# ISSUES OF INTEREST

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POLICE ACADEMY

Written by John M. Post

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## (VOLUME NO. 9)

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## THE CHARTER OF RIGHTS - BREATHALYZER LAWS

**Is being compelled to give a sample of breath in violation of Section 11(c) of the Charter, which establishes the right against incrimination?**

**Was stopping the accused for a vehicle check an arbitrary detention and contrary to section g. of the Charter?**

R. v. Altseimer Ontario Court of Appeal September 1982

Some apparently bizarre court decisions are coming our way from the east via our news media. Most have been in respect to breathalyzer laws and our new Charter of Rights.

It seems that the Ontario Court of Appeal was anxious to dispell some of these notions when it handed down these reasons for judgment in this Altseimer case. At one stage this Court said:

> "In view of the number of cases in Ontario trial Courts in which Charter provisions are being argued, and especially in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to observe that the Charter does not intend transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter which is part of the supreme law of this country".

Altseimer was convicted of "80 mg" and successfully appealed the conviction. The Crown took the case to the Ontario Court of Appeal and the defence raised a number of arguments under the provisions of the Charter.

The facts are as follows:

| | |
|---|---|
| 1:23 a.m. | the accused's car was stopped by police; |
| 1:27 a.m. | road side test was administered and the accused failed it; |
| 1:36 a.m. | upon the accused's request, a second roadside test is performed with similar results; |
| 1:39 a.m. | accused arrived at detachment (which was a very short distance away); |
| 1:50 a.m. | breathalyzer operator arrives at detachment; |
| 2:12 and 2:21 a.m. | breath samples are analyzed. |

The County Court Judge who heard the first appeal by the accused had held that 22 minutes from the time of the technician's arrival and the first test being administered was not "as soon as practicable" and he therefore held that the well known presumption of equalization was not available to the Crown.

The Court of Appeal disagreed quite strongly and might as well have said that if the County Court had known the case law, he would not have found as he did. The Criminal Code does not say the tests have to be taken as soon as possible but as soon as practicable. The County Court's determination "was an error in law".

Then the Court dealt with the issues raised under the Charter which it really was not required to do, as the alleged offence did not occur since the Charter became effective. The Court of Appeal proposed, however, . . . "to defer the question of retrospectivity and determine first whether the Charter could apply to the facts of this case".

The accused claimed that being compelled to give a sample of breath violates his rights against self incrimination.

The Ontario Court of Appeal held that it was plain from the language used in the Charter (section 11(c)) that the protection, as it was before the Charter becoming effective, is protection against "testimonial compulsion and nothing else". In other words, it protects him from having to enter the witness box or the use of what he says while testifying in subsequent judicial proceedings

The accused also claimed that his apprehension had amounted to arbitrary detention contrary to his rights under section 9 of the Charter. The court responded that the vehicle check was not unlawful nor was there any detention involved until the accused failed his roadside test and was arrested for a contravention of section 236 C.C.

By means of a general comment, the Ontario Court of Appeal said that in some of the decisions on the Charter's application that have received so much notoriety in Ontario, the trial Judges were simply wrong.

Crown's appeal allowed
Conviction restored

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## THREATENING BY PHONE

Regina v. Anderson - County Court of Westminster - Registry No. X82-8125 September 1982

The accused was involved in a car accident. The investigating officer processed the accused for a drinking/driving offence. It does not seem an overstatement that the accused was furious about this. When he went to I.C.B.C. and discovered the contemplated charge against him, he uttered threatening words about the constable. The accused took the matter a step further and phoned the police station and spoke to a corporal whom he told that he would cause the constable's death. The corporal did not pass the threats on to the constable but saw to it that a charge of "threatening" under section 331(1)(a) of the Criminal Code was preferred.

The defence had been that the intended victim was unaware of the threats and therefore the offence was not complete.

The County Court Judge quoted from a reason for judgment by the Supreme Court of Canada* which had found the offence created by this section "remarkable" in many respects and held that it did not matter:

1. whether or not there was intent to carry out the threat;
2. that the accused acted for any specific purpose;
3. what the accused's motives were;
4. whether the threats raised the possibility of imminent or remote danger;
5. what the effect of threat on the prospective victim was; or
6. if the person threatened was aware of the fact that he was threatened.

The County Court Judge concluded:

> ". . . the offence of threatening under Section 331(1)(a) is committed at the time the threat is made in any of the ways set out in the section, and it matters not the circumstances as they affect or do not affect the recipient or intended recipient of the threat".

Accused convicted

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* R. v. Nabis (1974) 18 C.C.C. (2d) 148

**FALSE COMPLAINT AGAINST POLICE - PUBLIC MISCHIEF - ADMISSIBILITY OF COMPLAINT**

R. v. Stapleton 66 C.C.C. (2d) 231.
Ontario Court of Appeal February 1982

An 18 year old youth gave a statement to an Ontario police department's complaints officer claiming that he was assaulted by two officers of that force. An investigation proved the allegation false and the youth was charged with public mischief (s. 128(e) Criminal Code). During his trial, the defence counsel took the position that a voir dire should be conducted to determine if the statement to the complaint officer was voluntarily made. The Ontario Court of Appeal held that the accused's statement was not like admissions, confessions or denials made by an accused to a person in authority when questioned regarding the commission of an offence. The making of the statement constituted the offence; in other words, it was the actus reus.

Accused's conviction upheld.

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**IS A FENCED COMPOUND A "STRUCTURE" AND A "PLACE" PROTECTED BY SECTION 306(1) CRIMINAL CODE?**

R. v. Thibault 66 C.C.C.(2d) 442. Nova Scotia Supreme Court Appeal Division, March 1982

It is an offence to break and enter a place with the intent to commit an indictable offence therein. Section 306(4) of the Criminal Code provides that a "place" means, among other things, a structure. The accused scaled the 7 foot high fence of a compound which contained a fuel storage tank, a warehouse and an office building. The two gates giving access to the compound were locked and the accused was apprehended when he removed the cap of a gas tank. He had a five gallon can and siphon hose in his possession. He disputed his conviction of breaking and entering a place with the intent to commit an indictable offence therein. The defence claimed that the compound was not a "structure" and, therefore not a "place".

The Nova Scotia Court of Appeal held that what may be a "structure" for one purpose will not be for another. It may well be that some "erection" is not recognized as a building under a building code or municipal by-law, however, if you break into it to steal the content, one may find it protected by the criminal law. A fenced farmer's field is not a structure, however, a compound enclosed by a fence obviously to keep people away from buildings and equipment is a structure whether or not it has a roof.

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## PROTECTION OF PRIVACY

R. v. Commissio 66 C.C.C. (2d) 65
B. C. Court of Appeal January 1982

An authorization to intercept private communication mentions the offence which the person(s) named are suspected to commit. When the intercepted communication leads to or is in relation to another offence, that does not necessarily mean that this evidence is inadmissible should the Crown proceed against someone for that other offence. There are several cases on this issue including decisions by the B. C. Court of Appeal*.

In this case, police had grounds to believe the accused and others conspired to import heroin and an authorization to intercept private communications was granted by the Court on June 10. The interception gave police reasonable grounds to believe that the accused and others were into counterfeit money and had some in their possession. This was by June 30. On July 9, the police officers made Crown Counsel aware of their reasonable and probable grounds regarding the money as well as the identification of another party the interception had surfaced and who was not mentioned in the authorization. Police were advised that there was no need for a new authorization re the money and on July 10 the original authorization in respect to the heroin was renewed.

The accused was convicted of having conspired to possess counterfeit money. He appealed claiming that the evidence obtained by intercepting his private communications by means of the "heroin" authorization was inadmissible in regards to the "counterfeit money" charge. He claimed that the interceptions in these circumstances were unlawful.

The B. C. Court of Appeal held that intercepted communications in relation to an offence other than the one for which the authorization was granted is admissible in evidence if it is unanticipated. Here Crown Counsel and police were aware and had their grounds to believe that the accused was into counterfeit money when they renewed the authorization. When an authorization is issued or renewed the Judge must be satisfied that other investigative procedures have failed or are unlikely to succeed or that there is an urgency to investigate by this means. When the Crown applied to renew the authorization, their

* R. v. Rouse and McInroy (1977) 36 C.C.C. (2d) 257 [1977] 4 W.W.R. 734

purpose was perhaps to pursue the "heroin" matter but certainly also to investigate the "money" affair. Without revealing this to the Judge, he was unable to determine the above mentioned prerequisites to the authorization. The Judge may well have granted it in regards to the heroin and refused it for the money. If that was the case, the evidence regarding the counterfeit money would, of course, have been inadmissible. Concluded the B. C. Court of Appeal:

> "In short, it is my opinion that the rule which permits the introduction of evidence with respect to an offence not specified in the authorization but which turns up unexpectedly in the course of the interception, does not extend to evidence with respect to an offence that is being investigated at the time of the authorization or at the time of renewal. To decide otherwise would permit a single authorization to spread to offences and persons never contemplated by the authorizing Judge who is charged with the responsibility for applying the rigorous tests established by the protection of the privacy sections of the Criminal Code."

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## BLOOD SAMPLE - EVIDENCE TO THE CONTRARY

The Queen and Meys - B. C. County Court No. X80-5479
New Westminster July 1982

The accused was injured in an accident and taken to hospital where a nurse took a sample of blood. She put the blood in sterile vials which contained a white powdery substance. A crime lab analyst kept the vials in a refrigerator for over four weeks before he had time to analyze the blood and determine that it contained 174 milligrams of alcohol per 100 millilitres of blood.

The accused was convicted of "over 80 mg". The Crown had relied on the presumption in section 237(1)(c.1) C.C. to prove that at the time of driving the blood alcohol level of the accused was over the "80 mg". However, the accused appealed, claiming that there was evidence to the contrary which negated the presumption that his blood alcohol level at the time the blood sample was taken was not equal to that at the time of driving.

The nurse had called the powdery substance "a preservative" but had no personal knowledge what it consisted of. The Crime-lab analyst testified that it was sodium fluoride which kills any bacteria and prevents the blood from coagulating. He said the substance could in no way affect the blood so as to render the test inaccurate.

A defence analyst testified that blood may "putrify" when it sits for awhile. This, he said, can cause the alcohol content of the blood to increase or decrease. The former if contaminants are introduced and the latter if it breaks down and the alcohol evaporates. He agreed that sodium fluoride would prevent this and that no refrigeration is necessary if enough is mixed with the blood.

The question now remaining was if the evidence of the defence analyst amounted to evidence to the contrary.

The B. C. Court of Appeal said in 1973*:

> "Any evidence therefore, tending to show that at the time of the offence the proportion was within the permitted limit is 'evidence to the contrary' within the meaning of the subsection".

* R. v. Davis (1973) 14 C.C.C. (2d) 513

The Supreme Court of Canada accepted this description[1] and added in another case[2]

> "Thus, any evidence tending to invalidate the result of the tests may be adduced on behalf of the accused in order to dispute the charge against him. . . . It is not necessary in such cases that the rebutting evidence should do no more than raise a reasonable doubt . . .".

The County Court Judge held that in this case no inference of impropriety can be drawn from the defence evidence or that of the Crown witnesses. There was no evidence that the delay affected the accuracy of the analysis. As a matter of fact the defence analyst had in fact verified that the sodium fluoride is capable of killing bacteria that could otherwise have been in the vial.

Accused's appeal dismissed
Conviction upheld.

* * * * *

[1] R. v. Moreau, 42 C.C.C. (2d) 525
[2] R. v. Crosthwait 52 C.C.C. (2d) 129

## AS SOON AS PRACTICABLE

Ulrich and The Queen B. C. County Court
No. FCR 14/82 Dawson Creek August 1982

At 19:55 the accused was arrested for impaired driving and a demand for breath samples was made. The officer radioed to the Detachment office to have the technician alerted that tests had to be made. At 20:05 the officer and the accused arrived at the Detachment but the technician did not show until 20:38, samples were analysed at 20:47 and 21:02, both indicating a blood alcohol level well in excess of 80 mg. There was no explanation given for the 38 minute delay either to the accused at the time nor during the accused's trial. The trial judge felt that no such explanation was necessary as the evidence explained the delay although not the reason for it. The accused appealed his conviction claiming that the trial judge had erred. He claimed that in the absence of knowing the reason for the delay the Court cannot determine if the tests were made "as soon as practicable".

The County Court Judge held that the arresting officer's testimony that the technician was not on duty, was nothing more than an assertion that "he was not there because he was not there". To determine if a sample was analyzed as soon as practicable, the prerequisite to the "certificate short cuts" and "the presumption of equalization" the Court must in the case of a delay be informed of the reasons.

Appeal allowed
Conviction set aside

A similar defence was advanced at trial and again at appeal before the same B. C. County Court Judge (August 1982 No. C 50/82 Prince George Registry in MacEacheran and The Queen). The accused was stopped at 23:45 and arrested for impaired driving five minutes later. As the accused's truck could not remain where it was a tow truck was called and while waiting for it to arrive a demand for breath samples was made of the accused at 23:57. The constable and the accused waited for "a long time" and as the tow truck did not show, the constable drove the truck to a safe location and transported the accused to the detachment arriving there at 00:20. The tests were made at 00:26 and 00:40 resulting in readings well in excess of "80 mg".

Precedents draw attention to the distinction between "as soon as practicable" and "as soon as possible". Where the former term is used, all circumstances must be considered. Although "a deliberate delay for a wrong reason does not come within the phrase", the provision "contemplates that the officer has other duties aside from escorting the accused promptly to a breathalyzer and those duties must be considered".

Defence had belabored the possibility to have another officer attend to wait for the tow truck, or move the accused's vehicle; or why had the officer not moved the truck earlier. This was entirely discretionary, said the Court. Waiting for the tow truck "formed a legitimate part of the officer's duties", solely related to the accused's case.

Accused's appeal dismissed
Conviction upheld.

* * * * *

**Crown Counsel:** **"Can it ever be justified or reasonable for a police officer to throttle someone who is handcuffed and already in a detachment police office"?**

**Trial Judge:** **"No".**

R. v. K. County Court No. 355 C.C.C. Kamloops Registry July 1982

A motorist who had a "considerable quantity of alcohol to drink" was arrested by the accused (a police officer) for impaired driving. The motorist who complained that the handcuffs were too tight was "abusive" during the entire encounter he had with the accused officer. In the breathalyzer room the motorist was told to sit down three times and after the last request the accused officer lunged at the motorist and choked him causing him bodily harm (injuries are not described in the judgment). This resulted in a conviction of assault causing bodily harm against the officer, which he appealed.

The accused officer had testified that when he attempted to sit the motorist down he (the motorist) attempted to knee him in the groin and that the force he used was necessary to subdue his prisoner. This, the defence counsel argued brought the accused officer within section 25 of the Criminal Code which renders him immune from criminal liability if he used no more force than was necessary.

The trial judge had applied the objective test to determine if the accused officer had a reasonable belief that it was necessary to apply force. He had weighed all circumstances to determine the reasonableness of the belief the officer claimed to have. Defence counsel argued that a subjective test should have been applied, that is if the officer's testimony was that he had such beliefs, it should be accepted.

The County Court held that regardless what test was applied, the matter was outside the purview of section 25 C.C. The trial judge had found as a fact that in this case it had never been necessary to apply force, leave alone the degree of it.

Conviction Upheld
Appeal Dismissed

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**Does there exist in Canada a 'qualified' defence of use of excessive force in preventing the commission of an offence in a case of homicide?**

The Queen v. Gee - Supreme Court of Canada - February 8, 1982

Gee, the accused, was a male prostitute and female impersonator. He, a female prostitute and a male friend attended at the home of "a kinky trick with lots of money". According to Gee, the male friend got into women's lingerie upon the request of "the trick". While Gee and the female prostitute were doing likewise, the male friend and their client got involved in a fight. To prevent their friend from being assaulted, Gee and the female prostitute struck their client over the head with bottles, a lamp and even a frying pan, until he was dead.

The Crown's theory was that the three attempted a robbery and that their victim resisted.

The accused and his female co-accused were convicted of second degree murder. They appealed successfully gaining a new trial. This decision the Crown appealed to the Supreme Court of Canada.

The issue in this case is whether in Canada there is a defence for murder where the accused honestly but mistakenly used more force than was necessary to prevent the commission of a crime; or should the application of such force where it caused death be a justification to reduce murder to manslaughter.

When one person causes the death of another person, he commits homicide. Homicide which is not culpable is not an offence. Culpable homicide is an offence and is either murder or manslaughter. In this case it was alleged that the accused caused the death of a person by means of an unlawful act. However, section 27 of the Criminal Code makes lawful what otherwise would be unlawful. It simply states that everyone may use as much force as is reasonably necessary to prevent the commission of a crime for which a person may be arrested without warrant and would cause "immediate and serious injury to the person or property of anyone".

It must be remembered that in view of the defence evidence, this section must in this case be applied to its application where one person acts to defend another

The section that deals with a person defending himself is section 34 of the Criminal Code. It, in essence states that a person who has not provoked an assault on himself is justified to repel the physical force that is applied to him with no more force than is necessary to defend himself as long as the force he uses is not intended to cause death or grievous bodily harm. However, where such force to repel an assault does cause death or grievous bodily harm, then he was justified if he had a reasonable apprehension "from the violence with which the assault was originally made or with which the assailant pursues his purpose "that his death or grievous bodily harm to him will result. In addition, the person who so defends himself, must believe on reasonable and probable grounds that there is no other way to prevent death or grievous bodily harm to himself.

The defence counsel argued that if there is justification in certain circumstances to cause death of an assailant in defending one's self, this ought also to be the case where a person is defending someone else.

The Alberta Court of Appeal had held that if a person prevents a crime from being committed (in this case one person defending another), then if the excessive force applied by an honest but mistaken belief causes death, the offence committed is manslaughter and not murder (this is the law in Australia).

The question then to be answered by the Supreme Court of Canada was if a successful defence to murder under section 27 C.C. where it is shown that there was an honest but mistaken belief that such force was necessary may result in a conviction of manslaughter.

The Crown argued that the use of excessive force which causes death is murder, while the defence argued that the offence may be reduced to manslaughter. Submitted the defence:

> ". . . should a qualified defence of excessive force in self-defence exist in Canada by analogy, a qualified defence of excessive force in the prevention of an offence should also be admitted".

The Court observed that this question was never raised before in Canada and was difficult to answer in view of the two differently worded statutory provisions (sections 27 and 34 C.C.).

The Supreme Court of Canada reviewed the distinction between murder and manslaughter and reiterated that it was in the intent of the person who caused the death. It reasoned that in a case of self-defence the person who caused the death may well have intended to cause it. If it was reasonably necessary for him to do so to preserve his life or grievous bodily harm being inflicted on him, he did so with impunity because of the law in relation to self defence.

In relation to section 27 (prevention of the commission of an offence), which includes protecting someone else, the Supreme Court of Canada said:

> "The section clearly contemplates the possibility of a killing and can even extend its justification to killing with the intent to kill, if it is reasonably necessary".

The Court concluded from this:

> "If the force is reasonable in all the circumstances, the accused is entitled to an acquittal; if not, he is in my view guilty of murder <u>if he has the required intent</u>".

In Canada in circumstances where a person is justified in using force, he is criminally responsible for the excess thereof (s. 26 C.C.). The Supreme Court in essence held that if a successful defence is raised under section 27 C.C. the accused must be acquitted. If it is found that the force used was excessive, then, if the accused had the specific intent to cause death, he is guilty of murder. If he used excessive force and caused death unintentionally, then he committed manslaughter.

In other words, in Canada it cannot be said that force can be partially justified and no "qualified" defence of use of excessive force in the prevention of the commission of an offence does exist.

Crown's appeal dismissed
New trial to be held.

* * * * *

## POWERS OF ARREST FOR BREACH OF THE PEACE

R. v. Lefebvre County Court of Vancouver Court File No. 02490F
Powell River Registry September 15, 1982

In theory, any criminal offence is a breach of the peace, however, a breach of the peace is not a criminal offence. Yet every citizen has a right to preserve the peace and a peace officer has a sworn duty to do so. Both are robed by statute law (section 30 and 31 C.C.) with authority to arrest a person for committing a breach of the peace or to prevent one. Said this County Court:

> "An arrest for breach of the peace is an adjunct to the criminal law. It is a form of preventative justice not retributive justice. It does not result in a conviction, but a preventative remedy..."

These were some of the comments (or versions thereof) by the County Court Judge when he dealt with an appeal by the Crown of the acquittal of a charge of obstructing a peace officer in the lawful performance of his duty when he (the officer) made an arrest for a breach of the peace. The trial Judge (Provincial Court) had held that neither police nor anyone is empowered to arrest for breach of the peace. Therefore the accused had a right to resist the arrest, he concluded.

The County Court Judge lamented the fact that so many misconceptions exist among peace officers about the "breach of the peace" provisions in the Criminal Code and at common law.

Police in the common law system actually carry out the function for which every citizen is responsible. Basically, the citizen has, by statute and common law, authority to carry out a considerable portion of the police function. Policing is not captured by a chosen few but is a community business. However, society has assigned their function to police officers and, in spite of discretionary authorities, have made them duty bound to maintain the public peace, the normal state of society - the Queen's peace.

The statutory authorities granted police and citizen alike fall sometimes far short of equipping them to deal with those who commit, are about to commit, or are renewing a breach of the peace which is not merely an annoyance or any disturbance.

The County Court Judge accepted "for modern purposes" to accept the following observations[1]:

> "We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.
>
> It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable or anyone else, may arrest an offender without warrant".

If such is the duty and the right of a police officer to prevent or stop a breach of the peace (as that expression is defined), then "it could logically follow" that the obstruction of a peace officer in the performance of that duty would justify a conviction under section 118 of the Criminal Code.

The controversy whether section 31(1) C.C. confers a power to arrest or is merely a protection for anyone who interferes in a breach of the peace, was the topic in the famous Biron[2] case. The Supreme Court of Canada rejected the latter view and adopted the former.

A breach of the peace was an offence at common law. Section 8 C.C. dictates that in Canada no offence is known at common law, and therefore a person cannot be charged with a breach of the peace. Hence, the Judge's comments that the provisions in sections 30 and 31 C.C. are preventative and not retributive.

Now, of course, the practical question arises what to do with a person who was arrested for a breach of the peace only. In view of the preventative nature of the provisions, the peace officer's right to continue the detention of a person so arrested evaporates when the reasonable and probable grounds upon which the arrest was made, cease to exist. When the arrest has restored peace, the remedy the arrest provision provides, has reached its objective. Any continuation of detention beyond that remedy is, no doubt, excessive medicine and may well be an unlawful confinement.

1 Errol Howell 1981 C.A. 31 at 37
2 R. v. Biron 23 C.C.C. (1d) 513

Where the arrest (and the removal from the scene where this is necessary) does not remove the reasonable and probable grounds that the prisoner will renew or join in a breach of the peace, it justifies continuation of custody and section 453 and 454 C.C. do apply. It has been held[1] that if such grounds persist, then the person may be placed (by a Judicial Act) on a peace bond at common law.

In any event, the County Court Judge held that a peace officer has authority to arrest for a breach of the peace. The trial judge should have explored whether or not in the circumstances the arrest was justified. If so, the officer was in the lawful performance of his duty.

Crown's appeal allowed
New trial ordered

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[1] R. v. Compton [1978] 5 W.W.R. 473.

## HIT AND RUN . . . LEAVING THE SCENE TO ESCAPE CIVIL OR CRIMINAL LIABILITY

R. v. Hofer 67 C.C.C. (2d) 134
Saskatchewan Court of Queen's Bench

In early morning hours the accused lost control of his car and crashed into two parked cars and then into a house. He left the scene of the accident "in haste" without giving his name or address.

He was charged with hit and run under section 223(2) C.C. The accused stated that he left the scene to escape the execution of warrants which were outstanding for his failure to pay fines. In that respect, he did leave the scene to escape this liability, but not one arising from the accident he was involved in. In addition, there was evidence that the accused paid his fines later that same date and reported the accident to police in the afternoon.

The Provincial Court Judge had apparently followed a comment made by a Justice of the Quebec Court of Appeal[1] who suggested that the civil or criminal liability the hit and run driver must be trying to escape is liability arising from the accident. (Fournier apparently intended to escape arrest for armed robbery when he was involved in an accident). The Saskatchewan Supreme Court Justice disagreed with this view and concluded that it was not binding on him and answered the following two questions:

1. Does the intent to escape the execution of outstanding warrants constitute "intent to escape civil or criminal liability" within the meaning of section 233(2) C.C.?

2. Does the intent to escape civil or criminal liability within the meaning of section 233(3) C.C. include only intent to escape such liability arising from the accident itself?

The answer to question #1 was "Yes". The Court held that injuries or "eventual liability" do have to be proven to convict under section 233 C.C. What constitutes the offence is the specific intent of escaping liability and the act of failing to stop. They are the mens rea and actus reus respectively.

[1] Fournier v. The Queen (1979) 8 CR (3d) 248

The answer to question #2 was "No".

The Court reasoned the urgency of evading a greater liability may overshadow the concern respecting a lesser one. In other words, it becomes worth the risk to evade a more serious liability than that for hit and fun. After all, the rebuttal of the presumption that one leaves the scene of an accident to escape civil or criminal liability, can hardly be "I was trying to get away from a more serious crime". That would mean that only law abiding citizens are compelled to remain at the scene of an accident, and wanted or fleeing criminals can continue on their way with impunity.

Crown's appeal allowed
Matter referred back to Provincial Court for sentencing.

* * * * *

## RIGHT TO COUNSEL

R. v. Andrew County Court of Westminster No. X81-7324 July 1982

The accused was in the breathalyzer room under demand to give samples of his breath (by the Court referring to the officer as the "arresting officer" and to the accused as the "detainee", it is assumed that the accused was arrested and detained) and asked to make a phone call to his lawyer. The officer dialed the number for the accused who had a two minute conversation but was apparently unable to reach his lawyer. The officer was found to be "obviously aware" of this and the fact that the accused was waiting for a return call. A few minutes after the telephone conversation terminated, the accused was demanded to give samples of his breath. He did not respond and walked out of the breathalyzer room. The accused now appealed his conviction of failing to give samples of his breath.

It was found as a fact that the officer knew that the accused was waiting for his lawyer to call back. It was also found that from the time of driving to the first breath test, 35 minutes elapsed.

The County Court Judge held that the "right to counsel" and the requirement that the test must be taken "as soon as practicable" must be balanced. The accused should have been allowed more time to contact his lawyer.

Accused's appeal allowed
Conviction set aside

In his reasons for judgment the Judge said he was persuaded by the reasons given on this topic by a brother Judge:[1]

> "The law with respect to the right to counsel has been summarized by Mr. Michael Henry, a Research Officer with the Ontario Legal Plan, in a note printed at p. 309 of 12 C.R. (3d) he has digested the present state of the law in the following propositions:
>
> '1. A person detained for the purpose of taking a breathalyzer test is entitled to contact and speak with a lawyer before taking the test.

[1] R. v. Wood New Westminster Registry No. X817094 July 1982 (p. 309 Vol. 12 Criminal Reports (2d))

2. The entitlement of a detainee to consult with counsel before submitting to a breathalyzer test is dependent upon his request to do so being bona fide (i.e. not simply to create delay, etc.).

3. The right to counsel does not extend to a right to insist upon the personal attendance of counsel at the breathalyzer test.

4. The right to consult with counsel involves a right (of an, as yet, slightly uncertain nature) to conduct such consultation in private.

5. Where the detainee, through no fault of the police, is unable to contact a lawyer, he or she has not been denied the right to counsel and has no "reasonable excuse" for refusing to provide a breath sample.

6. The right of a detainee to consult with counsel before submitting to a breath test includes an entitlement to make as many phone calls as are reasonably necessary for this purpose.

7. Where a detainee is denied his or her right to counsel but does not refuse to provide a breath sample, the evidence of such breath test is admissible, notwithstanding having been illegally obtained.'"

* * * * *

## ADMISSIBILITY OF STATEMENT BY JUVENILE

B. and The Queen B. C. Supreme Court No. CC821271 Vancouver October 1982.

The accused, a 16 year old juvenile, was the passenger in a stolen car. Police stopped the car and for approximately 20 seconds the accused had a gun trained at her from a distance of 3 feet. About 5 minutes later an officer who described the juvenile as being scared, warned her, informed her of her right to counsel and interviewed her. The girl admitted to have stolen the car the night before (together with a boy) from a person they knew. She was charged with a delinquency, to wit theft, and was convicted. The statement was the only evidence against the accused and had been ruled admissible by the Juvenile Court Judge. The defence had claimed, to no avail, that the statement was taken too soon after the traumatic experience of being held at gunpoint. Furthermore, the trial judge held that once the warning was given, there was no need to give an explanation of it. This was in answer to a claim that the immediacy of the questioning made an unsolicited explanation of the options open to the juvenile (to remain silent and/or consult a lawyer) necessary to assure the alternatives were understood.

The Supreme Court referred to four cases* which contain the guidelines for taking statements from juveniles. In regards to the explanation of the warning, the Court said its necessity should at least have been considered by the trial judge before admitting the statement in evidence. This had aggrevated the already borderline admissibility of the statement which had been "rushed" in view of the circumstances.

Statement was held to be inadmissible
Acquittal ordered.

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* 1. Re A (1975) 5 W.W.R. 425
2. R. v. J. 29 CR 249
3. R. v. Y. 36 CR 339
4. R. v. W. 11 CRNS 11

## STATEMENTS

The ritual question: "Officer, did you make any threats, or promises, or hold out any inducements or offers or hope of advantage or favour to the accused?"

If the Crown omits to ask this question, does that mean that there is a lack of evidence to show that statement was voluntarily made?

The Attorney General of B. C. v. Hayes Supreme Court of B. C. August 1982 Kamloops, B. C.

The accused had given a statement to a police officer regarding a motor vehicle accident in which he was involved. The accused was charged with an offence resulting from the accident and a voir dire was conducted to determine the statement's admissibility in evidence. The Crown did not ask the police officer the above mentioned "ritual" question and as a consequence the Provincial Court Judge held that the statement was inadmissible. The Crown appealed this decision to the B. C. Supreme Court which rejected the defence position and the trial judge's view. The Supreme Court Justice felt that voluntariness is determined from all events surrounding the taking of the statement and not on the officer's opinion of what he did. As a matter of fact, the Justice went as far as to suggest that the ritual question is actually improper. Whether the actions of the person in authority were threats, promises or inducements is for the Judge to decide and not the person in authority. If the officer states: "No", it is simply his opinion which should not be sought when deciding the voluntary nature of a statement.

Crown's view upheld.

Comment: This view is no doubt interesting, but one wonders if that ritual question is asked to solicit the officer's legal interpretation of his actions or simply to be exhaustive and in essence ask: "Is this everything or is there something else we should know about in respect to the question in issue - the voluntariness of the statement?"

But whatever the reason is, its omission should not necessarily result in a statement being inadmissible.

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## CREDIBILITY OF WITNESSES

R. v. Farstad County Court of Kootenay No. F/3/82 Creston Registry September 1982

The accused, charged with refusing to give samples of his breath, testified at his trial that he had requested to phone his lawyer at the time of his arrest and again in the breathalyzer room when he was told to blow.

The arresting officer (as well as the technician) testified that the accused had made no such request from them or anyone in their presence. The accused had simply refused, as supplying a sample was "against his constitutional rights". He was then placed in cells. After that, the accused requested to phone his lawyer and was accommodated to do so.

The trial judge had believed the officers. He said that even constables coming straight out of bootcamp know that refusing a suspect to phone his lawyer is defence for "refusal". Furthermore, if he did not believe the officers, then he would have to accept that the constables were willing to jeopardize their careers by perjuring themselves.

The defence had asked the trial Court to consider the consistency in the accused's testimony, referring to the fact that he asked for a lawyer after the offence of refusing was complete. The Judge said that he was inclined to take a realistic approach. The accused discovered that his refusal resulted in having to spend the night in goal and he decided then to contact a lawyer.

The accused was convicted and appealed claiming that the trial judge's conclusion was not supported by the evidence, in that he had determined that the police officers were credible strictly because they were trained and would not jeopardize their careers. After all, jeopardy and expertise do not render someone credible in regards to being truthful when relating an event.

The County Court Judge rejected the defence argument and reasoned that not only did the trial judge hear the evidence of the officers which contradicted the accused's testimony but he had also the benefit of observing the witnesses' demeanor, appearance and non verbal communication. These cannot be recorded in the transcript but are

part of the evidence upon which a trial judge may base his reason to believe or disbelieve a witness, a decision Courts of Appeal seldom interfere with.

The trial judge had accepted the evidence of the police officers over that of the accused, not because they were police officers ("that would be a serious error") but having considered all the evidence. The finding of guilt had been reasonable and is supported by all the evidence.

Accused's appeal dismissed
Conviction upheld

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## OBSTRUCTING A PEACE OFFICER

R. v. Guthrie [1982] 5 W.W.R. 385
Alberta Court of Appeal

"This is going to be interesting to see the system working" the accused said when she was arrested for obstructing a peace officer in the performance of his duty. The accused was seen walking across the parking lot of the police station in the middle of the night. As there had been break-ins in the private cars of police officers, the two patrolmen had asked the accused to stop. Asking, "Why"? she had continued on her way and was then pnysically prevented from walking any further and told that unless she identified herself she would be detained. As this was to no avail, the accused (who was otherwise described as "polite, not nasty or abusive") was placed in the police car with "minor resistance" on her part and at that time charged with obstruction. Then the officers inspected the lot and found a car door standing open, but it had not been forced and nothing had been taken. When questioned if she was involved with that car the accused had remained silent. Eventually, on her way to the remand centre, the accused identified herself.

The accused was convicted of obstructing the officers and appealed this verdict, claiming that in the circumstances, the failure to identify herself did not amount to such obstruction.

The issue of course is whether this case is distinct from the now famous Moore case[1]. Moore was found to ride his bicycle through an intersection against the traffic light. He had refused to identify himself, which would have resulted in the officer being prevented from charging the accused with the non-arrestable traffic offence. The officer had arrested Moore for obstruction and the Supreme Court of Canada verified this to be correct. Ms. Guthrie, of course, was not found to have committed an offence but was found "in suspicious circumstances". The cases therefore are distinct from one another.

In another well known case, Rice v. Connolly[2], the circumstances were "invitingly similar" to those in this Guthrie case. The suspect was found in the dark hours acting suspiciously in an area in which break and entry offences had occurred. It was found that he had a lawful excuse for refusing to answer questions put to him by police and that at most there was a moral obligation to cooperate with police to solve crime.

[1] [1978] 6 W.W.R. 462
[2] [1966] 2 QB 414

In this Guthrie case, there was "no apparent commission" of an offence known to law. The accused's failure to identify herself and her refusal to answer questions "arose within lawful excuse and did not constitute the obstruction charge".

Appeal allowed
Conviction quashed

Note: In quashing the conviction, the Court of Appeal did not comment on the legality of the arrest the officers effected. The accused's refusal to cooperate in any way, and the finding of the open car door, coupled with the fact that cars had recently been rifled, would have to be weighed to determine if the officer's beliefs were reasonable and probable to make the arrest. The alleged obstruction did not arise from the arrest; rather the arrest arose from the obstruction. Having been lawfully arrested and then failing to identify oneself does not amount to obstruction; and, of course, remaining silent when questioned, is one's right. In other words, when the identification was demanded, the information available to the officers at that point in time did not oblige the accused to identify herself.

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## SEARCHING A LAW OFFICE - PRIVILEGED COMMUNICATION

Supreme Court of Canada June 1982 Simon Descoteaux, Centre Commucutaire Juridique de Montreal v. Alexandre Mierzwinski and Le Procureur de la Province de Quebec and Le Barreau du Quebec, La Commission des Droits de la Personne.

Investigators searched a law office and seized a form for which a Mr. Ledoux provided the information. The form had been completed by the clerical staff for him (Mr. Ledoux) to receive legal services at the taxpayers' expense. Giving false information on an application form to receive legal aid is a false pretence, held the Supreme Court of Canada. However, the court had to respond to a defence submission if the form and the information it contained were admissible in evidence, as it was part and parcel of the priviliged communication the accused had with his lawyer.

In point form, the Supreme Court of Canada held:

1. As soon as a potential client takes the first steps, even before the formal retainer is established, the communications made between solicitor and client are priviliged.

2. It does not matter if the communications are in regards to the means to pay for the legal services sought, they are priviliged.

3. The communications between the client and the solicitor's staff is included in the principle of confidentiality.

4. However, communications which are in themselves criminal or are advice to facilitate the commission of a crime are not priviliged.

When documents are to be searched for, a justice of the peace issuing a search warrant has no jurisdiction to order seizure of documents which are inadmissible in evidence because they are privileged. The form that must be filled out to obtain legal aid is protected as it is part of receiving legal advice. When false information is given in regards to the applicant's financial means, then the content of the form in regards to those means only, is criminal in itself and admissible in evidence.

The legal aid lawyers had refused to give any information to the investigators or release the form to them. Hence there was no reasonable alternative but to apply for a search warrant.

Said the unanimous Supreme Court:

> "Perhaps, as a result of their investigation, they knew that Ledoux was not eligible for legal aid in view of his financial means, but the crime of which they suspected him and concerning which they were entitled to continue the investigation was that of having concealed his means, ineligibility not being a crime in itself".

The Supreme Court of Canada suggested procedures when a Justice of the Peace issues a search warrant for documents in a law office. The Court said it is appropriate for the Justice of the Peace to make certain conditions in respect to the warrant. As for instance in this case, the Justice could have ordered that the document (the application form) be delivered to him in a sealed envelope. That, in the presence of the parties (Crown, defence and legal aid) he examined the document to determine if it contained confidential (privileged) information, irrelevant to the facts in issue (Ledoux, financial means). He could obliterate the privileged information, photocopy what is relevant, and seal the original document in an envelope for presentation to the Court.

The Court emphasized that each case will be different and drew a distinction between situations where the lawyer is the victim of his clients (as in this case) and where he is the accomplice. In the latter, little, if any, information will be privileged.

> The Supreme Court of Canada ordered the form to be returned to the Justice of the Peace and to be dealt with as described above.

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## USING A CREDIT CARD OBTAINED BY THE COMMISSION OF A CRIME (FINDING)

R. v. Costello B. C. Court of Appeal October 1982 CA810630

A synopsis of this case (when it was before the County Court) can be found on page 25 of our Volume No. 4.

Costello appealed his conviction of using a credit card obtained by the commission of a crime to the B. C. Court of Appeal.

Costello testified that he had found the credit card in question on the street in front of his house. He had placed it on a shelf in the kitchen and there it stayed for several days without the accused having any intention of using it. However, one evening the accused received an unexpected invitation to have some drinks with friends in a bar. When the friends ran out of money, the accused retrieved and used the found credit card.

His defence was that he had found the card and had not "obtained" it by the commission of a crime. He argued that once he procured the card, the act of "obtaining" ended.

As the Supreme Court of Canada held* in 1975, in circumstances as these, there are two stages to "obtaining". The first may be totally innocent and lawful, however, when the intention was formed to convert the property (the credit card in this case) to his own use, the second stage of "obtaining" was concluded.

Said the B. C. Court of Appeal:

> "He had committed theft. Thereafter he was in possession of a stolen credit card, with the requisite guilty knowledge and the offence with which he was charged was completed when he used the card".

Accused's conviction upheld.

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* R. v. Maroney 18 CCC (2d) 257

## TIDBITS

### Criminal Justice

A lawyer (defending someone charged with a serious criminal offence) consulted an experienced "learned friend" from another province. A brilliant defence resulted. The consulted barrister urged his colleague to wire the verdict as soon as it was known.

Defence counsel's telegram read:

"Justice was done".

The consulting attorney responded:

"Appeal immediately".

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### Charter of Rights

Section 688 of the Criminal Code (dangerous offenders legislation) was recently challenged in the B. C. Supreme Court in that it violates section 7 and 9 of the Charter of Rights.

Section 688 C.C. uses permissive language in giving judges the power to imprison indeterminately in that it uses the word "may". Therefore, the fundamental principle of justice (section 7 of the Charter) that similar individuals must be treated similarly is being violated claimed the defence. It was also claimed that some of the provisions under section 688 C.C. amounted to arbitrary detention.

The Supreme Court Justice said that the arguments raised were "downright silly" and that lack of logic was inherent in the defence submission.

Imprisonment based on law is not arbitrary within the meaning of section 9 of the Charter. Furthermore, judicial discretion to imprison one person and not another is necessary if there is to be even the shadow of a hope of an equitable system. Therefore, the discretion granted to the Judiciary by section 688 C.C. does not violate section 9 of the Charter.

R. v. Gustavson C.C.#810372 B. C. Supreme Court October 1982

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The accused was served with a photocopy of the breathalyzer technician's certificate. Unfortunately it was a poor copy and the document could not be read through as words were blurred and obscured. The defence argued that this meant that no copy was served on the accused. The Court agreed and said:

> "In this appeal the certificate given to the appellant was so poor that I find it was not a 'copy'. Parts were blurred and some completely illegible. It was, therefore, not admissible as evidence".

R. v. McLennan County Court of Vancouver No. CC820675 Vancouver Registry

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The arresting officer was present when two samples of the accused's breath were analyzed. The officer testified that each sample had consisted of "three puffs". The two analyses resulted in a certificate giving readings of 180 and 170 ml. respectively. The defence claimed that there was evidence of six samples of breath while only two were adduced in evidence by means of a certificate. Therefore, it was possible that any one of "the puffs" were lower than the readings on the certificate; afterall, the lowest reading is the one that counts. This meant that the Court had to decide what is to be catagorized as "a sample". The Criminal Code obliged the accused to provide a sample of breath suitable to enable an analysis to be made . . . Case law states that "it is for the qualified technician to determine, on the basis of his training, the suitability of a sample of breath given for the required analysis".

In this case, the aggregate of three puffs amounted to one sample the technician considered suitable for analysis. In other words, the "puffs" were not samples within the meaning of s. 237 of the Criminal Code. The accused's acquittal in Provincial Court was set aside and the County Court found him guilty.

The Queen and Adkin County Court of Vancouver Island Victoria Registry No. 21884 October 1982

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