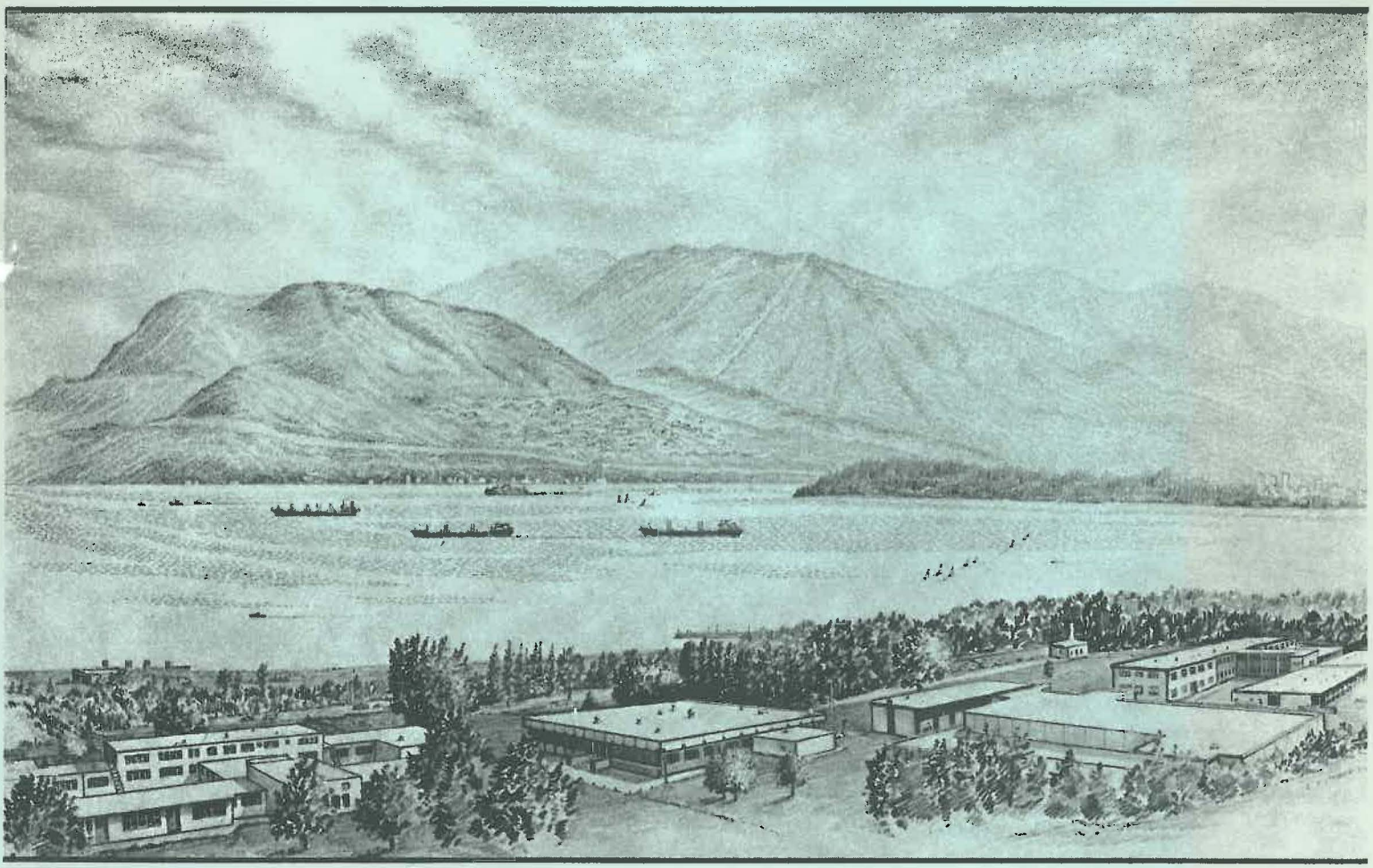
ISSUES OF INTEREST

VOLUME NO. 14



Written by John M. Post
January 1984

Justice Institute
Of British Columbia
4180 West 4th Avenue
Vancouver, B.C.
V6B 4J5

ISSUES OF INTEREST

VOLUME NO. 14

Written by John M. Post
January 1984

TABLE OF CONTENTS

Page

CHARTER OF RIGHTS AND FREEDOMS
WRITS OF ASSISTANCE - REASONABLE SEARCH

Regina v. Cuff - County Court of Vancouver, Vancouver Registry CC821838 June 1983

The accused, Cuff, (a known trafficker in heroin) was, according to informants, again plying his trade despite a previous conviction for this practice. As a result of this information, the accused was placed under surveillance. He was seen to meet a man and proceeded home via a round about route. It was decided that the accused probably had taken a delivery of narcotics or drugs and was approached by police while he was still sitting in his car in his own driveway. He was pulled out of the car through the open window and his mouth was searched in the usual fashion (All of this happened in "blitz-krieg" style before the accused had time to shut off the engine or secure the transmission. While Cuff was saying "ah" to the officers in the driveway, his car went home on its own but failed to stop when it reached the back wall of the garage). Nothing was found on the accused. An officer with a Writ of Assistance was called in and the house was searched.

Police controlled the residents of the home (unfortunately the officers testified that they 'detained' these other persons) while the search was conducted. During the search a bargain was struck with Mr. Cuff. He was promised that no charges would be preferred against anyone else in the house if he would tell them where he had the heroin. Cuff accepted and led police to his now well ventilated garage where behind a wooden board he had a quantity of the narcotic. This led to further bargaining. Cuff was promised that no charges would be laid in respect to his "possession of the heroin for the purpose of trafficking" if he would "get a Mr. X along with one ounce of heroin". Although Cuff, in his attempt to get Mr. X, supplied useful information to police, he failed to meet the objective of the deal. As a consequence he found himself charged with possession for the purpose of trafficking.

During his trial some very interesting points were raised by defence counsel who claimed that the evidence of the heroin should be suppressed due to several violations in respect to the Charter of Rights and Freedoms. He also urged the Court, in the alternative, to enter a stay of proceedings as the case amounted to an abuse of the process of the Court.

In regards to the abuse of process the defence claimed that the accused faced the charge because he failed to nail the bigger fish (Mr. X) for the police but not because he was in possession of heroin.

In support of this argument defence counsel cited the well known Smith* case. Smith had made a deal with police also. In return for surrendering a cache of dope to police he would not be charged in respect to dope he was found to be in possession of. Police kept their word but charged him with conspiracy in regards to possession of the cache of dope.

The Supreme Court of this Province found the conspiracy charge against Smith, in view of the deal, an abuse of the process of the Court. An ordinary man, after having made such a deal would feel safe and be astounded when, after having lived up to his part, charges of conspiracy could be proceeded with, said the Supreme Court Justice.

The County Court Judge, held that the circumstances in this Cuff case were distinct from those in R. v. Smith. Police had pledged not to charge anyone in the house and they didn't. The foregoing of the charge against Cuff for possession for the purpose, was conditional on him getting Mr. X, the bigger fish. He didn't and police went ahead with the charge. The Judge concluded in R. v. Smith police had not lived up to the bargain but in this case they did and therefore he found that there was no abuse of the process of his Court

This left the Court to deal with the claims that police had offended the Charter of Rights and Freedoms. If those violations, if any, would bring the administration of justice in disrepute, the evidence of the heroin would have to be suppressed. The alleged violations were as follows:

1. The accused and those detained in the house during the search had been denied their right to counsel; and

2. The use of the Writ of Assistance to search the home and to detain all those persons found in the home constituted an unreasonable search.

The Court was quite exhaustive in giving reasons for judgment and explored the law as it was before the Charter became effective and what it has been since. The assurance to be secure against unreasonable search and seizure is new and was not found in the Bill of Rights (1960). Therefore, Writs of Assistance and their use were seldom challenged in the Courts. However, the judiciary and various authors were in the pre-Charter times not silent on the subject. The writs were issued by the Federal Court to officials and R.C.M.P. officers under the Food and Drug Act, the Narcotic Control Act and the Customs Act. The Judges of that Court have been very vocal at times when an application, or for all intents and purposes, an order to issue a Writ was before them. In January of 1978 I wrote a synopsis of one of these judicial objections to the law by Mr. Justice Collier.

* Regina v. Smith CRNS Volume 30 p. 383

To understand some of the arguments that surround the infamous Writ of Assistance, it seems apropos to insert that synopsis here:

Writs of Assistance 34 C.C.C. (2d) 62 Federal Court Trial Division

The Federal Minister of Justice applied to the Federal Court to issue a Writ of Assistance to an officer of the Customs and Excise Investigation Division.

Mr. Justice J. Collier, then a "newcomer" to the Federal Court, entertained the application and was apparently shocked and dismayed with: the lack of judicial discretion; the wide and sweeping powers such a writ gives to the officer; and the fact that the application was void of any facts which might indicate the reason for the officer's need for such a writ. The Justice's research revealed that a person who exercises the powers conferred on him by a Writ of Assistance, exercises powers given to him by Statute rather than executing a judgement by the Court as is the case with a search warrant. The Minister of Justice or the Minister of National Health and Welfare can apply to the Federal Court for a Writ of Assistance to be issued to a specific "officer". The Court, upon being satisfied that the person is "an officer" has no alternative but to issue the Writ.

The Justice agreed with Justice P. Jackett's response to an identical application in 1965. He also objected to this procedure.

The Customs Act stipulates that a Justice of the Federal Court may issue a Writ of Assistance upon application of the minister mentioned above, while the other Acts stipulate that he shall issue the Writ upon application. The "may" is meaningless as there is nothing upon which to base any judicial discretion. Even if it was up to the judiciary to determine if there was a need for the officer to have a Writ, or if the officer was a suitable person to exercise the wide powers of search all through his career without a limit, the exercise to determine these things would be useless. How can you determine that the officer will properly exercise his immense power 10 or 20 years from now?

Mr. Justice Collier, granting the application, protested the wide powers the Writs give, the impropriety for any person to be clothed with such immense powers and the seeming perpetuity of "these untrammelled" writs. He was mindful of the recent abuses of power by the executive branch in the U.S. which more than anything motivated him to remind us of ministers who may apply for the Writs for persons to use them for political, administrative, social or economic reasons.

The County Court Judge was in total agreement with these views and added his own observations. He reminded that when a Writ of Assistance is used to search, the contraband seized does not have to be taken before a justice as is the case with a search warrant; the search can be carried out any time while a search warrant, unless it specifically states otherwise, may only be executed during the day, etc. He concluded:

> "In my view, the use of the device of a Writ of Assistance clearly offends section 8 of the Charter".

He also held

> "Reading section 8 and section 52(1) of the Charter of Rights and Freedoms together, I find that Section 10(1)(a) of the Narcotic Control Act is inconsistent with the provisions of the Constitution and, in the words of section 52(1), to the extent of that inconsistency, of no force and effect'".

The Judge said to be mindful that

> "The detection of criminals is not a game to be governed by the Marquis of Queensbury Rules"*

but commented that the Writ of Assistance was used in this case while there was sufficient time to obtain a search warrant from a justice. He was firmly of the opinion that

> "... the law without section 10(1)(a) will not be any less effectively enforced by the police. Where there is time and opportunity to obtain a judicial warrant and one is not obtained, where there is a detention of innocent people without any warning by virtue of the use of such writ, where there is no power of judicial review in the first instance, then I think the answer to the question of whether this conduct would bring the administration of justice into disrepute becomes self evident".

In the circumstances as they were here, the evidence was ruled inadmissible on account of an unreasonable search.

Accused acquitted

Comment: In this case the defence raised a number of issues at the conclusion of the trial, one of which was the "abuse of the process of

* Mr. Justice Horner in Rothman v. The Queen (1981) 59 C.C C. 74

the Court". When a judge finds that there is such abuse he can remedy it by ordering that the proceedings be stayed. Usually when that issue is raised it is dealt with first. Afterall, if there was abuse of the process and the proceedings are stayed all the other submissions are superfluous.

In this case however, the Court found that there was no abuse as the Crown had lived up to its word in that it had not charged any other person who was in the house at the time of the search and as it would not charge the accused if he set up Mr. X. He failed and got charged.

Firstly, it was not the Crown that made the commitments to the accused but police. The two are by no means synonimous. However, for the purpose of the issue at hand the distinction may well be academic.

It is the second "deal" police made with the accused that is of interest. Whether or not they lived up to their commitments may make the matter not any less an abuse of the process. What, in principle, is different in the "deal" made here or the referring of a charge when in the first instance resulted in a "diversion contract". In 1978 the Supreme Court of this Province refused to order a Provincial Court Judge to try a Ms. Jones* after he had stayed the proceedings. Ms. Jones had breached the diversion contract she entered into to avoid a charge related to possession of a narcotic. The Provincial Court Judge had held that the matter was before him because she breached the contract and not because of possessing the narcotic. Needless to say in the Jones case there was more in issue than in this case, the system had been short circuited by the executive branch of government exercising a function exclusively assigned to the judiciary. The fact still remains that the breach of contract was what offended the Crown and not the original alleged offence.

In essence the accused Cuff was before the Courts because he did not get Mr. X and not because he possessed heroin. When a person, because he refuses or is unable to make restitution to his victim, is charged, it must be assumed that the kernel of the State's indignation is the refusal rather than the crime by which the harm or damage was caused. Many arguments are possible to show that these instances are distinct from one another but not in the basic criterion for an abuse of process for not living up to a "deal". Consider that, in the case of Ms. Jones, there was a deliberate breach of her diversion contract. Yet her being consequently charged was considered an abuse of the court's process while in the case of Mr. Cuff, who may have done his darnedest to set up Mr. X but failed, the process was not abused. However, Courts have been generous in allowing police considerable latitude to ferret out crime. Perhaps this Judge was generous or wanted to get around this obstacle to deal with the Writs of Assistance which, no doubt, is a more interesting topic.

* R. v. Jones 3 W.W.R. [1978] 271

Another point to ponder is if this Court held that the search was unreasonable because the Writ was used or because the Writ was used while there was time for a judicial warrant. I think the former is the case. On page 13 of the reasons for judgment, the Judge begins his very interesting views and version of the Writ's history and its constitutionality by posing the following question:
"Now, is the use of a Writ of Assistance a violation of the Charter of Rights simplicites?" On page 19 he concludes that the provision in section 10(1)(a) of the Narcotic Control Act to search with a Writ of Assistance is so out of step with the Charter that it is of no force and effect. On the same page the judge concludes:

> "In my view, the use of the device of a Writ of Assistance clearly offends section 8 of the Charter".

I would suggest that he answered his own question with "Yes".

Another matter of interest is the Judge's views of police holding innocent people in custody without warning or access to counsel while they conduct their search. I think the word "reasonable" plays a major role in the control of people during a search of premises.

Many times the Courts have dealt with this question. One case I remember reading (but cannot cite) was by a Court of Appeal on whether or not police officers had been in the lawful performance of their duty when they controlled the persons who were, at the time the search began, attending a party at the premises. To the best of my recollection, police were looking for stolen jewellery. The Court held that the search was legal and would have been totally frustrated if people were allowed to mill around and come and go as they pleased. It was held that if police had been reasonable in the length of time they inconvenienced and treated the guests they were in the lawful performance of their duty. The control over the occupants was essential and was an ancillary power to the search.

It seems that if the control of the occupants of the house was reasonable, there would not have been an abuse of power. Of course, the Judge held that the Writ was illegal to use and this perhaps made also the control unlawful.

* * * * *

FALSE IMPRISONMENT

Re Butt v. Saint and Loveless, Newfoundland Supreme Court Trial Division

Mr. Loveless was on his way to his girlfriend's, when he saw a man coming out of a beauty salon. When he returned shortly after the police were at the beauty shop investigating an armed robbery. A young man who had his face covered with a ski mask had used a handgun to persuade the lady in the shop to turn the contents of the cash drawer over to him. Mr. Loveless gave police a description of the man he saw leaving the shop and it matched closely the description the "lady" gave of the robber. Loveless accompanied police to the station and was given a book with mug shots and he identified the person he saw coming out of the shop. The description of the person in the picture and that given by Loveless and the "lady" were very close. However, as it turned out the person in the picture was arrested just a few hours before the robbery took place.

Police asked Mr. Loveless to notify them should he spot the robbery suspect. A couple of weeks later Mr. Loveless phoned police to say he was in a shopping mall and he had spotted the young man he saw coming out of the store. Although the suspect had flown the coop when police arrived, his name was obtained from a shop where he had done some business. This person was the 18 year old Mr. Butt, who lived with his parents close by the beauty shop. A search warrant was obtained and executed. Nothing was found that connected the suspect to the robbery, but it was discovered that Mr. Butt Sr. had a gun collection and Mr. Butt Jr. did closely resemble the description given by the "lady" and Mr. Loveless on the day of the robbery.

Mr. Butt Jr., (the plaintiff in the consequential litigation against the police and Mr. Loveless) was asked to accompany police to their office. He was placed in the rear of the police car which had inside door handles. As a matter of fact, Mr. Butt left the car briefly prior to it being driven off, to consult with his father. At the police station Mr. Butt was placed in an interview room and was left alone there for some time. The room could not be opened from the inside without a key.

After this, Mr. Butt was placed in a "line-up" and was positively identified by Mr. Loveless as the person he saw coming out of the beauty salon on the day of the robbery. The "lady" also identified Mr. Butt, as he had a height, weight and hair colour identical to the man who robbed her. As a result Mr. Butt was arrested for armed robbery and a few hours later taken before a Provincial Court Judge who remanded him to the following morning for a bail hearing which resulted in the release of Mr. Butt.

Although it all seemed clear sailing from there on in, the Crown did not have much of a case left when it was discovered subsequent to this investigation that the star witness, Mr. Loveless, was recently convicted of armed robbery and was awaiting sentencing. Mr. Loveless approached police after Mr. Butt was charged and said to expect some representation to the probation officer who was preparing his pre-sentence report. Furthermore, Mr. Loveless also expected the money he claims was offered to him by the investigating officers.

Needless to say, Crown Counsel had a problem and Mr. Butt who elected to be tried by Judge and Jury, was dismissed at the conclusion of the preliminary hearing. Mr. Butt then petitioned the Supreme Court to be compensated by the police officers and Mr. Loveless for false imprisonment (for the period from accompanying police from his home after the search until he was released on bail on the afternoon of the following day) and malicious prosecution.

The Supreme Court dismissed the claim of malicious prosecution as it had not been without reasonable cause. However the Court awarded Mr. Butt $500 for false imprisonment. The Justice found that only the period that Mr. Butt was held in the interrogation room was imprisonment for which there was no authority without firstly arresting him. Police were in a position to have made an arrest but had not done so. In everything that happened during the investigation, Mr. Butt was a co-operative and voluntary participant who did not need to be and was not to be restrained. Said the Supreme Court Justice:

> "For their own protection the police should make it clear to any witness, particularly a suspect, that he or she is free to leave at any time. Whether they do so or not is their own business. More important than that, however, where a person is not under arrest whether he be a suspect or not he must not be kept behind locked doors without his consent. The doors of the interrogation room should have been left open or unlocked. They were not".

The Court concluded that police had acted properly with the exception of that brief period of incarceration in the interview room.

* * * * *

POSSESSION OF AUTOMOBILE MASTERKEY

IS A COAT HANGER INCLUDED?

Regina v. Young 3 C.C.C. (3rd) 395
Ontario Court of Appeal

The accused was found standing next to a car in the underground parking lot of an apartment complex. When a security guard appeared he ran. When apprehended he was found to be in possession of a coathanger bent and twisted in such a way that it could be used to unlock cars by pulling up the door latches. The accused was consequently tried for possession of an automobile masterkey contrary to section 311 C.C. and acquitted. The Crown appealed.

Section 311 C.C. prohibits the possession and sales of masterkeys for automobiles other than by persons licensed and audited by the Attorney General of a province. The Court of Appeal held that the Ontario Attorney General was not likely to issue licences and administer the distribution of coathangers. The gadget the accused 'fabricated was obviously not covered by the section despite the inclusion of the words "or other instrument designed or adopted to operate locks of motor vehicles" in the definition of masterkey.

Crown's appeal dismissed
Acquittal upheld

* * * * *

POSSIBLE BREATHALYZER FLAW
EVIDENCE TO THE CONTRARY?

Regina v. Stewart - County Court of Yale, Penticton Registry No. 4/83 (349) May 1983

The officer asked, "Do you know why you are stopped?" and the accused had replied: "Because I'm impaired". A while later the Borkenstein breathalyzer confirmed this and readings of 180 and 160 mlg. were obtained. Yet the accused was acquitted of "over 80 mlg", and the Crown appealed.

The Crown, of course, relied on the provisions in section 237 C.C. which state that the results of analyses done within two hours of driving are, in the absence of evidence to the contrary, proof of the accused's blood-alcohol level when he drove. The defence had subpoenaed a pharmacist employed in the R.C.M. Police Laboratory. The day after the accused was tested the manufacturer of the Borkenstein breathalyzer issued a bulletin warning that the instruments "may be affected in an unpredictable manner by various radio frequencies and power levels, which might affect the result of any test by such a machine". The lab technician had immediately experimented. He said:

> ". . . holding a portable transmitter close to the breathalyzer, the affect is of the nature of a hundred milligrams percent on that breathalyzer but by placing my hand just in the path, it was reduced to zero".

He concluded:

> ". . . so the problem is a hyper-variable problem. It's erratic and unpredictable in that sense".

The Crown had not tested the breathalyzer used to analyze the accused's breath.

The County Court Judge held:

> ". . . it was not unreasonable for the trier of facts in this case to find a reasonable doubt based on those tests done by that expert"

Crown's appeal was dismissed
Acquittal upheld

* * * * *

IS A VOIR DIRE AN INDEPENDENT TRIAL

Regina v. Morris, County Court of Prince Rupert, May 1983, No. C.C. 10/83 Terrace Registry

A police officer went through the regular routine of giving evidence. He identified the accused and a little further in the evidence the Court conducted a voir dire to determine the admissibility of a statement the accused gave to the officer.

The trial Court had refused to give the statement any consideration to reach a verdict, because the officer had failed to identify the accused in the voir dire. The Judge held that a voir dire is an independent trial and the failure to identify the accused during that trial meant that there was no evidence that the accused in the main trial and the person who gave the statement were one and the same.

The Crown appealed this decision. Quoting from other reasons for judgement* on this issue the County Court held, "that it is not necessary that there be a repetition of identification evidence within the voir dire itself or indeed that such identification evidence must precede the voir dire so long as at some point in the trial the statement is unquestionably linked to the accused".

Crown's appeal allowed
New trial ordered

* * * * *

* R. v. Hartley 1980 Vancouver Registry CC 791609

WHAT IS THE MEANING OF "FRAUDULENT"?

Regina v Dalzell 3 C.C.C. (3d) 232
County Court of Halifax

The accused was observed to place nearly $80 worth of merchandise in her brief case which she had on the bottom of her shopping cart. She left the cart near the front of the store, took her briefcase and walked out. She was apprehended by the store security person.

At her trial for theft under $200, the accused testified that as a mature student she was assigned to work in a community program known as "Save the Children". The program was similar to "Scared Straight" to deter juvenile delinquency. Part of this program was involvement in a "Stop Lift" project designed by local merchants and police. The information she received from the children, who all had at least one conviction, indicated that the "Stop Lift" did not work. The alterations she had suggested to the project were rebuffed. The accused had become emotionally involved in her crusade and to prove to the merchants that there was a better way to reach their objective she set out to demonstrate that their program was no good. She testified how she intended to go to stores,

> ". . . take items, leave the store, list them and go back and say to the manager, or whoever was in charge, now will you listen to me - I have an alternative. It might work".

The Provincial Court Judge acquitted the accused and the Crown appealed.

The County Court held that the accused's explanation was not rebutted and must be believed. Therefore it must be determined if a person who carries away property with the intentions the accused had, does commit theft. Said the Court:

> ". . . it would take a very rigid mind to characterize her conduct as dishonest or immoral other than in the sense of grossly imprudent".

The kernel of the question remaining is whether depriving a person "temporarily" of property in circumstances as these is "fraudulent" as these words are used in the definition of theft (section 283(1) C.C.). The first one was no problem; since 1955 the words "temporarily or absolutely" replaced the word "permanently" in regard

to depriving an owner of property. Whether the taking was "fraudulent" created a greater problem. The definition exempts persons who take property with a "Color of right". This simply means that a person has an honest belief that the property is his, or that he has a right to it or that the owner has consented or will consent to the taking of it. Needless to say that if there is a color of right the taking is not fraudulent.

The accused without telling what she intended to do, had phoned the store manager and asked him about his policy regarding shoplifters. He had said that if there were no extenuating circumstances the shoplifter would be given a warning only, provided they returned the goods. Acting on this belief the accused had gone on her crusade. This, the defence claimed amounted to color of right in that the accused had an honest belief that if she returned the goods, the owner consented.

However, the evidence designed to show that such phone call was made by the accused was "fuzzy" and of no consequence. Furthermore if there was sufficient proof of such a call it would not amount to consent to take goods out of the store but merely some statement of "no prosecution" policy. Just because one states that he would not prosecute his assailant if he was punched in the nose does not mean he consents to the assault.

The accused simply did not take the merchandise with any colour of right and the interesting question arose if there is any validity in saying that though taking something with a colour of right is not and cannot be fraudulent, can something done without colour of right not be fraudulent. In other words, does it always follow that when something is done without colour of right that it is then automatically done fraudulently? If something like in this case is done unwisely, with naivity, or to put it bluntly, stupidly, is it then done fraudulently?

In reviewing the laws related to larceny as far back as the Roman law it was concluded that

> ". . . fraudulently in s. 283 means a dishonest state of mind, leading to a dishonest intention to appropriate the property taken, i.e., to act with respect to it as if the taker were the owner although perhaps only the temporary owner."

In the circumstances, it could not be said to be beyond reasonable doubt that such were the dishonest intentions of the accused.

Crown's appeal dismissed
Acquittal upheld.

* * * * *

WHO DECIDES TO PROSECUTE?

Dawson v. The Queen, Supreme Court of Canada October 1983

A criminal dispute is between the alleged perpetrator and the Sovereign. When the state, on behalf of the Sovereign, refuses to take up the cause that may not be the end of the matter. At common law, any person or peace officer may, on behalf of the Sovereign, inform under oath a Justice of the Peace of the commission of a crime (private prosecution). When this happens the Justice of the Peace shall hear and consider (ex parte) if a case is made out. If there is he must issue process (summons or warrant compelling the appearance of the accused).

The Attorneys General of the provinces have the supervisory power over criminal prosecutions and have a right to prevent the use of the criminal process. Therefore, they were given the power to order a stay of any criminal proceeding. Such order cannot be appealed and the Attorney General's accountability for such action is strictly political and to the Legislative Assembly.

In this case Mr. Dawson went before a Justice of the Peace and preferred nine criminal charges against a police officer. As the Justice of the Peace was to conduct the mandatory hearing whether to issue process (a summons or warrant) the agent of the Attorney General directed that an entry be made on the record that the proceedings be stayed. Mr. Dawson appealed the Crown's right to do so and lost. He eventually was heard by the Supreme Court of Canada which decided unanimously:

> "When the proceedings are commenced by an information, the informant in a sense prefers the information and the Justice of the Peace decides whether or not to find the information and then the next step is to issue the process to bring the accused before him. . ".
>
> "The Attorney General's power to stay starts as of the moment a summons or warrant is issued".

In relation to make a distinction for summary conviction offences and indictable offences, the Court held that such disparity was undesirable and could not have been intended by Parliament considering the relevant legislation and its historical development.

The Supreme Court of Canada allowed the appeal and ordered that the Justice of the Peace conduct a hearing pursuant to s. 455.3 C.C. of the Criminal Code.

* * * * *

PROTECTION OF PRIVACY

RENEWING AN AUTHORIZATION AND NOT DISCLOSING THAT ADDITIONAL CRIMINAL ACTIVITY WAS DISCOVERED

The Queen v. Comisso Supreme Court of Canada October 1983

Police were authorized to intercept the accused's private communication on grounds for believing that he was dealing in heroin. Towards the end of the period for which the authorization was issued the communications indicated that the accused had possession of counterfeit money. Police told Crown Counsel and asked that this additional criminal activity be added to the authorization when it came up for renewal. The prosecutors decided that this was not necessary. The accused was subsequently convicted of possession of counterfeit money mainly due to evidence directly and indirectly derived from the wire tap. He successfully appealed this conviction to the B. C. Court of Appeal* which held that if evidence of a crime other than the one for which the authorization was granted, is revealed unexpectedly in lawfully intercepted communication, the evidence is admissible. However, where there is sufficient time to add this offence to the authorization or particularly where it is not added at renewal while it is known at that time, the evidence is inadmissible. The B. C. Court of Appeal upheld the acquittal.

The Crown appealed this decision to the Supreme Court of Canada which stood divided on this issue but decided 5 to 4 to allow the appeal and restore the conviction. Since the trial section 178.16(3.1) C.C. was added to the Privacy Act and both counsel took a position on the meaning of that section which seems to say that evidence obtained from a lawful interception of private communication is admissible whether or not the proceedings are related to issues or matters other than those specified in the authorization.

Crown Counsel claims the section means that such evidence is admissible regardless what the charge is. Defence counsel claims that renewal means an assessment of the authorization and keeping the new information from the issuing judge is like obtaining the authorization by false pretences which makes it nul and void. This, he claims, is not included in the new section which only deals with "windfall" evidence, in other words, unexpected evidence.

In finding for the Crown, the Supreme Court of Canada did not say, that where intercepted communications have revealed additional criminal activities it is alright to withhold that information from the judge when applying for a renewal of the authorization

* 66 C.C.C. (2d) 65 - also see Volume 9 of this publication, page 6.

The Privacy Act stipulates that when applying for a renewal, police and Crown must, among other things, inform him of "any information that has been obtained by any interception". (Section 178.13(3) C.C.)

Since defence counsel conceded that the renewal was legally obtained the majority of the Supreme Court Justices held:

> ". . . this case must be decided on the assumption that the judge was informed through the affidavit of what was heard as regards that offence (possession of counterfeit money). It might well be, though this need not, should not and is not decided on this appeal, that if the police on a renewal, were not to reveal such information in this affidavit, the renewal might have been obtained irregularly, the subsequent interceptions unlawful and any evidence obtained through such interceptions may be inadmissible, be it evidence of the offence stated in the authorization, or a fortioci*, of any other offences, subject, of course, to the descretion given judges under the section to admit unlawfully obtained evidence".

In addition, the Supreme Court held that evidence of offences for which no authorization can be granted (see 178.1 C.C.) is also admissible if it was obtained by means of a lawful interception.

Conviction restored

* * * * *

* With stronger reason; much more - logic to denote that if one fact exists, therefore one included but less improbable must also exist.

CAN "PUFFS" AMOUNT TO A SAMPLE OF BREATH?

Regina v. Adkin, B. C. Court of Appeal, No. 204/82 September 1983

According to a police witness who was present in the breathalyzer room, the accused gave three "puffs" of breath, the aggregate of which was a sample and was analyzed. The second sample was provided and analyzed in the same fashion. The Provincial Court Judge held that, due to the puffs, there was evidence to the contrary that the blood alcohol level at the time of analysis was the same as that level at the time of driving. He considered that the "puffs" amounted to evidence that more than two samples (as certified) were taken. A County Court Judge reversed the Provincial Court decision and the accused took the matter to the Court of Appeal which concluded:

> "Evidence that the appellant puffed several times during the taking of a sample, did not provide any basis for concluding that more than two samples had been taken. The appellant could not, on the facts of this case, assert that the certificate was unreliable because there was no evidence of any lower reading than those referred to in the certificate".

* * * * *

"GIVING A REASONABLE NOTICE OF INTENT AND A COPY OF THE CERTIFICATE"

Regina v. McGuire, B. C. Court of Appeal, September 1983

The accused was processed for impaired driving and at the conclusion of the tests, served with a true copy of the certificate of analyses. He was then arrested for a completely different matter and booked in cells. The certificate of analyses was taken from him and police testified that it is routine that all personal belongings are returned to any prisoner upon his release. However, no one could specifically say that the accused was upon his release given the copy of the certificate again. At trial, the accused argued, of course, that the certificate of analyses was inadmissible as there was reasonable doubt that he possessed the copy for a time sufficient for him to take notice of its content. This issue eventually ended up in the Court of Appeal which agreed with the Judges who dealt with this question before, that it ought not to be presumed that the certificate was not returned to the accused upon his release. "A reasonable doubt cannot be founded on speculation".

* * * * *

1. **CAN EVIDENCE OF PRIOR DRIVING LEAD TO FINDING CARE OR CONTROL?**
2. **DOES A "DEMAND" CAUSE THE SUBJECT TO BE DETAINED?**
3. **MUST A FAILURE TO INFORM THE SUSPECT OF RIGHT TO COUNSEL IF HE IS DETAINED, RESULT IN EXCLUSION OF CERTIFICATE IN EVIDENCE?**

Regina v. Hatter: County Court of Vancouver Island, Victoria Reg. No. 25979, June 1983

At 1:25 two officers attended at the scene of an accident in which the accused's car was totally destroyed. The accused was not in his car when the officers arrived. He admitted that he drove his car at the time of the accident; that he had been drinking, and had nothing to drink since the accident. He was consequently convicted of "over 80 milligrams" while having the care or control of (instead of driving) a motor vehicle. This, apparently, as the Crown had no evidence at what time the accident had happened and hence it could not be established at what time the accused drove. The accused appealed. The Crown's position was that the accused had care or control of his car (by then a wreck) when the officers came on the scene. The samples of breath were analyzed within two hours of that time and therefore the certificate of analyses was admissible, argued the Crown.

The defence submitted that the only evidence of care or control was when the accused had the accident and that standing beside one's totally demolished car does not amount to care or control. The County Court Judge responded:

> "The appellant obviously had the care and control of the vehicle at the time of the accident. Whenever that may have been, and I do not think that that care or control ceased at the moment the accident occurred"*.

The officers had made a demand of the accused to provide samples of breath. He had complied, gave the samples as required, was driven home, and issued an Appearance Notice. The officers did not at any stage of these events inform the accused of his rights to retain and instruct counsel. This, defence counsel claims, should result in all the evidence subsequent to the demand being inadmissible**.

The Court disagreed and held that the decision by the Supreme Court of Canada in Chromiak applied, despite the fact that Chromiak was demanded to

* See Reasons by Supreme Court of Canada in Saunders v. The Queen (1967) 3 C.C.C. 278.

** See R. v. Morrison Volume 12 p. 16 of the Publication and R. v Davignon Volume 11 page 2 of this publication.

*** R. v. Chromiak (1979) 12 C.RT. (3d) 300. Also see Volume 1, page 3 of this publication.

only give a sample "at roadside" where this accused was demanded to accompany the officers. Being arrested or detained is a requisite to being informed of right to counsel and the Court held that being "under demand" does not necessarily mean the suspect is detained.

However, should being under demand amount to detention, in this case the administration of justice was not brought into disrepute by admitting the evidence.

Accused's appeal dismissed
Conviction upheld

* * * * *

FAULTY APPEARANCE NOTICE - DOES COURT LOSE JURISDICTION?

Kennedy v. The Attorney General of B. C. B. C. Court of Appeal #820742, September 1983

A police officer served an Appearance Notice on the accused. Everything was filled in except where to appear. The notice was confirmed, and an information sworn. The accused failed to show and the information was struck off the court list. Later the Justice of the Peace issued a summons with which the accused complied. He entered a plea of not guilty and promptly applied for and was granted a Court order prohibiting the Provincial Court Judge from proceeding. The Supreme Court held the Provincial Court had lost jurisdiction over the information. The Crown appealed this decision to the B. C. Court of Appeal which held that the defect in the process by which the accused was brought before the Court is irrelevant to the validity of the information.

Provincial Court was ordered to proceed

* * * * *

UNREASONABLE SEARCH

EXCLUSION OF EVIDENCE

Regina v. Gladstone, County Court of Vancouver Vancouver Registry CC 821480 June 1983

The accused arrived at the Vancouver airport on a flight from Lima. He did fit the description of a possible drug carrier in relation to whom the Customs Officers had received an alert.

The Customs Act states that Customs officers may search a person who comes into Canada from a foreign country if the officer has reasonable cause to suppose that the person has contraband secreted upon his person.

The accused was taken into a "search room". He was given the above search provision to read. He said he understood its content and then consented to a body search. A "considerable quantity" of cocaine was found on him.

At his trial for importing, the accused argued that the cocaine should be inadmissible in evidence as the provisions of the Charter of Rights were not observed.

Firstly, he claimed that as the search was not warranted in the circumstances, it was unreasonable and contrary to section 8 of the Charter. Furthermore, the accused had not been promptly informed of his rights to counsel. He, therefore, suggested that the remedy for these constitutional wrongs was the exclusion of the evidence "lest the Administration of Justice be brought into disrepute".

The accused was also told that should he not consent to the search he could be taken before the chief officer at the port, or a justice of the peace, who, if a search was considered justified, could order the search. In other words, the accused was offered to have the grounds the officers had to search, judicially tested for adequacy. He had waived that right and had with an operating mind consented to the search. However, the search was conducted prior to the accused being informed of his rights to counsel.

The County Court replied that the information on the law and the options the accused had under the enactments were so clearly and accurately stated and explained to him that an imbicile could have understood them. A lawyer could not have improved on it and would only have been able to advise his client that the decision on the options were for him to decide. Said the Court:

> "Indeed to exclude such evidence as is before me now, would in the eyes of sensible folk everywhere, make the

> administration of justice the butt of more than disrepute . . . it would be regarded with derision, and rightly so. The essence of justice is even handedness even the general public has its rights, one of which is to have criminals, after a fair trial and investigation, brought to book. It is always a matter of balance".

The Judge concluded that indeed the officers should have informed the accused of his right to counsel, but the wrong was in these circumstances slight and totally out of proportion with the remedy suggested by the accused.

Cocaine was admitted in evidence.

* * * * *

ATTEMPT SUICIDE AMOUNTING TO MURDER - TRANSFERRED INTENT

Re Brown and The Queen, Ontario High Court of Justice, February 1983
4 C.C.C. (3d) 571

When a person has the specific intent to take the life of another person, but by mistake kills the wrong individual, his intent is legally transferable and he can be convicted of murder the same had he killed his intended victim. This is provided for in section 212(b) C.C. which states that such accident or mistake causes such homicide to be murder notwithstanding that he did not mean to cause harm or death to his actual victim. The requisite to the transferred intent is, of course, that the killer intended to take someone's life - what about if that life is his own?

The accused murdered his wife and child and wanted to end his own life as well. He drove at a high speed on a highway and deliberately drove head-on into an oncoming car killing it's lone occupant. He told police at the scene, "I just wanted to die" and admitted to deliberately have caused the accident to accomplish that objective.

The accused was committed for trial on a first degree murder charge. He appealed claiming that the intent was not transferable where the killer intended to take his own life. However, the Justice held that when a person kills someone else when attempting suicide, his specific intent is transferable.

The High Court of Justice held that there was enough evidence to commit the accused for trial for second degree murder and ordered the accused to stand trial for the reduced charge. This as there was insufficient evidence to show his act had been planned and deliberate.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

CRUEL AND UNUSUAL PUNISHMENT

Regina v. Smith, County Court of Vancouver Vancouver Registry No. CC821369 September 1983

Section 5(2) of the Narcotic Control Act states:

> "Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years".

(Subsection (1) creates the offence of importing a narcotic). The accused claimed the 7 years imprisonment is "cruel and unusual punishment". He argued that the underlined portion of the section is severable from the rest and that only that portion is unconstitutional. In addition to it being contrary to section 12 of the Charter (cruel and unusual punishment) it also amounts to arbitrary detention claimed defence counsel. Regardless of the quantity of the contraband, the purpose for bringing it into the country or how dangerous the substance is, the minimum penalty is 7 years. A sentence of such duration is seldom imposed. Therefore, it is likely that the person bringing in a small quantity of a substance for his personal use will receive the same minimum penalty as the person importing a large quantity of a harmful substance strictly for the purpose of trafficking and exploitive profits.

Said the Court:

> "Given that situation, the disparity is so gross, it is shocking to contemporary society, is unnecessary in narcotic control and results therefore, in a punishment which is cruel and unusual".

Hence the words, "but not less than seven years" are inoperable and a contravention of the Charter of Rights and Freedoms.

* * * * *

DOES MOVING A CAR AN INAPPRECIABLE DISTANCE AMOUNT TO "DRIVING"?

Regina v. Chessa, B. C. Court of Appeal (No. CA000657) September 1983

The accused drank at a hotel and realized he was incapable to drive home. He phoned a cab and while waiting for it to arrive he went to check on his van in the parking lot to ensure it was properly parked and locked. A police officer observed the accused getting into the van and saw it "lurch forward", stop and back up over the curb and subsequently move forward again into the parking position. The accused got out of the van, locked it up and was apprehended while walking back to the lobby.

The accused was acquitted in Provincial and County Court of impaired driving and "over 80 ml." as he did not move the van "an appreciable distance" and had only driven it from a purely technical viewpoint. The Crown had appealed these decisions.

The B. C. Court of Appeal accepted the definition of "drive" as expressed by the British Lord Chief Justice*: "The essence of driving is the use of the driver's controls in order to direct the movement however that movement is produced" (gravity, being pushed or under its own power).

The accused, by moving his van a few feet did drive and the Crown's appeal was allowed and a new trial ordered. However, in view of the accused's commendable and responsible attitude the Justices of the Court of Appeal expressed hope that no new trial would be conducted

* * * * *

* R. v. McDonagh (1974) 59 C.A.R. 55.

PROOF OF THERE BEING AT LEAST FIFTEEN MINUTES BETWEEN TWO EVENTS

Regina v. Taylor - Ontario Court of Appeal - May 1983

Police certified that a breath sample taken at 1:12 a.m. resulted in a reading of "190 milligrams" and that at 1:27 a.m. a second sample showed a blood alcohol level of "200 milligrams". The question whether such certificate is sufficient to prove that there was an interval of "at least fifteen minutes between the times when the samples were taken" was dealt with by the Ontario Court of Appeal when the accused Taylor appealed his conviction of impaired driving. If the answer was "No", then there would be no proof of the accused's blood-alcohol level at the time of driving. Lack of additional evidence made the admissibility of the certificate and the "presumption of equalization" crucial to the Crown's case.

What is unique in this case is that the Crown and defence counsel were both relying on the same B. C. case for support for their respective arguments (R. v. Perry (1978) 41 C.C.C. (2d) 182 affirmed by the Supreme Court of Canada in 1980 1 S.C.R. 1124). In essence, the Ontario Court of Appeal interpreted the Perry case. As mentioned above, in this Taylor case the Crown relied exclusively on the wording of the certificate to prove that there was a fifteen minute interval between the taking of the two tests. In Perry, the operator had testified and told when and how he had taken the samples and analyzed them, to complement the certificate which, like that document in the Taylor case, gave two moments in time which were fifteen minutes apart (3:00 a.m. and 3:15 a.m.). The operator's testimony in Perry showed that "everything necessary to complete the taking of the first sample had been done by 3:00 a.m. and that nothing in respect to the taking of the second sample had been done before 15 minutes had elapsed after the first sample had been taken". In other words, when the B. C. Courts and the Supreme Court of Canada eventually, found that there was proof of the two tests being at least fifteen minutes apart, it did not do so exclusively on the certificate but on proof that the taking of the first sample was completed at least fifteen minutes before the time at which the taking of the second sample was commenced. As a consequence, the Ontario Court of Appeal held that a certificate which states two moments in time 15 minutes or even 17 minutes apart is not by itself proof that the mandatory fifteen minute interval was complied with. By allowing Taylor's appeal and acquitting him of impaired driving, the Court did not fail to follow the Perry decision but simply disagreed with the Crown that all it has to do to prove compliance with section 237(1)(c)(ii) C.C. is to introduce a certificate that mentions two periods in time which, if you subtract the first from the second, results in 15 minutes or even more.

* * * * *

The Ontario Court of Appeal advised:

> "I should state that, if the Crown intends to rely in the future solely on a certificate of analysis such as the one relied on in these proceedings in order to prove the existence of a 15 minute interval between the times when samples are taken, it will have to be much more specific in the information contained in the certificate....
>
> Indeed, it seems to me, that where you have a certificate completed in the manner of the one used in the case at bar where the wording is identical for the time of the taking of the first sample and the taking of the second sample, the reasonable interpretation is that both samples were commenced at the times stated or both samples were completed at the times stated.....
>
> Accordingly, the information in the certificate of analysis should clearly state the time at which the taking of the first sample was completed and the time at which the taking of the second sample was commenced."

Note:

In our Province, the Criminal Justice Branch of Attorney General Ministry has issued new certificates which comply with this judicial advice.

Should you be interested in the details of the submissions made to the Courts and their respective responses about this apparent simple question what "a quarter of an hour" is, and how time must be calculated, the following cases may be of interest:

> Regina v. Davis 32 C.C.C. (2d) 459
> Regina v. Steiger 32 C.C.C. (ed) 461, and
> Regina v. Temble 1 W.W.R. 1977 575

The arguments are philosophical in nature and deal with fundamental questions such as "when is it 3 o'clock"? Is it three o'clock for 60 seconds until it is 3:01? The Courts say that when we say "3 o'clock" it is a precise time "of no duration". Therefore, seconds become important when we deal with a specific or "at least" a certain period of time.

* * * * *

"ADMISSIBILITY OF STATEMENTS TO PROVE 'DANGEROUS OFFENDER'"

The Queen v. Boyd, B. C. Court of Appeal, October 1983 - Victoria Registry 26/83

The accused was convicted of indecently assaulting a six year old girl. Due to previous similar convictions the Crown applied at sentencing to have the accused declared a dangerous offender. During the hearing such sentence requires, the Crown adduced statements the accused made to police during the investigations which had led to the previous conviction. The fact that the statements were made by the accused was proved but not their voluntariness. This caused the Court to reject them.

The Crown successfully appealed this decision and the B. C. Court of Appeal confirmed the Crown's position. Statements to persons in authority, adduced in evidence during a trial to determine guilt or innocence, must have been made voluntarily to be admissible. In proceedings to determine a sentence, only the fact that they were made by the accused needs to be proved.

Crown's appeal allowed

* * * * *

"COURT OF COMPETENT JURISDICTION" CHARTER OF RIGHTS AND FREEDOMS

Between Legal Services Society and His Honour Judge L.C. Brahen of the B. C. Provincial Court, Supreme Court of B. C. April 1983

An American citizen appeared before His Honour Brahan charged with counts of conspiracy to import narcotics and drugs into Canada. The Judge began to conduct a preliminary hearing but decided that the American was in need of a lawyer. He was informed that the Legal Aid Society was investigating the accused's eligibility for legal aid but that this would not likely be completed for several days.

The Judge then held that the American's rights to retain and instruct counsel were being infringed in that he had no means to engage a lawyer to act on his behalf. This, the Judge felt, brought the matter within the realm of section 24 of the Charter which states that an infringement of Rights or Freedoms entitles a Court of competent jurisdiction to remedy the situation it "considers appropriate and just in the circumstances". Considering the Provincial Court to be a court of competent jurisdiction, the Judge remedied the infringement of the Charter by ordering the Legal Services Society to provide the American "forthwith" with legal counsel. The Society applied to the Supreme Court to have the order quashed.

Our Courts are divided into two catagories: Courts of superior jurisdiction (Court of Appeal and Supreme Court) and those of inferior jurisdiction. Courts of superior jurisdiction can grant injunctions and generally order certain things to be done despite the fact that there is no specific legislation providing for such an order. In other words Courts of superior jurisdiction can go far afield to prevent or remedy harmful or unjust situations. However, all courts do have inherent and statutory jurisdictions, and if an inferior Court wishes to remedy an infringement of the Charter under section 24, it can only do so by ordering something that inherent jurisdiction or statute enables it to do. The order issued by the Provincial Court judge did not fall into this catagory.

Order quashed

Comment: Subsection (1) of section 24 of the Charter grants a court of competent jurisdiction to remedy infringements of the Rights and Freedoms the Charter assures us. Subsection (2) creates the "exclusionary rule". At the outset of the Charter's existence defence lawyers petitioned superior Courts in the middle of trials in Provincial Court, for instance, to obtain a ruling on the admissibility of evidence. There was a sigh of relief when Courts of Appeal instructed that the trial court had to make those decisions, and complete the trial. When a verdict is appealed then

the matter of the admissibility of evidence can be included in the grounds for appeal. This warded off the much feared "side tracking" process so prevelant in the U.S.. With this decision, that monster may be back at the door of our Court houses. This time in a different costume. If an infringement of a right or freedom is identified in the Provincial Court and the inherent or the statutory powers of the Judge are inadequate to remedy the situation, then the case may have to be adjourned and a court of superior jurisdiction would have to be petitioned.

Needless to say that those who have the funds for this sort of legal maneuvering may well now have an opportunity for some "side tracking".

* * * * *

"PRIVATE COMMUNICATION"
"REASONABLE TO EXPECT THAT IT WOULD NOT BE INTERCEPTED"

The Queen v. Samson Ontario Court of Appeal - June 1983

A voir dire was conducted to determine the admissibility of the accused's intercepted private communications. The Crown had adduced a statement the accused made prior to the interceptions to the effect that, due to his activities, he considered there to be a real danger that his telephone lines would be the subject of an authorization to intercept his communications.

As a personal opinion the Justice who wrote the reasons for judgment expressed:

> "In these circumstances, I question that it could properly be said that these communicatons were made under circumstances in which it was reasonable for Samson as the originator to expect that they would not be intercepted by any person other than the person whom he intended should receive it".

If this opinion is accurate, then all police need to do is create a reason for a person to expect that his communications will be intercepted. It would then follow that his communications are from thereon in not private (if you can show his belief) and they can be intercepted with impunity and there should be no barrier to admissibility in evidence.

Interesting question.

* * * * *

JUDICIAL STAY OF PROCEEDINGS DUE TO DELAY

Regina and Thompson - B.C. Court of Appeal - October 1983 Victoria Registry 109/83

In September 1981, the accused was involved in a fatal motor vehicle accident on Vancouver Island. She was injured and went to her parents home in Alberta approximately a month after the accident and found work there. Police continued their investigation of the accident and contacted the accused in July of 1982 in the course of their inquiries. In November of 1982 a warrant was obtained for the accused's arrest on a charge of dangerous driving. In view of the approaching Christmas season the officers did not execute the warrant or inform the accused of the charge until January of 1983. Even then the warrant was not executed and an arrangement was made between counsel that the accused would come to Vancouver Island and appear before a Provincial Court Judge in April of 1983 for her preliminary hearing. On that day defence counsel claimed that the accused's rights under the Charter of Rights were violated. He claimed that the length of time to lay the charge in addition to the unreasonable delay to inform her whence the charge was laid, violated her right to be tried within a reasonable time. The Court agreed, and to remedy the situation the Judge stayed the proceedings. Then the Crown successfully applied for an order from the Supreme Court for the Provincial Court Judge to proceed. The accused appealed that decision.

To determine if a delay was unreasonable the B. C. Court of Appeal said that the factors to be considered are:

1. The length of the delay and its relationship to the nature and gravity of the offence;

2. The reason for the delay, including whether the accused consented or was a party to it;

3. If the accused asserted his rights promptly; and

4. The prejudice to the accused.

The B. C. Court of Appeal implied that the accused consented to the delay and did not assert her rights promptly. She consented to the April date for the preliminary hearing and when she appeared she objected claiming unreasonable delay.

The Provincial Court Judge was instructed to conduct the preliminary hearing.

Accused's appeal dismissed.

* * * * *

OBLITERATED IDENTIFICATION NUMBERS
PRESUMPTION THAT CAR IS STOLEN AND THAT POSSESSOR KNOWS THAT

Re Boyle and The Queen - 5 C.C.C. (3d) 193
Ontario Court of Appeal

Section 312(2) C.C. provides that obliterated identification numbers on motor vehicles are in the absence of any evidence to the contrary, proof that the vehicle was obtained by the commission of an indictable offence. The section further presumes that a person who possesses a vehicle with obliterated identification numbers knows that it was obtained by the commission of an indictable offence.

The accused who possessed a car with obliterated identification numbers was committed for trial for possession of stolen property. The Crown had depended on the presumption of knowledge provided by section 312(2) C.C. The accused appealed claiming that the section violates the presumption of innocence and is therefore constitutionally invalid.

The Ontario Court of Appeal found that the section provides two presumptions. The first one is that we may presume that a car with obliterated identification numbers was obtained by the commission of an indictable offence. The second one is that the person who possesses such a motor vehicle is presumed to have guilty knowledge that the vehicle was so obtained.

The Court had no problems with the first presumption and said: "The obliteration of the vehicle identification number even in the absence of any presumption is strongly probative of the illegal history of the vehicle".

The second presumption, the one in respect to guilty knowledge, however, was found to be contrary to the presumption of innocence. The Court, in essence, applied its own devised test to this reversed onus provision, to determine if it was excessive in respect to the presumption of innocence. Every statutory or common law presumption of a fact has prerequisite facts. For instance, before it may be presumed that a person has culpable knowledge of a vehicle's illegal history, the Crown must prove that the accused had possession of the vehicle and that its identification numbers were obliterated. If the facts to be presumed (guilty knowledge) is not a probable or at least a reasonable consequence of the prerequisite facts (possession and obliterated numbers) then the provision of the presumption is excessive.

This presumption applies equally to persons who may not even be able to tell you where the engine is mounted (never mind the identification numbers) and a used car dealer who may not adhere to the noblest consumer-service ethics but who knows a stolen car when he sees one. Furthermore

the possession does not have to be "recent" in regards to the time the theft occurred. The presumption even applies to Auntie Matilda who inherited the car from grandpa who bought it in good faith.

This all means that:

> "... a jury, in the absence of evidence to the contrary, is required by Parliament to find that the accused had the necessary guilty knowledge even if there is no probative evidence that the accused in fact had such knowledge".

One may say that Auntie Matilda could never be convicted if this woman, the epitemy of credibility, took the stand. If her testimony would not amount to "evidence to the contrary" and not only creates a reasonable doubt but proves innocence beyond a reasonable doubt, nothing will. However, the fact that no police officer or prosecutor would accuse Auntie Matilda and that no conviction is likely to result, is not the test. The fact that the presumption may put her in a position of having to disprove (on the balance of probabilities) that she had no guilty knowledge contravenes the right to be considered innocent until proven guilty.

The Court, as stated above, held that evidence of an obliterated identification number is constitutionally appropriate proof that a vehicle or a part thereof was obtained by the commission of an indictable offence. This coupled with the doctrine of "recent possession" is capable of proving guilty knowledge on the part of the possessor of such a vehicle. However, the presumption of knowledge as provided in s. 312(2) C.C. is constitutionally excessive.

Accused's appeal allowed.
Committal for trial quashed

* * * * *

IS POSSESSION OF MARIJUANA A LESSER AND INCLUDED IN CULTIVATING MARIJUANA?

Regina v. Powell - B. C. Court of Appeal CA 000363 Vancouver November 24, 1983

Mrs. Powell, the accused, split up with her husband in January. In May hubbie came back to the homestead to plant marijuana plants over the objections of his wife who occupied the place. The accused did not enforce her objections as her husband was the joint owner of the property. In July, the husband transferred the property in the accused's name. A few days later police came and found nearly 300 marijuana plants on the property.

The accused was charged with cultivating marijuana, but the jury returned a verdict of possession of marijuana as an included offence. She appealed the verdict, not posing the question if in the circumstances she could have been convicted of "possession" had she been so charged, but whether "possession" is an offence included in "cultivation".

To determine if one offence is included in another the included offence must (1) be described in the enactment creating the principal offence; (2) it must be described in the count charged*; or (3) at common law, the offence is one of necessity to commit the principal offence.

Here are some examples respectively:

1. A person is charged with "aggravated assault" under section 245.2(2) C.C. If the evidence fails to show beyond a reasonable doubt that the victim was (as defined in section 245.2(1) C.C.) wounded, maimed, or disfigured, or that his life was endangered, but substantiates that the accused assaulted the victim then he can be convicted of the included offence of assault. This, as assault is described in the section (enactment).

2. A person is charged with attempted murder. If the count in the indictment does not describe any more then "that he did attempt to murder", there is no included offence. Should the Crown fail to prove specific intent on the part of the accused to take the life of his victim, he must be acquitted despite the heinous things the evidence may show he did to the victim. However, should, for instance, the count describe that he attempted to murder his victim by "administering noxious things" then if the specific intent to cause death is not proved, the accused may be convicted of the included offence under section 229 C.C. This as the offence of "administering noxious things" was described in the count as a means by which the accused alledgedly intended to take the life of his victim.

* See section 589(1) of the Criminal Code

3 The common law provision for one offence being included in a more grave offence is the one that had to be considered in this case. It only arises, of course, when the enactment or the count does not describe a lesser offence. The test to determine if there is at common law, an included offence is quite simple. If a certain offence cannot be committed without committing also a lesser offence, then that lesser offence is included. In other words, the lesser offence must be an act of necessity to commit the major offence. Or to do this test backwards, it has been said: "If the whole offence charged can be committed without committing another offence, that other offence is not included."* But, for example, one cannot commit theft without being in possession of stolen property; or cannot one drive without having the care or control of a motor vehicle?

The test then to be applied in this case is if the accused could be cultivating marijuana (the alleged offence) without being in possession of marijuana. On the surface the question seems outright stupid, and one is inclined to answer unhesitatingly, "No".

Quoting the Ontario Court of Appeal**, the Court observed that cultivating is "restricted to activities associated with the growing of plants" and does not include the process of "maturing the plants, after they were picked, by drying or curing".

The Crown, to prove cultivation, had to show that the accused took an active part in the growing of the prohibited plants. It had not met this need. And to support that "possession" is an included offence, the Crown had to convince the Court that "cultivation" of a plant is impossible without "possessing" it. The Court responded:

> "Clearly, one can bestow labour and attention upon land in order to raise a crop without being in possession of the crop".

Then there was an additional problem for the Crown. If proceeded by indictment, both offences carry the same penalty. Therefore the one is not "lesser" than the other and may consequently not be included. However, the Court did not answer that question.

Appeal allowed
Verdict of not guilty entered.

Note: The question of the offences carrying the same penalty and the one therefore not being a lesser offence to the other was addressed in Ferguson v. The Queen (1961) 132 C.C.C. 112. The Supreme Court of Canada held that the included offence need not be lesser in terms of gravity or penalty. All that matters is whether to commit the principal offence it is necessary to commit the offence sought to be included.

* R. v. Carey (1972) 10 C.C.C. (2d) 330.
** R. v. Gauvreau (1982) 65 C.C.C. (2d) 316

Another matter of interest is where the description of the included offence is in only one of the subsections that define the principal offence. For instance, section 302 C.C. defines that robbery is stealing where

(a) resistance to the theft was overcome by violence or threat of violence;
(b) any person, at the time of the theft or immediately before or after the theft, is wounded, beaten, struck or subjected to violence;
(c) any person is assaulted with intent to steal from him; or
(d) steals from any person while armed.

One could say that someone could commit robbery without committing assault. After all, under (d) no assault needs to take place. Therefore, the latter ought not to be included in the former. However, the B. C. Court of Appeal held* to have an included offence, "the lesser offence need not to be included in all of the definitions of the offence charged". The judgment implied that where the Crown depends on the included offence being described in the enactment it must necessarily be included in one of the definitions. Therefore, "assault" is an included offence to robbery if it is proved by the evidence adduced in a trial for robbery, even where it is not mentioned in the count.

* * * * *

* Luckett v. The Queen (1980) 50 C.C.C. (2d) 489