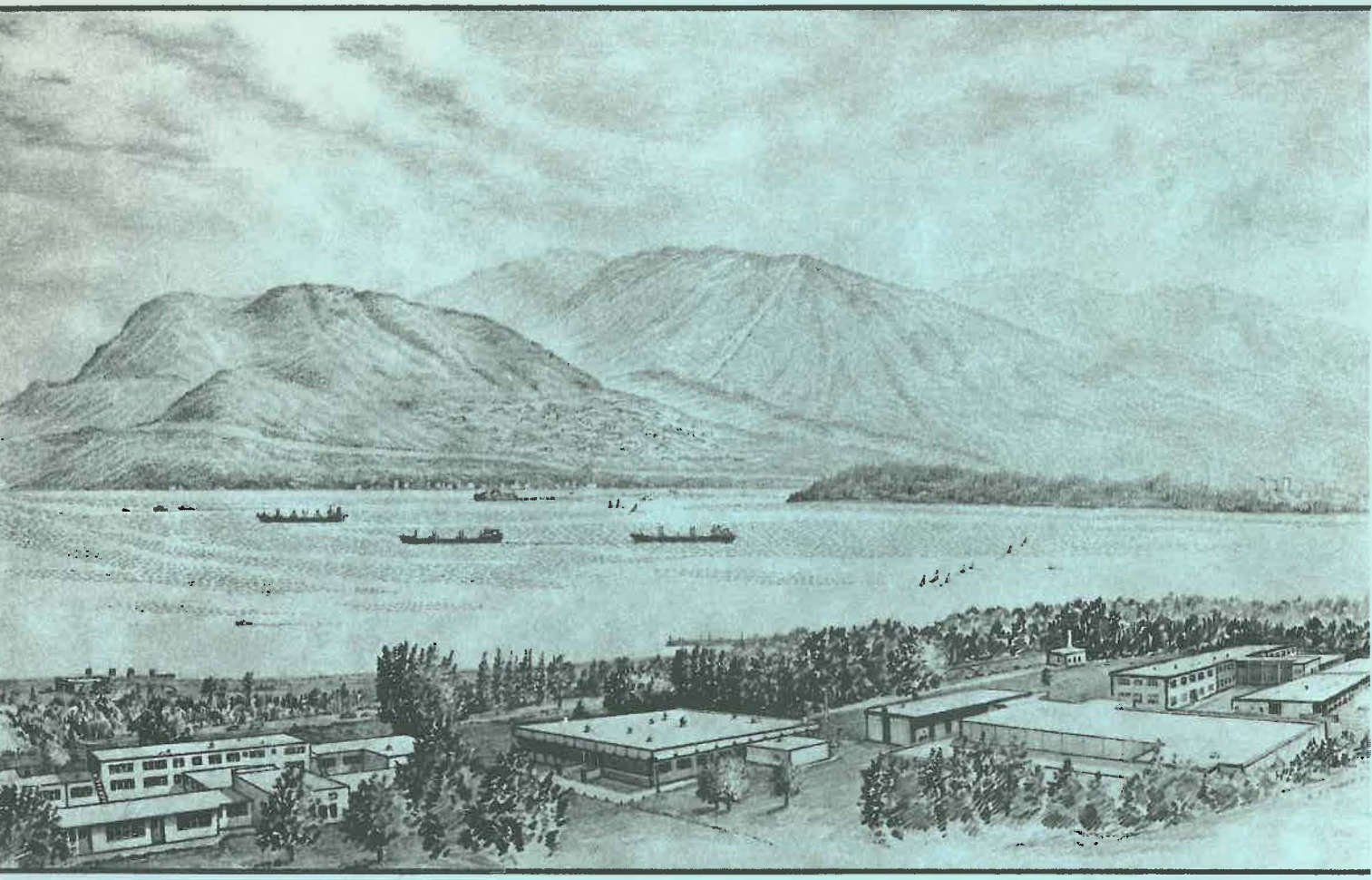
ISSUES OF INTEREST

VOLUME NO. 17



POLICE ACADEMY

Written by John M. Post

Oct. 1984

Justice Institute
Of British Columbia

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BEING A PARTY TO TRAFFICKING MARIHUANA

Regina v. Belacourt The County Court of Cariboo, Dawson Creek, April 1984

Two undercover R.C.M.Police Officers attended at a beer parlour where the accused was sitting with a party the officers knew. The officers spoke to this party and in the conversation complained about the price of marihuana. The accused intervened and implied that if they dealt with "a middle man" they would have to pay steep prices. Without asking the accused for assistance, the accused suggested to the officers "next time come and see me". Expressing curiousity for what price the accused could deliver, the one officer was told that for $1,800 he could get a pound of Red Hair marihuana. The officer responded that, subject to the approval of a partner in a nearby town, he was interested in doing business with the accused.

At subsequent meetings between the one officer and the accused, the latter made it quite clear that he was a person who, in some way, could make large quantities of drugs available to the officer.

The officer acted as a "wary and cagey" purchaser and indicated that he would consider the price and the offer. At the third meeting the officer said he now had the O.K. from his partner and he was in a position to buy. The accused asked: "How does a pound sound"? The officer agreed, rejected delivery for that day and replied: "No, tomorrow". The following day the two officers met with the accused who informed them that the price was now $2,300 for one pound. When the officers objected to the boost the accused said "All I'm making is $100". He also told the officers that they would have to pay in advance. The officers indicated that the conditions and price were unacceptable and in addition, the officers showed reluctance to deal through an intermediary. The accused replied: "I'll speak to my man".

At the subsequent meeting the officers were met by the principal trafficker Lebeuf, who said, "Terry is looking for you". Less than a minute later the accused (Terry) arrived and joined the officers. One of the officers told Lebeuf that $2,300 was an unreasonable price and that he was willing to pay $2,000. Lebeuf countered to sell a lesser amount for $1,650 and , added the accused, "It s all quartered and ready to go". "Let's go for it" said the one officer to his colleague.

Next the place of the transaction had to be determined. The accused suggested "Why don't we just do it at Dennis' place" (Dennis is Lebeuf). In the end it was decided to meet on a certain road in the country. The meeting and agreed to transaction took place between the officers and Lebeuf. The accused was not present.

The accused was charged with the offence of trafficking. The Crown, of course, relied on section 21 C.C. which states that anyone who aids or abets anyone to commit an offence is a party to that offence and is hence as punishable as the principal offender.

The accused did not contradict the evidence of the officers. He testified he had liked the one officer who had bought him several glasses of beer. He had wanted to do the officer a good turn and had promised him to keep his ears open and if he heard of a good deal he would pass it on. He said not to have expected to receive a commission or to make any profit from any deal he would arrange for the officer. He denied to have said that there was only $100 in the transaction for him.

The defence the accused advanced is not unique. To be a party to the offence of trafficking in these circumstances, one has to aid and abet the trafficker. The accused claimed he simply aided the purchaser and not the vendor.

The Court rejected the defence and held that, although one could find that the accused had assisted the buyer, he had equally aided the trafficker. The following facts led up to this conclusion:

1. When the accused at the first meeting said that he could provide one pound of Red Hair marihuana, "this remark by itself constitutes an offer to sell the drug..." to the officer;

2. During the entire discussion that led to the transaction, the accused made it clear he was speaking on behalf of another person and consequently he was aiding that person;

3. When Lebeuf, the principal trafficker, met the officer for the first time, he (Lebeuf) said: "Terry is looking for you" (Terry is the accused). This, coupled with the fact that the accused showed up shortly after (while there was no need for him to be there as he by now knew that his "friend" could very well look after himself) leads to the inferrence that he was not there exclusively to look after the officer's interest but was there principally in aid of the seller, Lebeuf;

4. When the accused said: "It's all quartered and ready to go", he stressed the convenience of the packaging and did promote the sale;

5. When the location for the transaction was discussed, the accused said: "Why don't we just do it at Dennis' place" and "Why don't you follow us down to Denny's place". The "we" and, particularly the "us", meant the accused and Lebeuf; and

6. The accused had shown during the entire events that he favoured the seller and looked after his interest.

The aggregate of all this is that the accused aided Lebeuf, the principal trafficker.

Accused was found guilty.

* * * * *

DRIVER'S LICENCE SUSPENSION NOTICE

Regina v. McIntosh County Court of Vancouver, Vancouver CC840382 March 1984.

Mr. McIntosh appealed the suspension of his driver's licence. On January 17, 1984 he received an unsigned notice from the Superintendent of Motor Vehicles that he was prohibited from driving for a period of 6 months unless he could, in writing, show sufficient cause why the prohibition should be for a shorter time.

A two page submission was sent to the Superintendent. This resulted in an unsigned notice from the Deputy Superintendent, without any reference to the appellant's submissions, that his driver's licence was suspended for 6 months.

The County Court Judge held that the notice and the order was a nullity. He observed that the suspension of a privilege cannot be accomplished by an unsigned notice from the authority who has the power to suspend. Such suspension can only be done for reasons established by statute. Particularly when invited submissions are made to show cause why the power to suspend should not be exercised, the Superintendent must give reason for his decision. Said the Court:

> "The Superintendent or his deputy, is required to consider individually each case proposed for a suspension of driver's licence privileges. He must consider each case on its own merits, including a consideration of the submission made, if any, by the person subject of the proceedings. In the absence of the signature and in the absence of any reference to the submission even being received, let alone considered, I am of the view that the purported prohibition is invalid...".

Appeal allowed.
Prohibition terminated.

* * * * *

IS UNJUSTIFIED CONTINUATION OF CUSTODY AN INFRINGEMENT OF s. 9 OF THE CHARTER?

Regina v. Bevan-Pritchard County Court of Vancouver Island Victoria Registry 30459 - April 1984.

The accused was involved in a motor vehicle accident. The investigating officer who considered her to be intoxicated, made a demand for breath samples and arrested her for impaired driving. The accused refused to blow and was lodged in cells. She appealed her conviction of impaired driving and failure to blow.

The grounds for appeal, based on the Charter of Rights and Freedoms, are interesting. The accused was arrested at 9:55 p.m. The officer booked her after she had refused to blow, and could not say when she was released. However, he did not argue the accuracy of his department's records which show that she was not released until 9:15 the next morning. No evidence was adduced on the justification of the continuation of the accused's detention other than that she was too intoxicated at 11:00 p.m. on the evening previous to her release.

We saw in Mason and Basse, Brown and Smith* an example on how the police may be civilly liable if custody is continued despite the fact that the public interest as defined in the Criminal Code, has been satisfied. This includes effecting an arrest which in terms of requisite grounds and beliefs is lawful but where, due to a lack of "public interest", the law states that the officer "shall" not arrest. In cases of custody the law is equally compelling and dictates that an officer-in-charge "shall" release in the absence of public interest issues.

In these criminal proceedings, the accused raised unjustified continuation of custody as a constitutional defence. She submitted that her continued custody had infringed her right not to be arbitrarily detained (section 10 Charter of Rights and Freedoms). She drew the Court's attention to section 24(1) of the Charter which authorizes the Judiciary to remedy an infringement of rights or freedoms as guaranteed by that Charter. She suggested to the Court that an acquittal was an appropriate remedy in the circumstances. This remedy had been invoked by a County Court Judge in Nelson, B. C.** who found that the onus was on the police officer in charge to comply with the provision of section 452 C.C. and ....

> "If he is unable to meet this burden, it is mandatory that the person be released. The onus does not lie upon the accused to meet the conditions of the release".

* See page 28 of Volume 16 of this publication.

** The Queen v. McIntosh, Nelson registry CC 33/83, February 1984.

As we saw in the civil proceedings, where a person seeks compensation for unlawful arrest or detention, all the plaintiff has to show is that he was arrested or detained and the onus is then on the defendant to show that the arrest or detention was lawful. However, where a claim is made for a remedy under section 24 of the Charter related to arbitrary detention, it seems (at least so far into the history of this constitutional declaration) that the onus to show that on the balance of probabilities the arrest or detention amounted to an infringement of a right or freedom is on the accused in criminal cases and the plaintiff in civil proceedings.

The County Court Judge in this case held that if the accused wished to raise this constitutional defence there should have been an indication of this to the trial judge or Crown Counsel so that witnesses on that point could have been called.

In this case that was not done and the issue of arbitrary detention was not even raised at trial. All cases indicate that the onus to show an infringement is on the accused. Furthermore, the County Court Judge held:

> "In the appeal before me, the only fact established by the evidence is that the appellant spent approximately 11 hours overnight in the gaol cell. Standing alone, that does not establish a prima facie violation of Section 9 of the Charter, nor, for that matter, under s. 452 C.C... "

* * * * *

SUSPECT CLAIMS HE WILL NOT SAY ANYTHING UNTIL HE HAS SPOKEN TO A LAWYER, YET HE MAKES A VOLUNTARY INCULPATORY COMMENT.

ADMISSIBILITY - CHARTER OF RIGHTS & FREEDOMS

Regina v. Manninen 8 C.C.C. (3d) 193
Ontario Court of Appeal, November 1983.

The defendant had stood with arms across his chest in front of a storekeeper, gun in one hand and a knife in the other. When he got the money he demanded, he made his getaway in a gold Lincoln Continental which he still drove when apprehended a little later. The car had been stolen.

The officers who arrested the defendent read him "the works"; notice of arrest, right to counsel, caution in respect to right to remain silent and secondary caution in the event another person in authority had influenced him in respect to making a statement. The defendant commented in response that it sounded like an American T.V. show. He also said: "Prove it, I ain't saying anything until I see my lawyer. I want to see my lawyer". Despite this indication that he intended to retain and instruct counsel, the officers asked the accused if the sweater and knives that were found in the Continental belonged to him and what they were used for. He answered, "What the fuck do you think they are used for? Are you fucking stupid?" And when asked again he said, "Of course it's mine. You fuckers are really stupid. Don't bother me anymore. I'm not saying anything until I see my lawyer. Just fuck off. You fuckers have to prove it".

The trial Judge had held that the accused's eloquent speech had been a voluntary one and was therefore admissible in evidence. This despite the accused's testimony that he had said these things as he was afraid of the officers. He had also claimed that the statement should be excluded as his request to firstly consult a lawyer had been ignored.

The accused was convicted of robbery and possession of the stolen car. He appealed.

Defence counsel argued that where voluntariness used to be the sole consideration whether or not to admit a statement like this, additional matters have now been considered in view of our Charter of Rights and Freedoms. He submitted that from the time the accused said: "I ain't saying anything until I have seen my lawyer", all activities involving the accused in their investigation should have ceased. They simply should not have asked him any further questions and given him an opportunity to call his lawyer.

The Crown retorted that the questioning had been an "on scene" one and had the accuser s request been made at the police station a phone

would have been made available This, the evidence revealed, was the intention of the officers. Furthermore the accused had not specifically asked to phone his lawyer, not even at the police station. He did apparently, via his family, make his need for a lawyer known, when about six hours after his arrest a lawyer phoned him, the accused was immediately put on the line.

The Ontario Court of Appeal went the route of section 24 of the Charter to determine the admissibility of the statement. It firstly held that "the appellant's rights under s. 10(b) of the Charter were seriously infringed by the conduct of the police officers". When the accused indicated his wishes in regards to his rights, he was basically asked three questions. 1. What is your name; 2. What is your address, and 3. "Where is the knife that you used when you ripped off the ... (victim)". The first two were innocuous and not improper. The third one was and the answer was "devastating to the defence". The Court said that in view of the defendant's clear intentions to seek legal counsel, police should have stopped questioning him and have made a phone available to him. The accused had not waived his rights to counsel before answering the questions by police. Admission of the evidence would, in view of the infringement of the defendant's right to retain and instruct counsel, bring the administration of justice into disrepute, held the Court

Conviction set aside.
New trial ordered.

Comment: On page 38 of Volume 12 of this publication is a synopsis and comment on post Charter reasons for judgment by the B. C. Court of Appeal in R. v. Spearman. Spearman said before his interview and several times during, that he wanted to speak to a lawyer. However, he continued to answer questions and confessed to murdering a woman. The B. C. Court held that the accused (as was Manninen) was experienced in dealing with police and was not as he claimed, intimidated to give the statement. It was implied that he should have requested a phone to speak to a lawyer and that the officers were not obliged to provide him with a phone simply because he claimed he wanted to seek counsel.

It seems that the highest Court in B. C. has a different view on this issue than their counterpart in Ontario.

* * * * *

CONSPIRACY AND BEING A PARTY TO THE SUBSTANTIVE OFFENCE

Re Meikle and The Queen 9 C.C.C. (2d) 91
Ontario High Court of Justice

Mr. Meikle, the owner of a van, approached his co-worker, Mr. Madill and asked him to take his van, drive it to a certain location and steal certain parts off it. Meikle would report the van stolen and when located, claim from the insurance company for the stolen parts. After the claim was paid, Madill was to re-install the parts. Madill was offered payment for this service.

The deal was made over a few days and when everything was agreed to, Meikle turned the keys to the van over to Madill to make the fake theft as effortless as possible. However, Madill turned the keys and the scheme over to the police who met Mr. Meikle when he delivered the van to the location where the theft was supposed to take place.

Meikle was charged with counselling Madill to commit the indictable offence of fraud over $200. "You can't do that" retorted Mr. Meikle. He reasoned that had things gone as was planned, he and he alone would have been the principal offender if the charge was fraud. In the circumstances, he argued, Madill could not commit a fraud; consequently how could he counsel a person to commit an offence he cannot commit as a principal. Apparently the Judge who conducted the preliminary hearing, was not to be persuaded, and Meikle petitioned this superior Court to remove the order of committal to stand trial.

The Justice of the Superior Court reiterated that the offence of counselling is complete the moment "solicitation or incitement" occurs. Although Meikle was the principal offender, Madill was "potentially particeps criminis" (party to the offence). This by virtue of section 21(1)(b) & (c) C.C.

Defence counsel also argued that section 21 C.C. cannot be relied upon to establish the ingredients for an offence under section 422 C.C. Counselling offences which is not committed). The Court pointed out that section 422 C.C. applies even where a person is incited to "commit offences" and not necessarily a specific or substantive offence.

In other words, if one commits a crime; aids and abets a person in committing a crime; or forms an intention in common with another person to carry out and assist one another in the commission of an unlawful act, he is a party to the crime whether or not he is the principal offender.

If one counsels procures or incites another person to commit an indictable offence, then if the offence is not committed the counsellor has committed an indictable offence of counselling and is liable to the same punishment as a person who attempts to commit that offence. The Court held that section 422 C.C. does not preclude the counselling of another person to be a party to a specific offence as long as the offence counselled are physically and legally possible.

Application dismissed.
Committal to stand trial upheld.

* * * * *

PRIVACY ACT

Reference re an Application for An Authorization, Alberta Court of Appeal. 10 C.C.C. (3d) 1.

Our senior governments may refer hypothetical constitutional or legal questions to the most superior court in their jurisdiction. This is known as a "reference". The practice is not too often applied as it is seen as a short-cut in the judicial law making process. The Court simply will not have the benefit of the judicial opinions of the "Courts below". When an issue comes to a Court of Appeal or the Supreme Court of Canada, it is by the appeal process and it has been thoroughly argued in the lower Courts and judicial opinions have been expressed on the subject. By the "reference" method the issue comes directly to the provincial Courts of Appeal if the provincial government has referred it, or the Supreme Court of Canada if the reference is by the Federal government.

These references are usually made when the legal or constitutional question put, is too urgent and pressing to let it be answered by means of the time consuming appeal process.

In any event, the Alberta cabinet upon the recommendation of the Attorney General asked the Alberta Court of Appeal:

1. Does a person acting under a judicial authorization to intercept a private communication have, by necessary implication, the authorization "to enter any place at which private communications are proposed to be intercepted ... for the purpose of installing, monitoring, repairing or removing any electromagnetic, acoustic mechanical or other device?"

2 Can a judge who grants the authorization expressly authorize a person acting under the authorization, "to enter any place at which private communications are proposed to be intercepted for the purposes outlined in question 1 above"?

The majority decision said "No" to both questions.

It had been argued that if a person receives authorization to do something he automatically is empowered to do all things "ancillary thereto". Also, the purpose of the authorization is to invade the privacy of an individual and the document is therefore a licence to make this possible, even in the privacy of his home.

Three out of the five Justices who decided on these questions found it "disquieting" that the State would argue that an authorization was such a licence and they found strength for their views in a decision by the Supreme Court of Canada in 1981.* The Court had issued a warrant pursuant to s. 105 (1) C.C. which authorized the seizure of all firearms in the possession of Mr. Colet. Police wanted, on the strength of the warrant, to search Mr. Colet's home. He, however, felt police had no right to be on his property, leave alone search his home and he took shots at the officers from the roof of his "rudimentary shelter". This resulted in two counts of attempted murder of which the accused was acquitted. The Supreme Court of Canada held that section 105(1) C.C. does not authorize the entering of private property to execute the warrant. The majority of the Justices dealing with these two questions under the Privacy Act held that the Supreme Court of Canada came out in the Colet case "as standing for the proposition that a statute authorizing the invasion of property must do so expressly". (Section 105 CC now includes a provision to search).

The Crown had also advanced the argument that when police have a warrant for the arrest of a person they have the power to search private property on reasonable grounds for believing the wanted person is there. The three Alberta Court of Appeal Justices held that the cases** indicating that proposition are distinct from what is proposed here. The "respect for privacy" is shown in police having to announce their presence and business. What is proposed by the Crown here is "surreptitious entry". In law the two are miles apart.

The court's "No" to the questions is pretty well summed up in the following passage of the reasons for judgment when it dealt with the intent of the lawmakers:

> "If Parliament knew that police forces were engaging in and wanted to engage in trespassory entry then one can say it's silence was a refusal to give that authority as easily as one can say it intended to give the authority..... That surveillance was hitherto done by trespass does not imply parliamentary approval of the practice. Nothing put before us leads me to conclude that Parliament must have understood it was necessarily authorizing surreptitious entry".

The dissenting opinions were in favour of allowing the judiciary to include the authorization for entry of private property in the authorization for the interception of private communication. In other words, the two dissenting justices said "No" also to question 1 and "Yes to question 2.

* Coleg v. The Queen (1981) 57 .C.C. (2d) 105. Also see page 18 of Volume #1 of this publication.

** Semayne Case (1604) 5 Co Rep. 91.a. 77 E.R. 194. - Eceles v. Bourque et. al. (1974) 19 C.C.C. (2) 129.

This all adds up that in Alberta the judiciary may not include authorization to enter private property to intercept private communications. And it was the unanimous opinion that an authorization to intercept does not by necessary implication authorize such entry.

Despite this decisive judgement by the Alberta Court of Appeal, it seems that its Ontario counterpart feels differently about the issue of surreptitious entry. The following case demonstrates that clearly.

The Queen and Papelia, Monaco, Koaches, Cavasin and Fishes Ontario Court of Appeal, August 1984.

Police received authorization to intercept the private communications of the persons mentioned above. Besides the usual telephone taps, police placed listening devices in the cars owned by Papalia and Monaco. Investigation had given them reason for believing that conversations related to the crimes under investigation took place in those cars. Needless to say that no permission to plant the devices was sought from the owners of the cars. Police also entered surreptitiously the offices and the boardroom of Papalia and Monaco's business and placed listening devices. The officers did so on the strength of the authorization which included: "... and for that purpose to enter such places as may be necessary in order to install, monitor and remove any ... devices..." They were also ordered to carry out these surreptitious entrees by their commanding officer. The trial judge had disallowed any evidence obtained from interceptions of communications in the cars. However, he had held that those resulting from bugging the offices and boardroom were admissible. The trial resulted in an acquittal and the Crown appealed. The surreptitious entrees and their propriety became the highlight of the reasons for judgement by the Ontario Court of Appeal.

The reason why the trial judge has disallowed the intercepted communications in the cars, was that police, prior to applying for the authorization, had knowledge of the suspected conversations in the cars. Despite the fact that they by statute (s. 178.12(1)(e) CC) were compelled to include in their application, "a general description of the nature and location of the place, if known..." they had not included the cars.

Neither would the judge allow the derivative evidence from the "in-car communications".

The Ontario Court of Appeal held that the trial judge was wrong. He had looked behind the authorization while it was valid in its face. Examining the grounds or validity of the authorization amounted to a collateral attack on a Supreme Court authorization. If the defence

wanted to challenge the superior court's decision to grant the authorization or its content, the proceedings must be for that purpose in the Court that granted it. All the trial judge has to concern himself with is that the interceptions were lawfully made and proper notices were given; that named and unnamed persons fall within the authorization, etc. However he is not to go behind it. The interceptions in the cars were lawful and the intercepted communications and its derivative evidence were held to be admissible.

The defence then urged the Court of Appeal to rule inadmissible the communications intercepted in the offices and boardroom. Locks were picked to plant the necessary devices and surreptitious entrees were made. This was not pursuant to the authorization and, therefore, it ought to be inadmissible, said defence counsel. To answer this question the Court of Appeal referred to decisions* prior to the Charter being effective.

These decisions basically say that an authorization to intercept a private communication is not a licence to break the law and that authorities who assault, cause harm or trespass are on their own. In such circumstances, the authorization does not give them any protection. However, if the authorities resort to these methods to intercept the private communications referred to in the authorization, that does not make the interception itself unlawful. One could say that the unlawful means did not affect the lawful ends, after all, the interception itself is pursuant to the judicial licence to intercept.

It is important to note, however, that also authorizations that included permission to enter places to install and remove devices, were frowned upon by the Courts of Appeal. There was an apparent consensus that there is nothing in law that enables a judge to authorize illegal acts to accommodate the interception. Nevertheless, as pointed out above, if police officers committed such acts, it made the interceptions not unlawful or the evidence obtained thereby inadmissible; and where an authorization includes a licence to trespass, it adds nothing to the document and does not invalidate the licence to intercept private communications. Furthermore, the trespass is not a part of the interception and, therefore, the unlawfulness of the former does not contaminate the latter.

Dissenting judicial views, are best summarized by quoting from a minority judgement in the Lyons case:

> "A police officer does not act in accordance with an authorization when he carries out the instructions of the authorizing judge in an unlawful manner, namely, by unlawfully trespassing to install and maintain the monitoring devices".

* R. v. Lo Serge (1975) 26 CCC (2d) 388; R. v. Welsh and Tonnuzzi (No. 6) (1977) 32 C.C.C. (2) 363; R. v. Lyons, et. al. 69 C.C.C. (2d) 318 (B. C. Court of Appeal) 1980.

The defence urged the Ontario Court of Appeal to follow this dissenting view, particularly in view of the current Charter provisions. The opinion of their Alberta counterparts, expressed in the 1983 Reference, was of course also drawn to the attention of the Ontario Justices.

However, this was to no avail and they were more impressed with the observations of the Chief Justice of the Alberta Court of Appeal (a dissenting judgement). His views are similar to those expressed by the U. S. Supreme Court*. The Alberta Chief Justice observed:

> "... the serious invasion is not the entry upon a person's property, but the entry into his mind by intercepting communications intended to be private communications. Once that invasion was authorized, the means were merely incidental"

He is of the opinion that Parliament knew the distinction between "wiretapping" and "bugging" and that an authorization includes both. Parliament understood that surreptitious entry is simply an integral part of electronic eavesdropping.

Although the reasons for judgement are lengthy and somewhat confusing in some places, it is obvious that the Ontario Court of Appeal agreed with the dissenting views of the Alberta Chief Justice. It held that necessary entries are the exercise of powers ancillary to the authorization.

All evidence admitted.

Note: The Alberta reference case has been appealed to the Supreme Court of Canada and we should be certain of this law in the not too distant future.

* * * * *

* Delia v. The United States of America 441 U. S. 238 99 S C.E 1682 (1979)

RELATIONSHIP BETWEEN THE MECHANICAL CONDITION OF THE MOTOR VEHICLE INVOLVED IN THE OFFENCE OF DANGEROUS DRIVING

Regina v. Claxton, County Court of Vancouver Island Victoria No. 32089-T March 1984.

The accused began a right hand turn when something that happened in the area of the left front wheel caused him to lose control of the car. In addition, his brakes failed and an accident resulted. He was charged with dangerous driving.

The mechanical condition of the car was abysmal. The brakes were metal on metal with the drum near breaking point; the steering mechanism was badly worn; tires were without or little tread; and the stud holes in the wheels were so badly worn that a wheel could be removed without loosening the nuts. As a matter of fact, the accused had just put the spare wheel on one of the front hubs as the original wheel had dropped off. In addition to all of this the accused had been drinking.

The Court found that the mechanical failure was the "approximate" cause of the accident. If that is so, argued the counsel for the defence, the accused should be acquitted.

The Court repeated the wellknown ingredients of the offence of dangerous driving:

1. driving without due care a prudent person would exercise in the circumstances, (with regard, of course, to the factors mentioned in s. 221 (4) C.C.); and

2. failure to exercise such care and thereby, in fact, endanger the lives and safety of others whether or not harm resulted.

The question was how the horrendous condition of the car did fit into all of this. The Court found on the evidence that the accused knew or ought to have known the condition of the vehicle. He owned the car and was an experienced driver who understood the mechanical anatomy of the car. The English Court of Criminal Appeal was quoted in regards to the defence of mechanical failure. It had held that this defence simply has no application

> "... where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor car in such circumstances is manifestly dangerous".

Accused convicted.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS

SHOULD PROCEDURAL ERRORS RESULT IN CONSTITUTIONAL REMEDIES AT TRIAL?

The Queen and Erickson, B. C. Court of Appeal, June 14, 1984
Vancouver Registry CA001770

Police, armed with a search warrant under the Narcotic Control Act, searched the appellant's home. No narcotics were found, but a quantity of blank driver's licence forms of various provinces were contained in the accused's safe. He was consequently arrested and charged under s. 324 C.C. (possession of government marks) which carries a maximum penalty of 14 years imprisonment.

The arresting officer was aware that the accused was on parole and immediately upon arrest contacted the parole officer. A warrant suspending the parole and ordering that Erickson be delivered to a federal penitentiary was issued a couple of hours later. In view of this revocation and the warrant, Erickson was not brought before a Justice until 3 days later. Police had assumed that there was no need to comply with 454 C.C. (appearance without unreasonable delay) as Erickson's detention was on account of the warrant and not the charge of possessing government marks. The Provincial Court granted bail and, subsequently, the parole authorities cancelled their warrant. Mr. Erickson was then released. All this took place in February of 1982 prior to the Charter of Rights and Freedoms becoming effective. The trial took place after the Charter became effective.

Six days into the trial Mr. Erickson's defence counsel submitted that the evidence of the government marks was inadmissible as the search warrant was confined to narcotics. He claimed that the search was unreasonable and had infringed Erickson's right to be secure against such a practice. It was also stressed that the conduct of the officers, particularly in respect to the "arbitrary" detention of Erickson, amounted to another infringement of his rights

The Provincial Court trial judge "poured through" an abundance of decisions on these matters and zeroed in on the custody issue. He found that there had been no malice or negligence on the part of police but nevertheless Erickson's detention had been in violation of s. 454 C.C. in that he was not brought before a Justice of the Peace without delay. Instead of determining if the admissibility of evidence was affected by the unlawful detention (s. 24(2) of the Charter), he turned to s. 24(1) of the Charter and quashed the indictment as a remedy to Erickson being denied his right not to be arbitrarily detained.

The Crown appealed the Provincial Court Judge's decision to the B. C. Court of Appeal and argued that the Charter provisions were not retrospective in respect to the infringement, if any, of Erickson's right in these circumstances. However, the Court of Appeal declined to deal with these issues. In other words, it did not determine if the detention was appropriate or the search reasonable. The Court simply addressed itself to the question if the quashing of the indictment as a remedy under s. 24(1) of the Charter, was "appropriate and just" and if there was any grounds in law for making the order to quash the indictment.

The Court of Appeal held that the Provincial Court Judge had erred in law and had used a cannon to shoot a rabbit. What carried a lot of weight as a fundamental issue to the Court's conclusion was the fact that no malice or negligence was found on the part of the police officers.

Said the Court of Appeal in regards to the justification of invoking a remedy under s. 24(1) of the Charter:

> "He granted the most sweeping and drastic remedy in the arsenal of remedies without any factual basis that could possibly permit the conclusion that it would be either just or appropriate to do so." ..... "The need to impress upon all parties the requirement that the law be obeyed is not enough to justify granting a remedy which is not otherwise just and appropriate. I say that with full recognition of the fundamental nature of the right created by s. 454 and the importance of it being complied with by those who are obligated to do so; but a breach does not in itself justify turning the system on its head" ..... "It simply does not follow that every breach must lead to some remedy being granted at trial. The purpose of the trial is, as it was before the Charter, to decide whether the accused is guilty. Breaches of Charter rights do not become a proper subject of enquiry at trial simply because they occurred in relation to the charge being tried".

These comments generally reflect the Appeal Court's opinion on the subject. The Court was also subtly critical of the trial judge as he had invited defence counsel to apply for the remedy under 24(1) of the Charter (such application is requisite to implementing a remedy).

Indictment reinstated.
Provincial Court was ordered to try Mr Erickson

Note: In relation to the custody of Mr. Erickson in regards to the charge of possessing the government marks, the Crown conceded that the

parole warrant did not preclude compliance with s. 454 C.C. Although the B. C. Court of Appeal did not rule on this issue, they strongly hinted to agree with the Crown's concession on that issue.

* * * * *

POLICE ENTERING HOME TO ASSIST VICTIM AND INVESTIGATE A STABBING - OBSTRUCTING A PEACE OFFICER - LAWFUL PERFORMANCE OF DUTY

Regina v. Custer [1984] 4 W.W.R. 144
Saskatchewan Court of Appeal April 1984.

Police received a report that someone had been stabbed and attended at the location. They found no one there, and attended at a nearby house and spoke to the accused, the occupier. He conceded that his wife had been stabbed but assured that she was perfectly all right. The officers asked for entry into the home to investigate the stabbing and assist the victim. They did not in any way indicate any suspicion that the husband (the accused) who blocked their way, was responsible for the stabbing.

When the officers forced their way into the home a struggle ensued. One consoling factor to the officers must have been the proof that the victim of the stabbing was all right. She emerged from the house and "threw herself on the back of one of the officers".

The accused was tried for obstructing the police officers "in the investigation of a complaint of a person being stabbed". From all of the evidence, the trial judge concluded that:

> "... the peace officers did not want to gain entry to make an arrest. If they believed that the accused had committed or was committing an offence related to his wife they would have arrested him on the steps. If they believed that he was not a party to the stabbing then they would conclude from his lack of concern about his wife that the stabbing was not continuing as he stood there talking. What they did want to do was determine the extent of the wife's injuries, give aid, if necessary, and find out who was responsible".

He classified the issue surrounding the case as a classic conflict between two rights; that of the state to investigate crime and protect human life and the right to protect the privacy of the home. In any event, the Court held that the circumstances had not triggered the common law which authorized the officers to enter the home to prevent death or serious injury. The prerequisite reasonable and probable grounds simply did not exist.

The Crown unsuccessfully appealed the verdict of "not guilty" and finally ended up arguing the case in Saskatchewan's highest court, the Court of Appeal. This Court gave lengthy reasons for judgement and

explored the three most significant cases on this point* decided by the Supreme Court of Canada and found that all were distinct from this case.

None of the established common law provisions that authorize police to enter private property without warrant did apply. Another point which hindered the Court to include the police common law duty "to preserve life and prevent serious injury" was the wording of the charge. The Crown claimed that the officers were obstructed exclusively in their duty in the "investigation of a complaint of a person being stabbed". In other words, the Crown particularized the duty upon which it relied to show obstruction on the part of the accused. This, the Court of Appeal claimed, prevented them from considering the duty of preserving life and preventing injury

Crown's appeal dismissed.
Acquittal upheld.

Comment: Anyone can understand the unenviable dilemma the officers found themselves in. Assuming that the husband or someone else was in the process of murdering the woman or had already done so, the police officers knew that a stabbing had taken place. The victim "is all right" said a person who was hostile towards them. Should they in these circumstances have left when told to "fuck off"? Again, assuming that in a case like this, a death resulted and it was shown that had the officers acted at the time they were at the door, they could have saved the woman's life, I do not believe that their leaving, as the law seems to say they must, would receive public acceptance.

One of the officers in his testimony said he thought, at the time, that the stabbing might be continuing. However, this was rejected as speculation and conjecture and something without evidential support. Hindsight in these events is wonderful, but until the lady emerged and vigorously attacked those who thought to look after her welfare and interest, the predicament of the officers was precarious.

One comfort is the indication that had the information included "preservation of life and prevention of injury" as a duty in respect to which the officers were obstructed, the Crown's appeal would have been allowed. This we can infer from the following and final comments in the reasons for judgement:

> "While the evidence might have supported a conviction (I do not make a finding in this respect) had the charge been one

* Colet v. R 57 C.C.C. (2d) 105 (1981) - [1981] 2 W.W.R. 472.
Eccles v. Bourque [1975] 1 W.W.R. 609 - 19 C.C.C. (2d) 129
R. v. Stenning [1970] 3 C.C.C. 145

alleging obstruction of the constable s duty to preserve life and prevent serious injury, that was not the charge before the Court".

* * * * *

B. C. PROVISIONS FOR THE TAKING OF BLOOD SAMPLES FROM SUSPECTED IMPAIRED DRIVERS

The Queen and Hurst, Supreme Court of B. C., Victoria Registry 84/1285, July 1984

It was predictable that the recent B. C. statutory provisions authorizing police, doctors and registered nurses, and analysts to respectively demand, take and analyze samples of blood of a driver whose blood-alcohol content is believed to be in excess of 80 mlg. per 100 millilitres of blood, would be tested for jurisdictional validity at the first opportunity.

Mr. Hurst refused to allow a sample of blood to be taken from him despite the fact a police officer had made a proper and authorized demand of him under the B. C. Legislation. He entered a plea of not guilty and at his trial the Provincial Court Judge held that the provincial Motor Vehicle Act legislation regarding blood tests is ultra vires the provincial government in that it contradicts s. 237(2) of the Criminal Code. This Criminal Code section states that for the purposes of this section no one is required to give samples of any bodily substance for the purpose of analysis. If asked to do so, a refusal or the fact that no sample was taken may not be subject of comment by anyone in the proceedings. The Crown appealed.

The Provincial Court, in essence, had held that if the provincial legislation contradicts federal law then the provincial enactment is ultra vires the provincial government. The Supreme Justice held that this at best was a misconception (and a prevalent one).*

* The B.N.A. Act of 1867 and the Canada Act of 1982, divide the powers to legislate between the federal and provincial governments. Each government is supreme within it's legislative purview. That is a fundamental ingredient of a federation. Basically, when a government legislates in an area that is not within its legislative competence, then that legislation is ultra vires that government. In some cases there is an overlapping jurisdiction and both senior governments have jurisdiction to legislate. When this happens the paramountcy doctrine is applied and the federal legislation supersedes that of the province. Such legislation, though intra vires that provincial government, may be inoperable if it contradicts federal provisions. When legislation is excessive from a constitutional viewpoint in that it, for instance is discriminatory the Courts may declare it invalid despite the fact that in terms of the division of legislative powers, the law was intra vires the senior government that enacted it. Then, of course, there is the principle of residual power. In the federation of Canada (unlike in some other federations) whatever has not been assigned in the constitution befalls the Federal government

If the B. C. "blood sample" legislation is repugnant to that of the Federal government, it may be inoperable but it is nonetheless intra vires the B. C. government, said the Supreme Court. It held that the provincial governments in Canada have jurisdiction to legislate such law as is in question here*. This left the Justice to decide if the provincial provisions did contradict s. 237 (2) C.C. and therefore would be inoperable.

There are many examples where both the federal and provincial governments have within their legislative purview enacted law affecting the same sphere of behaviour, regulating the same activities. A knee-jerk reaction to this is to believe that federal law always supersedes that of the provinces. That can be the case where, by applying the paramountry doctrine, it is found that these two valid sets of law are inconsistent with one another; where the one contradicts or defies the other, then the federal law has it and the provincial legislation, though intra vires the provincial government is inoperable.

However, if the two sets of valid law, one federal and one provincial, for instance, simply give authorities an option to proceed under either, then both are operable.

When we still had only intoxicated and impaired driving offences provided for in the Criminal Code, there was no provision for demanding a breath sample. The best police could hope for were volunteered samples. In 1958 Saskatchewan did something about this and provided in its Vehicles Act that where suspected impaired drivers did not give a sample of breath, their driver's licences would be suspended and eventually revoked. That legislation flew in the face of the then Criminal Code stipulation that no one would be required to provide any bodily substance including breath. The Saskatchewan government referred this legislation to their Court of Appeal for an opinion. The reference reached the Supreme Court of Canada. An eight-man decision of this Court held that the Saskatchewan legislation did not specifically compel a citizen to give a sample of breath despite the fact that he could not refuse with impunity. Furthermore the Court found that the Saskatchewan law was not in conflict with the Criminal Code provision that no one, for the purpose of this section, could be compelled to give a sample of breath. Therefore, the Saskatchewan law was operable.

* Reference re validity of 2. 92(4) of the Vehicle Act 1957. (Saskatchewan) (1958) S.C.R. 608.
* The Provincial Secretary of the Province of Prince Edward Island v. Egan et. al. (1941) S.C.R. 396.

The matter of parallel legislation is a bit more complex than explained here and there are more tests to these turf issues. For instance, where provincial provisions are obvious, attempts for authorities to gain evidence supporting Federal offences, or where they create procedures affecting Federal criminal process, the issue becomes a little more dicy. The Saskatchewan legislation was very close to doing the former.

The B. C. "blood sample" law operates quite separate and distinct from the drinking-driving law in the Criminal Code. The B. C. provisions are, for lack of a better term, self contained. No part of it is an evidential conduit to the Criminal Code offence. The latter statute provides for a conviction of "over 80 mlg." by means of compulsory breath tests and certificate evidence. The B. C. provisions are similar and lead to the conviction of a provincial offence of "over 80 mlg" by means of a compulsory blood test and certificate evidence. Whenever a police officer demands a blood test he does so exclusively for provincial purposes and is then excluded from proceeding under the Criminal Code. These provisions, said the Supreme Court Justice, are <u>not</u> in conflict with section 237(2) C.C. The Parliament of Canada decided that they would not require anyone to give a blood sample for the purposes of gaining evidence for their drinking-driving law. The Province of B. C., having equal jurisdiction to create drinking-driving laws, decided to include a compulsory submission to a blood test to gain evidence for their own drinking-driving laws. This means that there is a difference but no conflict.

B. C. blood sample law were held to be operable.

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CHARTER OF RIGHTS AND FREEDOMS

THE WRIT OF ASSISTANCE AND REASONABLE SEARCH

The Queen v. Hamill, B. C. Court of Appeal, CA 001117 Vancouver Registry, September 1984.

Various Provincial and County Courts have addressed the constitutional validity of the much debated Writs of Assistance. Since the Charter, the Court of Appeal seemed to have been inundated with appeals involving the Writs and it, therefore, decided to amalgamate these cases and included three other appeals* into their reasons for judgment in the Hamill case.

On page 1 of Volume 14 of this publication, a synopsis of the Vancouver County Court's reasons for judgment in R. v. Cuff outline the issues involved in the question on the constitutional validity of Writs of Assistance. I think it fair to say that the B. C. Court of Appeal has now overturned the decision in Cuff and here are the reasons why.

The lower Courts had various approaches and answers to the complicated question surrounding this issue. Some held that the writ was unconstitutional but still admitted the evidence resulting from a search where a writ was used as such admission would not bring the administration of justice into disrepute. Others, like the Judge in the Cuff case, rejected all direct and indirect evidence that resulted from the use of a Writ of Assistance. That judge seemed even anxious to get at the writ and left his personal feelings not covered on the matter. This decision by the B. C. Court of Appeal will bring some consistency in the interim period. The issue will inevitably reach the Supreme Court of Canada and if it disagrees with the B. C. Court of Appeal's decision we will simply have to adjust again.

The B. C. Court of Appeal firstly concluded that there is only one section of the Charter that applies to the question before them, and that is section 8 which assures us of a right to be secure against unreasonable search and seizure (some judges had brought section 7 of the Charter into the picture as well). The main objective of the Court was to determine if section 10(1)(a) of the Narcotic Control Act, which authorizes a Writ of Assistance to be used for the search of a dwelling house, was inconsistent with section 8 of the Charter; in other words does section 10 N.C.A. validly confer the power to enter and search under the authority of a Writ of Assistance. Some Courts have referred to a search under the authority of a Writ of Assistance as a warrantless search and for all practical purposes it is, said the Court of Appeal. Opponents of the Writ of assistance claim that any search of a home other than those specifically

* R. v. Sieben CA 000878, R. v. Descamps CA 000983
R. v. Pasztor CA 001154

authorized by an independent member of the judiciary are unreasonable and excessive (save those to preserve life and in fresh pursuit of an offender). Determination of the necessity of a search and the judgment whether or not there are the prerequisite reasonable and probable grounds, cannot be left with the law enforcement officers, they say. Others can see the need for the Writ but favor that it must be shown that its use is necessary, in that the obtaining of a warrant was impractical in the circumstances.

In the U. S. they have struggled for decades with the question whether a warrantless search can be reasonable. Their debates have resulted in an overwhelming volume of cases which has caused incredible complexities. Basically a judicially granted warrant is the best protection against unreasonable search. Some claim that if a search is warrantless, it is nonetheless capable of being reasonable; others argue that any warrantless search is unreasonable ... and on go the discussions. The U. S. laws and those of other commonwealth nations were reviewed recently by the Ontario Court of Appeal in Regina v. Rao (May 1984, unreported). The case is interesting on these various viewpoints but is distinct from this case as the place search in "Rao" was not a dwelling house.

As interesting as all the preliminaries may be the B. C. Court of Appeal had to come to grips with reality and answer the narrow question before them: "Are the powers granted in s. 10(1)(a) N.C.A. excessive"? Defence counsel argued that it could not be anything else but excessive. The B. C. Court of Appeal disagreed! It said that what has to be considered is the particular circumstances encountered and the seriousness of the evil against which the law is directed. The Court said to be cognizant of the accusation that the search provisions under N.C.A. are excessive and abused by police, however, it concluded that "it may be useful to take note of what has been said about them by those who have had reason to consider them most carefully".

Quoting from the 1971 Le Dain Commission Report, the Court observed the following:

> "A writ of assistance is a general warrant..." "In acting under a writ of assistance a police officer must reasonably believe that the dwelling house contains a prohibited drug..." "Officers who hold these writs are obliged by R.C.M. Police regulations to report on the use they make of them (writs), and they are subject to disciplinary measures for any apparent abuse...". "The chief distinction between a search warrant and the writ is the convenience of the latter". The report sums up the difficulties in firstly obtaining a warrant under many conditions so prevalent in the illicit drug trade and concludes that "though the writ and many other necessary practices in drug-law enforcement tend to bring police and law some disrepute, taken the writs away would seriously handicap such enforcement..." It would appear therefore, that they (writs) must be regarded as special cost inherent in the criminal law prohibition of the distribution and use of drugs" said the report.

The 1969 Quimet report (Canadian Committee on Corrections) came to similar conclusions. It found that the use of writs was carefully monitored and that the broad and apparent excessive powers they confer, had not been abused. Furthermore, the committee observed that the writ is used in two areas of vital national interest, illicit drug trades and revenue. This coupled with the practical necessity of search at specific and unpredictable times in investigations caused the committee to leave the granting and use of writs of assistance undisturbed.

The B. C. Court of Appeal considered these reports "statements from responsible sources" that support continuation of the unabused warrantless searches, but was hesitant to hold that these committee findings were valid and appropriate in 1984.

It was suggested to the Court that the test of "reasonableness" in respect to the use of a writ, is whether it would, in the circumstances, be practical to obtain a warrant. If the answer is "yes" and the writ was used, the search would consequently be unreasonable. The Court of Appeal rejected this idea and predicted that such a rule would cause trials to become minute examinations on that question with all the useless hindsight as a benefit, while the investigator "must, at the crucial times, assess those matters on the basis of his experience and training and often on the basis of hunch or instinct". The exercise to determine such practicability would add nothing to our right to be secure against unreasonable search and would take much away from our right to be secure against crime.

Another option the Court had was to follow the American rule which, in essence, dictates that warrantless searches are (with few exceptions) per se unreasonable and unconstitutional. This idea was also rejected as the Charter would specifically have stated that, if that had been the intent. At this stage of their reasons, the Court of Appeal found that section 10 N.C.A. is not inconsistent with the Charter provisions and writs of assistance are, therefore, constitutionally valid. It referred to their ruling in R. v. Collins* in which a clear interpretation of section 24(2) of the Charter was given on how evidence resulting from an unreasonable search is only inadmissible in evidence if admission would bring the administration of justice into disrepute. This makes it clear that our Court of Appeal steers clear from U. S. strict rules on the reasonableness of search or exclusion of evidence. In any event, in regards to the former, the Court disagrees with its Ontario counterpart and in respect to the latter it said:

> "It is neither just nor appropriate to exclude evidence simply because the wrong done to the accused person is so trivial that no civil remedy would be of practical benefit to him. To approach the matter in that way is to treat the exclusion of evidence as something of no great importance, as a remedy to be granted lightly. On the contrary, I would suggest, it is a

* See page 1 Volume 12 of this publication.

> drastic and inherently dangerous tool which should be employed with caution. The purpose of a trial is to get at the truth of the matters in issue. The effect of granting an application to exclude evidence is to suppress the truth ...."

Reasonableness of search was prior to the Charter, never an issue and background information in possession of the investigators which guided their conduct during a search needed not to be examined by the Courts. Since the Charter, the information an officer has and the manner in which he conducts a search must now dovetail to determine the reasonableness of a search. This means that a new dimension has been added to our trials and Courts will have to deal with the background information in evidence. This no doubt will often be to the detriment of the accused despite the fact that such evidence of background knowledge adduced is not to prove the truth of its content but to explain the officer's state of mind and justification for his actions.

In this case the accused was seized and choked immediately after the officers entered the dwelling under the authority of a writ of assistance. The officer responsible testified this was in the circumstances a natural instinct and a method taught to officers. Also, the officers had, from a computer print-out, learned of the accused's propensity to violence. What about the admissibility of such evidence?

The Court again referred to their decision in Collins (supra) that:

> "... it was for the Crown to lay the groundwork to show what knowledge the police had".

In relation to the apparent unfairness to adduce such evidence it must be remembered that the accused raised the issue of infringement of rights and must prove that on the balance of probabilities to trigger the exclusionary rule. He is, at it were, the author of his own misfortune in this respect while the Crown does not have to show the lawfulness or the reasonableness (there is a distinction between these two) of the search as a prerequisite to the admissibility of what was seized. In other words:

> "If the accused does not apply under s. 24 for exclusion of the evidence, there is no issue to which either the legality or reasonableness of the search can be relevant".

The sentences that best synopsizes the Court's conclusion on this issue, is:

> "If the search was carried out under the authority of s. 10 N.C.A., it will be a reasonable one under s. 8 (Charter) only if the officer had the requisite reasonable belief in the presence of the narcotic".

> "Every unreasonable search is an infringement of the individual's right under section 8 (Charter). But not every unreasonable search can satisfy the second test under s. 24(2) (Charter)".

In other words, if a search is unreasonable the evidence resulting therefrom is still admissible if such admission does not bring the administration of justice into disrepute. In this case the search was lawful and reasonable.

Crown's appeal allowed.
Acquittal set aside and new trial directed.

Comment: The welcome views by the B. C. Court of Appeal are encouraging and it is sincerely hoped that this reasonable interpretation will be shared by the Supreme Court of Canada. Many members of the Judiciary, particularly those of the lower Courts, have interpreted the Charter provision very much in favour of those accused of crimes. Our superior Court continuously issues warnings to those judges in the front trenches not to be too generous and not to give too liberal an interpretation to our new Charter and that, with some exceptions, there is nothing new under the Canadian constitutional sun in terms of rights and freedoms. Other factions totally disagree and reason quite to the contrary. Of the greatest interest, for instance, is the debate over the meaning of section 1 of the Charter which says that this part of our new constitution is subject only to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society. Does this mean that we should not create legal luxuries we cannot afford or that where it fits in our ideals we must implement and allow the exercise of freedom and rights at all costs. A similar (in principle) looming issue is the apparent distinction in the sensitive subsection (2) to section 24 of the Charter (exclusionay rule) between the English and French words used. The English wording dictates the exclusion of evidence where admission "would" bring the administration of justice, while the French version uses the word "could". I'll leave you to ponder over the immense distinction between these wordings particularly in view of the provision in the Interpretations Act that stipulates that where there is a difference in the wording of law in our two official languages, the version most favorable to an accused must be applied. What I am implying is that, despite judgements like these, we are far from settled on the meaning of our new Charter.

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RIGHT TO PRIVACY TO CONSULT COUNSEL

Regina v. Peters, County Court of Westminster, New Westminster Registry No. X-012155, June 1984

The accused was under demand to give samples of breath and while at the police station he phoned his lawyer. Police were within earshot while he spoke to his lawyer. However, the accused did not request privacy and appeared satisfied and comfortable as the circumstances were. The trial judge held that despite the accused had not asked for privacy it should have been afforded him. Presumably under either of the subsections of s. 24 of the Charter (remedy or exclusion) the judge acquitted the accused of impaired driving and refusing to blow. The Crown should have lead evidence to support the conclusion that the accused was given privacy while he exercised his right to consult counsel said the Judge. The acquittals were appealed.

In 1977, prior to the Charter becoming effective, the Supreme Court of Canada[1] held that a suspect need not be afforded privacy to consult counsel unless he requests it. The accused had claimed at trial that he had refused to blow as he had been inhibited in speaking to his lawyer. He was nevertheless convicted as he should have asked for a greater degree of privacy. However, there was a dissenting judgement in which three justices of the Supreme Court of Canada felt that privacy should be a natural part of the right to consult and retain counsel.

The defence lawyer in this Peters case had argued that the dissenting judgement by the Supreme Court of Canada should, in view of the Charter now being effective, be followed. The trial judge apparently agreed.

The very same issue has been argued at least twice in B. C. County Courts[2] in 1983, since the Charter. The cases are on all fours with this Peters case. In one the Court held the suspect's rights had not been infringed and there was no excuse to refuse to blow. In the other case the Court held that the accused's rights would only have been infringed if he had asked for privacy and was not given it.

The County Court Judge agreed with his brothers, allowed the Crown's appeal and ordered a new trial.

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1 Jumaga v. The Queen (1977) 1 S.C.R. 486.
2 R. v. Fellowfield (1983) 24 M.V.R. 97 and R. v Rosenan (unreported)

FAILURE TO INCLUDE ALL PLACES AND NAMES INTENDED TO BE SUBJECT TO INTERCEPTION IN APPLICATION FOR AUTHORIZATION

Regina v. Meidel, Meidel, Alvarado, Moser and McIsaac, County Court of Vancouver Island, Victoria Registry No. 27589, January 1984.

The accused applied to have set aside an authorization setting out certain narcotic offences in respect of which private communications could be intercepted. They claimed that police had misled the Court in the application for the authorization by failing to disclose the names of persons whose private communication they fully intended to intercept. The same was claimed in respect to addresses at which police intended to intercept telecommunications.

The Court found as a fact that the authorization did not include names of persons whose private communications the police intended to intercept. These names as well as the addresses were known to the police at the time of the application. This caused the Court to say that the police "did not act with scrupulous regard for the obligations of the judge..." Hence the supporting material did not comply with what section 178.12 C.C. stipulates must be contained in the application. What aggravated the situation was that the telephone intended to be tapped (but not included in the application) were public telephones and this would mean an invasion of the privacy of persons unconnected with the offences.

> "It is not for police authorities to fail to fully inform that judge and indeed to conceal their true intention from the judge, in breach of the requirements of the statute and to conduct the interception of such public telephone lines in such manner as those authorities deem appropriate".

The judge examined "the packet" and particularly the affidavit. He came to the conclusion that the granting of the authorization in view of the evidence before him and that contained in the affidavit, was contrary to s. 178.12 C.C. The judge said that police had not been frank, open and fair and he found to have been misled when he granted the authorization and, therefore, had been unable to fulfill his obligation under the Act.

Defence Application granted.
Authorization set aside

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ARMED ROBBERY - FORCED RESTITUTION

Regina v. Ellis, County of Westminster, New Westminster Registry No. X011424, March 1984

The accused was "ripped off" for $1,100 in a drug deal and he knew who had done this to him. With the assistance of "Crazy Brian" armed with a shotgun, and another friend carrying a club, he went a-calling at the address where the two rip-off artists were. When the two perpetrators of the rip-off did not immediately show signs of making restitution, Crazy Brian came on the scene and matters were settled inside the house. A total of $250 was collected and as this was not enough in the accused's opinion he demanded that a car owned by one of the debtors was signed over to him. The scene with "Crazy Brian" brandishing his gun was described as a "madhouse" and the occupants of the home in which this happened were literally terrorized.

In view of the fact that theft is an essential ingredient to robbery, the accused claimed that he was entitled to be acquitted of armed robbery. After all he did not commit a theft but simply collected monies he had an honest belief to be entitled to. In other words, he claimed to have "colour of right". He drew the attention of the Court to an English case[1] where a man had used a knife on his employer to collect wages owed to him. Whatever crime he committed in doing so, the English Court of Appeal held it was not robbery due to the lack of theft.

In this case the accused had given his victims $1,100 to buy drugs for him. The transaction went off the tracks somewhere as the accused did not get the drugs nor his money back. The English Mr. Skivington had done honest labour and thereby had a claim to wages from his victim, but the accused's claim was founded on the commission of a crime. Is there a distinction? The Court in its deliberations on this point, asked if, for instance, a gambling debt could be collected by a means the accused applied and not commit robbery? After all, a gambling debt is not a lawful debt and cannot be legally enforced.

There is another B. C. case on nearly all fours with this one[2]. In that and other cases, the Courts have held that this kind of defence must withstand the test of the accused's belief to have a lawful claim to what he took. That test is a subjective one, meaning that it is not important if the accused had in law a claim but whether he genuinely believed he had a lawful claim. The Court quoted the English Court of Appeal:

> "... a claim of right exists whenever a man honestly believes that he has a lawful claim, even though it may be completely unfounded in law or in fact".

1 R. v. Skivington (1967) 51 Criminal Appeal Reports
2 R. v. Sherman, 47 C.C.C. 521 (B.C.C.A.)

The Court concluded that the accused, if he believed he had a lawful claim, would have gone to the police or pursued the matter civilly. He proceeded in his bizaare manner of collecting a debt, because he knew he did not have a "lawful" claim. Without a genuine belief in such a claim, the accused s defence could not succeed.

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ADMISSIBILITY OF VOLUNTARY STATEMENT AND SECTION 10 CHARTER OF RIGHTS AND FREEDOMS

Regina v. Abraham, County Court of Prince Rupert, Smithers, B. C. No. 4276XZ February 1984.

The accused was on trial for a sexual assault on a 12 year old girl. The girl had been given an alcoholic beverage to drink. While she was asleep and in the presence of the girl's 11 year old sister and an adult, the alleged assault took place. Police investigated and interviewed the 11 year old witness. Before they interviewed the adult witness, word got to the accused that police wanted to talk to him. He went to the police station and spoke to the investigators. Whatever he said became subject to a voir dire to determine its admissibility in evidence. The Court held that the interview was civilized, free of any improprieties and that the accused had voluntarily given a verbal and then a written statement.

Prior to making the verbal statement, the accused had not been informed of his right to counsel. This he claimed was an infringement of his right under s. 10 of the Charter and therefore the statement should be inadmissible by virtue of s. 24(2) of the Charter. Police claimed, however, that the accused was not detained when he was interviewed, although they considered him a suspect. After he had made his verbal admission of guilt, the officers told the accused of his rights to counsel which did not deter him from giving the investigators a written statement as well. The officers had reasoned that prior to the verbal admission they had insufficient evidence to arrest or detain the accused. After that admission, things had changed and, although they did not arrest the accused, they considered him detained.

The Court held that when the accused made the verbal statement he was not detained and there was no infringements of the accused's rights. The voluntary statement was therefore admissible.

The accused then challenged the admissibility of the written statement. Although the investigators had told the accused (after the verbal statement) of his right to counsel they had not told him promptly for what reason he was detained. Crown Counsel retorted that the accused had been asked about the alleged sexual assault and had confessed to it prior to the need to tell him why he was detained. In other words, he knew why.

The Court held that the duty to tell a person why he is detained is unambiguous (10(a) Charter). The accused had not been told and, therefore, his rights had been infringed. However, admitting the statement in these

circumstances would not bring the administration of justice into disrepute.

Both statements ruled admissible.

The admissibility of statements and infringements of an accused's right were also discussed in the B. C. Supreme Court in R. v. Stone (No. 00049 Quesnel Registry, May 10,/84).

In that case two officers were called to the accused's home where a dead man and woman were found. When the officers tried to get the accused away from the scene to ask him some questions, he tried to enter the house and when stopped, he fought the officers. He was handcuffed and placed in the police car where the officers spoke to the accused for nearly an hour before special investigators arrived. When the accused was booked nearly two hours after his first encounter with police, he was told for the first time of his arrest, the reason for it, and his right to counsel. He phoned a lawyer and was interviewed again a couple of hours later.

The statements were all ruled to be admissible in evidence. The one in the police cruiser was found to be voluntary and the infringements of the Charter in the circumstances, would not bring the administration of justice into disrepute. In regard to the statement made a few hours after the accused had been informed of his rights and had consulted a lawyer the defence argued that the requirements of s. 10 of the Charter go beyond just informing a detained or arrested person of his rights. The lawyer for the defence claimed that when a person has decided to retain and instruct counsel, no person in authority may interview that person in the absence of counsel.

The Supreme Court Justice rejected this theory. Although a prisoner may well be told by his lawyer not to say anything he may chose to ignore that advice. That "surely is his prerogative and responsibility", said the Court.

All statements were admitted in evidence.

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UNREASONABLE SEARCH - TAKING URINE SAMPLES FROM DRAINAGE BAG

Regina v. L.A.R., 9 C.C.C. (3d) 144.
Manitoba Court of Appeal.

The accused had an all night celebration on the event of his 18th birthday. While driving home he was involved in a serious motor vehicle accident and ended up in hospital. Police found him smelling of liquor and shouting profanities at the nurses. As a blood sample was denied the officers they asked a nurse to give them a urine sample out of the drainage bag which was fed by a catheter used in treating the accused. The nurse complied and the accused was charged with impaired driving and was acquitted. Crown appealed.

The admissibility of the accused's blood-alcohol content established by the analysis of his urine was fought on the basis that the taking of the urine was an unreasonable search contrary to s. 8. of the Charter. This as no search warrant or consent from the accused was obtained.

The Court responded that in these circumstances there was nothing to hold that what was lawful before the Charter has now become "unreasonable". The Charter arms individuals with rights but does not disarm the community and render it unprotected, particularly not in "the critical battlefield of search and seizure". The Court reminded that the crusades in the U. S. under the banner of the fourth amendment to its constitution "have often glorified a law less reasonable than the search it condemned". The Court further observed that the trial judge had confused astute investigative practices with oppression or abuse. It concluded that there was nothing unreasonable about the seizure.

Crown's appeal allowed.
New trial ordered.

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DOES THE PRESUMPTION THAT A PERSON WHO BREAKS AND ENTERS INTENDS TO COMMIT AN INDICTABLE OFFENCE ALSO APPLY TO THOSE WHO ATTEMPT TO BREAK AND ENTER?

R. v. Garlow, 10 C.C.C. (2d) 575
Ontario Court of Appeal and Supreme Court of Canada, May 1982 and May 1984 respectively.

Section 306(2) C.C. includes a presumption that when a person breaks and enters a place he does so to commit an indictable offence therein. Without such intent there is no offence under s. 306(1) C.C.

The accused attempted to break into a place and, relying on s. 306(2) C.C. the Crown intended to prove that the intent of the accused was to commit an indictable offence once inside. The trial judge used the presumption to convict the accused, despite the fact that he could not find from the evidence, what specifically the accused intended to do if he had been successful. In view of s. 306(2) C.C. that does not seem to matter.

The accused appealed and the Ontario Court of Appeal as well as the Supreme Court of Canada agreed that the trial judge erred in law. Both Courts held that the presumption of intent does not apply to attempted breaking and entering. Therefore, the trial judge must be able from the evidence, to find what specific indictable offence the accused intended to commit had his attempt been successful.

Accused's Appeal allowed.
Conviction quashed.

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