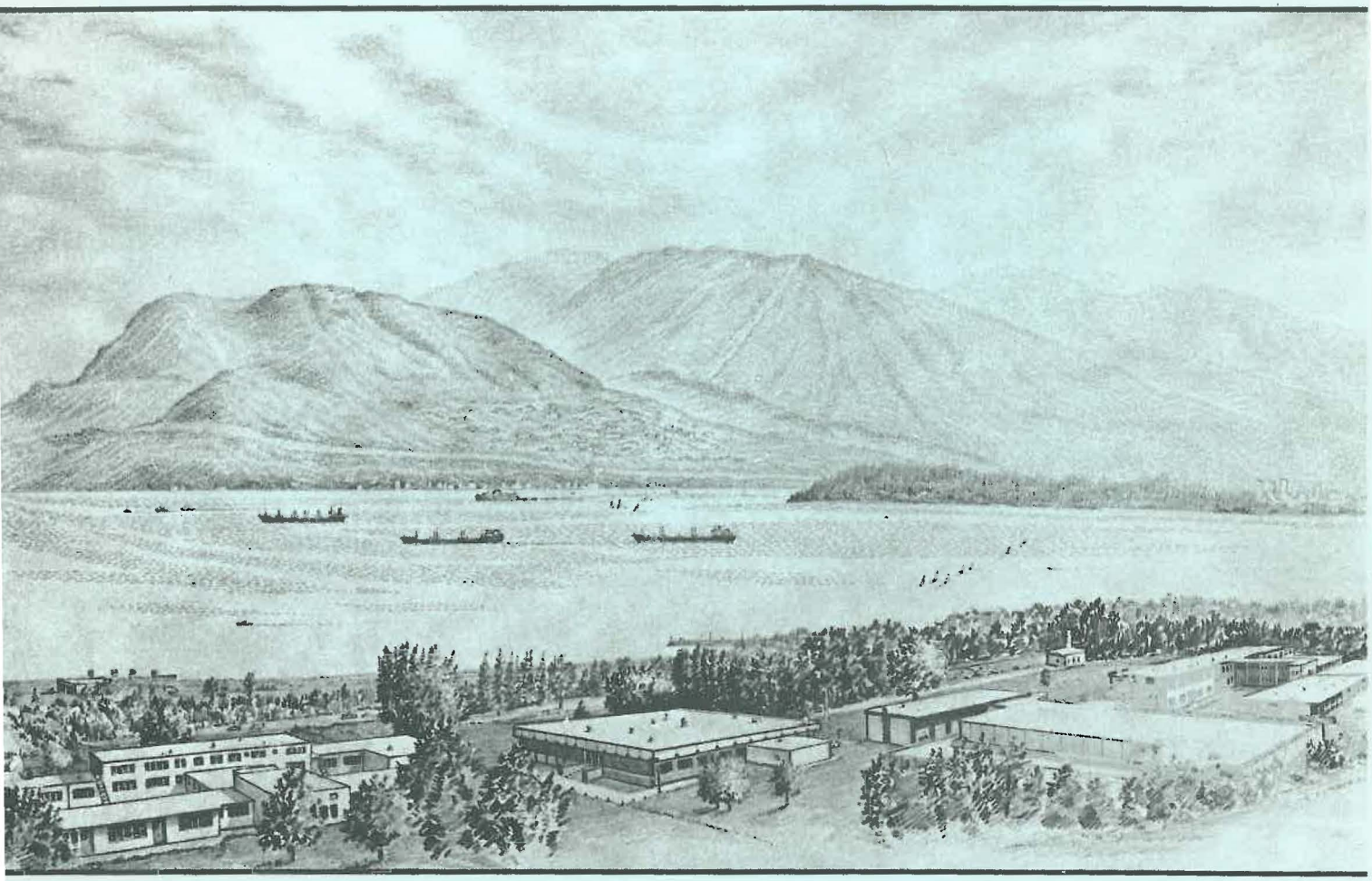
ISSUES OF INTEREST

VOLUME NO. 18



POLICE ACADEMY

Written by John M. Post

Feb. 1985

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DEFENCE PRACTICE AMOUNTING TO OBSTRUCTION OF JUSTICE

Regina v. Doz - 12 C.C.C. (3d) 200
Alberta Court of Appeal, April 1984.

A Mr. Woitt was arrested for driving while his ability to do so was impaired by alcohol. He had no identification on him and wishing to avoid the consequences of other outstanding traffic matters, he gave the name and address of a friend as being his. He was later released on a promise to appear. The document was made out for Mr. Hutchinson, the friend, and Mr. Woitt signed that name to the document. This false identity was continued when Woitt was photographed and fingerprinted under the provisions of the Identification of Criminals Act.

Mr. Woitt went to see the accused, a lawyer who primarily practises criminal law. Mr. Woitt told all and a meeting of the accused, Mr. Woitt, and Mr. Hutchinson was arranged. This resulted, despite the total conflict of interest, that both signed a retainer for the accused to represent them. The accused, fully aware of all facts, presented Mr. Hutchinson as the man charged with impaired driving and represented him at a trial at which all facts as they occurred in regards to Mr. Woitt's arrest were adduced in evidence. The constable, when asked to identify the impaired driver he had encountered, said he recognized no one in the Courtroom as the person he apprehended. The judge then asked defence counsel, the accused: "Is your client here Mr. Doz?" The accused replied: "Mr. Hutchinson is here" (of course, Mr. Hutchinson's name appeared on the information). In cross examination the accused asked the police officer, while pointing at Mr. Hutchinson: "... was that the man you charged that evening?" The officer repeated that he did not recognize Hutchinson as the person he arrested. The accused then addressed the Court and said if the Judge found there was sufficient identification to convict Hutchinson, he would call his client who would tell the Court where he was on the evening in question. When the trial judge said: "tell it to the Court of Appeal, I find the accused guilty", the accused changed his mind and said he wanted to adduce evidence in defence. He called Mr. Hutchinson who, of course, testified that he was on the evening in question at a place other than where Mr. Woitt was arrested. When Mr. Hutchinson was asked how he learned of these proceedings he said that his sister had "reemed him out" at a party for being on the Court docket for impaired driving. He then had retained Mr. Doz, the accused, who had confirmed that his sister was correct. The prosecutor showed Mr. Hutchinson the mug shot of Mr. Woitt and asked if he knew who that was. He replied: "It's not me anyway". Despite the fact that Hutchinson and Woitt were friends he answered: "No, not that I recall" when asked if he ever had seen the individual before. Defence Counsel (the accused) lamented how unfortunate it was that Mr. Hutchinson had been compelled to present a defence, and the Judge dismissed the case but suggested that an investigation should be conducted.

Hutchinson told his parents what he had done. They made him aware that he had committed perjury and retained counsel for their son. Consequently Hutchinson told police the whole distorted story. When Woitt was interviewed he confessed also.

Woitt was charged with personation and failing to appear on the impaired driving charge. He was sentenced to four months. Hutchinson was not charged with anything. Mr. Doz, the lawyer, was convicted of being a party to the offences of:

1. Personation;
2. Obstruction, perversion or defection of the course of justice; and
3. Perjury.

He appealed the convictions.

The Alberta Court of Appeal held that when the trial was conducted in which Hutchinson acted the part of the person charged with the offence, the "motorist" who was apprehended on the night in question was, for all intents and purposes, the accused; not Hutchinson. This as Doz and Hutchinson as well as Woitt (the motorist) knew of the charade. Doz claimed that his legal ethics had precluded him from stating what he knew, namely, that the accused (the motorist) was not in the courtroom. These assertions, said the Court of Appeal, were unbelievable and incredible. As an officer of the court, Doz's primary duty was not to deliberately mislead the court. Said the Justices in respect to obstruction of justice:

> "By his conduct he (Doz, the defence lawyer) was not only guilty of conduct unbecoming a barrister, but also of the criminal offence of attempting to obstruct justice as charged".

The Court of Appeal held that all of the elements that led to a conviction of obstructing justice were the same as those adduced to seek convictions of personation. Therefore, a conditional stay of proceedings was directed on the charge of personation. Should Doz win a further appeal on the obstruction charge the judicial stay in personation would be lifted.

In respect to the conviction on the perjury charge, Doz' appeal was dismissed. Although Hutchinson was called to testify "on the spur of the moment" he lied as Doz expected him to do.

Appeal allowed in part only.

* * * * *

INTERCEPTING A PRISONER'S TELEPHONE CONVERSATION - PRIVATE COMMUNICATION - WARNING POSTED THAT CALLS MAY BE MONITORED

Regina v. Rodney - 12 C.C.C. (3d) 195
British Columbia Supreme Court, April 1984.

The accused was in a provincial correctional institute awaiting to be tried for murder. A correctional officer saw the accused using the telephone on one of the tiers. As he seemed unusually agitated the officer went to the director's office and listened in on the accused's conversation on the monitoring system. The officer recognized the accused's voice but not that of the woman he was having a conversation with. The woman spoke a German type language while the accused's part of the communication was in English. The conversation was monitored but not taped and the officer made notes of what the accused said. Whatever that was, it must have been of interest to the Crown as it was adduced in evidence at the murder trial. The defence, of course, objected to the admissibility of the evidence despite the fact that above the telephone the accused used, was a warning saying: "All personal calls may be monitored". The Crown claimed that the accused was the originator of the monitored communication that was adduced in evidence (only what he said was presented) and the sign made it reasonable for him to expect that his communication would be intercepted. Therefore, the communication was not private (see definition in s. 178.1 C.C.) and its admissibility in evidence not subject to the provisions of the Privacy Act contained in the Criminal Code. The defence, of course, argued that the communication was private, the interception therefore unlawful and that without the consent of the accused or the woman he spoke to the evidence given by the correctional officer was inadmissible.

The test whether it was reasonable for the accused to believe that his call was going to be intercepted is an objective one. That means that it is not what the accused believed at the time but what a reasonable person may have thought in the circumstances. The Crown attempted to persuade the Court to hold that... "a reasonable inmate standing in the shoes of the accused would have read the signs" that all phones are subject to monitoring. The Court did not agree and held:

> "On the whole of the evidence, I am not satisfied that the Crown has established beyond a reasonable doubt that it was reasonable for the accused, using an objective test of reasonableness to expect that his telephone conversation with the woman to whom he was speaking would be listened to by any person other than the woman to whom he was speaking".

Communication ruled inadmissible.

* * * * *

CONSTITUTIONAL PROPRIETY OF PRESUMPTION THAT GOODS OBTAINED BY N.S.F. CHEQUE WERE BEGOTTEN BY A FALSE PRETENCE

Regina v. Bunka - 12 C.C.C. (3d) 437
Saskatchewan Court of Appeal.

The accused issued an N.S.F. cheque for goods he purchased. The cheque was presented for payment within a reasonable time and in accordance to s. 320(4) C.C. it was presumed that the goods were obtained by a false pretence. The accused appealed the conviction claiming that the presumption violates s. 11 and 7 of the Charter, which spell out respectively the well-known presumption of innocence and that we cannot be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.

The Saskatchewan Court of Appeal applied the test suggested by their Ontario counterpart to determine the propriety of statutory and common law presumptions of guilt. The Justices held that the presumed fact (that the goods were obtained by a false pretence) and the facts prerequisite to the presumption (presentation of cheque within a reasonable time; dishonoured due to insufficient funds; absence of evidence that accused had reasonable grounds for believing that cheque would be honoured) had a logical connection and relationship. The prerequisite grounds made the presumed fact more than probable.

Appeal dismissed.
Presumption not contrary to Charter.

* * * * *

THE DEFENCE OF NECESSITY

CAN ONE BE EXCUSED FROM HAVING COMMITTED AN OFFENCE IF HE FELT IT WAS NECESSARY IN THE CIRCUMSTANCES TO COMMIT THE OFFENCE?

Perka, Nelson, Hines, Johnson and The Queen, Supreme Court of Canada, October 1984.

The accused were on the Pacific Ocean en route to Alaska with a cargo of $7,000,000 worth of marijuana. They were sailing outside the Canadian 200 mile limit, when, according to their testimony, they encountered mechanical problems and heavy weather. The captain decided to put in a bay on the west coast of Vancouver Island, offload and make repairs. Police moved in, made arrests and seized ship and cargo. The accused successfully raised the defence of necessity and were acquitted of importing a narcotic and possession for the purpose of trafficking. The B. C. Court of Appeal ordered a new trial and the accused appealed that decision to the Supreme Court of Canada.

There were several grounds for appeal but the kernel one was whether or not there exists in Canada a defence of necessity and, if so, when is it available.

This case seems a landmark decision in that it was not certain whether the defence of necessity existed in Canada. The British common law was of no help as legal scholars and authors cannot agree if in England such a defence is recognized. Yet, for centuries the courts have responded that a man may be excused from committing a crime if he had no choice in rejecting a greater evil.

One crucial aspect of this "ill defined and elusive" defence has always been whether we can afford such a legal luxery. One can imagine all the innovative fabrications that could "very easily become simply a mask for anarchy". On the other hand when a man commits a crime to prevent a more serious wrong or harm, should he then not be at least excused from committing the less pernicious one?

When Dr. Morgentaler raised this defence, he argued that procuring a miscarriage contrary to the Criminal Code was an act of necessity to prevent graver evil to the woman. When this issue reached the Supreme Court of Canada in 1976*, the defence of necessity was no longer the kernel issue. The Supreme Court's opinion was, that if the defence existed, it was not available to Dr. Morgentaler in the circumstances. Said the Court about the defence of necessity:

> "If such a principle exists, it can go no further than to justify non-compliance in urgent situations of clear and imminent peril when compliance with the law is demonstrably impossible".

* 1 CSRX (1976)

These words apparently triggered a belief that the defence exists and it was since successfully raised in four cases.

The Supreme Court of Canada blamed all the ambiguity about this defence on the Courts having failed to determine the distinction between two related principles. The one is where a person for practical reasons in an emergency situation, is justified to break the letter of the law to avoid a greater harm. The other is where for humanitarian reasons, it is, in an emergency, excusable to break the law if compliance would impose an intolerable burden on the accused. In criminal theory there is a distinction between "justification" and "excuse".

> "A justification challenges the wrongfulness of an action which technically constitutes a crime...." "In contrast, an excuse concedes the wrongfulness of the action but asserts that the circumstances under which it was done are such that it ought not to be contributed to the actor".

Police may be "justified" in shooting a hostage-taker. The action is in certain circumstances rightful. "The concept of punishment often seems incompatible with the social approval bestowed on the doer".

Necessity goes to excuse conduct, not to justify it.

When a person commits a crime while drunk, mentally ill, or sleep walking, no matter how we disapprove of his criminal act, the law may consider it an "excuse" sufficient not to impose punishment. For a criminal act to be "excused", it must be one of "moral involuntariness".

If one goes through the Criminal Code, a number of "excuses" and "justifications" for the commission of offences can be found. These are commonly raised as a defence or the wording of the codified definition of the crime may exclude "justification" or the defence of "excuse". However, in terms of the defence of necessity the statutes are not exhaustive. Those that are valid "excuses" but not on our statute books, are labelled the "residual defence of necessity".

Having said this, the Court dealt with the limitations of the "greater good theory" with the obvious objective to prevent exploitation of this defence. The Court prefaced that part of the judgement by saying:

> "... I retain the skepticism I expressed in Morgentaler. It is still my opinion that, no system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value".

Reiterating the meaning of "the excuse of necessity" the Court said that "... humane criminal law cannot hold people to the strict obedience of laws in emergency situations where normal human instincts, whether self preservation or of altruism, overwhelmingly impel disobedience". Although the act is still a crime in the circumstances, it is excusable. There cannot be praise for the act, but only pardon. After all, despite the overwhelming urge to commit the offence, in the circumstances the act was voluntary.

The Court gave a very vivid example of this theory. A man can find himself lost in the elements and come upon a dwelling. To avoid freezing to death he breaks in. He may well help himself to provisions and damage the house or its content to make a fire. Though he voluntarily broke in and committed mischief, "realistically his act is not a voluntary one". His choice was not a true choice at all, said the Court. It simply amounts to "moral or normative involuntariness".

Then the Court established the limitations of this defence of necessity. The Supreme Court, probably concerned that the defence would be abused prefaced this part of their reasons for judgment by emphasizing that it must "be strictly controlled and scrupulously limited to situations that correspond to its underlying rationale". Again the Morgentaler case was used as an example where the defence of necessity was not available. Said the Court:

> "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable".

The wrongful act must be unavoidable and there must not be a legal way out. Having established that, a Court must consider the proportionality of the offence to decide if the defence is available.

> "No rational criminal justice system, no matter how humane or liberal, could excuse the infliction of a greater harm to allow the actor to avert a lesser evil".

Then the court dealt with the inevitable question about the availability of this defence for a person who got into the predicament (where he of necessity committed an offence) because of his own negligence; or if one can have the benefit of this defence when he, like in this case, was or was about to commit a crime. The accused claimed that when they decided to head for shore to preserve their lives, they were outside Canadian waters. Therefore, as far as Canadian law is concerned, they were, when the necessity arose not doing anything illegal. Therefore, the Crown's argument that the

defence of necessity was not available to the accused on account of their criminal activity at the time, did not receive too much attention. Nevertheless the Court answered the question and offered an opinion that it had grave doubts that illegal activities of a person at the time the necessitous circumstances arise deprive that person of the defence of necessity for his responsive criminal action. The two acts are separate. After all, the original unlawful behaviour is punishable. Said the Court:

> "Necessity goes to excuse conduct, not to justify it. Where it is found to apply it carries with it no implicit indication of the deed to which it attaches. That cannot be over emphasized".*

The only time that "fault" on the part of an accused for the emergent situation is relevant to the availability of the defence of necessity, is when it was "clearly foreseeable to a reasonable observer". Then what confronted the accused was not the kind of emergency intended to excuse responsive action. If he ought to have known that his actions were likely to create an emergency to which he would have to react unlawfully, then his reaction is not "moral involuntariness".

Now that we seem to have the defence of necessity, is there an additional burden on the police and Crown to prove in all cases that what the accused did was not in response to an emergent situation which would excuse his wrong doing? Does the absence of such evidence in the Crown's case result in an acquittal?

The Court responded that normally, voluntariness may be presumed. In regards to the defence of necessity, the accused needs not to prove anything. However, should an accused through his own witnesses or cross-examination of Crown witnesses place sufficient evidence before the Court to raise an issue that an emergent situation caused him to act, then the onus is on the Crown "to meet that issue". Where the charges are under the Narcotic Control Act the same principle applies, despite section 7(2) of that Act.

This Supreme Court of Canada's decision on the defence of necessity can be summarized as follows:

1. The defence of necessity should be recognized in Canada as an excuse (not justification);

* This view contradicts the views expressed by the Nova Scotia Court of Appeal in the nearly identical case of R. v. Salvadore (1981) 59 C.C.C. (2d) 521 and of the U. S. National Commission on Reform of Federal Criminal Laws.

2. The moral involuntariness, which is the criterion, implies no vindication of the wrongful act;

3. The moral involuntariness must be measured on society's expectation of normal resistance to pressure;

4. Negligent, criminal, or immoral activities at the time the emergent situation arose, does not disentitle an accused to the defence of necessity;

5. Any activities or evidence that the wrongful act was not truly involuntary or the existence of a legal alternative does disentitle an accused to the defence of necessity;

6. The involuntary wrongful act must be inevitable, unavoidable and afford no reasonable opportunity for lawful alternative action;

7. The wrongful act must have been taken to avoid an immediate peril; and/or

8. When the accused adduces sufficient evidence to raise the issue, the onus is on the Crown to melt it beyond a reasonable doubt.

In this case, the trial judge did not instruct the jury to consider if there was a legal way out of the predicament the accused found themselves in and which they claimed caused them to enter Canadian waters. Although the Court did not say so, they had for instance the opportunity and equipment to call the Coast Guard for assistance but chose not to do so.

Appeal dismissed.
Order for a new trial upheld.

* * * * *

IS AN ADOPTED DAUGHTER THE EQUIVALENT OF A STEPDAUGHTER, FOSTER DAUGHTER OR FEMALE WARD? - DISCRIMINATION

Regina v. McIntosh - 13 C.C.C. (ed) 130
Manitoba Court of Appeal, May 1984.

The accused married a woman who had, at the time of their marriage, a two year old girl born out of wedlock. The accused was not the natural father. Shortly after the marriage the accused adopted the girl. When the girl reached the age of sixteen he had sexual intercourse with her on several occasions. When she was 18 years of age the accused was charged under section 153 C.C. which prohibits a male person to have illicit sexual intercourse with his step or foster daughter or his female ward. The Crown selected to call the complainant a foster daughter in the indictment. The trial judge acquitted the accused holding that the girl was not a foster daughter. The Crown appealed this decision.

The Manitoba Court of Appeal dealt firstly with the application of "the narrow construction doctrine". In 1951 already, the Supreme Court of Canada* held that the rigorous pursuit to apply the letter of penal laws, had lost its force. The Court instructed the judiciary to consider not the semantics of statute but to interpret the language of the legislature "honestly and faithfully" and in such a way that it can remedy what it was intended to remedy and to promote its object.

Section 11 of the Interpretation Act gives similar instructions to our Courts as it says:

> "Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures attainment of its objects".

The Manitoba Court of Appeal, after examining also the French version of section 153 C.C., concluded that the section intends to provide to an entire class of female persons "protection from their male guardians, be they permanent, temporary or adoptive guardians". The mischief the section prohibits is an act of sexual intercourse by a male guardian or parent.

The most interesting submission in this case was the claim by defence counsel that section 153 C.C. is contrary to the Canadian constitution (s. 15 Charter**) as it discriminates against "male persons". The Criminal Code section protects female persons only and creates a criminal liability for male persons only. Unless nature dictates that only one sex is able to commit the offence or that because of such

* R. v. Robinson et. al. 100 C.C.C.
** See s. 32(2) of the Charter.

dictate only one sex is in need of protection, then the law prima facie discriminates and should be declared invalid.

The Manitoba Court of Appeal in rejecting this submission, said that the law does discriminate not from an Act of Parliament but from an act of mother nature. Also:

> "A male person can force himself into a female person to the extent of penetrating her body with his penis".

The reverse is quite impossible concluded the Court. All a woman can do is seduce a male person to do so to her. Therefore, the defence position was labelled a "vein attempt" to force equality by mixing "apples with oranges".

Crown's appeal allowed.

Comment: Other Courts may well respond differently to the question of section 153 C.C. being discriminatory.

The repeal of the "rape" section and including such act in sexual assaults, was likely part of cleaning up apparent discriminatory law. Rape could, in terms of being the principal offender, only be committed by a male person. To say that this was the result of an act of "mother nature" was a sound argument where it involved sexual intercourse without consent. However, if one examines the means that rendered a man to be criminally liable for having sexual intercourse with a female person with her consent, one cannot help but conclude that a woman was equally capable of forcing the act upon a man by the same means. Although submissions of discrimination in regard to the definition of rape did fail, it seems fair to say it was only a matter of time before "rape" as it was, would have been found discriminatory.

Apparently the Manitoba Court of Appeal found that section 153 C.C. does not discriminate in that a man only is capable of an act which previously was known as rape. Is it not fair to say that if a male guardian "rapes" his step or adopted daughter the appropriate charge would be one of sexual assault? Rape, as we have learned to understand the meaning of that act, appears not to be the gravaman of the offence created by section 153 C.C. It seems that the illicit sexual intercourse with a step or adopted daughter is the kernel of the offence whether outright consent, seduction or intimidation is involved. If that is so it should be noted that a stepmother is equally capable to seduce or intimidate a stepson or adopted son. One wonders if Parliament, by enacting section 153 C.C. intended to create surrogate incest. If so, male children ought to be protected equally to those of the female pursuasion, while it matters not if it is a step-father or step-mother who sexually exploits the child placed in their charge. It seems not unlikely that section 153 C.C. will be "nutured" by Parliament in the not too distant future. If not, it may eventually be ruled inconsistent with section 15 of the Charter of Rights and Freedoms.

* * * * *

CHARTER OF RIGHTS AND FREEDOMS ABOUT "UNREASONABLE SEARCH"

Hunter v. Southam Inc., Supreme Court of Canada, October 1984.

In the last volume I welcomed the views of the B. C. Court of Appeal* on "unreasonable search", but warned that these views could be superseded by the Supreme Court of Canada. This Court of the last resort has now interpreted some fundamental aspects of section 8 of the Charter (unreasonable search) and they do not coincide with the views of the B. C. Court of Appeal. What is to be remembered is that the two cases (Hamill and Hunter v. Southam) are in terms of circumstances distinct in that in Hamill the constitutionality of writs of assistance and section 10 N.C.A. were challenged while in the Hunter case the statutory provision for, in essence, a warrantless search by the Combines Investigation Branch became subject to an application for an injunction. Both challenges were argued in light of the constitutional right to be secure against unreasonable search and seizure. However, despite the distinction in circumstances, should the views of the Supreme Court of Canada as expressed in Hunter have preceded the Hamill case the decisions of the B. C. Court of Appeal would likely have been different. As a matter of fact on some points explicitly made by the B. C. Court of Appeal the Supreme Court was equally explicit in expressing different views. One major point in particular, was seen differently by the Supreme Court of Canada. The B. C. Court of Appeal steered clear from law that has resulted from the Fourth Amendment to the U. S. Constitution; the Supreme Court of Canada, however, held that in view of the objectives of section 8 of the Charter and the U. S. Fourth Amendment, that the U. S. approach "is equally appropriate in construing the protections in s. 8 of the Charter of Rights and Freedoms". This could, particularly if the Charter is considered to be complementary rather than supplementary, open a can of legal worms (whatever way you want to take this, the expression seems to fit).

Members of the Combines Investigation Branch conducted a rather thorough search of the offices of the Edmonton Journal, a newspaper owned by Southam Inc. Their objective, of course, was to find documentary evidence of offences under the Combines Investigation Act. This Act provides that the Director of the Branch or any representatives authorized by him, may enter any premises on which he believes there may be evidence relevant to an investigation.

* The Queen v. Hamill Page 26 Volume 17 of this publication.

Apparently to prevent abuses and arbitrary searches the director or his representatives must produce before searching, a certificate from a member of the Restrictive Trade Practices Commission, which can be granted, like a search warrant, on an ex parte application by the Director.

The lawyers for Southam Inc. argued that the search was, for all intents and purposes a warrantless search. The procedures prescribed in the Combines Investigation Act to have a search authorized, is proscribed by the Charter, which guarantees us, within reasonable limits, the right to be protected from unreasonable search and seizure. The provisions under the Combines Investigation Act, to carry out searches, hardly ensures appropriate consideration for authorization for such search the Southam lawyers argued. They had applied for an injunction which appeal ended up in the Alberta Court of Appeal. This court ordered that the seized documents be sealed in containers pending this appeal to the Supreme Court of Canada.

The Supreme Court of Canada firstly addressed how the Courts must approach the Charter. The Court recognized that there has always been growth in terms of law protecting the rights and freedoms of individuals. However, now that we have entrenched those rights and freedoms in our constitution and have declared that they are the supreme law of Canada, they must receive greater attention and consideration. We have not reached the ultimate of civilization and we must encourage and allow growth and development over time. This constitution was "drafted with an eye to the future" said the Court. It is not to be seen like Canada's last will and testament, the end of something, but rather as a framework for the legitimate exercise of governmental powers. It is simply a firm commitment and a most significant stage in the continued building of constitutional evolutionary process.

To best explain the views of our Supreme Court, their findings are, in point form, as follows:

1. In Canada we have been inclined to use the provisions of the trespass laws to weigh the propriety of governmental searches and seizures of property. In other words, if one (if it was not for the warrant) would be a trespasser at the location to be searched, the document is a necessary ingredient. Section 8 of the Charter has not destroyed this concept but broadened it. Holding like their U. S. counterparts, the Justices of our Supreme Court were unanimous in saying that section 8 does not just protect places, but people and their privacy. This creates and describes the scales on which we must from hereon in weigh the propriety of a warrant or the search and seizure of any property. The reasons for judgment record:

   "The guarantee of security from unreasonable search and

> seizure only protects a reasonable expectation. This limitation on the right guaranteed by Section 8, whether it is expressed negatively as freedom from unreasonable search and seizure, or positively as an entitlement to reasonable expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement".

2. Whether a search or seizure was reasonable is usually determined after the fact, when it is deliberated at trial if there was an infringement of a person's rights or freedoms. However, there is now an obligation placed on us by section 8 of the Charter to prevent such unreasonable intrusions. By means of a warrant the judiciary certify that it was demonstrated to them that the state interest superseded that of the person and his privacy. Therefore, wherever feasible such validation should precede a search or a seizure. Fully cognizant of the fact that it is not in all circumstances practical to insist that a warrant be firstly obtained the Supreme Court of Canada nevertheless held that a search or a seizure without a warrant is ipso facto (automatically) unreasonable. In addition, the Court held that a warrantless seizure places an onus on the Crown to show that the search for it and the seizure itself were "reasonable" within the meaning of s. 8. of the Charter.

3. The Supreme Court of Canada held that the Charter being supreme law means that the validity of legislation that empowers investigators to search without warrant or on the authority of persons who hold a certain office, can be tested. Whether the person who is empowered to authorize a search is a member of the judiciary is not important, as long as he is in a position to act judicially. That means he or she must be impartial in the matter. If that person is part of the investigative branch which is seeking the authorization that hardly meets that test. In other words, he or she must be neutral and detached. Therefore a search authorized by the provisions of the Combines Investigation Act (as explained above) is unreasonable and those provisions are inconsistent with section 8 of the Charter and are, therefore, of no force and effect.

   Any statutory scheme for prior authorization must not only allow the issuer of the authorization to investigate the probability that the property to be searched for is at the location to be searched, but must compel him to do so.

   The question asked of the Supreme Court of Canada was if the provisions of the Combines Investigation Act under which the search of the Edmonton Journal was authorized were of no force or effect. The answer was a unanimous and resounding "Yes".

Comment:

This judgement will undoubtedly have a considerable ripple effect. It is a quantum departure from what was established at common law and from what the Courts had to say about section 8 up until now. I hardly know where to begin my speculations and predictions. Firstly, I believe that all the theories that s. 8 did not apply to the Privacy Act and the interceptions of private communications may have been erroneous. If the section is intended not only to protect property but persons and/or their privacy, this, no doubt, includes their communication. Furthermore warrants under the Criminal Code can be issued for buildings, receptacles and places. The latter means geographical places and there seems nothing to prevent warrants from being issued for a street or any other public place. Since a warrantless search or seizure is by its very nature unreasonable unless the Crown shows otherwise, this leaves one pondering if warrants must now be obtained for seizures police have customarily made without a warrant. It also leaves one wondering if proof of reasonable search is now an ingredient to the crime alleged against an accused?

It must be remembered that the Supreme Court of Canada did not deal with the exclusionary rule (s. 24(2) Charter), but did simply say that no warrantless search is reasonable unless the Crown shows it is. This means that what the B. C. Court of Appeal established in Collins* in respect to infringements of rights vis-a-vis the exclusionary rule is now no longer valid, where the infringement is an unreasonable search on account of it being warrantless. The Supreme Court did not go so far as to say that the Crown has to prove in criminal prosecutions that there were no infringements of freedoms or rights during the investigation. In cases other than those in which a warrantless search is involved, we should assume that the Collins precedent still stands, that is that the accused, to trigger consideration under the exclusionary rule, must show on the balance of probabilities that his rights or freedoms were infringed.

The Supreme Court of Canada said that if there are statutory provisions for a person to authorize a search, then the test of validity of those provisions depends on whether that person can act judicially. This may well be the judicial death blow** to the writs of assistance issued under the Narcotics Control Act and the Customs and Excise Act. These documents "shall" be issued by the Federal Court upon the application of the competent minister. This means that the Judge is acting administratively and not judicially when he issues this licence to search. After all, the judge has no discretion in the matter.

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* See Volume 12, page 1 of this publication.
** A legislative one is promised by the Minister of Justice.

IMPLIED THREAT AND ROBBERY

Regina v. Tardiff, County Court of Vancouver, Registry No. CC840163 - October 1984.

The accused who visibly wore a sheath knife on his hip, went into a store, ordered the cashier to open the till, and give him a paper bag. The victim complied and the accused grabbed approximately $370 after which he fled on foot while followed by the store owner to an apartment block.

Defence counsel argued that what the accused did amounts to theft but not robbery, in that there was no violence or threats of violence to the victim. In support of his submission he drew the Court's attention to a case* where a charge of robbery was reduced to the included offence of theft. The perpetrator in that case had put an empty shopping bag in front of the teller and said, "Put the money in. This is no joke". The teller had simply replied that she, the accused, was at the wrong wicket. She, saying "I don't care", moved to a different wicket where she was successful because the teller felt threatened and did comply. Another Ontario case** with similar results in respect to the Court's decision, was discussed. The accused, wearing ski-mask said to a laundromat attendant, "Give me all the money in cash". She promptly started to cry out of fear. The accused had then in a polite way and in a normal tone of voice assured the victim that he had no intention of hurting her and that all he was after was the money.

Defence counsel in this case argued that since the visible sheath knife was not referred to or touched, the coincidence that the accused was wearing this implement (which is not unlawful) ought not to be of any consequence in respect to the alleged offence. The knife was in the circumstances not a "weapon" and therefore the accused was not armed.

Crown Counsel argued that when the accused committed the theft of money he was armed with an offensive weapon as he had equipped himself with the knife and wore it visibly to intimidate and threaten his victim. He asked the Court to follow a decision by the B. C. Court of Appeal†. In relation to the issue whether a person is armed at the time of a theft the court had held that conduct is a significant factor. The accused in that case had "played out a pantomime to give

* R. v. Thierbault (1981) 61 CCC (2nd) 175
** R. v. Letourneau and Rochon - Unreported - April 1982
† R. v. Sloan (1974) 19 CCC (2d) 190

the impression that he had a weapon" and as a consequence he was charged with robbery in that he committed theft while armed with a weapon. The Court held that he could not be convicted as charged although his conduct might have justified a conviction of robbery using threats of violence or assaulting his victim (see definition of assault).

In this case the accused, like the accused in the case decided by the B. C. Court of Appeal, was charged with theft while armed with an offensive weapon. The accused visibly wore a knife while his historical counterpart only made his victim believe he was armed. This begged the question if (considering that many items may and can be used as a weapon) any tool or piece of clothing may be considered to be an offensive weapon when worn by the perpetrator during the commission of a theft.

The most frequently referred to case when defence counsel attempts to argue that there is doubt that theft amounted to robbery, is that of a man giving a bank teller in Victoria, B. C. a paper bag with the words "empty your till" written on it. The trial judge held that the words amounted to a demand that, coupled with the man's conduct, should be regarded as a threat. What in essence was said was "empty your till - or else". In other words, the conduct is of utmost importance.

The "or else" was also strongly implied in this case.

Accused convicted of robbery.

Comment: The County Court Judge obviously stayed away from finding that the accused was armed despite the fact that the charge alleged stealing while armed. He simply found as a fact that the knife was visibly worn. The knife, the words spoken, and the general conduct of the accused had given the victim reasonable and probable grounds to fear from the implied threat. In a way the knife became part of the conduct.

It seems that the question whether the accused was armed is a difficult one; as difficult as determining whether a person commits assault by being armed (see section 244(1)(c) C.C.). To beg, accost or impede anyone while openly carrying a weapon amounts to assault. This subsection was inserted in the mid seventies to discourage aggressive begging. I cannot recall reading a case where someone was charged with assault as defined in this section. It is obvious what Parliament attempted to remedy, but I believe it will fail to be remedial. The definition of "weapon" is predicted to cause the problem.

What intimidates the victim of this sort of assault are the knives, chains, belts and buckles and whatever other paraphernalia is worn by persons the section is aimed at. However, by definition, a weapon is something designed to be a weapon or anything intended to be used as such. What persuades the "beggee" to give an alm is what he or she believes may be used as a weapon while the law refers to what is in the mind of the "beggar". What is a kitchen utensil, a pants-holder-upper, or an ornament to the rambler and beggar is a weapon to the "beggee". It seems from the cases explored in this case, that when this section 244(1)(c) C.C. fits the scenario the act amounts to robbery.

In essence, this definition of assault attempts to remedy something that is "in the eye of the beholder" while the definition of weapon addresses what is in the mind of the perpetrator.

It seems that when an alm is obtained because of "the weapon" worn by the begger, the so-called begging amounts to robbery. If this is not so then, facetiously speaking, all the accused in this case had to do was add "please" to the words he spoke to the teller and his act would have amounted to no more than assault.

* * * * *

ARBITRARY DETENTION

Not Releasing an Impaired Driver when There is no Apparent Further Need for Custody

The Queen v. McIntosh, B. C. Court of Appeal, B.C.C.A. 002074, September 1984.

The accused was, on appeal, acquitted in County Court of "over 80 mlg." (see page 20 of Volume 16 of this publication). He was considered to have been co-operative all through the investigation and had requested, at its conclusion, to be permitted to make arrangements for transportation home. Although he had apparently no grounds for so believing, the officer testified that the accused just might have returned to his car and driven again. He, therefore decided to place the accused in cells where he was held from 22:30 hours until 9:10 hours the following day. Expert testimony showed that considering the reading obtained, the accused was considered sober at 3:00 hours, and it was clear that none of the other grounds under s. 450(2)(d) C.C. existed to continue the custody of the accused.

The County Court Judge had found that the accused had been arbitrarily detained and had concluded that acquittal was the appropriate remedy for this infringement of the accused's right (s. 24(1) Charter). The Crown appealed this decision.

Regrettably the B. C. Court of Appeal did not get to deal with the propriety of acquitting the accused as a remedy to the infringement. To do so the Court had to find firstly that there was an infringement of the accused's right. Surprisingly, the justices found that in these circumstances, there was no such violation. Furthermore the application of the circumstances as related in the reasons for judgement by the B. C. Court of Appeal is less slanted towards arbitrary detention than that by the County Court.

Firstly, everyone including the accused was complimentary about the Constable's handling of the investigation. He had been fair, polite and treated the accused well; he had been forthright in his evidence and was described as a credible witness with impressive experience in apprehension of impaired drivers.

When cross examined why he had not allowed the accused to go home by taxi or to be picked up by his wife, the Constable had responded:

> "... most drivers who find themselves in this situation will say anything to get out of the police office";

> "... a person has to be reasonably sober to understand the appearance notice";
>
> "... accused persons under similar conditions and the person released has gone back to the vehicle and committed the same offence";
>
> "... accused persons fail to appear in accordance with the provisions of the appearance notice and the court has held the person was too drunk to understand the appearance notice";
>
> "... I could not convince myself he would not have driven";
>
> "... I had doubts he would try other means to get home and would drive".

When asked more specifically why he had locked the accused up the constable had testified:

> "The accused was retained to prevent a repetition of the offence";
>
> "Solely because he was drunk";
>
> "I could not release him in that condition";
>
> "I do not know what he would have done. I would not take that chance".

The County Court Judge had labelled these reasons as mere speculation on the part of the officer and falling short of continuing the custody on reasonable and probable grounds that the public interest was not satisfied.

The B. C. Court of Appeal, as stated above, only addressed whether the test of public interest under section 452(1)(f) C.C. had been met. As they found that it had been, the justices needed not to answer the more interesting Charter questions. The Justices' views can best be related by quoting the highlights of their reasons for judgement. Acknowledging that the onus is on the Crown to establish that the conditions prerequisite to continued custody have been met, the Court said:

> "The fact is that the constable was faced with a man who admittedly was drunk and unfit to drive, and starting from that point it was reasonable for him to view the matter by asking whether he could meet the conditions which make it in the public interest for him to be released".

The B. C. Court of Appeal said that the County Court Judge had erred in law when he held that the reasons given for not releasing the accused amounted to mere speculation and that therefore the custody was arbitrary. The Justices said:

> "The constable had regard for the facts, particularly to the condition of the accused and to his own experience and that of other officers in dealing with similar cases.... Indeed, it was open to him to draw on the knowledge which all of us have with regard to these matters".

In addressing the submission that the accused had been co-operative and had not in words or demeanor given the constable any grounds for believing that he would drive again that night and that frequently experienced propensities on the part of impaired persons could not be considered grounds for keeping this accused locked up, the Court said:

> "That was irrelevant to the question of whether he could, with due regard to the public interest be released.... The implication seems to be that the Provincial Court Judge could have regard only to the conduct and words of the accused in determining whether the officer was justified in reaching the conclusion he did under section 452. That too, in my view, is wrong in law".

Relating what, in their view, the accused himself had provided to the constable's grounds justifying the continuation of the custody was his drunkenness and his being "adamant" to get home. Said the Court:

> "That was most germane to the question whether there was a risk of him repeating the offence".

The B. C. Court of Appeal explained their reference to "a risk" of a repetition of the offence. That question must be viewed on whether there is a risk of that occurring or that the officer could be certain that it would not occur.

> "It does not matter that the risk in statistical terms may be small. The risk which the Constable had to be concerned about was not merely that of the repetition of the offence. The more important risk was that of the serious consequences which might have ensued had the accused resumed control of his vehicle on that night".

Having explored the possible consequences, including the loss of life of an innocent bystander, the Court of Appeal said:

> "Would it then have seemed reasonable for the officer, perhaps in defending himself in disciplinary or civil

> proceedings that would surely have ensued, to say that he was doing his duty under the Charter. I think not. The Constable was carrying out his clear duty in ensuing that such disaster could not occur. The Charter in protecting individual rights, does not require that the public interest be neglected".

The issue of the custody being extended beyond the time at which, by a simple calculation it is reasonable to assume the accused was sober again was not raised at the accused's trial. Therefore there was insufficient facts known to make the decision that the custody after that point in time was arbitrary.

Crown's appeal allowed.
Conviction restored.

Comment: It would seem quite impertinent for me to write reasons why I think this binding precedent for B. C. will have a life span equal to this case or another like it, reaching the Supreme Court of Canada. In other words, I am predicting that these welcomed views of our B. C. Justices will not survive an appeal. For one thing, I do not believe that the propensities of some fellow citizen are reasonable and probable grounds to keep another citizen in custody where he personally has not indicated to do anything contrary to the public interest. With due respect, I think the Supreme Court of Canada would reason similarly to the County Court Judge who dealt with the first appeal and said there were no such grounds in relation to the accused. He had held that there was nothing more than suspicion and conjecture. However, the case raises numerous interesting questions in respect to arbitrary detention. The most basic one of which is its meaning. However, finding that the constable's reasons for continuing the accused's detention withstood the test of "public interest" as defined in the Criminal Code, the Court did not have to deal with that issue.

* * * * *

ADMISSIBILITY OF EVIDENCE OF BREATH ANALYSES WITHOUT EVIDENCE OF SUSPECT HAVING BEEN INFORMED OF RIGHT TO COUNSEL

Regina v. Copley, County Court of Vancouver, No. CC 830036.

The accused was acquitted of "over 80 mlg.". Breath samples had been taken on demand but no evidence was adduced by anyone that the accused had been informed of her right to counsel. The trial judge had taken the position that the Crown's failure to show that section 10 of the Charter had been complied with, was evidence of an infringement of the accused's right which was fatal to the acceptance of the analyses evidence (s. 24(2) Charter). The Crown appealed the acquittal on the grounds that: (1) the accused was not "detained" at the time the samples were taken; (2) there was no infringement and in any event the accused should have shown on the balance of probabilities that there was an infringement; and (3) if there was an infringement the admission of the evidence would not bring the administration of justice into disrepute.

The first question the Court had to deal with, of course, was whether the accused, when she gave the breath samples, was "detained". If so, the officer had been obliged to inform the accused of her right to counsel. The officer had testified that as far as he was concerned the accused was detained. He came to this conclusion as he would not have let her leave if she had been so inclined, and the fact that he had to use "verbal force", to get her to accompany him. He had not arrested her.

The appropriate answer to the question whether a person in these circumstances is detained, still "floats" among the judiciary. On this issue, many apply or find comfort from a decision by the Supreme Court of Canada in 1980*. In that case the suspect was demanded to give a sample of breath in a roadside screening device and was therefore not obliged to accompany the officer. Some judges feel that that distincts that case from those where one must accompany police. Others express the opinion that the case is no longer a valid test to determine if the suspect was detained as it was argued under the Bill of Rights. Although the wording in regard to right to counsel is nearly identical to that in the Charter, they feel that the latter being the supreme law of Canada, must receive greater consideration than the provision under the Bill of Rights. The 1980 Supreme Court of Canada decision was that a person is not detained by simply complying with a legal obligation, but that detention is determined by the physical restraint placed on the person. Yet judges have found that handcuffed impaired driving suspects, transported in secured police vehicles were not detained as long as they had not been arrested, but were only under demand to provide samples of breath.

* R. v. Chromiac 49 C.C.C. (2d) 257 - Also see page 3 of Volume 1 of this publication.

The Saskatchewan Court of Appeal* held in 1983 that a person who is under demand to accompany a police officer, is detained. The Ontario and Alberta Courts of Appeal seem to have disagreed with their Saskatchewan counterpart.

In B. C., the matter has not reached (to the best of my knowledge) the Court of Appeal yet and this County Court Judge was pretty well obliged to follow the precedent he himself set on this issue, in R. v. Leemhuis**. He had followed the reasoning by the Saskatchewan Court of Appeal.

This County Court Judge expressed the view that to consider that there is no "detention" until there is a form of custody that is reviewable by means of habeas corpus would mean that detention is the equivalent of a custody after arrest. Said the Judge:

> "With respect to state that detention means some form of compulsory restraint by process of law is not realistic".

He concluded that the accused was "detained" when she gave her samples of breath.

As stated above, there was no evidence that the accused was informed of her rights and from this the trial judge had concluded that she had not been informed and hence her rights had been infringed. The Crown objected to this logic and submitted that the onus is not on the Crown to show that the Charter had been complied with. The County Court responded that there was no evidence of compliance with the Charter and the onus was on the police officer to do so. It was concluded that the accused's right had been infringed.

Then the County Court considered if the administration of justice would be brought into disrepute if the evidence obtained by this infringement was admitted. The Court instructed itself that the onus is on the accused to prove on a balance of probabilities that such disrepute would result and held that the accused had failed to do so.

* R. v. Therens 5 CCC (3d) 409
** R. v. Leemhuis X010247 New Westminster Registry

This case was one of "inadvertence" on the part of the police and "the community would not be shocked" by the conduct of the police in this case. No unfair advantage was taken.

Crown's appeal allowed.
New trial ordered.

Comment: This case was decided long before the Supreme Court of Canada gave reasons for judgement in Hunter v. Southam (See page 12). Therefore, the Court's decision that the absence of evidence to the contrary by the Crown was sufficient to show that a detained person's rights were violated, could not have derived from the decision by the Supreme Court of Canada. It dictates that any warrantless search is unreasonable unless the Crown shows that it was otherwise. One could advance an argument that the Southam decision means that the Crown is obliged to show that there were no infringements of any rights or freedoms during an investigation and that in the absence of such proof (the burden of which may well be beyond a reasonable doubt) all evidence derived from such presumed infringements is subject to the test on whether admission would bring the administration of justice into disrepute. Legal opinions are that the Supreme Court of Canada did only deal with warrantless searches and did not say that proof of absence of violation of rights or freedoms is prerequisite to the Crown's case being prima facie. In any event this County Court decision was prior to the Southam decision and it seems the judge applied what would be the interpretation of that case most adverse to the Crown. The procedure established by the B. C. Court of Appeal* was apparently not followed. Assuming that these decisions are still binding in B. C. in relation to violation of rights or freedoms other than in cases of warrantless searches, then they stipulate that to trigger consideration for the exclusion of evidence the accused must show that on the balance of probabilities his rights or freedoms were infringed.

The "detention debate" will no doubt continue until an appropriate post Charter case reaches the Supreme Court of Canada. However, I will try my hand at a prediction. The Court will hold that being under a legal obligation to do something, does not, by itself render a person being detained. The measure of physical restraint and being held in custody will determine whether or not there is detention. Actually this is not much of a prediction as it is the pre-Charter Chromiac decision in a nutshell. Many Courts have continued to apply this test to determine whether a person should have been informed of his right to counsel.

* Regina v. Collins and Regina v. Cohen CA 821232 and CA821475 respectively 1983. Also see page 1 of Volume 12 of this publication.

Police officers are inclined to apply a pretty safe test themselves. The officer testified that he would not have let the accused go if she had been inclined to leave. He determined by that test that the accused was detained and did so testify. This test is safe but probably not conclusive. It may also depend on whether the matter of detention will receive an objective or subjective test. It will, regardless of the officer's opinion, remain a matter for the Court to decide on.

* * * * *

"AS SOON AS PRACTICABLE" and HUMANITARIANISM

Regina v. Robinson, County Court of Westminster, New Westminster Registry No. X81-7085.

The accused appealed his conviction of "over 80 mlg."

The accused was involved in an accident in which his wife was injured. The attending constable had, immediately upon arrival at the scene, observed all the symptoms of impairment but failed to make the demand as the accused was seemingly sincerely concerned about his wife's condition. The officer stood by while he conversed with the ambulance crew and then drove the accused to the hospital allowing him to be with his wife for about 20 minutes. When he was assured his wife would be alright, the constable made a demand of the accused for samples of his breath.

The accused now argued that the delay in making the demand was fatal to accepting the certificate of analyses. He claimed that the demand should have been made at the scene and that humaneness could not be allowed to interfere with a strict compliance of the law. The demand simply had not been made as soon as practicable as s. 237 C.C. dictates.

Said the County Court Judge:

> "Police Officers, in doing their duty, should not be discouraged from a reasonable and humane concern for the feelings of others by a necessity for servile adherence to absolute technicality and justice should not be thwarted by their having done so".

He agreed with the trial judge that the delay had been explained satisfactorily.

Appeal dismissed.
Conviction upheld.

* * * * *

UNREASONABLE SEARCH - GOOD FAITH

R. v. Leveillee, B. C. Court of Appeal, No. 831359, September 1984.

The accused was stopped for speeding. The officer who did not know him thought that the accused just may have drugs on him and asked: "What is your record for"? The accused answered to be on probation for possession of hash for the purpose of trafficking.

The questioning continued and the accused assured the officer he had nothing on him he should not have. The inevitable question: "You don't mind then if I take a look, do you?" was replied to in silence by taking his hands out of his pockets and holding them out in front of him. This was taken as not only a consent but also an invitation to a body search. A small ball of foil was found in a film cannister in the accused's pocket. When asked what the ball contained the accused said: "Hash, it's mine".

The accused testified that his gesture was in no way intended to convey consent, but exasperation with what was happening. This had not been accepted by the trial judge and the accused's defence that the search was done without the prerequisite reasonable and probable grounds for the officer to believe that he had a narcotic in his possession and without his consent, rendered it unreasonable. He claimed the search amounted to an infringement of his right to be secure against unreasonable search and seizure and the narcotic found on him should not be admitted in evidence. As his gesture was accepted as giving consent to the search, the trial judge had held there was no infringement of rights and the evidence was admitted and the accused convicted. He appealed the conviction.

The B. C. Court of Appeal said that it was not important if the accused consented to the search. His gesture was in good faith interpreted as giving consent to the search. The officer had not "acted carelessly, maliciously or in deliberate defiance of the rights of the accused person". Therefore, assuming the search was in fact without the accused's consent, the administration of justice would, because of good faith on the part of the officer, not be brought into disrepute.

Appeal dismissed.
Conviction upheld.

* * * * *

ADVERSE WITNESS PROCEDURE

Regina v. Booth, B. C. Court of Appeal, Vancouver Registry C.A. 001743.

This case is about thieves who sold their ill-gotten goods to the accused who painted the tools so they could not be readily recognized. When one of the thieves was in the stand to testify for the Crown, he seemed to struggle with premature senility as he could remember hardly anything that was inculpatory in regards to the accused. To say the least, the Crown had an evasive witness on its hands and applied under the provisions of the Canada Evidence Act for permission to cross examine its own witness. The trial judge, in response, directed the witness to read the written statement he had given to the police during the investigation, and asked some specific questions from the witness. He concluded: "It was lack of recall" and expressed the opinion that the witness would have been entitled to read his statement to refresh his memory prior to testifying, so why should he not be allowed to read it while in the stand for the same purpose? The judge then said to Crown counsel "... carry on from there, Mr. Goodfellow". This resulted in testimony which incriminated the accused.

What may be of interest for police investigators is the use of statements from witnesses during a trial. When testimony is inconsistent with a statement the witness gave previously, the question is whether the cause is "flurry or forgetfulness". If there is an honest inability to recall, the crown witness is not legally adverse and the prosecutor should be allowed to put the witness back on the tracks by either a leading question or allowing the witness to read their previous statement. In such circumstances, there is no need to discredit one's own witness. When the lack to recall is suspected to be derived from being adverse to the interest of the party who called the witness (can also be the defence) the party may apply to the trial Court (section 9(2) Can. Evidence Act) to cross examine his or her own witness. By judicial law-making a procedure for this was established in 1971*.

1. The party who wishes to cross examine their own witness must make the court aware that they intend to make the appropriate application;

2. If there is a jury, it must retire and a voir dire must be conducted to determine whether or not the witness is adverse;

* R. v. Milgaard 2 C.C.C. (2d) 206

3. The applicant must then make the court aware what in particular between the testimony and the previous written statement, is inconsistent;

4. The trial judge must read the statement and rule whether there is an inconsistency;

5. If he finds there is not, that ends the matter; if he finds there is an inconsistency he must call on the applicant to prove that the statement was made by the witness which must be done by calling witnesses in the event the witness refuses to admit having made the statement; and

6. If at the conclusion of the voir dire the trial is satisfied that it was indeed the witness' statement, he must recall the jury and he may allow the applicant to cross-examine his or her own witness.

In this case that procedure was not followed. Defence counsel had objected when the trial judge, in response to the Crown's application allowed the witness to read his statement and then carry on with the trial. This was the ground for appealing the accused's conviction. Crown counsel, can assumed to have claimed that the trial judge had decided the witness was not adverse but simply had a lack of recall and remedied the situation by letting the witness read his previous statement. However, it is not too clear what was held.

The Court of Appeal reminded that the witness was an accomplice and that the evidence he gave was inconsistent with his previous statement. Therefore, the trial judge should have made a decision if the witness was adverse. Resolving the doubt in favour of the accused the Court of Appeal held that the trial judge probably held the witness was adverse and used the wrong procedure. In any event he did not have a fair trial.

As the Crown was not interested in a new trial, the Court quashed the conviction for possession of stolen property.

Comment: Some refer to an adverse witness as a hostile witness. Some of our judiciary claim that for all intents and purposes there is no difference but others have held that they are quite distinct from one another.

For instance, if on a certain issue a witness is apparently adverse to the interest of the party that called him, and the testimony is inconsistent with a previous statement, then if the trial judge concludes that the witness is indeed adverse, he may be cross-examined by the party that called him. However, such examination is restricted to that portion of the testimony that is inconsistent with the previous statement.

If the witness in addition, does show in his general demeanor and/or deportment that he is hostile towards the party that called him, then all of his testimony is subject to cross-examination.

It should also be remembered that a witness who did not make a previous statement does testify that he does not recall anything he may well be adverse to the interest of the party that called him, but that by itself does not make him an adverse witness.

* * * * *

HOW TO PROVE THAT THERE IS 15 MINUTES BETWEEN THE TAKING OF SAMPLES OF BREATH

Regina v. Moore, B. C. Court of Appeal, No. 001604, 1984.

In May of 1983, the Ontario Court of Appeal held* that a certificate of analysis under s. 237 C.C. that records two points in time that are more than 15 minutes apart in respect to the taking of breath samples is no proof that they were taken "with an interval of at least fifteen minutes". The Ontario Court of Appeal reasoned that the words mean that there must be at least 15 clear minutes between completing the first analysis and commencing the second one, and it should be so certified. Unless this was clearly stated, no certificate can be accepted held the Court, not even if the times that the suspect blew is certified to be apart in excess of 15 minutes.

Some courts in B. C. and other provinces have felt obligated to follow the opinion expressed by the Ontario Court of Appeal even though the ruling was not binding on them (with the exception of these Courts in Ontario, of course). Acquittals have resulted. However, the Alberta Court of Appeal expressed disagreement with its Ontario counterpart**; now in the Moore case the B. C. Court of Appeal joined the view of their Alberta brothers. They reminded that s. 237(1)(d) C.C. stipulates that the analyst's certificate is evidence of its contents. Quoting from the Alberta decision, the B. C. Court of Appeal said:

> "Therefore, a statement in the certificate that one sample was taken at a certain time and a second sample was taken 15 minutes later is conclusive and final...". "The Criminal Code does not require that the certificate of analysis 'should clearly state the time in which the taking of the first sample was completed and the time at which the taking of the second sample was commenced'".

(Emphasis is mine).

Accused convicted.

Comment: The Criminal Justice Branch of the B. C. Ministry of Attorney General did taylor our certificates to the Taylor decision. This is now excessive but safe. It is not believed that a certificate that states, for instance, that samples were taken at 03:00 and 03:15

* R. v. Taylor 7 C.C.C. (3d) 293. Also page 26 of Volume 14 of this publication.

** R. v. Kornak (1984) 51 A.L.R. 93.

hours is evidence of a 15 minute interval. There are still the cases that deal with the calculation of time* and establish that "3 o'clock" is a time of no duration. In other words it does not stay 3 o'clock until 03:01 hours. Therefore, seconds are of importance and a certificate, as they used to be, should indicate times calculated on that basis. Without such evidence the presumption that the blood alcohol level at the time of driving and at the time of analyses is the same, is simply lost.**

* * * * *

* R. v. Davis 32 C.C.C. (2d) 459 - R. v. Steiger 32 C.C.C. (2d) 461 - R. v. Tremble 1 W.W.R. [1977] 575.

** R. v. Chapman 24 M.V.R. 290

CONSTITUTIONALITY OF PRESUMPTION OF KNOWLEDGE THE DRIVER'S LICENCE IS SUSPENDED (M.V.A.)

The Queen and Johnson, B. C. Supreme Courts Vancouver Registry No. CC840173, July 1984.

The accused was found driving his car on a day the Superintendent of Motor Vehicles certified was included in a period of time the accused was prohibited from driving a motor vehicle.

The accused plead not guilty and did not adduce any evidence in his defence. The Crown introduced evidence of the driving and presented the Superintendent's certificate to prove the prohibition and the accused's knowledge of it. In regards to the latter the prosecutor depended on the presumption of knowledge under section 88(2) of the B. C. Motor Vehicle Act. This subsection provides that the Superintendent's certificate is proof of knowledge on the part of the accused that he was so suspended or prohibited, unless he proves on the balance of probabilities that he did not know.

Defence counsel unsuccessfully submitted that the presumption of knowledge was contrary to the Charter of Rights and Freedoms, particularly in respect to the presumption of innocence. The accused appealed by means of stated case and was successful. The Supreme Court Justice applied the constitutional test to this presumption of knowledge. The Courts have reasoned that the prerequisite facts and the presumption must be a natural flow. In other words, if the prerequisite circumstances or facts exist, then the fact to be presumed must be a probability. For instance, when the presumption of care or control (section 237 C.C.) was tested, the Courts held that it is probable that someone who occupies the driver's seat of a car has the care or control of it.

The Court held that it hardly, naturally flowed from the fact that the Superintendent of Motor Vehicles signed a suspension certificate that the person mentioned in that certificate has knowledge of the suspension. Therefore, s. 88(2) of the Motor Vehicle Act, which allows that presumption is arbitrary and inconsistent with the Charter of Rights and Freedoms (s. 11(d)).

Appeal Allowed.
S. 88(2) M.V.A. struck down.
Accused acquitted.

* * * * *

DOES AN AUTHORIZATION TO INTERCEPT PRIVATE COMMUNICATIONS INCLUDE THE POWER TO ENTER PLACES TO INSTALL THE NECESSARY EQUIPMENT?

In synopses of opposing reasons for judgement by the Alberta and Ontario Courts of Appeal, I have explained why the former said "No" and the latter "Yes" to this important question*.

Apparently a majority decision on this issue was handed down by the Supreme Court of Canada (believed to be an appeal of the Alberta decision). It held that an authorization to intercept a private communication includes authority to enter places for the purpose of installing, repairing, removing or monitoring the necessary equipment.

I have not yet received a copy of the reasons for judgement. Look for an explanation in our next volume.

* * * * *

* Volume 17, page 11 of this publication.

THE WRONG DEAL?
AGENT PROVOCATEUR NOT AVAILABLE TO TESTIFY

Regina v. Ross - County Court of Westminster, No. X829640 New Westminster Registry.

The accused was charged with trafficking heroin as a result of a sale to a Cst. L. and a Ms. W. At his trial the following was cited as the facts: Police, in a drug enforcement operation, brought Cst. L. from the east to work undercover. A Ms. W., a drug addict, was recruited by the N.C.O. in charge of the operation to play the part of Cst. L.'s girlfriend. Cst. L. was "kept in the dark" about the arrangement between his Force and Ms. W. which was that she received a per diem rate and, for lack of a better word, a commission for each purchase of illicit drugs she arranged. She was at the conclusion of the operation to "absent herself" from the area and it was understood that she would not ever be required to testify. She did absent herself and she was not subpoened by the Crown.

What is important to remember here is that Ms. W. was not an informant but an agent provocateur and a compellable witness for either side in this criminal dispute. The defence wanted the Crown to produce Ms. W. so she could be cross-examined or in the alternative subpoena her for the defence. The trial was adjourned and the Crown was instructed to provide defence counsel with all the available information on Ms. W.'s whereabouts. However, no information to locate her was available. She had phoned police six months prior to the trial to say she was living in the U. S., had kicked the habit and had begun a new life.

Ms. W. usually worked alone when persuading suppliers to make a sale to Cst. L. Due to the arrangement to pay a commission, it must be presumed, claimed defence counsel, that Ms. W. was extremely persuasive and anxious. The accused's testimony supported such importuning. Evidence showed that the accused Ross was originally not a target. However, Ms. W. was friendly with him years ago. Their friendship had a "certain degree of intimacy". He was then involved in trafficking and she decided to solicit him. She phoned him and suggested she'd come over to his apartment the following night to pick up where they had left off. The accused who claimed that he had been rehabilitated accepted the offer and was looking forward to the visit only to be disappointed as she brought Cst. L. with her. She asked the accused to arrange a supply of "a bundle" (25 caps of heroin) while L. was in the bathroom. The accused had refused and said he simply could not do so. A few days later the three met again and this time, according to the Constable, Ms. W. asked for "a bundle" in his presence. The accused said, "he'd look around" to see if he could find someone. The accused denied this and said Ms. W. had, by

herself, persisted he supply the caps. This pressure and his feeling of guilt for not helping her had made him contact some types from his previous lifestyle. There was evidence from defence witnesses that Ms. W. bothered the accused and would not leave him alone. A few days later Cst. L. and Ms. W. met the man who supplied "the bundle" to the accused who in turn sold it to Cst. L. Shortly after, in subsequent attempts for more purchases it became obvious that the underworld knew L. was a policeman and the operation was stopped.

The accused claimed he was entrapped and was deprived of a fair trial as he could not cross examine or subpoena the party who had played a major role in the transaction that was the basis of the charge.

The Court held that the Crown's lack to keep in touch with and produce as a witness Ms. W., infringed the accused's right to a fair trial. He was incapable to give a full answer to what the Crown alleged and that a stay of proceedings was an appropriate remedy for this infringement (s. 24(1) Charter).

Secondly, the Court held that entrapment is now* a defence known to law, and that Ms. W. may well have entrapped the accused.

Comment: Whether there exists a defence of entrapment in Canada has been an issue of debate. Our Courts have not hesitated to define entrapment to mean ensnaring, calculated inveigling or persistent importuning by authorities for a person to commit a crime he was not predisposed to commit. This does not include creating an opportunity for or persistent solicitation of a person who is predisposed to commit the crime. Flagrant cases of entrapment never used to result in acquittals but in judicial stays of procedure. Charges arising from entrapment are seen as an abuse of the process of the Court.

In December of 1981 a Nova Scotia District Court Judge held that there exists a defence of entrapment** and acquitted a person charged with trafficking in marihuana. In August of 1982, the Supreme Court of Canada (in a 5 to 4 decision) reiterated in Amato v. The Queen the definition of entrapment but upheld Amato's conviction as there had been no more than "persistent solicitation" on the part of police.

* Amato v. The Queen (1982) 69 C.C.C. See also page 34 of Volume 1 and page 32 of Volume 8 of this publication.

** R. v. Rippley 65 C.C.C. (2d), 158.

Said the Court:

> "In my view, it is only where police tactics are such as to leave no room for the formation of independent criminal intent by the accused that the question of entrapment can enter into the determination of his guilt or innocence".

Some are of the opinion that the Amato judgement has recognized entrapment as a defence. Others feel the Supreme Court of Canada simply reiterated its definition and held that the circumstances in Amato did not amount to entrapment and that the process of the Court was not abused.

Obviously the Judge of the County Court of Westminster who decided on this Ross case is of the opinion that there is now a defence of entrapment. Yet he stayed the proceedings instead of acquitting the accused.

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