber* v. *California* concerning the degree of seriousness of the procedure. Under this test, it would seem fairly clear that the search warrant in the case under discussion should be quashed, since the operation would involve some degree of risk to Laporte.

Instead of embracing the American approach and prohibiting the surgery because of its serious nature, Hugessen,J. undertook an historical analysis of the right to search an individual. He commenced by examining two century-old cases which form the foundations of the modern rule.[7] They establish that a policeman has a right at law to search a prisoner at the time of arrest. Nowhere is there mention of a right to conduct internal searches, although in *R.* v. *Brezack* the Ontario Court of Appeal held a search of the accused's month for narcotic capsules permissible.[8] The search was justifiable as an incident of the arrest since it took place at that time. As Hugessen,J. states:

> The reasons for such right [are]... to make the arrest effective, to ensure that evidence does not disappear and to prevent the commission of a further offence.[9]

In *Re Laporte and The Queen* the slugs had probably been in the petitioner's body for over a year. This fact alone would clearly remove any common law justification of an operation because of the passage of time.

If no right to search existed at law, could such a right be found in the provisions of a statute? Express statements of the right to search a person appear to be limited to section 103(1) of the *Criminal Code*, section 10(1)(b) of the *Narcotic Control Act*,[10] and section 148 of the *Customs Act*.[11] However, Laganière,J. held that the right might also be based on section 443 of the *Criminal Code*. As mentioned above, he found that a person may be considered a "receptacle" under that section. This use of the word is founded on its definition in the *London County Council (General Powers) Act*,[12] which is the source of the definition offered in *Words and Phrases*. But the Act does not state that a human being may be a receptacle; rather, it provides that receptacle includes a "container" for any living thing. That does not mean that one's body

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[7] *Leigh* v. *Cole* (1853), 6 Cox C.C. 329; *Bessel* v. *Wilson* (1853), 1 El. & Bl. 489; 118 E.R. 518.

[8] [1950] 2 D.L.R. 265; 96 C.C.C. 97.

[9] (1972), 29 D.L.R. (3d) 651, 658.

[10] R.S.C. 1970, c.N-1.

[11] R.S.C. 1970, c.C-40.

is a receptacle, unless one adopts the crudest form of philosophic dualism. In any event, Hugessen,J. thought it:

> ...totally unjustified to make use of a definition of this sort, contained in a foreign statute, and having a specific purpose, to and in the construction of plain words used in the *Criminal Code*. In my view whatever else a receptacle may be, it cannot in any normal construction of language be held to include the interior of a living human body.[13]

Laganière,J. did not discuss the definition of the word "place" since he had already defined "receptacle" in such a manner as to justify his decision. Hugessen,J. does not attempt an exhaustive study of the word, because it fairly clearly has a geographical and not an anatomical connotation. As well, among various Acts there is a certain consistency in limiting the use of the word to geographical matters.[14] It would therefore seem that section 443 of the *Criminal Code* was not intended to permit a search of an individual's body.

It is quite obvious that the meanings of "receptacle" and "place" would be extended if either included a person's body. It is also clear that this was hardly the case to prompt such an extension. As Hugessen,J. concluded, the search warrant was "a grotesque perversion of the machinery of justice".[15] But it is less than clear whether such a search warrant may be so described in all circumstances. Is it "grotesque" to require a sample of the accused's blood or a bullet lying superficially beneath his skin to be produced? If the operation does not involve any risk to the accused (other than that of being found guilty of the offence charged), a failure to require the evidence may result in a greater perversion of justice.

Hugessen,J. would seem to have been thinking of this argument when he stated that "if the police are today to be authorized to probe into a man's shoulder for evidence against him, what is to prevent them tomorrow from opening his brain or other vital organs for the same purpose".[16] As a criticism of the American decisions noted above, this is somewhat unsatisfying. While it is no doubt difficult at times to determine whether an operation is fraught with risk, one may still point to paradigms of risky and "safe" operations. But if this variant of the domino theory does

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[12] 10-11 Geo. VI, c.46, s.15(1).

[13] (1972), 29 D.L.R. (3d) 651, 660.

[14] *An Act for the Suppression of Betting Houses*, 16-17 Vict., c.119; *Scrap Metal Dealers Act*, 12-13 Eliz. II, c.69, s.9.

[15] (1972), 29 D.L.R. (3d) 651, 662.

[16] *Ibid.*, 661.

not destroy the rationale of the *Crowder* case, it is a not inappropriate comment on the present law in Canada.. If one's body is a receptacle for one purpose, it is so in all cases. Without the safeguards of the American constitution, one might be forced under section 443 to undergo a major operation. The *Crowder* case, as Hugessen,J. notes, "is not the law in Canada".[17] If a search is permitted in one case, it may therefore be allowed in all cases. One may want to reject this interpretation of section 443 because it flies in the face of the ordinary meanings of "receptacle" and "place". But it is also objectionable as "an unwarranted invasion upon the basic inviolability of the human person".[18] Given the narrow terms of the section of the *Criminal Code* he was interpreting, Hugessen,J. gave the only decision "compatible with individual human dignity".[19]

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[17] *Ibid.*, 662.
[18] *Ibid.*
[19] *Ibid.*
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