ISSUES OF INTEREST

VOLUME NO. 12

Written by John M. Post

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THE EXCLUSIONARY RULE

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Police officers had some people in a pub under surveillance. Two of them left but the accused and others stayed. The persons who left were followed and after they had stopped at a trailer park the officers stopped their car and found balloons with heroin.

The officers then returned to the pub and approached the accused. Although the arresting officer conceded that he had no grounds for believing that she had any drugs or narcotics on her he, because of being suspicious, grabbed the accused by the throat to prevent her from swallowing. The accused's mouth was clear but he saw subsequently that she clenched something in her hand. This turned out to be a balloon containing heroin. It was the admissibility of this heroin the accused disputed on the basis that the search was not one authorized by law as the officer did not have the reasonable and probable grounds prerequisite to a legal search.

Section 8 of the Charter of Rights and Freedoms guarantees us to be secure against unreasonable search while section 24(2) of that Charter states that evidence obtained by means that infringe on or deny anyone's rights or freedoms must be excluded. However, the subsection warns that when considering the admissibility of evidence so obtained, the judiciary must have regard to all circumstances and consider if the admission of evidence so obtained would bring the administration of justice into disrepute. This issue compelled the courts to give an interpretation of section 24(2) of the Charter and determine the degree of the 'exclusionary rule' it creates. This case was decided by the B. C. Court of Appeal and despite the fact that it is the highest court in our Province, its resolves may well be influential but are not binding on courts in other provinces. The Supreme Court of Canada may disagree with these views and its decisions, of course, are to be followed by all Canadian Courts.

Perhaps the issues raised in the numerous courtroom debates respecting the exclusionary rule (also known as the poisonous tree principle) in the U.S. and Canada may depict the dilemma of the judiciary.

The basic question is whether fruit of a known poisonous tree is fit and safe for consumption at the table of evidence. Will its presence disgrace the table? Will it shake the confidence of the guests to such a degree that they doubt the hygiene in the kitchen, question the competence of the chefs and fear contamination?

The Bible tells us that no good fruit can grow on a poisonous tree. However, the Good Book also says that it is virtuous not to be wasteful with food. In the U. S. they apparently found the former text more compelling that the latter. In Canada we have been more inclined to consider the poisonous tree text as a warning to be aware and careful of the possibility of poisonous fruit. However, when the fruit was tested and found to be good then we, in Canada, used to comply with the prohibition to discard good food. However, quite separately from dealing with the harvested fruit, we subsequently paid some attention to the tree to cure it or to put the axe to it

History of Exclusionary Rule:

The United States Supreme Court established a strict exclusionary rule for the Federal Courts in 1914[1] and for the State Courts in 1961[2]. After a number of warnings to law enforcement officers and other government authorities, the U. S. Supreme Court felt it had to protect the public from oppressive enforcement, discipline agents of the State and doubt their credibility when they had used illegal or surreptitious means to collect evidence, particularly where this amounted to constitutional contempt. Furthermore, the Court had to protect and maintain its own image to not only be, but also appear to be, just and impartial. The judiciary are, afterall, the enforcers of the constitution. By accepting evidence which was obtained by unauthorized and illegal means the Court would become a party to those means.

Although on the surface, this is a commendable and apparent appropriate position to take by the Courts, the consequences have in some cases deeply shocked public confidence in the judicial system. Wigmore, the authority on evidence, wrote the following to demonstrate the absurdidity of a strict exclusionary rule which he called "indirect and unnatural"[3]:

> "Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly but shall do so by reversing Titus' conviction. "

1 Weeks v. United States (1914) 232 U.S. 383
2 Mapp v. Ohio (1961) 367 U.S. 643.
3 A Treatise on the Anglo-American System of Evidence in Trials at Common Law

Wigmore obviously ridiculed the absurdity of erasing one person's wrong because someone else committed another wrong. Why should each not be responsible for his own acts? There is evidence that the U.S. find this exclusionary rule a legal luxury they can no longer afford and there is considerable activity to modify the strictness of their exclusionary rule. This, while Canada is getting into an exclusionary rule the degree of which is still uncertain.

In Canada we had the start of an exclusionary rule in the first few "rounds" of the well known Wray case[4]. In a robbery, Wray had exchanged the life of a service station attendent for the $55 in the till. The murder was committed with a rifle which Wray threw in a lake or swamp afterwards.

A statement obtained from Wray revealed the location of the rifle and a ballistics test proved that the retrieved rifle was the murder weapon. However, numerous improprieties occurred during the interview and the statement was ruled inadmissible in evidence. The Ontario trial Court as well as the Ontario Court of Appeal held that the exclusion of the statement included all evidence that was obtained as a result of the information Wray gave police in his statement. This, of course, included Wray's knowledge of the location of the rifle, the weapon itself and the results of the ballistics test. Without this evidence a conviction was simply not possible in the circumstances.

The Supreme Court of Canada reversed the decision. It held that, although the statement was inadmissible (the poisonous tree), the proven facts discovered as a result of it (the good fruit) were admissible. This, the critics said, removed all inherent judicial discretion to exclude evidence where the illegal means used to obtain it and the evidentiary value of the proven facts are disproportionate and an imbalance on the scales of justice. This judge-made-law remained unaltered until April 17 of 1982 when the Charter of Rights and Freedoms became effective and, until this issue is again put to the Supreme Court of Canada, we will not be able to assess the impact of section 24 of that Charter.

This Collins case is well suited to address all these issues and the B. C. Court of Appeal said, in view of section 24 of the Charter:

> "No longer is all evidence admissible, regardless of the means by which it was obtained. Nor on the other hand, is all improperly obtained evidence inadmissible. A middle ground has been chosen, but not the middle ground of discretion that has been chosen in many jurisdictions".

[4] R. v. Wray [1971] S.C.R. 272

This of course because the Charter stipulates that the Courts must have regard to all the circumstances, and if the admission of such illegally obtained evidence would bring the administration of justice into disrepute. The Court said:

> "But it is not open to a court in Canada to exclude evidence to discipline the police. We are only to exclude evidence to avoid the administration of justice being brought into disrepute". (Emphasis is mine)

The B. C. Court of Appeal held that the accused must show that on the balance of probabilities his rights or freedoms were violated and that admission of the evidence obtained by means of such a violation would bring the administration of justice into disrepute. Said the Court:

> "It is the admission, not the obtaining, that is the focus of attention, though the manner of obtaining the evidence is one of the circumstances".

And later, after concluding that Canadian Courts are not badly regarded in spite of them having accepted illegally obtained evidence up until last year, the Court said:

> "The United States' experience teaches us that excluding illegally obtained evidence tends to bring the administration of justice into disrepute, at least where there is not, on the part of the police, a contempt for constitutional rights".

The B. C. Court of Appeal unanimously decided that the trial judge who had admitted the evidence of the heroin found in the accused's hand in circumstances as explained above, was a correct decision.

Since the Court of Appeal agreed, the trial Judge's comments are interesting:

> "Turning now to the case at Bar, would any ordinary right thinking person think that seizing and searching a suspected hard drug trafficker for possession of illicit drugs be shocking to the community? The answer is self evident. Even though search and seizure of the accused would be regarded at law as an unreasonable infringement of a right provided by section 8 of the Charter, I have concluded that, having regard to all the circumstances of this case, police conduct here was not shocking such that the admission of the evidence derived from these seizures would necessarily cast the administration of justice into disrepute".

The Justices of the Court of Appeal wrote separate reasons for judgement, each reaching the same conclusion. The Chief Justice emphasized the following points in the last paragraph of his judgment:

1. The constable's suspicion that the accused was in possession of heroin was proven correct;
2. The offence alleged against the accused was serious;
3. The officer was not acting at random or out of malice towards the accused;
4. The use of the throat hold was to prevent the loss or destruction of evidence; and
5. The admission in evidence of the heroin found was not unfair to the accused:

   "Having all these facts before him, he (the trial judge) decided to admit the only evidence which could convict her. Without justifying the use of the throat hold as a general practice, I cannot say that the judge erred in the circumstances of this case".

Conviction upheld.

The B. C. Court of Appeal, within a few days of dealing with the Collins case, rendered judgment in an appeal by the Crown in the Cohen case (CA 821475). In that case the police officers had reasonable and probable grounds to believe the accused was in possession of cocaine. The officer 'seized' the accused by her throat. Her mouth was found to contain nothing nature did not intend to be there, however, in her purse six packages of cocaine were found. At the preliminary hearing defence counsel persuaded the judge that the choking amounted to an unreasonable search, that it was "shocking" to the community and that admitting evidence thereby obtained would bring the administration of justice into disrepute. Although the search of the purse was lawful and reasonable, the search of the mouth and the purse, in these circumstances, was held to be one transaction of searching by the provincial court judge.

Knowing how the Judge viewed this issue, defence counsel promptly applied to re-elect the mode of trial from judge and jury to trial by magistrate without a jury - to wit by this kind judge. The application was granted, the evidence so far heard (the remnants of it) was ordered to be treated as evidence at the trial and the charge was dismissed.

The Crown and defence counsel conceded that the moment the accused was seized by the throat she was under arrest and that the search of the mouth was unreasonable* in the circumstances. However, the Court of Appeal disagreed that the entire search was one transaction. The search of the purse was separate and lawful. Therefore, the discovery of the cocaine was part of a legal and reasonable search. The court did, therefore, not have to rule if the choke hold (when used to search the mouth) makes the search unreasonable.

Two of the three Justices of the B. C. Court of Appeal held that the Crown's appeal should be allowed, the acquittal set aside and a new trial conducted.

* * * * *

* How much bearing this had on the concession made by the Crown is difficult to infer from the reasons for Judgment but the police officer testified in cross-examination that his reasonable and probable grounds were in regards to possession of cocaine. He agreed that persons hide heroin in their mouth and conceded that he had never found anyone carrying cocaine in the mouth.

REGURGITATING ON SECOND BREATH TEST

REFUSING TO GIVE SAMPLE

Regina v. Brown County Court of Westminster New Westminster Registry X82-8767

The accused gave, upon demand, an adequate sample of his breath for the first analysis. No reading could be obtained from what breath he gave as a second sample. In spite of his testimony at trial that "he had been trying as hard as he could", he was convicted of refusing to give a sample of breath.

The accused appealed his conviction on several grounds. The only one of interest is the accused's claim that there was a lack of proof that the "instrument" was in proper working order.

The constable had testified that he "got the instrument ready" and had analyzed one sample of breath given by the accused. For the second analysis the accused, in the officer's opinion, simply did provide an inadequate breath sample. However, the accused swore he tried as hard as he could and the Crown did not prove that the instrument was at that moment not blocked. The defence asserted that if the accused is to be believed, it raised the possibility to infer that the instrument was not properly working, particularly in the absence of any evidence that for the second test it was in good working order.

The Court did not go along with the defence's theory. It held that in section 235(1) C.C. the obligation is on the accused to provide "such a sample of breath as is in the opinion of a qualified technician is necessary to enable a proper analysis to be made", etc. The Crown had presented the opinion of a qualified technician that the sample provided was not adequate and "that is all that was necessary" in the circumstances.

Accused's appeal dismissed
Conviction upheld.

* * * * *

DEMAND WITHOUT REASONABLE AND PROBABLE GROUNDS

R. v. Thurlow County Court of Yale Vernon Registry No. 08341

The accused was involved in a motor vehicle accident and admitted to have consumed some wine with his dinner. Although he showed no symptoms of impairment the attending officer demanded samples of the accused's breath. The accused complied and a certificate under section 237(1)(f) C.C. resulted.

The trial Judge had held that a demand under section 235 C.C. can only be made upon reasonable and probable grounds that the accused had committed the offence of impaired driving. The lack of such grounds meant that the demand was not pursuant to section 235 and, therefore, the certificate had no evidentiary value. As a consequence the accused was acquitted of "over 80 ml.".

The Crown appealed and the County Court Judge saw no reason why the certificate should not be proof of its content. The demand was purporting to be pursuant to section 235 C.C. and in compliance with a precedent set by the Supreme Court of Canada*, the certificate was admissible in evidence as proof of its content.

Appeal allowed
New trial ordered

Note: Although the reasons for judgment do not mention this, it should be noted that had the accused refused to supply samples of his breath, the lack of the reasonable and probable grounds prerequisite to the demand could have provided him with a reasonable excuse for the refusal.

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* R. v. Billing (1975) 24 C.C.C. (2d) 81

PASSENGER'S POSSESSION OF A STOLEN CAR

The Queen v. Terrence, Supreme Court of Canada March 24 1983

The seventeen year old accused was invited by a friend to go for a ride in "his brother-in-law's car". The car, in fact, (a new Camero) had been stolen that evening from a garage. The accused testified that it was logical for him to believe the car was not stolen as he knew his friend's brother-in-law had a wreck for a car and was due for a new one; furthermore his friend had the keys for the car.

The ride ended up at a police roadblock after a chase. When the car slowed, the accused "rolled out" and escaped across a field.

When tried for possession of stolen property, the Crown had not been able to contradict the accused's version of what happened or rebut his claim of no knowledge that the car was stolen. However, the Provincial Court Judge "utterly disbelieved" the accused and from that inferred that the accused had knowledge. In regards to the requisite ingredients to possession, the trial judge had held that, although the accused was not the driver, he had, in a sense, control of the car in that the driver had control with his knowledge and consent.

The Ontario Court of Appeal disagreed with the trial judge and had held that the essential measure of control necessary to show possession as defined in section 3(4) of the Criminal Code was not present.

The Crown appealed claiming that the accused had culpable possession. It was proved that the accused was a passenger in the stolen car, which the Crown claimed he knew to be stolen. He had also consented to the possession of the vehicle by the other person.

Actually there was no evidence adduced at the trial that the accused had knowledge that the car was stolen. This knowledge had been inferred by the trial judge via the doctrine of recent possession. Unexplained possession of recently stolen goods entitles the Court to draw the inference that the person who had possession committed the crime by which the goods were obtained or had knowledge that they were so obtained. When the accused did explain and was "utterly disbelieved", the Court reasoned (based on precedent)* that the disbelieved evidence is incapable of rebutting the presumption. In other words, disbelieved evidence has no evidentiary value.

* R. v. Proudlock [1979] 1 S.C.R. 525.

The Supreme Court of Canada held

1. That before the doctrine of recent possession applies, possession has to be proved. The Crown had failed to do so as it showed no control of consent on the part of the accused.

2. Also the accused was not a party to the offence of theft or the possession of the car as the Crown failed to show that the accused had a common intention with the thief or the person who in fact had possession of the car.

Crown's Appeals Dismissed.
Acquittal upheld.

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TO SAY WHEN YOU ARE BORN IS "HEARSAY" PROOF OF AGE

Wigmore: **"Strictly speaking one cannot exactly know his own age except upon hearsay information; for he is not capable of knowing this, or anything, until an appreciable time after birth".**

Regina v. Botel County Court of Vancouver Island Nanaimo Registry Cr. 2720 April 1983.

The accused was charged with having sexual intercourse with a female person under the age of fourteen years. The girl's mother was not available to testify and the Crown produced (besides the girl's testimony) a birth certificate. The question was the adequacy of this evidence.

It seems that the Courts have been inclined to accept the evidence of older persons in respect to their ages and rejected that of the younger ones while the source of the information is the same for both. No one was consciously present at birth and cannot vouch for the accuracy of the information in regards to date or location. Both must rely on documents or what was told them. In other words, none of us can attest to his or her age as we must rely on the credibility of parent(s) or anyone who was present at our birth.

The experts on evidence have suggested that testimony like "I am 20 years of age" or "I was born on January 1, 1954", should be treated as a question of "testimonial qualifications" and regarded as admissible in evidence. Alternatively it can be an exception to the hearsay rule as "an assertion of the family reputation". However, the question remains if this last resort measure should only apply if no family (direct evidence) is available.

And what must we do about the above mentioned distinction we make between the older and the younger generation? Needless to say that in the "teens" category the age is often more crucial to the charge. For example, is the person a juvenile; is he under nineteen in a drinking charge; was the victim under the age of fourteen as in this case. Nevertheless, to establish age the law of evidence should be the same for all.

After reviewing numerous cases with these specific and similar evidentiary problems, the Court held:

> "The recent authorities support the position taken by counsel for the Crown, that the individual is entitled to state in the witness box his or her own age. It is a question, ultimately, for the jury to decide whether or not that evidence, plus any other evidence which is tendered, satisfied the jury beyond a reasonable doubt as to whether or not the complainant is under fourteen years of age or is the age stated".

However, the Court warned that where the witness only knows his or her age because of what he or she was told, it may not satisfy the judge of the facts. In addition, persons who had associated with the complainant in this case, were allowed to give their opinion of her age.

* * * * *

HIT AND RUN

The Queen v. Roche, Supreme Court of Canada April 1983

The accused backed his car into one parked in a laneway. Apparently the collision was not a gentle one and considerable damage was caused. The accused, armed with a pool cue, stopped and approached the other car. As the occupants of the victim's car alighted the accused got back in his own car and rammed the other car with such force that it moved forty feet further into the laneway.

Although on the surface the incident seems to be more one of mischief, the accused was, at trial, convicted of Hit & Run but had this verdict reversed on Appeal. The Crown then took a lingering argument over the interpretation of section 233 of the Criminal Code (which is the heart of the issue in this case) to the Supreme Court of Canada.

Section 233 says in subsection (2) that anyone who is involved in an accident and fails to stop, identify himself "AND" does not assist the injured, commits a crime (provided, of course, that this failure resulted from an intent to escape civil or criminal liability). Foreseeing great difficulties in proving such intent beyond a reasonable doubt, Parliament provides in subsection (3) that failure to stop, identify oneself "AND" assist the injured is "proof" (not merely evidence) of such intent. If, for instance, a person accused of the crime of Hit and Run exercises his right to remain silent on the issue of his intent (his reason for leaving the scene) then, if there is no evidence to the contrary, he must, at trial, rebut this "presumption of intent" on the balance of probabilities.

Needless to say that if in subsection (2) the "AND" means that it must be interpreted conjunctively absurd situation would arise. It could mean that at an accident scene where no one was injured, all a driver has to do is stop and then leave or if there are injuries, assist the injured and leave. After all, the "AND" indicates that the duties the section imposes must all be ignored before one commits "Hit and Run". The same goes for subsection (3) the presumption of the intent to escape civil or criminal liability. Taking the subsection at its word, it is of no assistance to the Crown unless the driver failed to stop, identify himself AND assist the injured if there are any.

The Courts across Canada have varied considerably in the interpretation of subsection (3), although in respect to subsection (2), the offence section, they pretty well have agreed that failure of anyone of the duties it imposes will constitute the offence

When this case reached the B. C. Court of Appeal, the majority of the Justices held that failure to carry out any of the three duties imposed by subsection (2) may constitute an offence, however, before we may infer the prerequisite criminal intent by using the provision of subsection (3), all of the duties must have been ignored. The Crown appealed the decision to the Supreme Court of Canada which cleared the matter up by holding:

> "I think, therefore, that if Parliament intended that the accused could commit the offence by failing to do any one of three things specified in subsection (2), Parliament intended, also, that the presumption provision would be applicable in any case where the accused failed to do any of the things specified"

Crown's appeal allowed
Conviction restored

* * * * *

SELF PROTECTION

WEAPON DANGEROUS TO THE PUBLIC PEACE

Regina v. Ali B. C. Court of Appeal 811156

In November of 1982, the B. C. Court of Appeal dealt with a case[1] where a young man was found carrying a knife while walking down the street. He had explained that although he used the knife for many legitimate purposes he would use it to protect himself, "if I get jumped or someone comes on to me". The trial judge had held, in essence, that where a person carries an item that he would use to defend himself and carries it for that event, then the item is a weapon dangerous to the public. The B. C. Court of Appeal reversed that decision. Many believe that this precedent created a full proof defence for the offence of carrying a weapon dangerous to the public peace. All one has to say is that he carried it to protect himself. This is a misconception of what the B. C. Court of Appeal said. As a matter of fact the Court gave an example of what it meant. A woman may wear a hat with a hat-pin. If she was asked if she would use it to defend herself and the answer was "Yes" this does not mean that she carried a weapon dangerous to the public peace.

One month later the B. C. Court of Appeal gave a decision on the same question in this Ali case which demonstrates that the Sulland decision did not change the law.

Ali and a number of his friends were driving on city streets offering gratuitous insults to women ("street people"), and seemed to invite an altercation with a group of others. Police stopped the car and found that the accused had a carpenter's hammer in his possession. In the back of the car an axe was found but the accused claimed to be unaware of its presence and denied ownership. When questioned for what purpose he had the hammer in his possession the accused explained that people get murdered every day and that he had it "in case I need it for protection". He asked the officer what he would do if "faggots" were coming at him with "clubs and two-by-fours". When asked about the near altercation with the "street people" the accused claimed they were kicking his car.

The B. C. Court of Appeal unanimously held that the accused (who appealed his conviction of possession of a weapon dangerous to the public peace) "was looking for trouble and possessed the hammer to use in the event that the trouble he was looking for arose."

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[1] Sulland v. The Queen CA 820276 - see page 14 of volume 10 of this publication.

CHARTER OF RIGHTS AND FREEDOMS

DEMAND - TRANSPORT IN POLICE WAGON - DETENTION

Regina v. Morrison Vancouver County Court March 1983 Registry CC821618.

The accused went through a red traffic light and was stopped. He showed symptoms of impairment and the officer made, upon reasonable and probable grounds, a demand for samples of breath. The "Police wagon" was called, the accused was secured in the back of it, and transported to the police station where he went, after pretty sophisticated attempts to ruin the possibility of an accurate analysis, through the motions of giving samples of his breath. He was then charged with "refusal" and informed of his right to counsel under section 10(b) of the Charter.

The accused appealed his conviction of refusing to give samples of his breath.

The interesting ground for appeal was that since he was not told of his right to counsel until arrested long after the demand was made

> ". . . the learned trial judge erred in failing to exclude evidence that was obtained in a manner that infringed or denied rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms".

What is refreshing is to see the matter of "detention" being raised. On page 3 of volume 11 of this publication[1] comment is made how it seems simply to be assumed by some Courts that when a person is under demand to give a sample of his breath he is detained. In this case that was not done. It was assumed that the definition of "detention" had not changed since the Charter became effective. Therefore the County Court reviewed the opinion of the Supreme Court of Canada on the meaning of that word "detention"[2] as it is in the Bill of Rights 1960.

[1] Regina v. Davignon County Court of the Cariboo

[2] Chromiak v. The Queen 49 C.C.C. (2d) 257. See also page 3 of Volume of this publication.

The Supreme Court of Canada said that whenever the words "to detain" are used it is always in association with "actual physical restraint". It held that that was not the legal situation" of one who has been required to accompany a peace officer for the purpose of having a breath test taken". The Supreme Court reasoned:

> "The test may well be negative and, in such a case, it would be quite wrong to say that this person was arrested or detained and then released. Detained means held in custody as is apparent from such provisions as s. 15 of the Immigration Act. . .".

The County Court Judge concluded from this that the accused Morrison was not arrested or detained and it was, therefore, not necessary for the officer to inform the accused of his rights. This made it unnecessary to consider if the administration of justice was brought into disrepute; the evidence was admissible and

The appeal was dismissed
Conviction upheld

Comment: It seems not unlikely that this issue will either be appealed further or debated in other cases. The law is clear that only being under demand "to accompany" and give samples of breath does not mean a person is detained or arrested. However, what happens subsequent to the making of the demand may well cause a detention. The Supreme Court of Canada said that when a person complies with directions police officers are entitled to issue, he is not in custody. When he tries to get away to avoid obeying the test, then a detention or arrest may well result. However, it seems reasonable that when a physical control is imposed such as being locked in the back of the police van or handcuffed or in the rear of a patrol car equipped with a shield and without door handles, that the Courts will hold that in such circumstances, there is custody and hence detention. It should be noted that arrest includes detention but that there can be detention without arrest. Had the accused been transported as an ordinary passenger there seems to be no doubt that he would not have been detained.

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OVERSIGHT ON THE PART OF POLICE TO INFORM DETAINED PERSON OF RIGHT TO COUNSEL

Regina v. Fugard Vancouver County Court, November 1982 Vancouver Registry CC820806

Shortly after the Charter of Rights and Freedoms became effective the accused was found on private property at night in circumstances which caused the officer to arrest him for trespassing by night. The officer told the accused the reason for the arrest and that he had the right to remain silent. However, the accused was not informed of his right to retain and instruct counsel. The officer searched the accused and found a screwdriver and a flashlight on him and later, at the station, a pair of socks.

An hour after the arrest the officer informed the accused of his right to counsel. By this time all the items the Court later considered essential to the proceedings, had been found on the accused. This resulted in a voir dire to determine if the violation of the accused's rights should result in exclusion of the exhibits (the accused was tried for possession of house breaking tools).

When the accused was informed of his right to counsel he did not take advantage of the opportunity to contact a lawyer. He said: "No, it is too early in the morning". Furthermore the Court held that the officer's error was not for any oblique purpose and was simply an oversight due to the incident having occurred very shortly after the Charter was proclaimed.

The Court reasoned that had the officer informed the accused of his right to counsel at the scene, his search of the accused would not have depended on whether the accused wanted to contact a lawyer. It is well established at common law* that authority to arrest includes the entitlement to search the suspect and it was a result of the search that the tools were found. Said the Court:

> "I think that upon an examination of all the circumstances, and more particularly with respect to the reaction of the accused when he was informed of his right to counsel, to admit this evidence would not necessarily bring the administration of justice into disrepute. Rather, I think under these particular circumstances, not to admit it would, in fact, bring the administration of justice into disrepute"

Exhibits admitted in evidence.

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* Laporte and The Queen (1972) 8 C.C.C. (2d) 343

CHARTER OF RIGHTS AND FREEDOMS

ERRORS IN SEARCH WARRANT

EXCLUSION OF EVIDENCE

Regina v. Thompson County Court of Yale March 1983, Kelowna Registry CR95/82

Police armed with a search warrant, searched the accused's home. This resulted in a conviction of possession of marijuana which the accused appealed.

The warrant recorded a belief that marijuana was being cultivated at a certain address. As it turned out the house number was wrong and was one of a single dwelling. The address where the search took place contained two apartments and that of the accused was searched. In any event, there were a number of errors, each of which, by itself would not have been adequate to invalidate the search. However, the County Court Judge found that the aggregate of them did. He found that the officers had been careless, indifferent and unseeing.

Without saying what specific rights or freedoms were infringed or denied by these errors, the judge invoked subsection (2) of section 24 of the Charter and excluded the evidence that resulted from the search. He did so on the basis that society would be shocked by the acceptance of the evidence.

Appeal allowed
Accused acquitted

Comment: The Judge seems to have invoked the exclusionary rule to discipline the police officers which probably is not a judicial function according to other reasons for judgment.

It can only be deduced that the judge must have thought that the errors in the warrant made the search unreasonable and in violation of section 8 of the Charter. As only a denial of a right or freedom can activate the remedy of excluding evidence.

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EVIDENCE TO THE CONTRARY

"MIRACULOUS FACTS"

Regina v. Acheson County Court of Yale February 1983 Kemloops Registry CC433

At 2:10 and 2:30 a.m. analysis of the accused's breath resulted in readings of 130 and 120 miligrams respectively.

The accused was charged with "over 80 ml." and released.

Within an hour he was found driving again and a new demand for samples of breath was made of him. Readings identical to those above - 130 and 120 miligrams respectively, resulted from tests at 3:21 and 3:38 a.m.

The Crown and defence "agreed" that the accused had nothing to drink between the two sets of tests yet the Crown's evidence of the blood-alcohol levels was adduced by means of certificates and it depended on the presumption that in "the absence of evidence to the contrary" the blood-alcohol level at the time of analysis was the same as at the times of driving.

The accused claimed that the "curious facts" of identical alcohol levels with nearly an hour in between the two sets of tests was sufficient to doubt the accuracy of the analyses. The blood-alcohol level was on its way down during the first set of tests; then without having anything to drink, it increased 10 ml. only to reduce by the same rate during the second set of tests. This impossibility or miracle was, the accused argued, evidence to the contrary which precludes reliance on the presumption of equalization. During the trial, which resulted in convictions, experts conceded that the two sets of readings could not possibly be accurate if the accused had nothing to drink between his release and second apprehension. The accused appealed.

The County Court Judge held that a demonstrated inaccuracy in the analysis of the blood-alcohol level does not amount to "evidence to the contrary" unless it is of "sufficient magnitude to leave a doubt as to the blood-alcohol content of the accused being over the allowable limit"*. In view of the tests having resulted in readings 50% in excess of the legal limit, the County Court Judge held that "the evidence to the contrary" could withstand the quantitative and the qualitative tests

Appeal dismissed
Conviction upheld

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* R. v. Cresthwait [1980] 6 M.V.R. 1. (Supreme Court of Canada)

CHARTER OF RIGHTS AND FREEDOMS

POSSESSION OF HOUSE-BREAKING TOOLS

R. v. Holmes - Ontario Court of Appeal - March 1983

On page 33 of Volume 11 of this publication it was indicated that an Ontario County Court had held that section 309(1) of the Criminal Code was inconsistent with the presumption of innocence guaranteed in section 11(d) of the Charter. The Crown appealed that decision to the Ontario Court of Appeal.

Section 309(1) C.C. states:

> "Everyone who without lawful excuse, the proof of which lies upon him, has in his possession any instrument suitable for house-breaking, vault breaking or safe breaking, under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for house-breaking, vault-breaking or safe-breaking, is guilty of an indictable offence ...".

The Ontario Court of Appeal disagreed with the opinion of the County Court Judge and held that the section does not create a reverse onus at all. The Court of Appeal said that the Crown must prove the essential ingredients to the offence. Nowhere does the section displace the onus of that proof in respect to any of those ingredients. In other words it does not relieve the Crown from proving all ingredients beyond a reasonable doubt.

One of the ingredients to this offence is that the possession is in circumstances that give rise to a reasonable inference of intent to use the instruments for an unlawful use. This calls for an objective rather than a subjective test. The masked man with a crowbar in a back alley in the middle of the night or a plumber in the daytime making his service calls with a van full of tools describe the distinction. To draw an inference that the latter has the tools for an unlawful purpose (other than the bill for his service) is of course, absurd. However, the former (the masked man) has some explaining to do.

A reasonable doubt about any of the essential ingredients must result in acquittal. The proof on the accused is simply one of explanation: "I am the plumber" etc. The section is not in any way inconsistent with the presumption of innocence

Crown's appeal allowed
Trial ordered to proceed

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CHARTER OF RIGHTS AND FREEDOMS

UNDERCOVER OFFICER IN CELL WITH ACCUSED ADMISSIBILITY OF STATEMENTS MADE

Regina v. Mason B. C. Supreme Court Vancouver No. CC821292 January 1983

These reasons for judgment are strictly in relation to a voir dire conducted for the purpose to determine the admissibility of statements made by the accused to a policeman who shared his cell and who the accused believed to be a fellow prisoner.

The accused was "picked up" by the two patrol members on instructions from detectives who wished to question the accused in connection with a homicide. The two officers did as they were told but the accused demanded to know why he was being detained. All he was told was that "major crime detectives" wanted to question him. The accused was placed in cells and taken to the detective offices three hours after being booked. There he was informed for the first time, of his rights and why he was being detained.

The arguments that arose from these events should be of considerable interest to police. The officers who "picked up" the accused, did so they thought and told the accused, for the purpose of investigation and questioning. There is no such charge or provision in law that authorizes that practice! Arrests can only be made if statute or common law provides the authority to do so.

When the detectives were questioned during the voir dire it became clear that they did have reasonable and probable grounds for believing that the accused had committed a murder. However, the arresting officers had no such grounds. The question then is if the belief and knowledge of the detectives could be imputed to the officers who made the arrest. The defence claimed that this could not be done and argued that the accused had been arbitrarily detained.

In responding to this submission, Mr. Justice Berger said:

> "These officers were acting on instructions from the radio operator; the police as a corporate body had grounds appropriate for detaining the accused. It seems to me that we have gone far beyond the days of the village policeman and we should not apply unrealistic standards to police work today. Often officers will be given the responsibility of detaining an accused while it is others in the same force who possess the knowledge that justifies the detention".

In view of the reasonable and probable grounds the detectives had, there was therefore no arbitrary detention.

The Court then had to address the apparent violations of section 10(a) of the Charter and section 29 of the Criminal Code. Both require that an arrested person must be informed for the reason of the arrest. The Charter dictates that this be done "promptly". The B. C. Supreme Court held that there was a breach of section 10(a) of the Charter. It can hardly be said that in the circumstances, the accused was promptly told of the reason for his detention.

In regards to the requirements under section 10(b) of the Charter the Justice found that there was no breach. A detained person must be informed of his right to counsel and when he wishes to exercise those rights he must be afforded an opportunity to do so without delay. It does not say he must be informed promptly. The accused had not asked to consult counsel and was informed of his rights by the detectives before they questioned him. Therefore the statement he made to the detectives was not obtained by infringements of the Charter.

It should be emphasized that the Court was considering the admissibility of the statements made to the detectives and the undercover officer. This in respect to section 24(2) of the Charter which states that evidence obtained by means which violate provisions of the Charter shall be excluded "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute".

There were no problems about the voluntariness of the statements, a prerequisite to admission in evidence quite separate from the ones considered here.

The undercover officer, as long as the accused was unaware of his status, was not a person in authority. In respect to the statement to the detectives, there was no doubt about voluntariness.

The sole issue then, using the poisonous tree principle as an analogy, was whether the violation on the part of police of section 10(a) of the Charter was a fungus sufficient to have probably contaminated the fruits on the branches. Or, as the Court did put it: "The key here was causation". The causation being, of course, the violation of section 10(a) of the Charter by the arresting officers at the outset of the detention. The Court held:

> "These statements were obtained by questioning, not by breaches of the Charter. The chain of causation, such as it was, was broken when the detectives quite properly advised the accused of his rights under section 10(b)".

Had the accused not been so advised then probably the statements given to the detectives and subsequently to the undercover officer would have been obtained by breaches of the Charter and would have compelled the Court to consider exclusion under section 24(2) of the Charter.

Statements ruled admissible.

Note: The Court made a comment that the accused perhaps had a right under Section 24(1) of the Charter to sue for damages for the breach under section 10(a) of the Charter.

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BREATH SAMPLE - AS SOON AS PRACTICABLE
OFFICER DELAYED ON ACCOUNT OF ASSISTING FELLOW OFFICER

Regina v. Pearce County Court of Westminster New Westminster Registry X82-8765

While on his way to the police station with the accused who was under arrest for impaired driving, the officer learned by radio that another police car in the immediate vacinity was chasing a motorcycle. Not that it was an emergency or that he was requested to do so, but in compliance with what he perceived to be police policy, the arresting officer varied from his course to the police station to assist his colleague.

The colleague lost the motorcycle but the officer transporting the accused continued the search for the bike and was eventually successful in locating it. When the colleague arrived at the scene the officer continued to the police station. The rendering of assistance was the cause of a delay of approximately twenty minutes. As a result the first breath sample was taken forty-six minutes after the arrest was made at a location three kilometres from the station.

The accused was convicted of "over 80 ml." and appealed claiming that as the samples of his breath were not taken as soon as practicable the certificate of analysis was not proof of his blood-alcohol content at the time of his driving.

The County Court Judge referred to cases where the same arguments were advanced and the interpretations of the term "as soon as practicable" were given. "As soon as practicable" is totally distinct from "as soon as possible". It must be considered in view of all circumstances and means when it is capable and feasible of being done. It means "within a reasonably prompt time under the circumstances".

The Courts have also emphasized that not satisfactorily explained delays that prejudice the accused are not in compliance with the provision that samples must be taken as soon as practicable.

The County Court Judge found that considering the circumstances the delay had not prejudiced the accused and that it was satisfactorily explained. If the delay was not connected with the administration of the tests or had interfered with the accused's access to counsel, or had prejudiced the accused in any way, the Court would have found that the tests were not taken within the appropriate time. Such conclusion, the Judge said, could not be drawn in the circumstances of this case.

In regards to the "prejudice", the Court considered when the accused had done his drinking and what the results of the analyses were.

Appeal dismissed.
Conviction upheld

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ROADSIDE PROHIBITION TO DRIVE

DOES LACK OF PROOF THAT SUBSEQUENT ADMINISTRATIVE DUTIES WERE COMPLIED WITH PROVIDE A DEFENCE?

R. v. Hardy B. C. Supreme Court May 1983 - Vancouver Registry CC830271

The accused was prohibited to drive for a period of 24 hours by a constable who had reason to suspect that the accused had consumed alcohol. Shortly after the accused was found driving and he was charged with driving while prohibited (section 88(1) M.V.A.). In respect to imposing the period of prohibition on the accused, everything was done properly. However, as required by the policy of his force, the officer left the copy of the prohibition notice in a tray designated for this purpose. He had no idea if the notice was forwarded to the Superintendent of Motor Vehicles as required under section 214(10) M.V.A. Lack of proof that this was done, caused the Provincial Court Judge to acquit the accused.

The Crown appealed.

Section 214(5) M.V.A. states that unless the prohibition imposed by a police officer is terminated under other conditions of the section the prohibition is for a period of 24 hours from the time the officer asks the driver to surrender his driver's licence.

The obligation to report such a prohibition to the Superintendent of motor vehicles imposed by subsection (1) is merely an administrative provision which does not amount to an essential ingredient to the offence of driving while prohibited.

This being the opinion of the County Court Judge, the accused was convicted.

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DURESS - UNDERCOVER OPERATION

The Queen v. Gardiner - County Court of Prince Rupert, April 1983
Registry #CC197/12

An ex Green Beret member approached a police officer with a scheme to get stolen hand-guns off the street. As a result another officer posed as an arms dealer from the U. S. The so-called dealer had a M16 automatic rifle with him which he was willing to exchange for hand-guns.

A meeting was arranged between the undercover officer and the 20 year old accused. Polie interupted the meeting and arrested the accused who was in possession of a stolen revolver.

The meeting was arranged by the ex Green Beret who boasted to the accused and another "gullible and impressionable" youth that in addition he had been a member of the C.I.A. and Israeli Intelligence. To corroborate his claim to fame the ex Beret demonstrated some moves and holds that injured his prospective clients. The whole scheme, said the Court, as presented by the Beret "would have made a normal person suspicious". The Court concluded that both the accused and his friend lived in fantasy-land to believe that the stolen revolvers were so desparately needed by mercenaries in Nicaragua to "penetrate a dam" that an M16 automatic rifle would be given in exchange.

The ex Beret went as far as threatening to blow-off the accused's head with one of his own revolvers unless he made the exchange. Furthermore the accused was made to believe that secret agents had him under observation. A failure to make the exchange would result in being shot either by the agents or the ex Beret.

As a consequence, the accused was far from constipated when the zero hour for the exchange arrived. The undercover agent, the so-called U.S. gun dealer, testified that the accused was "very nervous and fearful when the deal was made in the motel" and that he had been told by the ex Beret that the accused was and would be "scared, nervous and afraid".

The ex Beret was rewarded with his keep for a few days and his whereabouts were not known at the time of trial.

The conversation between the accused and the under-cover officer at the time of the exchange was taped. The arresting officer had used the tape to make some notes and then erased it. The failure to preserve this important evidence resulted in the Court to "draw the most favourable inference that I can for the accused".

The accused raised the defence of duress as described in section 17 of the Criminal Code. It excuses persons from committing some offences (including possession of stolen property and possession of an unregistered restricted weapon, the offences alleged against the accused) if done under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed.

The problems in applying the defence of duress to this case are that the section implies a sudden threat and an immediate consequence of death or injury. It seems the defence is only available when there is a gun-to-the-head at the time of the crime; an ugly choice of committing the crime or be killed or injured. The accused became gradually involved with time to withdraw, seek protection and escape the threat and danger he perceived.

The accused had become voluntarily involved and as things gradually developed the threats and fear resulted with lots of opportunity on the part of the accused to extricate himself. Although the scheme had the flavour of a "Grade B movie" and the accused and his friend were under a "Modern Merlin's spell" according to the County Court, a conviction was registered for the eight charges.

* * * * *

"OVER 80 ML." AND THE DEFENCE OF AUTOMATISM

R. v. Litchfield County Court of Westminster April 1983 New Westminster Registry X82-9176

The accused was seen "careening" out of the parking lot of a hotel He was found to have a blood-alcohol content "substantially in excess of 80 ml." and was convicted accordingly.

At his trial the evidence revealed the following:

> "The accused drank approximately six beers in three hours at the hotel. He got in an argument with his wife and was bodily removed and landed with his head on a motor-cycle. He then went into his car where he had a mickey of Tequilla of which he availed himself".

The accused said that he cannot remember anything between the time he hit his head and waking up in a police cell.

The defence was that the six beer over the three hour period could not have been the cause of the high blood-alcohol content. Therefore, the "substantial excess" was due to the Tequilla which was consumed while the accused was "not responsive". Hence the intake of alcohol was an unconscious act and not a voluntary intake and his subsequent driving lacked the mens rea. Furthermore the departure from normal driving was probably due to the blow to his head. This resulted in an acquittal of the second charge of impaired driving.

The accused appealed his conviction of "over 80 ml." claiming that the defence of automatism was available to him in respect to that charge.

A psychiatrist testified that the consequences of concussion and intoxication are similar and the Crown as well as the defence could marshall support from his testimony. Based on the facts as he found them, the trial judge had rejected the defence of automatism. He said that getting in the car and drinking the Tequilla and the subsequent driving were consistent with a person who knows what he is doing and inconsistent with automatism.

This then begs an obvious question. If there was a level of unawareness of what he was doing to the extent that he was acquitted of impaired driving, how could there be sufficient awareness to drive with a blood-alcohol content in excess of 80 ml.

For the "over 80 ml." charge the trial judge had considered that consumption of beer and Tequilla were voluntary and both were with an awareness of the effects they would have. Furthermore the accused knew what he was doing when he drove. In respect to the impaired driving charge the trial judge "looked not at the standard of driving and its cause but at the ingestion of alcohol and at the act of driving to determine whether or not those were acts of the appellant's (accused's) own will".

The accused knew he was drinking and knew he was driving and the analyses proved a blood-alcohol content over the legal limit. Therefore, the Crown's case was complete.

Appeal dismissed.
Conviction of "over 80 ml." upheld

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REASONABLE NOTICE OF CERTIFICATE OF ANALYSIS

R. v. Parker County Court of Vancouver April 1983 No. CC821536

The accused was convicted of "over 80 ml.". He appealed claiming that the Crown failed to prove that he had received reasonable notice of the intention to adduce the certificate in evidence or that he was served with a copy of it.

When examined by the prosecutor the qualified technician was asked:

Q.: And at the bottom of the form under the heading 'Notice of Intention to Produce Certificate' again the signature of the person who served that notice, again is that your signature Constable?"

A.: "Yes, it is".

Q.: "And prior to serving that notice on the accused . .", etc. (evidence was then led to show that the copy was a true copy).

The above question was the only evidence that the copy was served on the accused. This the accused claimed was inadequate to be proof of a reasonable notice. The County Court Judge agreed and quashed the conviction.

Appeal allowed

Note: Counsel brought to the attention of the Court that it is not an uncommon practice for trial courts to reject any submissions regarding the admissibility of a certificate of analysis until the case has been closed. The County Court Judge warned that this practice should not be continued.

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CHARTER OF RIGHTS AND FREEDOMS

STATUTORY PRESUMPTION OF "CARE OR CONTROL SECTION 237(1)(a) C.C.

PRESUMPTION OF INNOCENCE

Whyte v. Regina County Court of Vancouver, April 1983 No. CC821405 Vancouver Registry

Applying section 237(1)(a) of the Criminal Code the trial judge had found that the accused, whose ability to drive was impaired, had care or control of his car.

The accused appealed his conviction claiming that s. 237(1)(a) C.C. is a presumption of guilt which violates section 7 and section 11(d) of the Charter. The former guarantees no deprivation of liberty except in accordance with the principles of fundamental justice and the latter assures that we will be presumed innocent until proven guilty.

Reviewing cases* by courts of superior jurisdiction in other provinces, the County Court Judge held that the presumption of "care or control" does not violate the Charter.

The superior courts have said that Parliament had not enacted the Charter in a vacuum and was aware of the established fair, efficient and reasonable system of criminal law in existence at that time. It did not intend to displace this but simply wanted to establish some new rights, modify others and give a clearer definition of them.

> "It cannot be thought that the intent of the provisions of the Charter that are in issue in this case, is to undermine and bring to the ground the whole framework of laws and the legal system of the country at the stroke of a pen, even if it be a royal pen".

Appeal dismissed
Conviction upheld.

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* R. v. Belton (1983) 2 W.W.R. 472. (Manitoba Court of Appeal)
R. v. Potha (1982) 37 O.R. (2d) 189 (Ontario High Court of Justice)

CARELESS STORING OF FIREARM

Regina v. Batalka 70b C.C.C. (2d) 190 (1982)
B. C. Court of Appeal

The accused had an unloaded shotgun stored on a rack in the back window of his pick-up truck. Shells for the gun were stored on top of the dashboard. The accused left his truck parked on a public parking lot (reasons for Judgement do not say if it was locked) and was, as a consequence, convicted of "storing a firearm and ammunition in a careless manner". (s. 84(2) C.C.). He appealed his conviction.

The B. C. Court of Appeal remarked that the Criminal Code usually prohibits things to be done in a "dangerous" manner or prohibits "criminal negligence" for certain activities or with certain consequences. Seldom or not anywhere does it use the word "careless" to indicate a degree of negligence. Negligence is divided in civil as well as criminal law in categories and doing something without care is the lowest degree of negligence, usually left to be used in Provincial statutes. "Dangerous" and "criminal negligence" usually require advertence as a prerequisite to conviction. In other words the act must have been heedfully rather than inadvertently committed. The accused argued that the same applied when "carelessness" is an ingredient to a Criminal Code offence.

The B. C. Court of Appeal held that the word "careless" must be given its ordinary plain meaning. It simply means doing something without care. Said the Court of Appeal:

> "... to protect the public from the improper carrying, handling, shipping and storing of firearms, Parliament has imposed a duty of care. If the accused failed in this duty, he is liable, because the Code says so, even if he is no more than civilly or inadvertently liable".

Appeal dismissed
Conviction upheld.

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LOITERING - PROSTITUTION

Regina v. Munroe - 1 C.C.C. (3d) 305
County Court - Ontario

The accused was observed for approximately 15 minutes, standing and walking back and forth near the entrance of a pedestrian tunnel. She accosted three men (separately) and had brief conversations with them. A fourth man she grabbed by the wrist and "steered him into the tunnel". At this stage police interfered which upset the accused who said: "I had the guy all lined up". She was consequently convicted under the provision of section 171(1)(c) C.C. which states:

> "Everyone who loiters in a public place and in any way obstructs persons who are there, is guilty of an offence punishable on summary conviction".

She appealed that conviction claiming that she did not loiter or obstruct anyone.

Loitering, the County Court Judge found, contains an element of "sauntering or idleness". He said that though many may disapprove of her objectives, the accused was far from idle but in pursuit of a purposeful activity.

Furthermore the Judge thought that she had not obstructed anyone as was intended to be prohibited in the Criminal Code. Speaking of her "contacts" the Court said:

> ". . . the trial judge erred in finding that the appellant had obstructed the male persons whom she approached including the fourth male person the appellant took by the arm. If that person had resisted the appellant's aggressive approach and had she still persisted further, my conclusion might well have been different".

The Court also commented that the section had been used in this case for purposes other than those for which it was designed.

Accused's appeal allowed
Verdict of not guilty entered.

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REASONABLE NOTICE THAT GREATER PENALTY IS SOUGHT

Regina v. Duncan 1 C.C.C. (3d) 444
B. C. Court of Appeal

In 1971 this court of Appeal held* that when a notice is served on an accused that the Crown intends to seek a greater penalty where the law provides for such a more severe penalty due to a previous conviction, (s. 740(1) C.C.) that notice cannot be served until the information is sworn and the notice must refer specifically to the charge upon which the greater penalty is sought. One justice of the Court of Appeal dissented

Recently in this Duncan case, the same question arose and the B. C. Court of Appeal held unanimously that it had been in error in 1971. It held that the notice does not have to refer to the specific charge upon which the greater penalty is sought and the notice can be served prior to the information having been sworn.

Matter referred back to Provincial Court for sentencing.

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* R. v. Basi (1971) 5 C.C.C. (2d) 429

DEMAND MADE ON PRIVATE PROPERTY
ANALYSIS ILLEGALLY OBTAINED EVIDENCE?

Regina v. Meadows County Court of Yale Kelowna Registry CR 5/83, April 1983

A patrolling police officer received a complaint that involved a motor vehicle. The officer found the vehicle, followed it for some distance and found nothing out of the ordinary in the way it was being driven. To attend to the complaint the officer attempted to stop the vehicle. Shortly after the officer activiated his emergency lights, the accused (who drove the car under investigation) swung into the driveway of his home. During the conversation with the accused regarding the complaint the accused asked the officer if he had a warrant and questioned his right to be on the accused's private property. The officer noticed pronounced symptoms of impairment and attempted to read the demand to the accused who had turned quite belligerent. The accused was arrested for impaired driving and analysis of breath resulted in a reading of 150 ml. The accused appealed his conviction of "over 80 ml.".

The defence claimed that the evidence of blood-alcohol content was illegally obtained and was, as a consequence, inadmissible. Should the Court hold that the evidence is admissible the accused claimed that, due to the reading of s. 237 C.C., the evidence would not have any evidentiary value and that the presumption that his blood-alcohol content at the time of the test and driving were the same, could not be applied.

The accused claimed that his arrest was unlawful as the officer, prior to the accused entering his driveway, had no evidence of impaired driving. It was after he trespassed that the officer obtained the grounds to believe that the accused was impaired

The Courts have held that even where an officer in the strict sense is within the general scope of his duty, an unjustifiable use of power associated with that duty may well be an unlawful interference with a person's liberty.

The court responded that the officer was entitled to follow the accused onto his property to investigate the complaint (which apparently was unrelated to the charge) in relation to which the description of the accused's car was given to the officer. Once on the property the officer became aware of the impaired driving which did not, in the circumstances, become inadmissible because the accused

revoked the permission the officer may have had to enter on to the property. Said the Court:

> "I find, therefore, that not withstanding that the officer did not have before he entered on to the appellant's property sufficient evidence on which to arrest him for impaired driving, that the evidence he obtained on the property was lawfully obtained, admissible against the appellant, and was important here, formed a basis for a lawful arrest for impaired driving."

Hence the demand was lawful and the evidence that resulted from it was properly admitted in evidence. Consequently the Crown had the benefit of the presumption that the blood-alcohol level at the time of analysis was the same as at the time of driving.

Appeal dismissed
Conviction upheld.

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ADMISSIBILITY OF STATEMENT

ACCUSED CLAIMS HE WILL NOT ANSWER QUESTIONS UNTIL HE HAD TALKED TO LAWYER BUT CONTINUES TO ANSWER QUESTIONS

Regina v. Spearman 70 C.C.C. (2d) 371 (1982)
B. C. Court of Appeal

The accused confessed to a member of the John Howard Society that he murdered a woman. The member took him to the police where he was questioned for 1 1/2 hours. At the outset, when warned, the accused said he wanted to speak to a lawyer before he answered any questions. Despite this request, police questioned him and the accused answered the questions. At the conclusion of the interview the accused was asked to check for accuracy the notes made of the interview and sign them. The accused did the former and did agree with the content but refused to do the latter until he had consulted a lawyer.

In the statement he confessed to strangling the woman. At trial the confession was admitted. The accused appealed his conviction of murder (second degree) claiming that the statement should not have been admitted. Although no threats were used the police had applied "subtle pressures" to keep him talking without consulting counsel.

The Court of Appeal made some observations about the facts. The accused had mentioned several times, even during the interview that he wanted to see a lawyer first. Yet he continued to talk to police. He said he had done so out of fear that they would become angry and frustrated with his vague answers. Police said that they had not obtained counsel for the accused as they did not feel obligated to do so. The Court observed that the accused is a man with a criminal record who is accustomed to be questioned by police. He had made his own presentation to the Court of Appeal and the Justices were not inclined to believe that the accused was easily intimidated.

The Court decided that the statements were voluntarily made and admissible.

Appeal dismissed
Conviction upheld.

Comment: It should be kept in mind that the interviews with the accused took place in 1980, well before the Charter of Rights and

Freedoms became effective. The informing of a detained person of his right to counsel is not retroactively applied. Some predict that circumstances like these would receive different consideration by the Courts in view of the Charter. This seems debatable. Assuming an accused is made aware of his rights and says he wants to exercise them but continues to answer questions, then, if that questioning or anything else is not the cause of the deprivation of that right, the outcome of a voir dire on this issue may well be similar to that in this Spearman case. Again, the Court apparently placed a lot of emphasis on the fact that the accused was sophisticated in this area and not easily intimidated. A meek person in these circumstances, who continues to answer because he feels obliged to do so on account of continued questioning may well be considered to have been deprived of his right to instruct and retain counsel without delay. It should be remembered that the right to counsel was guaranteed under the Bill of Rights and existed at common law long before the Charter became effective. What is new is that an arrested or detained person must be informed of that age-old right.

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WITHHOLDING IDENTITY OF POLICE INFORMER - TRAFFICKING BY AIDING PURCHASER OF DRUG?

Regina v. Davies 1 C.C.C. (3d) 299
Ontario Court of Appeal

A police informer contacted the accused and requested him to find a source of supply for cocaine and was promised money for his services. After some months the accused contacted the informer and told him he had a possible supplier. The informer introduced the accused to an under cover police officer as the prospective purchaser. Meetings and exchanges took place which resulted in a delivery of cocaine to the officer. It is conceded by all concerned that the accused did not handle any of the drugs or money in the transactions. He, however, was paid "a pittance" for his service. A jury convicted the accused of trafficking and he appealed.

The issue, according to the defence, was its inability to present a full defence. The law is that if one only has aided the vendor by solely acting for the purchaser, he is not a trafficker. The accused claimed that he was solely acting on behalf of the informer and the officer. The informer who was the only person who dealt with the accused through all the events that made up the case against the accused, was not made available by the Crown during the trial. The defence applied unsuccessfully to the Court for the name and the last known whereabouts of the informer.

The jury had been instructed that they had to find that the accused was an agent for the vendor to convict him. The Crown urged that the accused was "working both ends" and the defence claimed he was solely acting for the purchaser, the only one who paid him for his involvement in the transactions. The informer, besides the accused, was the only person who could attest to this. The accused testified and to no avail applied to the Court to have the informer subpoenaed to corroborate his testimony.

The Crown took the position that public interest demanded that the identity of police informers not be revealed and based its argument on an abundance of case-law that recognizes that the state cannot function and control criminal or other unlawful activities unless it can receive information from citizens without having to divulge its source to the public or the Courts. However, that is not the case if the informer is an agent provocateur. For instance, if a person, whether requested to do so by authorities or not, infiltrates certain circles and informs on the activites, he is solely an informer. However, if overt acts on his part manipulate, influence or direct the activities on behalf of the state, then he is an agent provocateur and his anonymity cannot always be preserved.

Here the informer did not simply introduce the officer to the accused. On general instructions he posed as an agent for the purchasers of a large quantity of cocaine.

> "Once an agent provocateur goes into the field, he loses the protection of his cover".

This, the Ontario Court of Appeal held, was particularly so when his testimony is required "to show the innocence of an accused".

The informer was the only witness who could corroborate the accused's claim that any vendors he introduced to the informer or the officer had to make their own deals with them and that the single involvement on the part of the accused in the entire transaction was that introduction.

If the Crown, in circumstances as these, wishes to proceed, then for the sake of fairness it cannot leave the entire case on the credibility of the accused, but has to reveal the identity of the informer. After all, if the accused had been believed by the jury or even had created a reasonable doubt, then, if they were properly instructed, the verdict would have been different. Obviously they did not believe him, but would that also have been the case had his evidence been corroborated?

Appeal allowed
New trial ordered.

Note: On the surface it appears that this decision flies in the face of that of the Supreme Court of Canada in Amato v. The Queen*. On closer examination it does not. One of the issues in that case (the main one was entrapment) was that the agent provocateur was not available to the Crown or the defence. The defence claimed that its inability to cross-examine deprived them of the ability to a full defence. However, the defence flag failed to fly. In view of the absence of that evidence, the trial judge "assumed that the findings of fact ought to be made on the basis of the evidence by the defence". In other words, he accepted the facts as the defence claimed they were. This meant that there were no adverse consequences to Amato as a result of the agent provocateur not being available.

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